Northern Territory Report

National Competition Policy Legislation Review

6 July 2002

Legal Practitioners Act
Legal Practitioners Complaints Committee Rules
Legal Practitioners Regulations
Legal Practitioners Rules
Legal Practitioners (Professional Indemnity Insurance) Regulations
Law Society Northern Territory Rules of Professional Conduct and Practice
Law Society Public Purposes Trust Act

This Report has been prepared by the Northern Territory NCP Review Team for the *Legal Practitioners Act* and associated legislation. Any views or propositions in this Report should not be taken as representing the view of the Northern Territory Department of Justice or the view of any arm of the Northern Territory Government.

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1 OVERVIEW

1.1 THE PURPOSE OF THIS REPORT

This Report identifies the issues concerning the provisions contained in the *Legal Practitioners Act* and associated legislation that may be anti-competitive in terms of the National Competition Principles Agreement entered into by the Northern Territory Government.

It contains background and recommendations for the purposes of the Northern Territory Government meeting its legislative review obligations under the Competition Principles Agreement. [1]

This Report does not deal with professional indemnity insurance. The National Competition Council has advised that NCP issues relating to insurance, including legal practitioner's professional insurance, indemnity will be considered in 2003[2]. This delay has been permitted so to permit resolution of general insurance issues. The Northern Territory will resolve the professional indemnity insurance issue in conjunction with the processes currently under way concerning model national laws dealing with indemnity insurance[3].

2 SUMMARY OF FINDINGS

2.1 FINDINGS: THE OBJECTIVES OF THE LEGAL PRACTITIONERS ACT [SEE PART 8]

The Review Team found the objectives of the *Legal Practitioners Act* to be as follows:

1. To encourage delivery of fair, efficient and effective legal services.
2. To provide a support mechanism for the effective and efficient self-regulation of the legal profession.
3. To provide a professional approach to the resolution of legal issues.
4. To provide for a competent legal profession and to provide consumer protection by providing that only legal practitioners can provide certain legal services.
5. To provide that only appropriately qualified and trained people can use the name 'legal practitioner'.
6. To provide for a competitive legal profession.
7. To, in respect of mandatory indemnity insurance, maximise the possibility for clients that legal practitioners are in a position to meet the financial obligations to clients arising from their own negligence, breaches of contract and certain defalcations of employees.

The Review Team considers these objectives remain valid.

2.2 FINDINGS: RESERVATION OF WORK *[SEE PART 9]*

The findings are:

1. Sections 22, 131 and 132 contain anti-competitive provisions.
2. The anti-competitive provisions imposed by sections 22, 131 and 132 are justified.
3. The areas of work that can be reserved for legal practitioners should accord with areas of work that are generally reserved on a national basis. These appear to be:

   (a) appearances in Court and matters incidental to that right, such as:

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[1] See Part 5 of this Report.

[2] Letter dated 27 June 2002, Graeme Samuels, President National Competition Council to Hon Clare Martin, MLA, Chief Minister of the Northern Territory.

[3] Under the auspices of the Standing Committee of Attorneys-General - see Part 4.6.1

(i) advice on prospects in proposed or pending litigation;

(ii) advice on the legal aspects of contentious matters before litigation is proposed;

(iii) preparation and conduct of proceedings; and

(iv) legal professional privilege.

(b) (except for the work of conveyancers pursuant to the licensing scheme in the *Agents Licensing Act*) the drawing, filling up or preparation of an instrument or other document for fee or reward that:

(i) is a will or other testamentary instrument, but noting that legislation should recognise other more specialised qualifications that would permit non lawyers to draw up wills for reward;

(ii) creates, regulates or affects rights between parties (or purports to do so); or

(iii) affects real or personal property on behalf of another person (with the above to operate subject to the work of conveyancers pursuant to the licensing scheme in the *Agents Licensing Act*).

(c) probate work being:

(i) taking instructions for grant of probate or letters of administration; or

(ii) drawing up and preparing papers on which to found or oppose a grant of probate or letters of administration.

4. No other alternatives were identified to the provisions regarding the reservation of work.

2.3 FINDINGS: RESTRICTIONS ON BARRISTERS *[SEE PART 10]*

The findings are:

1. Section 16 contains anti-competitive provisions.
2. Section 16 cannot be justified to the extent that it contains an absolute prohibition on barristers acting independently of one another. Accordingly, section 16 should be repealed.
3. Alternative: The extent of the application of the other provisions of the Act to barristers should be determined having regard to the actual functions of the barrister.
4. It is appropriate that legal practitioners who intend to practise as barristers be subject to regulatory provisions suitable for that kind of sole practice

2.4 FINDINGS: RESTRICTIONS ON THE USE OF TITLES *[SEE PART 11]*

The findings are:

1. Reservation of titles is anti-competitive.
2. Reservation of titles provides a net public benefit.
3. There is no alternative to the reservation of the use of titles.

2.5 FINDINGS: BUSINESS PRACTICES *[SEE PART 12]*

The findings, in respect of the multi-disciplinary practices, are:

1. That there should not be any significant differential between firms/natural persons (on the one hand) in conducting multi-disciplinary practices and corporate bodies (on the other hand).

2. That the types of business that may be conducted by multi-disciplinary practices are subject to the regulations.
3. That there be appropriate management systems for ensuring that legal professional obligations prevail over other business obligations with responsibility being placed with a nominated legal practitioner.

2.6 FINDINGS: TRAINING REQUIREMENTS *[SEE PART 13]*

The findings are:

1. The training requirements for legal practitioners are anti-competitive.
2. The framework contained in the Act regarding training requirements for legal practitioners has a net public benefit.
3. There are no alternatives to this framework.
4. The requirement that legal practitioners hold practising certificates (local or interstate) is anti-competitive.
5. The requirement that legal practitioners hold such practising certificates has net positive value.
6. The differential (in section 25 of the *Legal Practitioners Act*) (dealing with post admission experience) should be standardised at either 2 years or whatever national standard may be agreed between State and Territory Attorneys-General.
7. There is no practical alternative to the need for practising certificates (or something equivalent).

2.7 FINDINGS: LIMITING THE NUMBER OF ARTICLED CLERKS *[SEE PART 14]*

The findings are:

1. Limiting the number of articled clerks that may be employed is anti-competitive.
2. The framework for this limitation is for the net public benefit.
3. Corporate legal practitioners should, through the legal practitioner in control of the professional side of the corporate practice, have the capacity, subject to the Legal Practitioners Rules, to employ more than two articled clerks.
4. There is no alternative for the Northern Territory (such as a practical legal training course).

2.8 FINDINGS: APPOINTMENT OF QUEENS COUNSEL *[SEE PART 15]*

The findings are:

1. The appointment of individuals as Queens Counsel is anti-competitive.
2. A framework that permits merit based appointments is in the public interest.
3. There is a better alternative. It is to remove the provisions concerning Queens Counsel from the *Legal Practitioners Act* and thus permit the profession (with the Supreme Court) to develop its own merit based scheme for recognition of especially skilled legal practitioners. It would be a matter of detail as to whether any new appointees would be called "Queens Counsel" or "Senior Counsel".

2.9 FINDINGS: PROFESSIONAL CONDUCT RULES *[SEE PART 16]*

The findings are:

1. The professional conduct rules contain no minor or substantial anti-competitive provisions.

2.10 FINDINGS: TRUST MONIES *[SEE PART 17]*

The findings are:

1. There is a need to ensure that client's monies are held in a regulated trust account.
2. All trust monies should remain in the legal practitioners trust account (and thus, there should be a dropping of the requirement that a portion of the trust monies be deposited with a statutory body).
3. That legal practitioners be obliged to advise clients whose money is likely to be held for more than the prescribed time that, at the cost of the client, the legal practitioner will arrange for the monies to be held by the legal practitioner as stakeholder with the income to be paid to the client or clients.
4. Monies held in such a stakeholder account are not to be protected by the Fidelity Fund.
5. There is a need for a single body responsible for entering into agreements with financial institutions concerning the payment of notional interest on such trust monies.
6. This single body should be the Law Society Northern Territory.
7. The interest from the trust accounts should be disbursed to the Fidelity Fund and the Public Purpose Trust in accordance with a formula to be contained in the *Legal Practitioners Act* or in Regulations under that Act.
8. Implementation of these changes should be delayed pending the outcomes of the national legal profession project.

2.11 FINDINGS: AUDIT *[SEE PART 18]*

The findings are:

1. The audit requirements are anti-competitive.
2. The audit requirements can be justified as being for the public benefit.
3. The audit requirements could be made more efficient by:
   (a) the audits being independent of the legal practitioner; and
   (b) the audits being targeted.

2.12 FINDINGS: FIDELITY FUND *[SEE PART 19]*

The findings are:

1. The requirement to maintain a Fidelity Fund is anti-competitive (including the obligations to contribute to the Fund).
2. The requirement is justified as being in the public good.
3. There is no non legislative alternative to such a Fidelity Fund.

2.13 FINDINGS: COMPLAINTS HANDLING/DISCIPLINE *[SEE PART 20]*

The findings are:

1. The imposition of a disciplinary system is anti-competitive.
2. The framework can be justified as being for the public benefit.
3. There is no alternative framework.
4. There is room to improve the framework with the main issues to be considered to include:
   (a) the institution of a gatekeeper/designated scheme for the purposes of having an authoritative process for investigating/classifying initial complaints;
   (b) a simpler mechanism for determining which complaints need to be dealt with by the professional body and which should go into the more formal (government) disciplinary system; and
   (c) greater accountability – such as publication of outcomes of both complaints (eg. what happened to them) and of disciplinary decisions (eg. what are the findings against legal practitioners).
5. The Government, in conjunction with the Law Society Northern Territory and the national reform agenda, should identify best practice concerning the disciplining of legal practitioners.

2.14 FINDINGS: ADVERTISING *[SEE PART 21]*

The findings are:

1. There are no anti-competitive advertising controls in the Northern Territory.
2. The imposition of new controls is outside the scope of this Review.

2.15 FINDINGS: CONTROLS OVER COSTS *[SEE PART 22]*

The findings are:

1. Controls over fees are anti-competitive.
2. The controls over fees can be justified as being in the public good.
3. The controls over fees to be conducted for work outside of the courts and tribunals would not appear to be justifiable.

2.16 FINDINGS: INTERSTATE LEGAL PRACTITIONERS *[SEE PART 23]*

The findings made in respect of legal practitioners also apply to interstate legal practitioners.

2.17 FINDINGS: FOREIGN LAWYERS *[SEE PART 24]*

The findings made in respect of legal practitioners also apply to foreign lawyers.

2.18 FINDINGS: SELF REGULATION – ROLE OF THE LAW SOCIETY NORTHERN TERRITORY *[SEE PART 25]*

The findings are:

1. There is no need to alter the *Legal Practitioners Act* in respect of the statutory powers and functions of the Law Society Northern Territory.
2. The amendment of the *Legal Practitioners Act* so that the Law Society Northern Territory is obliged

to provide an annual report to Parliament in respect of its statutory powers and functions and its expenditure of monies raised by virtue of the operation of the *Legal Practitioners Act.*

3. That the Law Society Northern Territory be deemed to be a body incorporated under the *Associations Incorporation Act.*

2.19 FINDINGS: TRADE PRACTICES ACT 1974 *[SEE PART 26]*

None of the provisions covered by this Report offend the *Trade Practices Act 1974* or are authorised by any exemption under section 51 of that Act.

4 That is, authorised as referred to in section 51 of the *Trade Practices Act 1974*

3 THE REFERENCE

3.1 FORMAL TERMS OF REFERENCE

The Chief Executive Officer of the former Northern Territory Attorney-General's Department[5] specified the following as being the terms of reference:

1. The review of the *Legal Practitioners Act* and the *Legal Practitioners (Incorporation) Act*[6] shall be conducted in accordance with the principles for legislation review set out in the Competition Principles Agreement. The underlying principle for such a review is that legislation should not restrict competition unless it can be demonstrated that:
   (a) the benefits of the restriction to the community as a whole outweigh the costs; and
   (b) the objective of the legislation can only be achieved by restricting competition.
2. Without limiting the scope of the review, the review is to:
   (a) clarify the objectives of the legislation, their continuing appropriateness and whether the *Legal Practitioners Act* remains appropriate for securing those objectives;
   (b) identify the nature of the restrictive effects on competition;
   (c) analyse the likely effect of any identified restriction on the economy generally;
   (d) assess and balance the costs and benefits of the restrictions identified; and
   (e) consider alternative means for achieving the same results, including non-legislative approaches.
3. When considering the matters referred to in clause 2 of these terms of reference, the review should also:
   (a) identify any issues of market failure which need to be, or are being addressed by the legislation; and
   (b) consider whether the effects of the legislation contravene the competitive conduct rules in Part IV of the *Trade Practices Act 1974* and the Northern Territory Competition Code.
4. The review shall consider and take account of relevant regulatory schemes in other Australian jurisdictions and any recent reforms or reform proposals, including those relating to competition policy in those jurisdictions.
5. The review shall consult with, and take submissions from, those organisations currently involved with the legal profession, other Territory and Commonwealth Government organisations, other State and Territory regulatory and competition review authorities, and affected members of the profession and their organisations.

This Report has been provided by a Review Team (see Part 4).

3.2 LEGISLATIVE PROVISIONS COVERED BY THIS REPORT

The Report covers Regulations and Rules made under the *Legal Practitioners Act.* A separate report has made finalised concerning the *Legal Practitioners (Incorporation) Act.* Subject to that point, a reference in this report to the *Legal Practitioners Act* will be taken to include a reference to regulations

[5] The Northern Territory Attorney-General's Department merged in November 2001 with the Department of Correctional Services, Office of Courts Administration and other Justice related agencies to become the Department of Justice. The responsible Minister is the Minister for Justice and Attorney-General.

[6] In the rest of this document general references to the *Legal Practitioners Act* should be read as including a reference to the various rules and regulations made under the *Legal Practitioners Act.* However the *Legal Practitioners (Incorporation) Act* has been subjected to a separate review.

and rules that have legal force because of either of these Acts. These regulations and rules include:

- The Legal Practitioners Complaints Committee Rules (which are made by the Judges and which deal with the practices and procedures of the Complaints Committee);
- Legal Practitioners Regulations (which deal with admission fees, certain exemptions and with the functions of certain classes of legal practitioners);
- *Law Society Public Purposes Act*;
- Legal Practitioners Rules (which are made by the Judges and deal with admission requirements); and
- Professional Conduct Rules (which are made by the Law Society Northern Territory but subject to regulatory oversight from the Attorney-General).

3.3 LEGISLATIVE PROVISIONS NOT COVERED BY THIS REVIEW

However, this Report does not cover various Acts and other legislative instruments which either give or take away from legal practitioners rights concerning representation in Courts and Tribunals. Accordingly, this review will not cover provisions such as:

- Section 75 of the *Supreme Court Act* or Rule 1.15 of the Local Court Rules. These two provisions give legal practitioners the right of representation before the Courts of the Northern Territory. Other persons may only represent persons in Court with the approval of the Court. There are similar provisions in Commonwealth legislation concerning representation in the Federal Courts operating in the Northern Territory;
- Section 7 of the *Agents Licensing Act* (dealing with membership of the Agents Licensing Board). These kinds of sections mean that only legal practitioners can be appointed to certain positions;
- Section 148 of the *Residential Tenancies Act* which limits representation before the Commissioner of Tenancies by a legal practitioner within the meaning of the *Legal Practitioners Act*, an articled clerk or a person who holds or has held legal qualifications under the law of the Territory or another place, except with the agreement of the other party to the tenancy agreement to which the proceeding relates and subject to the Commissioner being of the opinion that neither party will be disadvantaged by permitting such representation; and
- Section 149 of the *Residential Tenancies Act* which limits the rights of persons other than legal practitioners, employees, real estate agents and translators to be paid for providing representation before the Commissioner of Tenancies.

4 PROCESS FOR THIS REVIEW

4.1 REVIEWERS

In accordance with the national understanding concerning the conduct of such reviews, all members of the Review Team were chosen because they could bring an appropriate degree of independence of view to the process.

The current members of the Review Team are:

Robert Bradshaw - Northern Territory Department of Justice;
Margaret Rischbieth, Registrar - Supreme Court;
Prue Phillips-Brown - Chief Minister's Department;
Donald Hudson - Department of Business, Industries & Resource Development[7]; and
Craig Graham - Northern Territory Treasury.

One of the essential characteristics of an NCP review is that there be an appropriate degree of independence between the review process and the activity that is the subject of the regulation. Accordingly, review teams dealing with occupational or professional regulation should not, as a general rule, include individuals chosen to represent the profession or occupation that is the subject of the review.

On this basis, members of the private legal profession[8] are not part of the Review Team. The profession's involvement in the review and the professional expertise for the Review came from the consultation part of the process. As will be seen, the Law Society Northern Territory made a 50 page submission to the issues paper released in October 2000.

It must to be noted that the provisions in the Act cover a wide range of matters in respect of which there are many possible options. The Review Team's report states, in respect of the various findings, the majority position reached by the Review Team. However, there were some occasions where team members had a strong dissenting view or views (for example, regarding the issue of whether the Law Society Northern Territory should be able to tie membership into insurance obligations). Dissenting views have not been identified though arguments for such views have, as far as is possible, been incorporated into the discussion.

4.2 REVIEW TEAM'S WORK

The review process under the Competition Principles Agreement involves:

1. Clarification of the Legislature's objectives for the legislation;
2. Identification of restrictions on competition;
3. Ascertaining the effects of the restrictions; and
4. Assessment of the costs and the benefits of the restrictions.

4.3 ISSUES PAPER AND CONSULTATION

An Issues Paper was released in September 2000. It provided background and raised possible issues for comment. The Issues Paper was referred to each Northern Territory legal business, each Northern

[7] Replacing, Mr Tony Clark, of the former Department of Industries and Business
[8] It can, however, be noted that two of the members (Bradshaw and Rischbeth) are lawyers from the Government sector. The other members are economists or consumer/business experts.

Territory, other state and Territory regulatory Government Departments, Territory and national professional organisations, and national regulatory authorities such as the NCC and the ACCC.

Comments were sought in relation to any issue concerning the regulation of legal practitioners. Commentators were asked not to limit themselves to any issues specifically raised in the Issues Paper but were asked to be mindful of the terms of reference.

4.4 OUTCOMES OF THE CONSULTATION PROCESS

These outcomes are set out in the body of the report – in respect of each of the issues.

4.5 METHODOLOGY FOLLOWED IN MAKING THE FINDINGS

The following parts of this Report outline the findings concerning the various issues that exist in the regulation of legal practitioners. The assessment method has involved consideration of the following questions:

1. Does the model facilitate effective competition between players in the sector?
2. Does the model allow for the entry of new players, and alternative or para professionals where appropriate?
3. Does the model protect consumer welfare?
4. Does the model place consumers in a position to make informed choices about the type of services they require, and the person best placed to provide them?
5. Is the model likely to generate consumer confidence in the services provided by the legal profession?
6. Will the model maintain and support the integrity and viability of the legal profession?[9]

4.6 RELEVANCE OF NATIONAL DEVELOPMENTS

4.6.1 Model Law

By the time of the writing of this Report, significant national developments were taking place. These include a determination by the Standing Committee of Attorneys-General (SCAG) and the Law Council of Australia to develop model laws in relation to the regulation of legal practitioners on a national basis. The areas to be covered include:

1. Admission of legal practitioners;
2. Practice, including the issuing of practising certificates, the separate regulation of solicitors and barristers and the making of practice rules;
3. The reservation of legal work and the titles of legal practitioners;
4. Trust accounts;
5. Insurance;
6. Fidelity cover;
7. Complaints and discipline; and
8. Costs, costs disclosure and the review of legal costs.

[9] These questions were suggested in *Submission to the issues paper on the Legal Practitioners Act and associated legislation, regulations and rules*, ACCC, November 2000, page 5

Responsibility for preparing discussion papers on each of these areas was shared between the State and Territory jurisdictions and the Commonwealth. Papers were prepared in April 2002 and circulated to the Law Council of Australia for comment. The Law Council has established its own working groups which are operating in parallel with the SCAG officers working group, critically examining papers prepared by officers, in consultation with its constituent bodies. The Law Council's working groups are, as at May 2002, in the process of reporting to a reference group which, in turn, is responsible to the Law Council of Australia.

By way of background the Law Council's core policy documents are set out in Appendix 3.

4.6.2 Some possible principles for model national laws[10]

In order to achieve a uniform approach to the regulation of the legal profession, it may not be necessary to abandon a state and territory based system of regulation. Similarly, it may not always be necessary that functions be performed by corresponding bodies in each jurisdiction. Often, the important issue is that standards and procedures be broadly uniform, to promote the interests of national practice and protect the public. The corollary of such uniformity is that mutual recognition of action taken by regulatory bodies operates seamlessly, leading to greater efficiencies for the legal profession and regulators and enhancing the protection of the public. However, there may be some areas where joint regulation may be necessary to achieve national cohesion in the regulation of the particular area.

The model laws themselves will provide a basis for States and Territories to amend relevant legislation. The extent to which the aims of the project require uniformity as distinct from consistency or joint/common regulation will vary from issue to issue. This is reflected in the approaches adopted in the discussion papers.

The range of approaches towards national recognition are raised in the discussion papers include:

- Common regulation through a single regulatory mechanism (an option for some areas, eg. professional indemnity);
- Uniformity in substance (eg. standards for admission to practice);
- Mutual recognition across jurisdictions (eg. national practising certificates); and
- Consistency in principles with differing mechanisms (eg. regulation of costs).

The project does not seek to impose uniformity just for the sake of uniformity, but to address those areas where the current fragmentation of regulation is dysfunctional.

Another factor is that matters such as admission to the legal profession fall within the inherent jurisdiction of the Supreme Courts of the States and Territories. In adopting a national framework, this principle must still be respected and necessary local variations accommodated. Nevertheless, there is still substantial scope for achieving uniformity and/or consistency in the regulation of the legal profession.

Officers have also considered the application of local legal profession laws to interstate legal practitioners. Since a key goal of the project is the support of national practice, it is essential for the scheme to include clear rules about which laws apply to practitioners practising in more than one state or territory. Under the interstate practising certificate scheme, the general approach is that the law of the place of practice applies. This can lead to duplication and additional compliance costs. For

[10] This material is closely based on introductory material provided by Government officers to the Law Council, April/May 2002

example, a practitioner who comes from the Northern Territory to NSW and who deals in trust funds will have to open a new trust account governed by NSW laws. He or she will be subject to NSW arrangements for costs disclosure and complaints and discipline. There appears to be scope within a national uniform scheme to minimise the need for practitioners to duplicate administrative tasks and compliance. Officers consider that the issues surrounding the choice of laws which apply to practitioners, clients and transactions are especially complex and recognise that these matters will require separate, detailed consideration in the course of settling substantive proposals for model laws, and in the course of drafting. This paper notes preliminary questions identified by officers.

Other areas of regulation require harmonisation, but textual uniformity is less important. Local differences will matter less, either because the procedures are invoked rarely by any individual practitioner or because variations in process may not affect the outcome.

Another principle that has informed the development of papers is that in seeking uniformity, the "lowest common denominator" approach is avoided. The intention is to promote best practice.

4.6.3 Interrelationship between NCP Report and national profession project

The Northern Territory Department of Justice is participating in the development of these model laws. Any such laws will take into account NCP principles. Given these developments, there seems to be little point in the Northern Territory focusing on either the fine details of reform or on taking an overly firm position on the mechanics for achieving a particular end.

Accordingly, this report will, as a general rule, focus on the larger picture and on some issues of particular relevance to the Northern Territory.

4.7 Relevance of other NCP Issues Papers and Reports

Each State and Territory is obliged to conduct an NCP review of its legal practitioners' legislation. The National Competition Council has suggested that it is permissible to rely on the outcomes of other NCP reports where the legislation and the market are broadly equivalent of the place of the report are similar to those in the Northern Territory.

The legal profession of the Northern Territory operates in a market and under legislation that is sufficiently similar to that of the rest of Australia that it is relatively safe to rely on conclusions in such reports. In the main, those reports contain qualitative rather than quantitative findings. This Northern Territory report is similar. However, the WA Department of Justice released, for comment, during April 2002, a report that contains some quantitative analysis of a number of matters. This report will adopt most of those quantitative findings.

5 COMPETITION POLICY LEGISLATION REVIEWS - BACKGROUND

5.1 COMPETITION POLICY

5.1.1 National Competition Policy Agreements

On 11 April 1995, the Northern Territory Government, with the Commonwealth, State and Australian Capital Territory Governments agreed to adopt the National Competition Policy (NCP) and signed three specific agreements relating to the implementation of the policy. These agreements are set out in the following three paragraphs:

5.1.2 Competition Principles Agreement

The Competition Principles Agreement - this agreement, amongst other things, imposes on all governments (the Commonwealth, the six States and the two self-governing Territories) an obligation to review and, if necessary, reform all legislation, which restricts competition for which they are responsible.

5.1.3 Conduct Code Agreement

The Conduct Code Agreement - this agreement creates various controls for the purpose of ensuring that, as a general rule, government businesses are subject to the same competition rules as privately owned businesses. Effectively, government agencies, corporations, professional bodies and natural persons shall be subject to Part IV of the *Trade Practices Act 1974* or its equivalent in place under State or Territory law.[11]

5.1.4 Agreement to Implement the National Competition Policy and Related Reforms

The Agreement to implement the NCP and Related Reforms provides a timetable for reform and for the making of payments by the Commonwealth to the States and the Territories, in respect of appropriate progress in the making of the national competition reforms.

5.1.5 Legislative Reform under NCP

Under clause 5(1) of the Competition Principles Agreement, the guiding principle is that:

> "Legislation should not restrict competition unless it can be demonstrated that:
>
> (a) the benefits of the restriction to the community as a whole outweigh the costs; and
>
> (b) the objectives of the legislation can only be obtained by restricting competition."

5.1.6 Rationale for Competition Policy Reforms[12]

The underlying rationale for the NCP is that of ensuring that markets are free to operate without any unnecessary regulatory restrictions. It is also about improving the efficiency of the public sector. NCP is based on the idea that greater competition will increase the incentive for producers:

(a) to use their resources more efficiently (thus achieving greater productivity);

(b) to increase their efforts to constrain costs and thus be in a position to reduce prices; and

(c) to be in a better position to be more responsive to user's demands.

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[11] *Competition Reform (Northern Territory) Act 1995.*

[12] The material under this heading is a precis of a discussion contained in *National Competition Policy - Review of the Security and Investigation Agents Act 1995*, Issues Paper March 1999, South Australian Office of Consumer and Business Affairs, pages 1-2, 4.

However, increasing competition is put forward as a mechanism for the improvement of the general standard of living. It is not an end in itself. Increased competition is only to be adopted in so far as it increases public benefit overall.[13]

This NCP review aims to assess how the current regulation of the legal profession affects the provision of legal services in the marketplace. The review will consider whether current restrictions on legal practice and on the entry of non-legal practitioners into the legal services market unnecessarily restrict competition or whether there are sufficient public policy reasons for retaining restrictions.

5.1.7 Principles which underlie a Competition Policy Review

The following have been widely identified[14] as principles, which underlie a Competition Policy Review:

- There must be a presumption against statutory intervention and the onus of proof should be on the proponent of intervention;
- The direct costs of regulation should be borne by the immediate beneficiaries of the regulation; and
- Co-regulation, self-regulation and codes of conduct are all valuable regulatory mechanisms but are subject to capture. There are regulations with minimal statutory support that are very targeted and cost effective. The provision of information is important. Ordinary market mechanisms should generally not be inhibited, subject to active enforcement of the ordinary fair trading and other law.

5.2 RATIONALE FOR REGULATION[15]

The main rationale for government invention in markets is:

- To ensure that public goods are supplied (eg. some railways, defence forces);
- To prevent externalities - this is where costs and benefits accrue to or spill over to third parties to a transaction (eg. the activities of lawyers acting for parties may adversely affect the courts and the public). The main form of intervention is that of enactment of general laws which create offences, impose taxes or impose minimum standards;
- To prevent abuse of market power. The main form of intervention is the enactment of general laws (such as the *Trade Practices Act* 1974);
- To limit information asymmetry. This is where one party knows more than the other party. Consumers and clients deal with the service provider in ignorance of the quality of the service that is being provided. Occupational regulation can aim to have the result of providing objective information;
- To reduce transaction costs. Consumers/clients incur costs in locating services, changing between service providers, reaching agreement on price, ensuring compliance with the agreement. If the costs are too large clients/consumers may, because of the costs, desist from making sufficient inquiries in order to reach the correct decision; and
- To achieve other social objectives. This basically relates to the failure of service providers. The intervention is designed to prevent financial loss, prevent substandard work, protection of health and safety and the prevention of criminal activity.

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[13] See *Guidelines for the Review of Professional Regulation*, page 12.

[14][14] Victorian Department of Premier and Cabinet Competition Policy Taskforce, (1996) *Guidelines for Review of Legislation restrictions on Competition*, page 2.

[15] The following summary is taken from Victorian Department of Justice, Freehills Regulatory Group, June 1999, *Issues Paper National Competition Policy Review of Private Agents Legislation.*

5.3 OTHER REVIEWS

5.3.1 COAG Principles for the Regulation of the Legal Profession

On 25 February 1994, the Council of Australian Governments (COAG) requested the Working Group on Micro-economic Reform to report on detailed proposals for the reform of the legal profession with the view to removing constraints on the development of a national market in legal services and developing other efficiency enhancing reforms.

Subsequently, the COAG working group developed a series of principles and actions in respect of each of the principles. The principles (and actions) are set out below.

COAG Legal Profession Reform Principle 1:

For competition law to have full effect, States and Territories agree that regulatory intervention should be kept to the minimum necessary to protect the public interest in the administration of justice and consumer protection.

The proposed actions in respect of Principle 1 are as follows:

(a) Consistent with the legislation review principles contained in the National Competition Principles Agreement which requires that restrictions on competition should be both essential to achieving the objectives of the legislation and must yield a net benefit to the community, member Governments agree that legislation regulating the legal profession should not go beyond:

- A licensing and admission scheme (which allows for national recognition of practising certificates, building on mutual recognition where possible);
- A disciplinary and complaints mechanism independently-monitored within the State or Territory;
- Standards for an appropriate level and type of professional indemnity insurance;
- Requirements for compulsory Fidelity Funds and trust accounts;
- The protection of consumers from persons misrepresenting themselves as qualified legal practitioners;
- Requirements for disclosure of fees and costs and facility for independent assessment of costs (including party-party costs);
- Fee arrangements (including contingency fees);
- Business structures (so as to allow, for example, multi-disciplinary practices); and
- Ethical conduct rules (where self-regulation provides insufficient safeguards).

(b) Member Governments agree that they will not sanction in legislation/professional association rules which:

- Prevent barristers from appearing in court with solicitors (that is, in place of junior counsel);
- Prevent direct access to barristers by clients or attendance of barristers at solicitors' offices;
- Mandate or give exclusive status to particular specialist accreditation schemes;
- Require barristers to operate as sole practitioners; and
- Require barristers to operate from approved chambers and/or with approved clerks.

COAG Legal Profession Reform Principle 2:

Licensing arrangements for lawyers who require separate practising certificates for barristers and for solicitors should be eliminated.

Member[16] governments agree to take appropriate action to implement this principle.

COAG Legal Profession Reform Principle 3:

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, subject only to rules that prevent false, misleading or deceptive representations and conduct.

Member governments agree to take appropriate action to implement this principle.

COAG Legal Profession Reform Principle 4:

A national scheme should be established which allows a practising certificate issued in one State or Territory to be accepted in all others without further admission protocol.

COAG agrees to request the Standing Committee of Attorneys-General to identify the legislative changes necessary to establish a national practising certificate scheme and to ensure that appropriate arrangements exist for complaints and discipline, professional indemnity insurance, Fidelity Funds, trust accounts and similar consumer protection.

COAG Legal Profession Reform Principle 5:

COAG supports moves to market-based measures for establishing the price of legal services. Fee scales, where adopted, should not be used to set prices in the market. Full disclosure and voluntary fee agreements are important elements of reform in this area. These reforms should be introduced in conjunction with the removal of restrictions on advertising.

COAG supports those contingency fee arrangements that will increase access to the justice system, including conditional uplift fees. Plain English fee arrangements are also strongly supported, along with independent review of fee agreements and outcomes.

The Standing Committee of Attorneys-General should identify the legislative changes necessary to give effect to this principle in order to clarify options.

COAG Legal Profession Reform Principle 6:

COAG supports the general principles developed by the NSW Law Reform Commission so as to establish harmonised, fair and efficiently administered complaints systems.

Member governments agree to take appropriate action to implement this principle.

[16] It appears that NSW make plain its opposition to this.

COAG Legal Profession Reform Principle 7:

The determination of the exact boundaries of legal profession work requires far more detailed consideration than has been so far undertaken.

COAG agrees to refer this matter to the Legal Profession Working Group for further evaluation by its first 1996 meeting. The onus of inquiry should be the minimisation of restrictions on competition between legal service providers, including non-lawyers, while recognising the need to inform consumers about the quality and value of the various service options and to impose a complaints disciplinary system where remedies are available without prohibitive cost to consumers.
Most importantly, the inquiry should ask whether the current reservation of legal work benefits consumers and whether such benefits outweigh the costs.

COAG Legal Profession Reform Principle 8:

COAG agrees that flexible business arrangements are an important feature of a more responsive legal service market. In particular, combined practices such as multi-disciplinary partnerships may reduce transaction costs, particularly in the corporate sector where commercial requirements include a sophisticated mix of professional skills. However, some States have concerns in relation to the question of limited liability, given the costs that this might impose on consumers, and in regard to other consumer risks relating to multi-disciplinary partnerships.

COAG agrees to refer this matter for further evaluation, requesting a report from the Legal Profession Working Group.

COAG Legal Profession Reform Principle 9:

Rules requiring lawyers to obtain indemnity insurance only from insurers specified by the law societies should be reviewed to establish whether they are in the public interest.

The Legal Profession Working Group should report on its further inquiry into this matter.

COAG Legal Profession Reform Principle 10:

All States and Territories agree to cease official selection and endorsement of Queen's Counsel and all rules, including those relating to charges and fee scales, which distinguish Queen's Counsel from junior barristers and other advocates should be removed.

Those States which continue to appoint Queen's Counsel will review their position on this issue.[17]

It should be noted that there are various doubts and queries as to the current status of these principles and actions arising from them. However, it would appear that the principles are playing a significant role as to the directions being taken in various State and Territory NCP reviews concerning the Acts that regulate the legal profession.

[17] South Australia did not consider that this was a matter for COAG.

5.3.2 Law Council of Australia

The Law Council of Australia is constituted by the State and Territory legal professional organisations. With the support of its constituent bodies it has developed a "blueprint" for the development of a national legal profession. This "blueprint" is based on the following fundamental principles:[18]

"1. NCP principles apply to the legal profession;
2. Lawyers admitted in any State or Territory of Australia are able to practise law throughout Australia;
3. Existing constraints which prevent a lawyer's right to practise without restriction throughout Australia are removed in order to facilitate the development of a national market in legal services;
4. Recognition that the independence of the legal profession is dependent upon the profession's right to self regulation;
5. The system of regulation of the legal profession is implemented by uniform State and Territory legislation;
6. The self regulation of the legal profession is subject to an external and transparent process of accountability to ensure that the rules of the professional bodies are not inconsistent with national competition policy principles;
7. The protection of consumers of legal services through comprehensive education and training of the legal profession and the development of a uniform standard of client care; and
8. Proper information is available for consumers of legal services as to quality and cost of legal services."

5.3.3 National Competition Council

The National Competition Council has issued a brief paper dealing with the reform of the legal profession.[19] This paper appears to support the following propositions:

- One of the biggest restrictions on legal businesses relates to ownership;
- Lack of competition in respect of indemnity insurance may be preventing the development of tailored and more widely available insurance;
- It is incongruous to deny consumers advertising information;
- There are inherent dangers to allowing professions to make their own rules;[20]
- Independence (of the profession) must be balanced with transparency and accountability. Involvement in self regulatory bodies by persons from outside the profession appears desirable;
- Such bodies include registration and disciplinary bodies. Rules and processes should be public and be made with consumer debate and input; and
- Opening the market to alternate non-lawyer providers can significantly reduce costs and result in services becoming more widely available in the community. However if required, providers can still be regulated and can still have formal training and registration requirements for practice in that particular field.

[18] As advised to the Attorney-General for the Northern Territory on 17 December 1998 by the President of the Law Council.
[19] August 2000, NCC Webpage www.ncc.gov.au/
[20] Noting, however, that the NCC specifically recognised the need for Judicial Independence

The NCC, in its August 2000 paper dealing with the reform of the legal profession[21] it suggested that the lack of competition in respect of indemnity insurance may be preventing the development of tailored and more widely available insurance. In its final draft assessment for 2000/2001 the NCC observed as follows:

> *"Legal professional bodies generally argue that mandatory professional indemnity insurance has two benefits. First, it minimises information problems regarding compensation for loss. Second, it creates a sustainable insurance market by creating a pool of mixed risk, where low-risk solicitors cross-subsidise the riskier performers. The argument is that compulsion is required to enable creation of a sufficiently large pool of insured practitioners to operate effectively.*
>
> *The counter to this argument is that insurance schemes generally operate to remove their worst risks by increasing premiums significantly or by refusing to insure high risk operators. The central public interest question is whether positive outcomes such as improved public confidence in the legal profession and the effective operation of insurance schemes outweigh any anti-competitive effects from excluding uninsured lawyers from practising. Reviews have generally found that compulsory professional indemnity insurance is in the public interest.*
>
> *A key question is whether it is in public interest to require solicitors to obtain professional indemnity insurance from a single professional body on the terms and conditions set by that body. This lack of competition prevents insurers from competing for clients and denies lawyers the chance to obtain insurance that better suits their individual needs. For example, competition may facilitate the development of policies that reflect the riskiness of the type of work practitioners undertake. Those who conduct lower risk work may be able to pay a lower premium than those who conduct the higher risk work.*
>
> *Available evidence gives some support to the case for allowing solicitors to choose their insurer.[22] The New South Wales NCP review of the Legal Profession Act 1987 noted two examples.[23] In its submission to that review, Wills Corroun Professional Services Limited indicated based on its experience as the agent of insurers entering the ACT market, that competition led to broader cover, cheaper premiums and a higher level of service. The New South Wales Bar Association noted that the insurance market for barristers had already been deregulated: there are two providers of insurance to barristers and there is price competition.*
>
> *In defence of the monopoly arrangement, professional bodies argue that allowing choice of insurance provider will result in the better risks leaving to obtain more suitable arrangements elsewhere, ultimately leaving an unsustainable arrangement comprising only the poorer risks and a reduced premium pool for meeting claims. This may lead to the original pool having to reduce its liabilities, screening out the worst risks by not insuring them. Such high-risk practitioners would probably then be unable to practise, because they would have difficulty finding alternative insurance.*

Such an outcome is relatively common in other insurance markets. The ability to exclude very poor risks allows insurers to operate insurance arrangements by maintaining a commercially viable balance of risks. There may also be some benefit to the community from excluding lawyers with poor records from practising, given that such exclusion could reduce the likelihood of future negligence or error." [24]

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21 August 2000, NCC Webpage www.ncc.gov.au/

22 Barristers are generally able to choose between at least two insurers

23 NCP Review, NSW Attorney General's Department, 1998

24 2001 NCP (final draft) Assessment, July 2001, National Competition Council, pages 17.3 and 17.4

5.3.4 Trade Practices Commission [Australian Competition and Consumer Commission][25]

A number of inquiries have taken place concerning the legal services market and the role of regulators in recent years. The Trade Practices Commission issued its Report following an exhaustive, national study of the profession in March 1994. A number of its recommendations had been implemented in NSW by the *Legal Profession Reform Act.* Other more radical proposals by the Commission included proposals to open up legal work to other service providers,[26]the removal of separate practising certificates for solicitors and barristers,[27] the removal of many restrictions on the business structures of lawyers[28], and the introduction of competition in the provision of professional indemnity insurance.[29]

5.3.5 Victorian Law Reform Commission

In the early 1990s, the Victorian Law Reform Commission conducted a study of the profession[30] and made similar recommendations to those later adopted by the Trade Practices Commission. Many of the recommendations were implemented in the *Legal Practice Act 1996* (Vic).

5.3.6 Access to Justice committee

In 1994, the Access to Justice Advisory Committee, chaired by Ronald Sackville QC, advocated a national reform of the legal profession. It proposed that the *Trade Practices Act* 1974 should be applied to the legal profession. The proposed reforms were designed to ensure the minimum restriction of competition 'consistent with protecting consumers and the public interest'.[31] The Committee proposed a number of substantive changes, including the creation of independent regulatory bodies, allowing non-lawyers to practise in specific areas of the law, removal of the distinction between barristers and solicitors, removal of restrictions on lawyers' business arrangements and advertising and the imposition of mandatory costs agreements between lawyers and clients at the commencement of a matter.

5.4 Other National Competition Principles Reviews of laws relating to legal practitioners

The Competition Policy Agreement obligates States and Territories to identify anti-competitive legislative provisions and to then conduct a review. The proposed interstate reviews for the purposes of the Competition Policy Agreement and the summary status of them are as set out in the following table:[32]

5.4.1 National Competition Policy Reviews elsewhere in Australia

State/Territory	Legislation	Current position
NSW	*Legal Practitioners Act 1987.*	Review conducted by the NSW Attorney-General's Department Report completed November 1998. Tabled in Parliament in 1998. Various legislative changes have been made with the latest being contained in the *Legal Profession Amendment (National Competition Policy Review) Act 2002.*

[25] See para 1.43 *National Competition Policy Review of the Legal Profession Act 1987*, NSW Attorney General's Department Report, November 1998.
[26] Trade Practices Commission, Study of the Professions - Legal; Final Report, Commonwealth of Australia, March 1994, page 79.
[27] Ibid., page 107.
[28] Ibid., pp.133-134.
[29] Ibid., pp.204-206.
[30] Access to the Law: Restrictions on Legal Practice, Victorian Law Reform Commission Report No 47 (1992); Access to the Law: Accountability of the Legal Profession Victorian Law Reform Commission Report No 48 (1992).
[31] Access to Justice Advisory Committee, Access to Justice; an Action Plan, Commonwealth of Australia, 1994, page 123.
[32] Information taken from *Legislation Review Compendium* 3rd Edition, December 1999, National Competition Council.

State/Territory	Legislation	Current position
		Recommended in favour of allowing competition in professional indemnity insurance. A deregulated market (for indemnity insurance) would provide adequate protection to the public provided that adequate standards were developed dealing with minimum terms and standards (eg. concerning run-off cover and the validity of claims despite lack of appropriate disclosure by a legal practitioner to the insurer). In a competitive market, insurers would have the right to adopt risk weighting with certain obligations of insurers to "share" the business of "high risk" professionals. Parts of premiums would be paid to the professional associations with those associations having the duty to provide risk and practice management training. The NSW Government has not responded to the recommendations concerning indemnity insurance
Victoria	*Legal Practice Act 1997.*	Review was conducted in 1996. The decision in favour of competitive arrangements for indemnity insurance was reversed in 1998 by the *Legal Practitioners (Amendment) Act 1998.* The decision in favour of competitive arrangements for indemnity insurance was reversed in 1998 by the *Legal Practitioners (Amendment) Act 1998.* Another review (recommending retention of the monopoly) was released in November 2000.
Queensland	*Legal Practitioners Act 1995.*	It is understood that the NCP report was finalised in May 2002. However, the report has not been released.
Western Australia	*Legal Practitioners Act 1893 and Rules.*	Review being conducted by a Review Team of senior officials with the support of the WA Justice Department Issues Paper released in June 2000. The draft report was released in April 2002
South Australia	*Legal Practitioners Act 1981.*	Review being conducted by the SA Attorney-General's Department. NCP Issues Paper released in 1999. Report was finalised in 2000. However, the SA Government's response has been published. The SA Government announced some minor changes and a former Bill has lapsed following the 2002 election. The Government decided to retain unlimited personal liability for legal practitioners and to make no changes regarding indemnity insurance "provided that premiums remain competitive"

State/Territory	Legislation	Current position
Tasmania	*Legal Profession Act 1983.*	Review being conducted by the Tasmanian Justice Department. NCP Discussion Paper released in July 2000. Review being conducted by the Tasmanian Justice Department. NCP Discussion Paper released in July 2000. Regulatory impact statement released in April 2001. Legal practitioners are currently compelled to contribute to a mutual indemnity fund and participate in a single master policy. Under the legislation, insurance is required to be arranged by the Law Society on behalf of the whole profession, with a single insurer. The conclusion of the Tasmania Review Body was that the current requirement to the insurer only through the Law Society scheme is an intermediate restriction on competition and that the costs outweigh the benefits. Individual lawyers should be able to make a choice between insuring with the Law Society scheme, or to take out their own insurance, which can be tailored to meet the needs of their particular practice. This would require minimum standards for policies, run off and indemnity.
Australian Capital Territory	*Legal Practitioners Act 1970.*	Review being conducted by the Australian Capital Territory Department of Justice and Community Services. NCP Issues Paper on part of the review has been released by the Department. Current position is not known. However, it is understood that a consultancy may be being let for the remaining parts of the review.

5.4.2 Overview of Other NCP Reviews

Most of the NCP Reviews of the legal profession are reaching the point of finalisation. As far is known they have:

- upheld the need to regulate the legal profession in relation to entry requirements and supervision; and
- recommended only minor changes.

In respect of those minor changes, most of them are of little relevance to the Northern Territory. The only completed review to have been implemented is the review conducted for the NSW legislation. Those of some relevance to the NCP and the issues being considered in the Northern Territory in this Report include:

- The need for exposure/public scrutiny in respect of the making of professional rules for solicitors and barristers. A change along these lines was implemented in the Northern Territory by the *Legal Practitioners Amendment Act 2001*;
- The need to split the single fee for practising certificates so that part of it relates to licensing

functions carried out by the professional association with the other part relating to the membership activities of the professional association. Payment of the first fee would be compulsory. Payment of the second fee would be optional;

- The re-introduction of controls on advertising would not be warranted;
- The disciplinary system for addressing complaints is not anti-competitive because all members of the profession are subject to the scheme. However, it is possible that the costs of the scheme effect the ability of legal practitioners to compete with non-lawyer service providers within the legal services market;
- Solicitors should be able to be members of multi-disciplinary partnerships with there being no need for a majority of the partners to be solicitors;
- There is no reason in principle that the Fidelity Fund should not be replaced by fidelity insurance;
- A deregulated market (for indemnity insurance) would provide adequate protection to the public provided that adequate standards were developed dealing with minimum terms and standards (eg. concerning run-off cover and the validity of claims despite lack of appropriate disclosure by a legal practitioner to the insurer). In a competitive market insurers would have the right to adopt risk weighting with certain obligations of insurers to "share" the business of "high risk" professionals. Parts of premiums would be paid to the professional associations with those associations having the duty to provide risk and practice management training; and
- There may be some grounds for the re-introduction of costs scales where costs are passed on to third parties.

5.5 ANTI-COMPETITIVE PROVISIONS IN THE *LEGAL PRACTITIONERS ACT*

5.5.1 Tests as to whether provisions are anti-competitive

The Competition Principles Agreement sets out the general principle that legislation needs to be reviewed if it is anti-competitive.

The National Competition Council has identified that legislation may limit competition if it:

1. Governs the entry or exit of firms or individuals into or out of markets[33];
2. Controls prices or production levels;
3. Restricts the quality, level or location of goods and services available[34];
4. Restricts advertising and promotional opportunities;
5. Restricts price or type of input used in the production process;
6. Is likely to confer significant costs on business[35]; or
7. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.

5.5.2 Identification of the anti-competitive provisions contained in the *Legal Practitioners Act*

The tables[36] set out in Appendix 1 contain a description of the possibly anti-competitive restrictions in the *Legal Practitioners Act* and a summary and brief assessment of their impacts and significance.

[33] This includes restrictions on the types of business structure, form or ownership and size of a business.
[34] This would include restricting certain forms of conduct and provisions that inhibit innovation and differentiation of products and services.
[35] This would include costs that are greater in the Northern Territory than on competitors outside of the Northern Territory and also include unjustifiable administrative burdens.

In preparing these table the following proposition has been heeded:

> "The NCP review process involves assessing only those provisions which materially restrict competition and not those which impose only insubstantial costs on participants.[37]"

The tables in Appendix 1 contain an assessment as to whether the restriction is "trivial", "minor" or "significant". This is background information to those parts of this Report that contain information dealing with the provisions of the *Legal Practitioners Act* that may restrict competition and issues that have raised in respect of those parts. Some of these issues include alternatives to the current provisions of the *Legal Practitioners Act.*

5.6 POTENTIALLY ANTI-COMPETITIVE PROVISIONS - ISSUES AND QUESTIONS

The Issues Paper posed the following questions:

1. *Are there any other legislative provisions other than those listed in the tables in Appendix 1 that may be anti-competitive in terms of the 7 tests enunciated by the National Competition Council?*
2. *Do you agree with the classifications in the tables contained in Appendix 1 as to whether the restrictions identified are "trivial", "minor" or "significant".*

5.7 SUBMISSIONS ARISING FROM THE ISSUES PAPER

No further issues were identified by commentators.

No significant disagreement was evident concerning the classification of the restrictions.

However, the *Law Society Public Purpose Trust Act* was identified as an Act that should be part of this Report. It has the effect of imposing obligations on financial institutions in which respect of the way in which they handle legal practitioners trust accounts.

[38] The table is set out in a form recommended by the Northern Territory Treasury.
[37] Freehills Regulatory Group Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 11.

6 THE LEGAL PROFESSION

6.1 WHICH ACTIVITIES OF LEGAL PRACTITIONERS ARE REGULATED?[38]

6.1.1 Professional activities of legal practitioners

The members of the legal profession carry out a wide range of disparate activities.

The main professional activities appear, in no order of significance, to be as follows:

- To provide advice as to legal rights and responsibilities;
- To provide advice as to the prospects of success in civil litigation or in criminal proceedings;
- To prepare documents setting out legal rights and obligations (eg. agreements, policies and legislation);
- To prepare the documentation necessary for court, tribunal and other proceedings;
- To provide personnel for the courts and the tribunals (ie judges, magistrates, tribunal members, registrars, etc.);
- To provide a service to the courts (in the capacity of 'officers of the court');
- To represent persons before Courts and Tribunals; and
- To represent persons conducting business or seeking approvals.

6.1.2 Areas of work reserved for legal practitioners

However, not all of these areas of professional work are reserved for the legal profession. The areas for which there are such general reservations in the Northern Territory are as follows:

- Preparation of instruments creating or regulating rights or relating to property or legal proceedings;
- Legal representation before Courts and Tribunals;
- Preparation of documents used in Courts and Tribunals; and
- Preparation of agreements relating to property and testamentary dispositions.

There is doubt as to whether there is a prohibition on non-lawyers who do or who hold themselves out as being able to provide advice as to the interpretation of the law.[39]

6.1.3 Areas of work shared with other professions and occupations

It can also be noted that for certain other services, legal practitioners share the market with other regulated professions and occupations. For example, conveyancing is shared with licensed conveyancing agents. The provision of many kinds of services is shared between legal practitioners and non-lawyers in many markets. Such persons do so either as employees under the supervision of lawyers or in competition with lawyers. The areas of possible relevance to the Northern Territory now or in the future include:

- Taxation and company structures advice by accountants;
- Conveyancing by conveyancing agents;

[38] The following paragraphs are taken from the 1998 NSW Review.

[39] There is no such prohibition. However, provisions such as section 135B(3) (which prohibits foreign lawyers from providing certain advice on Australian law) appear to assume that the provision of advice on the law is a function limited to being performed by legal practitioners.

- The preparation of wills and other documents concerning succession to property by trustee companies and the Public Trustee;
- Advocacy services that are provided routinely in many tribunals such as the Administrative Appeals Tribunal, small claims courts and residential tenancies tribunal;
- Advocacy in the industrial sphere;
- The prosecution of summary offences in the Magistrates Court by unqualified police prosecutors;
- The role that non-lawyers often play in preparing matters for court hearings. In some government legal offices non-lawyers may interview clients and witnesses to prepare briefs in relation to court proceedings;
- The provision by non-lawyers of advice and related information by telephone in the Legal Aid Commission;
- Migration advice by migration agents;
- The preparation of superannuation documents and trust deeds;
- The preparation of bankers' security documents;
- The work of patent attorneys;
- The sale of will kits;
- The sale of shelf companies and superannuation trust deeds;
- Amendments to insurance policies and advising in relation to the interpretation of insurance policies by insurance brokers;
- Advice on the Corporations Law and Securities Law, tendered by merchant bankers and financial advisers;
- Litigation support services offered by accounting firms; and
- Employment relations legal advice by outplacement consultants.

6.1.4 Changes in the activities of legal practitioners

However, changes are occurring. Those that have been noted[40] include:

- That in some areas legal practitioners are excluded from providing legal services. Legal representation is restricted in some Tribunals and legal practitioners cannot provide migration advice unless they are registered migration agents under the Commonwealth *Migration Act 1958;*
- That, at the same time as more legal work traditionally done by lawyers is handled either by non-lawyers or consumers themselves, lawyers are moving into fields in which legal skill is not the primary consideration. Large and medium-sized firms are increasingly providing advice and other services in relation to corporate work with financial, economic, industry and trade aspects. In these fields lawyers are competing with non-lawyers such as accountants, financial and trade advisers, management consultants and others. Legal practitioners are becoming more involved in alternative dispute resolution procedures such as mediation and conciliation. Once again, in this area legal practitioners are competing with non-lawyers;
- Legal practitioners practise in a range of different modes and provide services targeted at different markets. Changes to the profession, which have been documented in the United Kingdom, appear

[40] See South Australian Issues Paper,

to be taking place in Australia. Firms are differentiated by market sector, activities and client type.[41] Australia-wide, firms having more than 100 partners represent less than 1% of the total number of practices, but employ 21% of employees and produce 30% of the total income of the profession.[42] Corporate clients are the source of 36% of the income of the profession. While 95% of practices employ fewer than 20 persons, they represent only 54% of total employment and 46% of total income.[43] A similar point to this was made in the NSW Report; and

- While the majority of legal practitioners are employed in firms there is a significant number of legal practitioners employed by corporations to act as their "in house" legal advisers. The Government is a significant employer of legal practitioners who perform legal services for the Government. Similarly legal aid and community legal centres are also significant employers of lawyers.

Currently, legal firms in the Northern Territory do not share the same range of business size as reported for Australia as a whole. In time this diversity is likely to occur. However even at present there are, within the Northern Territory's legal profession, divergent views about the nature of the regulation that is required having regard to the differing legal businesses or practices that exist.

6.1.5 Does the legal services market possess special features?

The NSW NCP Report noted that legal services comprise a specialised market that differs in significant ways from other kinds of markets. This means that there is a consequent need to consider whether there are certain characteristics of the legal services market warranting special restrictions on services, for the public interest. Characteristics of the legal services market which may be difficult to reconcile with deregulation of the profession include matters set out below:

- Legal practitioners are bound by statute based professional and ethical rules of a kind that usually do not apply to other service providers.[44] Most importantly, they are considered to be officers of the Court. This duty overrides their duty to their client if a conflict between the two duties arises; and
- Legal practitioners also have duties to each other, and in the case of barristers, have been bound by the cab-rank rule,[45] which requires them to accept any brief, subject to some exceptions. However, the current Rules of Professional Conduct and Practice[46] do not contain this provision. It would appear that the Rule no longer has any statutory base and thus the issue is irrelevant for this Report.

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[41] Gerard Hanlon, 'A Profession in Transition? - Lawyers, Markets and Significant Others', (1997) 60 MLR.

[42] Australian Bureau of Statistics, Legal and Accounting Services - Australia 1995-96 (Melbourne, 1997), at page 7.

[43] Ibid, at page 15.

[44] Though there are other professions (eg medical practitioners and veterinary surgeons) and some occupations (eg real estate agents) which also have unique ethical rules.

[45] In the Northern Territory the cab rank rule was given statutory force by Rule 15 of the repealed Rules of Professional Conduct. The current Rules do not have such a provision or Rule. Any non statutory rule (eg a rule laid down by a professional association or a practice required by a court would be outside of the scope of this NCP review. Thus any such possibility is not addressed in this Review. However, for the record, 15.2 of the former Northern Territory "General Rules of Conduct" provided:

> "(a) Counsel shall accept a brief in the Courts jurisdictions and areas in which he professes to practice at a proper professional fee, unless there are special circumstances to justify his refusal to accept a particular brief, examples of which include
>
> (i) where he has already advised or drawn pleadings in the matter for the other party to the proceedings;
> (ii) where he has some special knowledge of the other party's case by reason of his participation in some other litigation;
> (iii) if acceptance of the brief offered would be likely to injure his relationship with a friend or relation;
> (iv) ill health or over-work;
> (v) where for proper reasons he is unavailable;
> (vi) where the practitioner's name is on the List of Defaulters kept in accordance with the Bar Rules and the fee is not paid in advance; and \
> (vii) where a proper fee is requested in advance and is not paid."
>
> The new Rules contain no equivalent provision.

[46] Made on 29 November 2001. The new Rules of Conduct commenced operation on 12 April 2002.

6.2 THE MARKET FOR LEGAL SERVICES[47]

6.2.1 The clientele for legal services

The market for legal services is diverse. Clients of legal services possess different levels of sophistication and knowledge of available services. Some legal transactions are characterised by sophisticated clients who are familiar with the work required, who have the ability to choose competent practitioners without the need to rely on statutory recognition and whose market power and knowledge enables them to negotiate a market price for services. However, other consumers may have limited knowledge of the nature and complexity of the service required or its market value. For these latter circumstances, the market may operate imperfectly, and a market failure may result. Additionally, the modern legal services market may be local, regional, national or international in scope and the nature of the market affects the style and mode of practice.

The nature of legal services is not susceptible to simple analysis. Some services are straightforward and the level of training currently required of legal practitioners may not be necessary for the providers of these services. Other services may carry a high degree of complexity and require arcane, specialised knowledge. Moreover, it may be difficult to predict the complexity of a service in a particular case because of the role of third parties, the complexity of legal rules and the expectations of clients.

Some legal services are discrete while others, such as taxation services, are provided together with other professionals. The demarcation between legal work and other work may be unclear. Professionals whose work overlaps with legal work may not be subject to comparable legislative restrictions and professional rules. This may affect the ability of legal practitioners to compete with other professionals. Conversely, other professionals cannot hold themselves out as having legal knowledge or perform certain work, even though they may have detailed knowledge of the law in particular areas.

The specialised knowledge of legal practitioners may lead to market failure in the provision of legal services. The gap between the knowledge of the practitioners of the work involved and the skill required to deliver a service, and that of the client, may be such that the ability of the client to bargain for the service may be compromised. In these circumstances, regulation of the profession may be justified in the public interest as guaranteeing consumers a minimum standard of service and protecting consumers from incompetence. However, it may not be possible to justify the degree of regulation that is currently set out in the legislative rules on this basis.

The point was also made in the South Australian Issues Paper that the provision of professional services is often done in an environment of "information asymmetry" between providers and consumers. In such a case the consumer may lack the knowledge to assess the quality of the service being provided or the knowledge or expertise of the practitioner.[48] The provision of information to consumers is, therefore, a significant factor in promoting competition. Deregulation of professions, without a concomitant increase in the knowledge of consumers to enable them to make informed choices regarding service providers, could expose consumers to risks of harm without providing them with the means of avoiding this harm.

The South Australian Issues Paper stated that legal services do not produce defined or predictable outcomes in the same manner as contracts for the supply of goods and many kinds of services. Many legal services consist of a process of negotiation and compromise with third parties, and the level of satisfaction of a client with the outcome of a legal service may not be related to the degree of expertise

[47] The following outline is taken from the South Australian Issues Paper.

[48] John Webster 'Competition Policy and the Professions - The Issues' in Australian Council of Professions *National Competition Policy and the Professions* at page 5.

of the practitioner or the quality of the service. Clients often cannot identify the benefit obtained from legal services because legal advice or representation may not achieve the personal or business objectives of the client.

6.2.2 Participants in the legal services market

- The legal services market consists of all sellers and buyers of legal services;
- Sellers include all practising lawyers, whether practising in partnerships, as employees or as sole practitioners;
- Competition occurs between sellers who practise in the same fields of law, both within the private sector and between public and private sector sellers;
- Competition also occurs between lawyers and non-lawyers selling the same or substitutable services, for example between lawyers and conveyancers, taxation advisers, accountants, mediators, trustee companies, etc (see below);
- There may also be competition between lawyers and a small self-help market, such as sellers of kits, community agencies and lay advocacy services;
- Buyers include private individuals as well as trading and financial corporations, governments and government sector bodies, associations, community organisations, small businesses, and others;
- The market for legal services may no longer be geographically restricted, as mutual recognition arrangements permit lawyers admitted in one Australian jurisdiction to practise in another. Hence, local lawyers may compete with interstate lawyers and law firms both for local and interstate business;
- To a lesser degree, there may be competition with overseas lawyers for local and overseas work;
- Likewise, there may be training market competition across Australia's internal borders and even internationally, given that qualifications obtained overseas may be taken into account in admitting practitioners in the local jurisdiction;
- The market has temporal constraints in that a particular legal service must usually be purchased at need and the buyer may not be able to purchase in advance of need, or be at liberty to await an optimum purchase time. This is particularly the case in the purchase of litigation services, but also applies in the fields of family law, criminal defence, probate, taxation and some commercial transactions; and
- The functional level in this market is usually the retail level, ie, the purchaser of the service is its ultimate consumer. This may have market implications in terms of information asymmetry and title reliance.[49]

6.3 DEFINITION OF "MARKET"

Restrictive legislative provisions affect the level of competition. To accurately assess the level of competition and the impact of any restrictions, it is helpful to define the market affecting the provision of these services. Restrictive provisions do not operate in a vacuum. They are only worth considering if they affect a market.

An often-cited definition of a 'market' is:

> "...The area of close competition between firms or the field of rivalry between them.... Within the bounds of the market there is substitution - substitution between one product

[49] This statement is taken from the South Australian Issues Paper

> and another, and between one source of supply and another - in response to changes in prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given sufficient price incentive."[50]

Hence, a 'market' is the area of trade or traffic in a commodity or service. The competitiveness of a market will vary according to how different the offered products are from one another in character or use, and the degree of substitution of products that may occur if a sufficient price incentive is present.

Substitution may occur on the supply side, where producers will switch to the production of different products in response to changing prices, and may occur on the demand side, where consumers may change to the consumption of different products as a result of a change in price.

It is also possible to define the boundaries of a market by reference to:

(1) the nature of the product;

(2) the geographical "reach" of supply;

(3) where the product appears in the chain of production; and

(4) the levels of actual and potential competition - the latter requiring an estimation of what may occur in the future.

In the case of the *Legal Practitioners Act*, the market is made up of consumers and businesses that use the services of legal practitioners and others who compete with legal practitioners. They include many persons in the Northern Territory and outside the Northern Territory who use legal practitioners as sources of advice, as the drafters of agreements and other documents, as negotiators and as representatives before the Courts.

It can be noted that the 'market' affected by the *Legal Practitioners Act* extends beyond the Northern Territory. One of the effects of the mutual recognition legislation[51] is a licensing decision for a natural person taken in the Northern Territory may also be the main licensing decision for that person for the whole of Australia and New Zealand. This means that the potential market extends outside of the Northern Territory. Additionally, the 'travelling' practising certificate scheme[52] has the effect that:

- Interstate legal practitioners practising in the Northern Territory will be able to do so by virtue of an interstate practising certificate but will do so subject to Northern Territory rules; and
- Northern Territory legal practitioners may, by virtue of their Northern Territory practising certificate, be entitled to practise in other States and Territories that are participants in the 'travelling' practising certificate scheme[53].

6.4 THE SIZE AND STRUCTURE OF THE LEGAL PROFESSION IN THE NORTHERN TERRITORY

The following table contains statistical information concerning the size and structure of the legal profession in the Northern Territory as at 30 November 1999[54] and as at 23 May 2002.

[50] Re QCMA and Defiance Holdings (1976) ATPR 40 at page 12.
[51] *Mutual Recognition Act 1992* (Cth), *Mutual Recognition (Northern Territory) Act*, *Trans-Tasman Mutual Recognition Act 1998* and the authorising Acts of the other Australian jurisdictions.
[52] The 'travelling' Practising certificate scheme is a scheme whereby a State or Territory permits persons with a Practising certificate issued in another State or Territory to practise in the State or Territory notwithstanding the lack of a Practising certificate issued in that State or Territory. There are notification requirements and there are rules in place to ensure adequate disciplinary and control mechanisms.
[53] All jurisdictions other than WA and Qld are parties to this scheme. WA and Qld are expected to join the scheme in 2002 or 2003.
[54] The information that forms the basis of this table was provided by the Law Society of the Northern Territory.

Description	Darwin		Alice Springs		Other		Total 99/01
	1999	2002	1999	2002	1999	2002	
Number of legal businesses[55]	79	93	24	21	9	10	112/124
Number of persons with unrestricted practising certificates	114	127	30	25	41[56]	34	185/186
Number of persons with a restricted practising certificate	184	198	29	29	6	6	219/233
Total number of persons with practising certificates	298	325	59	54	47	39	404/418
Number of persons with practising certificates who are members of the Law Society Northern Territory[57]	290	324	58	53	41[58]	32	389/409
Number of persons with practising certificates working within government[59]	72	83	6	6	1	1	79/90
Number of persons with practicing certificate working within for firms	164	173	32	27	3	3	199/203
Number of barristers	30	32	0	0	36 - all interstate	26 – all interstate	66/58

6.5 LEGAL SERVICES MARKET - ISSUES AND QUESTIONS

The Issues Paper sought answers on the following questions:

1. *Does the above discussion accurately describe the legal services market in the Northern Territory?*
2. *Are there any other features of the market which are relevant to this analysis?*
3. *Does the Northern Territory market for legal services differ significantly from the legal services market in other Australian jurisdictions, and why?*
4. *How intense is competition within the legal services market in the Northern Territory?*
5. *Are there any factors arising out of the legislation that add to, or mitigate, the intensity of competition within this market?*

6.6 SUBMISSIONS CONCERNING THIS ANALYSIS OF THE MARKET

6.6.1 Law Society Northern Territory

The Law Society Northern Territory noted:

[55] This incudes firms, government departments, 'other' and "barristers chambers'.
[56] This figure includes 36/26 barristers who live outside of the Northern Territory.
[57] A person with a Practising certificate is entitled to be a member of the Law Society, without additional fee.
[58] This includes 31/26 interstate barristers.
[59] *Government* includes: Anti-Discrimination Commission, AGS, ASIC, ATO, Cwlth DPP, Dept Education, Dept Chief Minister, Dept Prim Ind & Fisheries, Dept of Lands & Planning, DPP, Health & Community Services Complaints Commission, Magistrates Court, Dept of Justice, NTLAC, Ombudsman's Office, NT Police Fire & Emerg Services, NT Treasury, OCA, Territory Health Services.

(a) the wide range of legal service providers (ranging through numerous legal aid organisations, land council lawyers, government lawyers, small-scale private lawyers, large firms and barristers who specialise in advocacy and in providing specialist advice);

(b) that the profession is fused;

(c) that the amount of work reserved to the legal profession is historically the least compared to the situation in other Australian jurisdictions with legal practitioners having long been in competition with conveyancing agents, accountants and financial advisers. The Law Society Northern Territory noted that this competition has, on occasions (resulted in a lowering of costs to consumers eg domestic conveyancing;

(d) that the market itself drives the level of competition with there being a trend for large corporations and the governments to tender for legal services; and

(e) that the legal services market in the Northern Territory is vibrant and fluid. It is marked by a high level of mobility of legal practitioners who tend to change employment and method of employment often. Firms merge often and it has historically been easy for legal practices to be established. There are few financial impediments to legal practitioners practising as barristers[60].

6.7 FINDINGS CONCERNING THE MARKET

The Review Team is satisfied that it has adequately described and understood the market for the purposes of this review.

[60] See Law Society Northern Territory Submission, 25 October 2000, pages 6-8.

7 DEVELOPMENT OF THE REGULATION OF LAWYERS - HISTORICAL OVERVIEW

7.1 EARLIEST REGULATION[61]

Elements of the legal profession of the kind that currently operates in the Northern Territory have existed since the 13th century. From the earliest of these times in English history, the profession was split into various groupings with differing regulatory controls.

Since 1292, attorneys (who were roughly equivalent to current solicitors) were placed by the King under the control of Judges of the Courts. Such members of the profession were officers of the court. Another group, 'the pleaders' (now barristers) were largely self regulated though some groups were appointed initially by the King and controlled by the Judges. These members of the profession were not 'officers of the court'. In time the Judges gave up control of the appointment of barristers. The function was performed by the Inns of Court (professional groups).

Over time, the branches of the profession became more distinct. Various rules gradually developed. Such rules included barristers not being able to take instructions from a lay client and barristers not being able to be sued.

The controls exercised by the Inns of Court over barristers meant that there was no need for the Courts or the parliament to regulate admission or to supervise conduct. However, in respect of solicitors and other like members of the professions there was not a strong professional body. Legislation regulated various aspects and the courts punished misconduct.

By 1729 there was comprehensive legislation which required articles, examination by judges and some control of costs. The courts also made rules relating to admission and professional conduct of solicitors. From about 1739, a professional organisation formed. It involved itself in all aspects of the profession. For example, it examined legislation, it scrutinised lists of admitted solicitors (to see if they were properly qualified), it took action to have solicitors guilty of misconduct struck off, it investigated offences and undertook prosecutions. It developed into the modern law society.

7.2 REGULATION IN THE PERIOD 1863 -1973

During this period of time the legal profession in the Northern Territory was largely regulated by the Supreme Court. Some legislation reinforced the Court's regulatory role. In general terms:

- there was no strong regulation by either the profession or executive government. The regulatory regime was light;
- admission was relatively straightforward for any person admitted elsewhere in Australia;
- overt consumer protection was minimal;
- basic trust account controls were imposed in 1928; and
- it can be noted that up until 1918, land brokers were licensed to conduct conveyancing.

7.3 REGULATION IN THE PERIOD 1974-2002

In 1974, the *Legal Practitioners Ordinance* and the *Legal Practitioners (Incorporation) Ordinance* were enacted. These Ordinances marked the commencement of a period of legislative activity that has led

[61] This broadbrush account of the development and regulation of the legal profession is a summary of chapter 1 of *The Law and Conduct of the Legal Profession in NSW*, RC Teecd, The Law Book Company 1963 (2nd Edition). See *Western Australia NCP Draft Report*, April 2002, pages 22-26 for a more detailed summary of the history of the regulation of legal practitioners prior to 1843. See also appendix 2 for a more detailed legislative history for South Australia and the Northern Territory.

to comprehensive regulation of the legal profession.

In large measure, the main regulator remains the Supreme Court through its control of the admission process and with its ultimate control over disciplinary functions. However, the Law Society Northern Territory has been given an increasingly important role by the *Legal Practitioners Act.* The Act also provides the main source of funding for the Law Society Northern Territory.

Between 1974 and 1996, the amount of regulation of the legal profession in the Northern Territory gradually increased. By 1996 it had become much the same as the regulation elsewhere in Australia. The only interruption was the enactment of the *Land and Business Agents Amendment Act 1991.* This Act re-introduced into the Northern Territory the licensing of conveyancing agents.

However, in 1999 and 2000 legislation was, at the behest of the legal profession, introduced with the view to opening up the local profession to more competition. These changes related to permitting the practise of foreign law and permitting interstate legal practitioners to practise law in the Northern Territory.

8 OBJECTIVES OF THE LEGAL PRACTITIONERS ACT

An NCP Review is required to identify and clarify the objectives of the legislation being reviewed. Over time the objectives of legislation may change. Arguably this is the case with the legislation that regulates the legal profession. Part 7.4 of the Issues Paper sought to identify the current objectives of the legislation.

8.1 NEED TO ASSESS THE OBJECTIVES

The objectives for the regulation of the legal profession are not stated in the *Legal Practitioners Act.* Stated as extremes the possible main objectives of the Act are to:

- ensure that the legal profession can govern itself in a way that is independent of executive government but subject to the judicial arm of government;
- ensure that the members of the legal profession can provide services competently and competitively; and
- protect the interests of the various consumers of the services provided by the legal profession (with such consumers including the executive and judicial arms of government).

In order to ascertain what might be the objectives in the Northern Territory, the following paragraphs deal with the enactment of the Northern Territory legislation and contain reviews of other NCP Issues Papers and law reform reports concerning the regulation of the legal profession.

8.2 OBJECTIVES STATED AT THE TIME OF ENACTMENT OF THE LEGAL PRACTITIONERS ACT

The *Legal Practitioners Act* was enacted in 1974. The Bill for the Act was introduced by Mr Dick Ward, a non-official member of the former Legislative Council. Thus it was, in some senses, a private members' Bill but with (Commonwealth) Government support.[62]

Mr Ward, as he then was[63], emphasised that the Bill was:

> *"[N]ot for the benefit of the profession but for the benefits of the public. It only benefits the legal profession to the extent that it is benefit to any profession, association or body or persons to have a disciplinary code imposed on it ...I am sure the legal profession is quite happy to have itself subjected to this discipline. The discipline is necessary because the frailties of mankind appear in all professions: in the legal profession, the medical profession, the church and the press. The legal profession is not immune and, in certain instances, the public needs protection."*[64]

8.3 OBJECTIVES OF SUCH LEGISLATION ELSEWHERE

8.3.1 Objectives identified for Queensland

In December 1998, the Queensland Department of Justice and Attorney-General issued a discussion paper on *Legal Profession Reform.* The document contained, at the direction of the Attorney-General, a comprehensive review of options for Legal Profession Reform. The document contains a set of objectives for the review. These appear also to be a set of objectives for the regulation of the legal profession. They were stated as follows:

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[62] However, the records of the Law Society suggest that " although the Attorney-General (Cth) and the Government had wanted it to be introduced by one of the 'official members' the Law Society Northern Territory succeeded in lobbying highly respected Territory lawyer Dick Ward to introduce the Bill. See Barbara James, *Twenty Years On A history of the N.T. Law Society (1969-1988) And a Glance at Pre-Society Legal Life in the North*, at page 16.

[63] Mr Ward was subsequently appointed as a Judge of the Supreme Court of the Northern Territory.

[64] NT Hansard, 1974 at pages 181 and 182.

"The objectives of the review are:

- *To provide a regulatory regime which promotes efficiency and high standards of service delivery by the legal profession;*
- *To promote competitive practices;*
- *To enhance the accountability of the profession to clients;*
- *To enhance the accountability of the professional bodies in the performance of their regulatory functions to the public and their members;*
- *To facilitate the practice of the law on a national basis;*
- *To eliminate unnecessary regulation of the profession; and*
- *To simplify and streamline the legislation in respect of the profession."*[65]

8.3.2 South Australian NCP Issues Paper objectives

The South Australian NCP Issues Paper noted that the stated purpose of the *Legal Practitioners Act 1981* is to regulate the practice of law and for other purposes.

This Issues Paper went on to state that the:

"second reading speech on the introduction of the Bill indicates that the object of the Act was to maintain the high standards of the legal profession; to promote sound and reasonable regulation of the practice of the law and to ensure accountability of the profession to the public;"[66] *and that the Act " has been amended several times since 1981 but with no stated change to its objectives."*[67]

8.3.3 Australian Capital Territory objectives

In November 1999, the ACT Department of Justice and Community Safety issued an Options Paper entitled "*National Competition Policy Review – Legal Practitioners Act 1970*".

The options paper does not contain an explicit statement of the objectives for the ACT Act. However, it would appear that it is understood that the objective of the Act is to ensure that promoting the efficient delivery of quality legal services at a competitive price. [68]

8.3.4 New South Wales NCP Report objectives

The NSW NCP Report states the following in relation to the objectives sought to be achieved by the NSW legislation:

- *'The objectives of the Legal Profession Act 1987 focussed on the preservation of an independent legal profession that was properly regulated and publicly accountable. The Parliament and Government had a responsibility to ensure that the profession was properly regulated, and that*

[65] Discussion Paper *Legal Profession Reform* (Queensland Department of Justice and Attorney-General, December 1998, page1.
[66] Parliamentary Debates 1980-81 Vol 4 at pages 3548-3549.
[67] *National Competition Policy Legislation Review Legal Practitioners Act 1981 (South Australian) Issues Paper* July 1999, Review Panel South Australian Attorney-General's Department, page 10.
[68] See *Options Paper National Competition Policy review: Legal Practitioners Act 1970*, ACT Department of Justice and Community Safety, November 1999, paragraphs 2 and 9.

clients of the profession were properly protected. The legislation was not directly concerned with ensuring market competition for legal services[69]*; and*

- *The Legal Profession Reform Act 1993 demonstrated that a shift in thinking had occurred since 1987. The object of the 1993 reforms was to create a more competitive market for legal services. The principle that the profession should regulate itself in the public interest was replaced with a co-regulatory scheme, whereby the profession's governance of itself was subject to enhanced independent scrutiny. Legal practice was understood to be both a professional service and a business, and regulatory measures were to be justified, on the basis of the accessibility, cost, speed and quality of legal services. For the first time, the 1993 Act provided for the review of rules governing practice made by the profession. The rules of the Law Society and the Bar Association were to be reviewed by the Councils themselves and Legal Profession Advisory Council (section 57H), to ensure that they were in the public interest and did not inhibit competition (section 57G)."*

8.3.5 Tasmania - NCP Issues Paper objectives

The NCP Issues Paper released in July 2000 contains a major review of the *Legal Profession Act 1993* and all subordinate legislation under that Act.

Similarly to some other states, the Tasmanian paper does not explicitly state the objectives of the legislation other than that:

> *"the stated purpose of the Legal Profession Act was to introduce a comprehensive revision and consolidation of the law governing legal practitioners, the Law Society and the manner in which legal services are delivered in the State. The Act continues or establishes a number of bodies, including the Law Society of Tasmania, the Council of the Law Society, the Solicitors' Guarantee Fund and the Disciplinary Tribunal, each of which play a role in the regulation of the practice of law in this State. The second reading speech on the introduction of the Bill indicates an aim of the Act was to improve standards of legal practice and to acknowledge the consumer's interest in the provision and standard of legal services."*[70]

8.3.6 Western Australia - NCP Draft Report objectives

The Western Australian National Competition Policy Draft Review Report identified the following possible objectives for the enactment of the legislation dealing with legal practitioners:[71]

- To provide benefit to the public of Western Australia through facilitating the independence of the judiciary, administration of justice and the rule of law and by protecting the public from the adverse effects that might arise if legal services were provided by persons who do not have the requisite knowledge, skill, experience, independence and integrity to competently and ethically deliver the legal service in question or who do not have adequate insurance and access to sufficient Fidelity Funds to compensate for any loss they cause in delivering such services; and
- The provisions dealing with interest on trust monies may have arisen because of the impracticability of apportioning interest.

8.3.7 Victoria

The Victorian review has never been made public. However, it led to the *Legal Practice Act 1987.* That Act contains no detailed statement of objectives except for:

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[69] See *National Competition Policy Review of the Legal Profession Act 1987*, NSW Attorney General's Department Report, November 1998.
[70] Ibid at page 14.
[71] *National Competition Policy Legislation Review*, Draft Review Report, April 2002, Department of Justice WA, page 44

"to improve the regulation of legal practice in Victoria[72]"

8.3.8 Britain - 1989 objectives

In 1989, the Lord Chancellor issued a paper entitled "Legal Services: A Framework for the Future." In this paper the Lord Chancellor identified a number of objectives concerning legislation dealing with the arrangements for the provision of legal services in advocacy and in the conduct of litigation. They were identified as:

"The objectives are:

- *To lay down standards of education and training in the provision of services in advocacy or the conduct of litigation which ensure that those who offer such services to the public are competent to do so;*
- *To maintain the standards of conduct in advocacy and the conduct of litigation which are required in the interests of the proper and efficient administration of Justice; and*
- *To meet those objectives in ways which ensure that there are no obstacles to access to justice, and no restrictions which would inhibit the client's choice of how he may obtain legal services, imposed on those qualified to provide legal services or what those qualified may do, which are not necessary in the interests of justice."[73]*

However, it must be noted that these objectives were formulated in the following conceptualisation of the framework of the legal system:

"The legal profession exists for the benefits of its clients, and for the proper administration of justice, criminal and civil. It works to resolve, formally and informally, disputes between citizens and with the State, and to assist people in pursuing their rights and understanding their obligations. Where it proves impossible for those concerned to settle a dispute, its resolution is ultimately a matter for the courts.

If that framework is to function efficiently, and the client is to have ready access to justice, he or she needs to be able to call on a wide range of services in many different combinations, from many different practitioners.

Equally, the client must have enough information about the practitioners he or she thinks of approaching, and enough confidence in the standards under which they operate, to be sure that they will be able to do what is needed at an affordable price. The court system must be able to protect litigants from sharp practice, and make sure they have all the opportunity that is needed to put their cases fully."[74]

8.3.9 Objectives identified by the Australian Competition and Consumer Commission

The ACCC has suggested the following:

"Regulation of the legal profession needs to be proportional to the potential harm. It should aim to provide a guaranteed level of service quality to consumers to reduce the risks associated with purchasing and using legal services. At the same time, regulation

[72] *Legal Practice Act 1997 (Vic)*, s.1(a).
[73] *Legal Services: A Framework for the Future*, Lord Chancellor, London 1989, page 11.
[74] *Legal Services: A Framework for the Future*, Lord Chancellor, London 1989, at page 4.

must allow maximum flexibility and competitiveness in service provision.[75]

8.4 General Objectives of Occupational Regulation

The remedying of a market failure.[76]

The only likely market failure is that known as asymmetric information. This occurs where the purchaser of the service has insufficient knowledge to be able to work out which service provider to choose. Such persons may seek third party assurances about the qualifications of service providers, ethical conduct assurances and/or service standards guarantees.

Government intervention is a means of ensuring a minimum standard of competency and behaviour. It has been suggested that legally enforceable minimum standards can reduce average cost and raise the average quality of such services though at the expense of excluding low quality supplies and customers.

The avoidance of tragic risk.

In one view, the risks of removing licensing controls may be regarded as low because most members of the occupations will conduct their affairs in a competent and honest way. However, a few members of society may suffer at the hands of charlatans who can practise notwithstanding criminal records, lack of compliance with consumer protection laws, lack of indemnity insurance and so on.

Encouragement of "more professionalism."

It has been argued by the Australian Council of Professions that:

> *"there is a significant public benefit in the maintenance of the highest levels of professional practice in this country and the concept and pursuit of 'professionalism' is essential to meeting the needs and aspirations of each and every citizen, thus contributing to the preservation of the social fabric."*[77]

In this context professionalism in respect of an occupation means an occupation that has the attributes of:

1. A requirement for special knowledge and skills;
2. A high requirement that practitioners exercise their knowledge and skills in the interests of others;
3. Standards of competence and conduct that are established and enforced by an association which represents the profession as a whole and which operates under a charter or articles of association which defines its gatekeeper role; and
4. Adherence of practitioners to a code of practice which includes requirements that practitioner place the health, safety and welfare of the wider community ahead of loyalties to client, colleagues or the professions, and that they practice only within their area of competence.[78]

8.5 Current Objectives for the Northern Territory Legislation

It is fairly apparent that the *Legal Practitioners Act* contains a number of discrete provisions the

[75] *Submission to the Issues paper on the Legal Practitioners Act and associated legislation, regulations and rules*, ACCC, November 2000, page 4
[76] This paragraph summarises paragraph 5.19-5.25 of the *Guidelines for the review of Professional Regulation.*
[77] See quoted, page 24, *Guidelines for the Review of Professional Regulation.*
[78] See quoted, page 22, *Guidelines for the Review of Professional Regulation.*

objectives of which vary. It is not possible to justify all of the provisions of the *Legal Practitioners Act* from a single objective or from a series of objectives.

Additionally it can be seen that there is a wide range of views concerning what should be objectives of a regulatory scheme. These range between objectives that focus on:

- the efficient delivery of effective legal services;
- the conduct of a business by legal practitioners; and
- lawyers as being part of the system for the administration of justice.

In all likelihood, a properly comprehensive statement of Northern Territory objectives will be one that acknowledges:

- the role of legal practitioners in the justice system (subject to supervision by the courts);
- the right of consumers to make appropriate choices and to have remedies; and
- the right of legal practitioners to carry on occupations and businesses that are competitive with other occupations and businesses that may provide similar services.

The September 2000 Issues paper listed a set of possible objectives. They were listed as set out below (with each objective being set in bold print). The Issues Paper noted that there were stated in no order of particular significance. At the most they reflect the historical order of the development of objectives.

The objectives listed in the Issues Paper were as follows:

1. **Adequate control by the Supreme Court of legal practitioners who appear before, and prepare documents for, the Supreme Court, other Courts, Tribunals and statutory bodies.**

   These courts, tribunals and statutory bodies usually give legal practitioners automatic rights of appearance. They do this for the purpose of attempting to ensure that the courts, tribunals and statutory officers can carry out their functions efficiently and effectively. There is a common view in the legal profession and amongst the judiciary that:

   "the equity and integrity of the justice system relies on practitioners acting in good faith, meeting appropriate standards of competence and diligence when acting on behalf of their clients and honouring their special duties to their clients and the court."[79]

2. **To provide a support mechanism, including funding, for the effective and efficient self-regulation of the legal profession.**

   In general terms most of the regulation has grown from mechanisms that were self-regulating under the auspices of the Courts. Given that the Courts are one of the arms of government it is probably stretching language to say that the profession was self-regulating when regulation was shared between the profession's own corporate and non-corporate bodies and the Courts. That point aside, the legislature, beginning in the early 1800's, stepped in to maintain much the same level of control over legal practitioners regardless of whether they worked as advocates or worked as solicitors. The view has been put that:

   "The considerable public service provided by the professional bodies in promoting and

[79] Discussion Paper *Legal Profession Reform* (Queensland Department of Justice and Attorney-General) December 1998, at page 4.

safeguarding the profession's high ethical standards is acknowledged ...With the current considerable cost of legal services to the community, it is in the public interest to ensure that they are delivered effectively, efficiently and effectively."[80]

3. **To provide a professional approach to the resolution of legal issues.**

   This is the provision of legal services having regard to the wider interests of the community. This objective may also cover the following:

   "From a consumer protection perspective, the public also has an interest in the profession meeting best practice by modern management standards in matters such as client agreements, client and case management, regular reporting etc."[81]

4. **To provide for a competent legal profession and to provide consumer protection by providing that only legal practitioners can provide certain legal services.**

   This is the objective relating to the setting of standards concerning the provision of certain services. There are some legal services that require a person to have technical/professional skills. There is an objective that only appropriately qualified persons provide such services.

5. **To provide for an accountable legal profession and to provide for consumer protection in respect of the activities of legal practitioners.**

   This is an objective that there be a fair process for the investigation and hearing of complaints against a practitioner's professional conduct. This is an objective to protect consumers/clients from being dominated unfairly by legal practitioners. It leads to provisions that control fees, reviews of fees, the need for written agreements, quotes and so on. It may also lead to formal dispute resolution processes over and above those offered by the courts (for ordinary contractual/negligence disputes) and the disciplinary processes.

6. **To provide for a competitive legal profession.**

   This is the objective of ensuring that legal practitioners are able to compete amongst themselves on an Australia wide basis. Similarly, it should ensure that legal practitioners are able to compete on fair terms with other professions and occupations that offer like services.

8.6 OBJECTS OF THE LEGISLATION – ISSUES AND QUESTIONS

The issues paper sought answers to the following questions:

(a) What are the public benefits that the Legal Practitioners Act seeks to confer on the community?
(b) For each such benefit, is it still required by the community?
(c) Do you agree with the statement of objectives? (as outlined in part 7.5 of the Issues Paper) If not, what objectives would you add and what objectives would you delete?

8.7 SUBMISSIONS CONCERNING THE OBJECTIVES OF THE LEGISLATION

8.7.1 Law Society Northern Territory

The Law Society Northern Territory identified[82] the following as the objectives of the *Legal Practitioners Act*:

[80] Discussion Paper *Legal Profession Reform* (Queensland Department of Justice and Attorney-General), December 1998, at page 4.
[81] Discussion Paper *Legal Profession Reform* (Queensland Department of Justice and Attorney-General), December 1998, at page 4.
[82] See Law Society Northern Territory Submission, 25 October 2000, page 9.

1. To encourage delivery of fair, efficient and effective legal services.
2. To provide a support mechanism for the effective and efficient self-regulation of the legal profession.
3. To provide a professional approach to the resolution of legal issues.
4. To provide for a competent legal profession and to provide consumer protection by providing that only legal practitioners can provide certain legal services.
5. To provide that only appropriately qualified and trained people can use the name 'legal practitioner'.
6. To provide for a competitive legal profession.

Later in its submission, the Law Society Northern Territory also noted that the Act provides:

> *"a framework for the regulation of the legal profession on behalf of both the courts and the public."*[83]

8.7.2 Other Submissions Concerning Objectives

No other submissions were made concerning the objectives of the legislation. However, one Darwin lawyer made the following observations:

> *"Our approach towards these issues is conditioned by a strong preference for maintaining the status of legal practitioners as member of a profession serving the Courts as well as the public. We believe that it is in the public interest that the work currently undertaken by legal practitioners be confined to persons with the special training prescribed for admission as a legal practitioner of the Supreme Court of the Northern Territory. Reduction in the scope or intensity of the training will produce service providers who:*
>
> - *are unable to provide an holistic legal service;*
> - *cannot demonstrate the skills necessary to resolve legal problems in a satisfactory manner; and*
> - *are unsuited to the application of the powers presently vested in the Supreme Court in relation to the conduct of legal practitioners.*
>
> *If this happens, legal practitioners as presently defined can be expected to seek other business activities to generate the income lost to competitors from outside the profession. This will inevitably lead to an erosion of standards as legal practitioner apply themselves to business activities requiring more commercial acumen, but less legal knowledge. The decline in emphasis on the traditional skills of a legal practitioner will produce a decline in practising standards. The decline will be manifest in the impairment of the quality of justice dispensed by the courts and in a loss in confidence in the rule of law*[84]*."*

8.7.3 Assessment of the objectives

The Law Society Northern Territory formulated the objectives in different terms to those set out in the Issues Paper. The Law Society Northern Territory did not include suggested objective 1 (that of providing a mechanism for permitting control by the Supreme Court of the profession). The inference from this is unclear. However, it may be that the substance of the matter is that the Courts supervise lawyers by virtue of courts' legislation rather than by the *Legal Practitioners Act*[85].

[83] See Law Society Northern Territory Submission, 25 October 2000, page 25
[84] *Ward Keller, Lawyers 24 October 2000.*
[85] With the main control being various Rules of Court setting out who may appear before the Court.

8.7.4 Findings concerning objectives

The following are found as being the objectives:

1. To encourage delivery of fair, efficient and effective legal services.
2. To provide a support mechanism for the effective and efficient self-regulation of the legal profession.
3. To provide a professional approach to the resolution of legal issues.
4. To provide for a competent legal profession and to provide consumer protection by providing that only legal practitioners can provide certain legal services.
5. To provide that only appropriately qualified and trained people can use the name 'legal practitioner'.
6. To provide for a competitive legal profession.
7. To, in respect of mandatory indemnity insurance, maximise the possibility for clients that legal practitioners are in a position to meet the financial obligations to clients arising from their own negligence, breaches of contract and certain defalcations of employees.

9 THE RESERVATION OF LEGAL WORK TO LEGAL PRACTITIONERS

9.1 ISSUE

The *Legal Practitioners Act* restricts who can provide certain legal services. However, the extent of the restriction is probably narrower than what is commonly assumed to be the case. Parts 8.2 and 8.3 of the Issues Paper described the limitations that exist in respect of the provision of legal services.

9.2 CURRENT POSITION

Section 22 of the *Legal Practitioners Act* prevents a person from acting as a legal practitioner unless the person holds an appropriate practising certificate or has some kind of exemption.[86]

Sections 131 and 132 of the *Legal Practitioners Act* reserve, subject to specified exceptions, the exclusive right for legal practitioners:

(a) to draw wills and testamentary instruments;[87]

(b) prepare court documents in respect of the administration of deceased estate;[88]

(c) to prepare documents that regulate rights between persons;[89] and

(d) to prepare documents relating to a legal proceeding.

A legal practitioner can represent a person in the Supreme Court if entitled to practise (that is, has a practising certificate) and can represent a person in the Local Court if admitted.[90]

There are additional restrictions on 'legal practitioners'. Thus, in order to practise law, a person must have an appropriate practising certificate.

These general provisions operate subject to various 'exemptions'. For example:

(a) The Courts have a general power to permit representation by persons other than legal practitioners;

(b) The *Agents Licensing Act*, read with section 132 of the *Legal Practitioners Act*, permits licensed conveyancing agents to provide conveyancing services of the kind specified in the *Agents Licensing Act*; and

(c) Probate and wills preparation by the Public Trustee and the approved trustee companies.

It can be seen that the work that may, under the *Legal Practitioners Act*, only be conducted by legal practitioners is fairly narrow. It hardly represents any kind of monopoly[91]. It does not even cover:

(a) the general advice work of legal practitioners – eg advice relating to prospects of success or the interpretation of the agreements or rights under law; and

(b) advocacy work in the courts.

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[86] For example, if the person holds some kind of statutory office such as the Director, Legal Aid or the Director of Public Prosecutions.
[87] This does not prevent public officers preparing documents in the course of employment - see S 132(2)(a) of the *Legal Practitioners Act*.
[88] This does not prevent public officers preparing documents in the course of employment nor does it prevent the Public Trustee and trustee companies from preparing documents - see S 133(2) of the *Legal Practitioners Act*.
[89] this does not prevent conveyancing work permitted by the *Agents Licensing Act* to be carried out by licensed conveyancing agents – see S 132(2)(d) of the *Legal Practitioners Act*.
[90] S75 of the Supreme Court Act provides that a person may be represented in court by a legal practitioner entitled to practise in the Court. Rule 1.14 Local Court Rules provides that an admitted person may appear for parties.
[91] Even if that word can be used to describe a market has so many competitors both locally and across State/Territory borders

However, the Courts and Tribunals control who may appear before them. In some cases, particular Acts or rules of court specify that legal practitioners have a right to appear.[92]

9.3 THE RESERVATION OF LEGAL WORK TO LEGAL PRACTITIONERS – QUESTIONS

The issues paper sought comments on the following:

1. *How significant is any such restriction in terms of its impact on the community/economy?*
2. *In relation to each category of legal work the subject of any such restriction, what are the public benefits and what are the costs to the community of the restriction? Is there any evidence available?*
3. *What are the public benefits, if any, conferred by this restriction?*
4. *How do the benefits, if any, compare with the costs entailed in the reservation of work? How would the cost of legal services be affected, if at all, by the modification or abolition of this restriction?*
5. *Could these benefits be achieved by other, less regulatory, or less costly, means?*
6. *Should non-lawyers be able to undertake any and what legal work? On what conditions, if any?*
7. *Should any and which legal work be reserved for lawyers, and why?*
8. *Does the general prohibition on specified kinds of practice of the law by non-lawyers restrict competition within the market for legal services? In what ways?*
9. *If abandoned, what would be the impact on other current requirements such as indemnity insurance, professional rules of conduct and disciplinary proceedings? What accountability controls would be put in place?*
10. *Is it an appropriate alternative that:*
    (a) *the only work reserved for lawyers should be Court work, advice on prospects and proposed or pending litigation and advice on the legal aspects of contentious matters before litigation; and*
    (b) *all other legal work would be open to non-lawyers. Such work has been described as primarily wills and probate, commercial law including conveyancing, leasing and sale of businesses[93];*
11. *Should the position in the Northern Territory concerning the reservation of legal work be aligned with that in place elsewhere in Australia?[94]*

9.4 SUBMISSIONS AND OTHER COMMENTS

9.4.1 Law Society Northern Territory

The Law Society Northern Territory states[95] its position as being that the benefits to the community of the reservations given by the Courts' legislation, Rules of Court and sections 131 and 132 of the *Legal Practitioners Act* in respect of appearances in court on behalf of clients outweigh the negative aspects of any restriction of competition. It states that legal practitioners by virtue of training and as a result of being "officers of the court" have a special and unique role in the administration of justice. Legal

[92] For example, see rule 1.15 of the Local Court Rules.

[93] This suggestion has been made by the Council of the Law Society Northern Territory, See Bulletin to Managing Partner, 20/1/1999. However, it appears that this advocacy about other legal work being performed by non-lawyers is not based on the view that anyone should be able to conduct the work. Rather, the position advocated is based on the view or assumption that the consumer protection measures, as in place for legal practitioners, should also apply in respect of these other providers – as is the intention with the *Agents Licensing Act* concerning conveyancing agents. Thus, the outstanding issue is what are the necessary consumer protection measures

[94] All jurisdictions' legislation contain provisions reserving specific kinds of legal work to lawyers, although the definition of what work is reserved varies slightly between jurisdictions see *Legal Practitioners Act* 1970 (ACT), ss 192-194; *Legal Practitioners Act* (NT), ss 132-133; *Legal Practitioners Act* 1981 (SA), ss 21(2); *Legal Practitioners Act* 1959 (Tas), ss 74-75, *Legal Profession Practice Act 1958* (Vic), ss 314-315; *Legal Practitioners Act* (WA), ss 76-78.

[95] See Law Society Northern Territory Submission, 25 October 2000, pages 12-14

practitioners have ethical duties and responsibilities which are not imposed on other persons.

The administration of justice and the confidence of the community in such administration relies, to a large degree, on the ethical responsibility of legal practitioners to be candid with the court and with each other and not to engage in dishonest or misleading conduct.

The Law Society Northern Territory noted the position of the Law Council of Australia (as outlined in 34.1) on the reservation of legal work. The Law Society Northern Territory noted that it supports this policy statement excepting for the reservation of work in respect of transactions relating to the sale of real property. The Law Society Northern Territory also observed that the work currently reserved in the Northern Territory reflects this policy position and also reserves the least amount of work to legal practitioners within Australia. The Law Society Northern Territory identified the following benefits as flowing from these reservations of work to legal practitioners:

- A control on a minimum standard of service provision within the courts;
- Efficient operation of the justice system and public confidence in it;
- Independence of legal practitioners from government and other large corporations;
- Consumer protection.

The Law Society Northern Territory notes:

> *"that it should not be forgotten that it was governments that reserved specific work for legally qualified legal practitioners. There is no doubt that this was done because it was the view that it was in the public interest that it be done and that the public interest outweighed restrictions in the market place".*

In respect of the Northern Territory, this proposition is very doubtful except in the literal sense that it is Parliaments that make laws. An examination of the history of the regulation of legal practitioners suggests that such regulation has very much grown out of the profession and the judicial arm of Government. In particular the basic legislation underpinning the current Act, namely the *Legal Practitioners Ordinance 1974* was developed by, and enacted at the behest of, the local profession in 1974. Prior to that time the old legislative provisions (being located with Courts' legislation) had fallen into disuse except for the 1928 Ordinance dealing with trust accounts.

Nonetheless the Law Society Northern Territory also notes that legal practitioners by dint of their experience and training would dominate the legal services market regardless of whether any work was reserved to them or not.

9.4.2 The Australian Competition Consumer Commission

The ACCC submitted the following:

> *There may be a public benefit in adopting a more flexible and targeted approach to the licensing of professionals providing legal services. The Ontario health legislation may provide a model worth considering for the regulation of legal and associated professions*[96]

The ACCC also restated its view to the effect that there is still scope for introducing additional competition and that there should be no presumption that any area of legal work be reserved.

[96] *Submission to the issues paper on the Legal Practitioners Act and associated legislation, regulations and rules*, ACCC, November 2000, page 10

However, if there is to be reserved work it suggests a model along the following lines:

- The identification of "controlled acts". These would be acts that public interest requires that they should only be performed by persons with particular skills, competencies or qualifications. Being of good fame and character would be a relevant factor for a practitioner of such acts.
- Some aspects of current "legal work" would not constitute such "controlled acts". For some of these areas there could be some form of probity requirements (trust accounts, professional indemnity insurance, complaint handling scheme). In others there could merely be a requirement to advise clients of their qualifications and/or whether they hold indemnity insurance.

However, the ACCC did not identify such "controlled acts". It suggested that such identification should be the subject of working parties. The ACCC noted the Law Council's policy [see Part 9.4.4 and Appendix 3] on reservation of legal work. The ACCC says that it does not agree that the following should be reserved for legal practitioners:

- mediation and conciliation services
- conveyancing;
- tribunal work ;
- wills, probate and tax work.

9.4.3 National Competition Council

See Part 5.3.3.

9.4.4 Law Council of Australia

The Law Council of Australia has developed the following statement:

The core areas of legal work should:

1. Relate to appearances in Court and matters incidental to that right, such as:
   - advice on prospects in proposed or pending litigation;
   - advice on the legal aspects of contentious matters before litigation is proposed;
   - preparation and conduct of proceedings;
   - legal professional privilege.
2. Relate to the drawing, filling up or preparing an instrument or other document for fee or reward that:
   - is a will or other testamentary instrument;
   - creates, regulates or affects rights between parties (or purports to do so); or
   - affects real or personal property on behalf of another person.
3. Relate to probate work being:
   - taking instructions for grant of probate or letters of administration; or
   - drawing up and preparing papers on which to found or oppose a grant of probate or letters of administration.

The Law Council of Australia justifies this proposal on the basis that the public interest in consumer protection is not well served by permitting persons without knowledge and competence in the law to undertake for fee or reward matters which fall into the core areas of legal work (as defined). This reinforces the paramountcy of the need to protect the public from incompetent service providers.

However, the Law Council also recognises that each State and Territory Government may determine that economic, social or demographic factors in the State or Territory justify, in the public interest, the reservation of other areas of work to qualified lawyers.

The Law Council of Australia has pointed out that:

- The overall scheme of the Policy Statement reserves to lawyers all steps in the advice and representation of persons involved in proceedings before any Court and the preparation for reward of instruments which affect legal rights.
- The Policy Statement does not seek to protect the mere giving of legal advice independently of any Court proceeding.

9.4.5 Others

A senior local solicitor stated:

> *"Sections 131 and 132 of the Legal Practitioners Act should be preserved, subject to the exceptions as they presently exist. The higher standards of training which are pre-requisite to admission as a legal practitioner of the Supreme Court are more likely to produce satisfactory delivery of services than if discrete areas are opened up to competition by non-legal practitioners. The public derives substantial benefit from having a multi-skilled profession able to recognise and deal with a wide range of problems. If competition from non-legal practitioners is to be encouraged then legal practitioners servicing the same areas should not be required to adhere to special standards of control or compliance. All competitors, legal practitioners and non-legal practitioners, should be subject to the same consumer protection mechanisms[97]."*

9.5 Discussion – Reservation of Work for Legal Practitioners

9.5.1 Potential Disadvantages[98]

- Higher fees for consumers of legal services as a consequence of a potentially limited supply of legal practitioners entitled to practise in the Northern Territory.
- Statutory prohibitions on the conduct of legal work by non-lawyers can impose public costs by restricting competition between service providers and from competent non-lawyers. This can raise the price of legal services and reduce the choice of service providers available to consumers.
- The existence of the system implies that lawyers are subject to higher standards than other service providers, who may be performing similar tasks. This may create anomalies that affect markets, because lawyers must observe professional duties which are not imposed on other service providers, and which may not be relevant to certain categories of services.
- Reduced consumption of legal services generally, due to the existence of higher legal fees and a limited supply of legal practitioners entitled to practise in the Northern Territory.

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[97] *Ward Keller, Lawyers 24 October 2000*

[98] WA NCP Legislation Review; page 45.

- Compulsory licensing may create a perception that lawyers are best equipped to provide any legal service. Hence, non-lawyer service providers who have special expertise may be excluded from sectors of the legal services market.
- Lower quality of legal services provided to consumers by legal practitioners entitled to practise in the Northern Territory because the absence of competition from non-practitioners acts as a disincentive to innovate in the delivery of legal services.

9.5.2 Potential Advantages[99]

- Minimises the risk that consumers of legal services will suffer adverse impacts as a result of being provided with low quality legal services by non-practitioners.
- Minimises the flow-on risk to third parties from low quality legal services being provided to consumers by non-practitioners.
- Reduces the costs to consumers of obtaining information to choose legal service providers who have sufficient knowledge, ethics and insurance as to pose minimal risk in service delivery.
- Facilitates the participation of local legal practitioners in national and international legal service delivery.
- Facilitates the administration of justice in the Northern Territory.
- There is a fundamental public advantage in facilitating an independent, rights based legal system that can be administered by the courts and tribunals because the courts and tribunals and the public can rely on competent legal practitioners to represent the interests of the parties.
- The Northern Territory legal practitioners operate as part of a national legal profession. They have rights of practice interstate that are dependent upon the maintenance of a regulatory scheme that is broadly similar to those in place elsewhere. This means that there is a need to protect local rights of legal practitioners under the mutual recognition scheme and the travelling practising certificate scheme.
- The community (as a whole) and the individual clients are protected from incompetent, unethical and impecunious providers of legal services.
- The community (as a whole) and the individual clients save money and time because they don't need to incur risk and undertake research in assessing which providers can provide legal services in an appropriate manner. The regulatory scheme (as a whole with reservation being a core factor) minimises the effect of failure on clients and the community of legal practitioners.
- The regulatory scheme (as a whole with reservation being a core factor) minimises the effect of failure on clients and the community of legal practitioners.

9.6 Assessment concerning reservations

The costs and benefits have been assessed qualitatively rather than a quantitatively. This approach accords with those taken in other NCP Reviews[100]. There are significant costs to the community in limiting the persons who can provide legal services. The Review Team notes that whilst there may have been, in the past, very good reasons fro reserving various areas of work for legal practitioners, this does not take away from the need to review the basis on which such reservations have been made.

The main area of legal work in the Northern Territory that possibly should not be reserved is that of the preparation of wills. The Review Team has noted that:

[99] WA NCP Legislation Review; page 45.
[100] For example, see discussion of the issue WA NCP Legislation Review, page 46.

- this kind of work is not reserved nationally;
- will kits are available for sale – so that individuals can prepare their own wills
- the *Administration and Probate Amendment Act 2002* provides for a class of professional executors. Currently, this class of persons is entitled, for reward, to carrying on the business of administering estates. It is possible that the concept in the *Administration and Probate Act* (of professional executors) could be expanded so as to include a class of persons entitled to prepare wills.

9.7 FINDINGS (INCLUDING ALTERNATIVES) CONCERNING LIMITATIONS ON NON-LAWYERS

The findings are:

1. Sections 22, 131 and 132 contain anti-competitive provisions.
2. The anti-competitive provisions imposed by sections 22, 131 and 132 are justified.
3. Sections 131 and 132 contain anti-competitive provisions.
4. That the areas of work that can be reserved for legal practitioners should reflect the work that is reserved on a national basis. This appears to be:
   (a) appearances in Court and matters incidental to that right, such as:
      (i) advice on prospects in proposed or pending litigation;
      (ii) advice on the legal aspects of contentious matters before litigation is proposed;
      (iii) preparation and conduct of proceedings;
      (iv) legal professional privilege.
   (b) except for the work of conveyancers pursuant to the licensing scheme in the *Agents Licensing Act,* relate to the drawing, filling up or preparing an instrument or other document for fee or reward that:
      (i) is a will or other testamentary instrument, but noting that the legislation should recognised other more specialised qualifications that would permit non lawyers to draw up wills for reward;
      (ii) creates, regulates or affects rights between parties (or purports to do so); or
      (iii) affects real or personal property on behalf of another person.
   (c) relate to probate work being:
      (i) taking instructions for grant of probate or letters of administration; or
      (ii) drawing up and preparing papers on which to found or oppose a grant of probate or letters of administration.
5. No alternatives were identified to the provisions regarding the reservation of work.

10 RESTRICTIONS ON THE WORK OF 'BARRISTERS'

10.1 ISSUE

Section 16 of the *Legal Practitioners Act* makes it an offence for a person who has arranged for his or her name to be entered on the Roll as a Counsel to practise:

(a) other than as a barrister; and

(b) other than independently of other legal practitioners.

10.2 CURRENT POSITION

Barristers are required to practise as sole practitioners. Section 16 of the *Legal Practitioners Act* makes it an offence for a legal practitioner to not practise independently if there is a notation entered on the Roll of Practitioners to the effect that he or she will not practise otherwise than a barrister and independently from another legal practitioner. The maximum penalty for breach of this section is 50 penalty units.[101]

For barristers, the sole practice rule has been retained on the basis that it ensures the independence of barristers, and that the duty of a barrister to the client and the court overrides other obligations. In fact, over the past 20 years the rule has gradually tightened in its application in the Northern Territory.

10.3 SUBMISSIONS AND OTHER COMMENTS

10.3.1 Law Society Northern Territory

The Law Society Northern Territory did not address this issue.

10.3.2 Other submissions

There were no other submissions.

10.4 DISCUSSION

10.4.1 Disadvantages

- Does not quite match reality. In practice, barristers often operate within groups. They share offices and resources. Often some barristers might own the premises and thus control some aspects of how other barristers operate. It would appear that there can be business and operational links whilst still maintaining the basic principle that persons operating as barristers do so, in respect of their professional activities, independently of anyone else.
- This provision may interfere with these kinds of business choices.
- However, this choice has regulatory consequences. For example, different rules apply concerning insurance (barristers are not required to have the same indemnity insurance cover) and barristers are not bound to contribute to the Fidelity Fund nor can their activities result in a claim against the Fidelity Fund.
- This means that it is important for the regulatory authority to have a precise knowledge of whether a legal practitioner is conducting his or her practice as a barrister.

10.4.2 Advantages

- All legal practitioners can operate on a solitary basis. All legal practitioners can operate provide the

[101] One penalty unit equals $100. To be increased to $110 on the commencement of the *Penalties Amendment Act 2002*.

services permitted of barristers. Thus, if a legal practitioner choses to have his or her name entered on the Roll of legal practitioners as a "barrister" it is really little more than a commitment to conduct his or her legal practice in a particular manner.

10.4.3 Assessment concerning barristers

It seems inappropriate that it be a offence for a barrister to practise otherwise than as barrister or independently. These are conduct issues that should be handled by the application of the professional conduct rules. Issues concerning insurance and the Fidelity Fund should be governed by the actual professional activities of the legal practitioner.

The question has also been asked as to whether is a public benefit case for the different regulatory schemes for barristers and solicitors. However, aside from section 16 there are few, if any, regulatory differences arising from the simple fact of whether a person operates as a solicitor or a barrister. For example:

(a) there are, in fact, differences in indemnity insurance requirements – but these exist because the Law Society has assessed barristers as having different risks and thus don't need the same level of insurance as other legal practitioners; and

(b) barristers don't need to contribute to the fidelity fund because they don't hold trust monies and thus have nothing of the clients that they can steal. Hence there is no reason for barristers to pay levies into the Fidelity Fund.

10.5 FINDINGS (INCLUDING ALTERNATIVES)

Findings:

1. Section 16 contains anti-competitive provisions.
2. Section 16 cannot be justified to the extent that it contains an absolute prohibition on barristers acting independently of one another. Accordingly, section 16 should be repealed.
3. Alternative: The extent of the application of the other provisions of the Act to barristers should be determined having regard to the actual functions of the barrister.
4. It is appropriate that legal practitioners who intend to practise as barristers be subject to regulatory provisions suitable for that kind of practice.

11 RESTRICTIONS ON THE USE OF TITLES SUCH AS "LEGAL PRACTITIONER", "SOLICITOR" AND "BARRISTER" – ISSUES AND QUESTIONS

11.1 ISSUE

Parts 8.2 and 8.3 of the Issues Paper described the limitations that exist in respect of the names that can be used by persons who provided legal services.

11.2 CURRENT POSITION

Aside from actual restrictions on who can provide what legal service, there are additional restrictions as to the names that can be used by persons who provide legal services (whether or not those legal services may be exclusively performed by legal practitioners).

11.3 RESTRICTIONS ON USE OF TITLES - QUESTIONS

The issues paper sought comments on the following:

1. *Is there any validity to the view that controls over the use of titles within the legal profession ensure that only those qualified in the profession provide the services sought by clients?*
2. *Is it correct that title reservation aims at ensuring demarcations recognisable by the public between those qualified as legal practitioners and others?*
3. *Is it correct that reliance may be placed on a title in choosing to deal with a practitioner so that the entitlement to use a particular style or title carrying such implications in the mind of the consumer could constitute a market advantage?*[102]
4. *Is there any National Competition Policy issue in ensuring that the restrictions concerning the use of titles match those in place elsewhere in Australia?*[103]
5. *Does the statutory restriction on a person holding themself out to be a legal practitioner assist in the creation of a body of persons with a sense of professional connection. It so, does this serve any purpose?* [104]
6. *Is an effect of the restrictions on the use of the title to protect legal practitioners from competition from those who may well be able to provide services – for example, from certain interstate legal practitioners.*
7. *What are the costs, if any, entailed in reserving titles in this way?*
8. *Could similar benefits be achieved by less regulatory or less costly means such as laws regarding misleading conduct, such as the Trade Practices Act 1974 ?*
9. *Does the reservation of the titles 'lawyer', 'legal practitioner' and the like to those who meet the requirements for admission to practise, as distinct from those who have obtained a law degree, restrict competition? In what ways?*

11.4 SUBMISSIONS AND OTHER COMMENTS

11.4.1 Law Society Northern Territory

The Law Society argues that by the reservation of titles ("barrister", "solicitor" and "legal practitioner")

[102] This description of the purpose and effect of the reservation of titles is taken from the South Australian NCP Issues Paper, page 21.
[103] *Legal Practitioners Act* 1970 (ACT), s 192; s 131; Queensland Law Society Act 1952, ss 7(1), 39; *Legal Practitioners Act* 1981 (SA), s 21(1), *Legal Practitioners Act* 1959 (Tas), s 74(3), Legal Profession Practice Act 1958 (Vic), s 92, *Legal Practitioners Act* (WA), s 80, Legal Practitioners Act 1987 (NSW) s.48C, 48D.
[104] In the sense of creating a kind of a club. Similarly, the reservation of certain kinds of work for members of the club must be an incentive for persons to take the action necessary to join the club.

the public is assured that when they attend upon a person using one or other of these titles the work they entrust to that person will be performed by someone with appropriate levels of skill and training and who is subject to the ethical controls of the Law Society Northern Territory. These titles amount to "trade marks" the use of which protects the community from substandard legal advice. The community is aware of the high level of service provided by the bearers of these "trade marks" an has a result of many years experience of their usage has confidence in the services provided by such legal practitioners. To allow others to use these titles would dilute public confidence in them. This would have the potential to increase transaction costs as it would necessitate consumers having to make inquiries and other searches to ascertain those who were actually "barristers", "solicitors" or "legal practitioners" (in the sense of being persons who are "fully qualified".

The Law Society Northern Territory gives the example of the differences between "solicitors" and "conveyancers". Both can provide conveyancing services. However, the Law Society Northern Territory suggests that the client should be able to make an informed choice (between them) based on whether one is a conveyancer or a solicitor. The Law Society Northern Territory states that the issue is not one that can be safely left to the provisions of the *Trade Practices Act 1974.*

11.4.2 Others – Local legal practitioner

There is a distinct market advantage in the use of titles such as "legal practitioner" etc. It is in the public interest to maintain that advantage which services to assure consumers that the service provider has undergone rigorous training, is subject to the control of the Supreme Court and is bound also by professional self-regulation[105].

11.5 Discussion

11.5.1 Potential Disadvantages[106]

- The entitlement to use particular or descriptive titles confers a competitive advantage on practitioners in areas of practice not exclusively reserved to practitioners, allowing them to attract work more readily than other persons of equal skill who are not so entitled, whereby competition between "legal advisers" and other professionals providing similar services could thus be restricted.

11.5.2 Potential Advantages[107]

- The restriction provides a signalling function, serving to reduce transaction costs to consumers in their search for and choice of a legal service provider.
- The restriction increases public faith in the justice system, by ensuring that persons offering legal services are suitably qualified, are subject to certain ethical restrictions on their behaviour, and carry suitable professional indemnity insurance.

11.5.3 Assessment concerning use of titles

The objective of the provision is to provide consumers with information as to the competence, training and professional values attained by potential legal service providers, and to facilitate client choice of legal advisers. This issue has been assessed on a qualitative rather than quantitative basis. Reservation of titles is a consequence or adjunct to reservation of work. It provides the best signal to clients, the community and the courts and tribunals as to which individuals are entitled to perform the work reserved for legal practitioners.

[105] Ward Keller, Lawyers 24 October 2000.

[106] WA NCP Legislation Review; page 106.

[107] WA NCP Legislation Review; page 106.

Most of the titles that may have been reserved for legal practitioners who compete with the members of other professions and occupations are now shared – for example the term "conveyancer". New terms have come to exist regarding areas of expertise that may be possessed by legal practitioners and others – eg. tax advisers, mediators, migration agents, etc.

It would be unnecessarily confusing for the members of the community to permit persons incapable of providing a range of legal services to call themselves "lawyers" merely because they provide services that some legal practitioner might provide to the exclusion of any other kind of legal service.

11.6 FINDINGS (INCLUDING ALTERNATIVES)

The findings are:

1. Reservation of titles is anti-competitive.
2. Reservation of titles provides a net public benefit.
3. There is no alternative to the use of titles.

12 CONTROLS OVER BUSINESS ARRANGEMENTS

12.1 ISSUE

There are many limitations on the way in which legal practitioners may provide legal services. These limitations come from a number of sources. The reasons for the limitations may no longer be justifiable in terms of the current objectives of the legislation. Part 8.6 of the Issues Paper described the limitations that exist in respect of the form of businesses that may be conducted by legal practitioners.

12.2 SEPARATE REPORT CONCERNING THE LEGAL PRACTITIONERS (INCORPORATION) ACT

The *Legal Practitioners (Incorporation) Act* is the main Northern Territory Act imposing restrictions on how legal practitioners conduct their businesses. This Act has been dealt with in a separate report. This issue is not further pursued in this report except to the extent that it has been raised in respect of barristers.

Additionally, a section raised in the Issues Paper but not discussed in great detail was section 136. This section prohibits legal practitioners sharing profits with persons who are not legal practitioners. However, the review of the *Legal Practitioners (Incorporation) Act* assumed the repeal of section 136. It would not be rational to retain section 136 whilst at the same time permitting corporations (owned by persons other than legal practitioners) to provide legal services.

The NSW *Legal Profession Amendment (National Competition Policy Review) Bill 2002*[108] makes it clear that a solicitor may be in partnership with a person who is not a barrister or solicitor despite anything to the contrary in the Act or in professional conduct rules. It also provides in respect of barristers that they may be in partnership with anyone subject only to the barristers rules. The NSW Bill goes on to provide that the regulations may make further provisions with respect to the business if any partnership in which a barrister or solicitor participates.

The issues addressed by the NSW Bill appear to be consequential to the generality of the findings made in the report made concerning the *Legal Practitioners (Incorporation) Act*. The Review Team considers that it is appropriate that they be picked up in this report. That is, the principles that will underpin corporate practices in multi-disciplinary practices, should also apply to natural persons engaged in multi-disciplinary practices. Thus, for example, there should be freedom to be in partnership with a person conducting another business (eg a licensed conveyancer) but that this freedom should be subject to the regulations (which might prescribe that some kinds of businesses are incompatible with the provision of legal services).

12.3 ADDITIONAL FINDINGS CONCERNING BUSINESS PRACTICES

The findings, in respect of the multi-disciplinary practices, are:

(a) That there should not be any significant differential between firms/natural persons (on the one hand) in conducting multi-disciplinary practices and corporate bodies (on the other hand).

(b) That the types of business that may be conducted by multi-disciplinary practices are subject to the regulations.

(c) That there be appropriate management systems for ensuring that legal professional obligations prevail over other business obligations with responsibility being placed with a nominated legal practitioner.

[108] This Act was passed by the Legislative Assembly on 8 May 20002. However, by 28 May 2002, it had not been passed by the NSW Legislative Council

13 TRAINING REQUIREMENTS FOR LEGAL PRACTITIONERS

13.1 ISSUE

Training requirements may restrict the number of persons who can commence business as legal practitioners. Part 8.8 of the issues paper describes the requirements concerning training for legal practitioners. Additionally, the *Legal Practitioners Act* impose experience requirements on legal practitioners before they can practise on their own behalf.

13.2 CURRENT POSITION

Legal practitioners are required to be "licensed" in order to perform certain legal functions. Having regard to the application of State, Territory and Commonwealth Mutual Recognition Acts and the travelling practising certificate legislation this "licensing" involves two main steps namely:

1. Admission by the Supreme Court of the Northern Territory or by an equivalent Court in Australia or New Zealand; and
2. Possession of a practising certificate issued by the Law Society Northern Territory or in a jurisdiction which is part of the national travelling practising certificate regime.

Additionally, there are numerous compliance issues that are tied in with the admission and practising certificate processes.

The responsibility for determining the training required of legal practitioners rests with the Judges of the Supreme Court. This power is given by section 11(1)(a) of the *Legal Practitioners Act*. It provides that the Judges may make rules regarding the qualifications, requirements and procedures to be followed in order for a person to be admitted to practise law. These Rules, called the Legal Practitioners Rules, are made in the form of Regulations.

A person must, in the vast majority of cases, complete a course of academic training prior to being admitted as a legal practitioner. The requirements for academic training are anti-competitive in the sense that the need for them imposes barriers to entry and they impose costs on the profession and the community.

There have been moves around Australia to determine core academic requirements. These moves occurred in the context of debates between the profession and the 18 or so Australian Law Schools as to what should be the core academic requirements for practise as a lawyer. The underlying issue is 'what is the main purpose of academic training – is it, in relation to lawyers, the imparting of a core body of knowledge or is the imparting of a method of thinking?' There is no doubt that it is a mixture of the two, however there is considerable debate about what core knowledge needs to be acquired in order to become an admitted legal practitioner.

The NSW NCP[109] review noted that a uniform national scheme for the admission and licensing of lawyers:

- Requires consideration in the context of the specialisation and diversification of the legal services market. A specific aspect of the scheme is the academic subjects which have been set as prerequisites; and

[109] *National Competition Policy Review of the Legal Profession Act 1987*, NSW Attorney General's Department Report, November 1998.

- Identified the group of subjects listed in Rule 94[110] of the NSW Legal Practitioners Transitional Admission Rules as prerequisites to admission as having been agreed by the Consultative Committee of State and Territory Law Admitting Authorities as prerequisites to admission. The Consultative Committee comprises members of the judiciary and representatives of admission boards in each jurisdiction.

A person who considers that he or she has complied with all of the training requirements may seek admission. This is a process by which the Supreme Court makes an assessment of whether a person is a fit and proper person to practise the profession of the law in the Northern Territory.

The Supreme Court, in making this assessment, relies on advice from the Admissions Board and advice from the Law Society Northern Territory. The Admissions Board is comprised of the Master of the Supreme Court, and up to six lawyers appointed by the Chief Justice. Of this membership two members must be legal practitioners practising in their own right and one must be a person nominated by the Attorney-General.

Admission occurs by way of a formal sitting of the Supreme Court. The rules governing the admission process are set by the Judges of the Supreme Court in accordance with Section 11 of the *Legal Practitioners Act*.

Admission does not, however, necessarily permit a person to commence to practise as a legal practitioner.

The same admission rules do not apply for persons admitted under the *Mutual Recognition Act* 1992. Similarly, persons practising in the Northern Territory under the travelling practising certificate scheme are not be required to be admitted in the Northern Territory.

A legal practitioner, having been admitted by the Supreme Court, must obtain a practising certificate from the Law Society Northern Territory in order to engage in regulated aspects of legal practice.

Section 22 of the *Legal Practitioners Act* sets out the rules that determine what type of practising certificate must be held.

The types of practising certificate vary depending on whether a person is practising on his or her own behalf (including in partnership), whether the person is an employed legal practitioner, whether the legal practitioner is a barrister or whether the legal practitioner is employed to perform legal professional activities by an organisation that does not itself have a practising certificate (eg various non-government legal aid bodies).

The various classes of practising certificates are defined in Section 6 of the *Legal Practitioners Act*. Practising certificates are either "unrestricted" or restricted class 1, 2 or 3. Section 25 of the *Legal Practitioners Act* governs the issue of unrestricted practising certificates.

In very broad terms a person is not entitled to the issue of an unrestricted practising certificate unless she or he has:

(a) for at least 2 of the past 5 years, practised as a legal practitioner or articled clerk; or

[110] Rule 94. Subject prerequisites in other states are substantially similar: Victoria: Legal Practice Act 1996, s 332 and Rules of the Council of Legal Education 1993, Rule 10; Western Australia: *Legal Practitioners Act* 1893, s 15; Queensland: *Legal Practitioners Act* 1995, s 58(1)(c), per Solicitors' Board approval; Tasmania: Legal Profession Act 1993, s 23, per Board of Legal Education Rules; Northern Territory: *Legal Practitioners Act* 1974, s 11, per Admission Board approval; ACT: *Legal Practitioners Act* 1970, s 11.

(b) previously held an unrestricted practising certificate.

Practising certificates are issued so as to expire on a fixed date of each year (namely 30 September). Practising certificates are issued so as to be conditional on compliance with various obligations - for example, the obligation to maintain professional indemnity insurance.

The Law Society Northern Territory may refuse to grant or renew a practising certificate for a variety of reasons including bankruptcy, conviction on indictment, trust account defaults, default of the indemnity rules, failure to make certain payments, because the practitioner is unfit to carry on practice due to infirmity, injury or illness etc. The practising certificate may be suspended for similar reasons. An appeal lies from these decisions to the Supreme Court.[111]

Certain government lawyers (eg. Commonwealth Government lawyers) are not required to have a practising certificate.

Legal practitioners issued with practising certificates are not required to belong to the Law Society Northern Territory. However, they may do so without the payment of any additional fee.

Once a person has a practising certificate and is practising there are requirements to be met by some legal practitioners concerning:

(a) trust accounts; and

(b) levies to the Fidelity Fund; and

(c) indemnity insurance.

The details of these requirements will be described later in this Report (see Parts 20, 17, 19 and 20).

Somewhat different rules apply to barristers, to employed legal practitioners, to interstate legal practitioners and to persons practising 'foreign law'. These will be considered later in this paper.

13.3 ACADEMIC TRAINING AND PRACTICAL TRAINING – QUESTIONS

The issues paper sought comments on the following:

1. *Do the requirements for admission as a legal practitioner restrict competition? In what ways? How significant is any such restriction in terms of its impact on the economy?*
2. *What are the public benefits and the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such restriction? Is there evidence available as to the relative magnitude of these benefits and costs*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by less restrictive or less costly means?*
5. *Should the Judges of the Supreme Court maintain the role given to them in 1993 of setting the academic and training requirements[112] or should the legal profession have a greater formal role in determining academic and/or training qualifications?*
6. *Should the main object of legal training be the acquisition of skills, rather than detailed knowledge*

[111] S29 *Legal Practitioners Act.*

[112] Previously, the requirements had been set by the Admissions Board (the members of which are selected by the Judges).

alone?

7. *Given that the current system of admission permits a legal practitioners to accept instructions in any area of law, should restrictions be placed on the types of matters undertaken by legal practitioners who have not completed formal study in certain areas of practice. If so, is there a case for amending the legislation so that there may be selective legal training for non-lawyers wishing to sell legal services[113]. Put another way, should all categories of practitioners be required to complete the same level of practical training before admission?*
8. *Is the efficient and effective operation of the Courts/Tribunals dependent on the competence and professional ethics of legal practitioners in respect of the conduct of matters in the Courts and Tribunals and in respect of the documentation prepared for use in Courts and Tribunals. If so, are the current training requirements (covering a four or five year period) necessary or might it be the case that experience within the Court system could suffice for many of the day to day Court and Tribunal matters?*
9. *Does the requirement that newly admitted practitioners complete a period of supervised law related employment restrict competition, either by restricting entry into the legal profession or in any other way? What, if any, public benefits are conferred by the restriction? How do the benefits, if any, compare with the costs entailed? Could similar benefits be achieved by a less regulatory or less costly means?*
10. *Should limited exemptions be available to practitioners proposing to work for Government, corporations or firms which have their own training arrangements in place?*
11. *Is competition restricted by any of the requirements for being issued with an annual practising certificate (aside from the pre-requisites for admission). In what ways? How significant is any such restriction in terms of its impact on the economy?*
12. *What are the public benefits and what are the costs to the community of any such restriction? Is there evidence available as to the relative magnitude of these benefits and costs? Is there a net benefit over costs? If the restriction does provide net public benefit, could these benefits be achieved by other less restrictive or less costly means?*

13.3.1 Potential Disadvantages[114]

- Higher fees for consumers of legal services because the specified requirement for educational qualifications reduces the supply of potential employees and bids up graduate salaries, and practical training increases operating costs.
- Reduced employment opportunities for graduates because of provisions to restrict admission of practitioners to persons who are of good fame and character.
- Reduced employment opportunities for graduates because of provisions to restrict unrestricted rights of practise to practitioners to persons who have 2 or more years of practical experience
- Higher fees for legal services provided by legal practitioner entitled to practise in the Northern Territory due to the requirement to bear costs of meeting minimum fiduciary standards.
- Higher fees for some legal services provided by legal practitioner entitled to practise in the Northern Territory due to costs of minimum compulsory levels of professional indemnity insurance.
- Higher fees for legal services provided by legal practitioner entitled to practise in the Northern Territory due to the requirement for certified practitioners to pay an annual prescribed fee to the Law Society Northern Territory

[113] The Law Council of Australia has devised a detailed Policy Statement with Explanatory Memorandum proposing such a scheme (Part 34.2.2).

[114] Draft WA NCP Legislation Review (April 2002); page 66 and 84.

- Higher fees for legal services provided by legal practitioner entitled to practise in the Northern Territory due to the requirement for legal practitioner entitled to practise in the Northern Territory to pay contributions to the Fidelity Fund.
- Reduced employment opportunities for practitioners due to restrictions preventing newly admitted practitioners from practising on their own account prior to completing a year of restricted practice.
- Reduced supply of community legal services due to disincentives for practitioners who are exempt from holding a practice certificate to undertake such work.

13.3.2 Potential Advantages[115]

- Higher quality legal services provided by legal practitioner entitled to practise in the Northern Territory to consumers because the educational qualifications held by and practical training provided to legal practitioner entitled to practise in the Northern Territory reduces risk of low professional standards.
- Higher quality legal services provided by legal practitioner entitled to practise in the Northern Territory to consumers because of provisions to restrict the admission of practitioners to persons who are of good fame and character reduces risk of low professional standards.
- Reduced risk to consumers of monetary losses arising from financial malpractice of legal practitioner entitled to practise in the Northern Territory and third parties.
- Consumer benefits from availability of compensation for damages incurred as a result of poor quality legal services provided by legal practitioner entitled to practise in the Northern Territory.
- Lower public costs in the regulation of legal services as a result of operation of a self-financed regulatory body for practitioners.
- Reduced risk of monetary loss to consumers of legal services through defalcations by legal practitioners.
- Reduced risk of poor services being received by consumers through inexperienced practitioners practising from their own account.
- Reduced risk of monetary loss to consumers of legal services provided by legal practitioner entitled to practise in the Northern Territory due to restrictions preventing bankrupt practitioners from practising .

13.4 Submissions and other Comments

13.4.1 Law Society Northern Territory

The Law Society Northern Territory noted:[116]

- The public needs to have access to people who are competent in the practice of the law and who have the ability to provide comprehensible and accurate legal advice and representations. Without this, many transactions and ventures would be become too uncertain and risky with resulting restriction on commercial activity;
- That it strongly holds the view that the community over many years has come to associate the reserved terms [see Part 9] with persons who have completed a rigorous course of study in the law and whose conduct adheres to a high ethical standard; and
- It is in the public interest that such associations should continue in the community mind by

[115] Draft WA NCP Legislation Review (April 2002); page 66 and 85

[116] See Law Society Northern Territory Submission, 25 October 2000, pages 18-19

maintenance of the current restrictions.

13.4.2 Australian Law Reform Commission

The Australian Law Reform Commission (ALRC) in its discussion paper on the *Review of the federal civil justice system*[117] discussed the issues that currently exist in respect of the training of legal practitioners. It noted the debate between the objectives of providing graduates with a high level of professional skills (which appears to have an increasing focus in North America) against that of specifying areas of knowledge of substantive law. It also noted that both the legal system (especially the courts) and clients may suffer if legal practitioners do not have appropriate professional skills.

The ALRC suggested a greater need in Australia for skills and ethics training. In respect of who should be responsible for setting standards it noted that this is an area of State/Territory responsibility but outlined the following proposal:

> "3.1 The federal Attorney-General, in consultation with the Standing Committee of Attorneys-General (SCAG), should establish a broadly constituted advisory body know as the Australian Council on Legal Education. This council would be charged with developing model standards for legal education and training for lawyers and other key participants in the justice system."[118]

The ALRC, in its Report *MANAGING JUSTICE - Review of the federal civil justice system*,[119] made the following recommendations:

> "2. In addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility.
>
> 3. All university law schools should engage in an on-going quality assurance auditing process, which includes an independent review of academic programs at least once in every five years.
>
> 4. The Commonwealth Department of Education, Training and Youth Affairs should give serious consideration to commissioning another national discipline review of legal education in Australia, commencing as soon as practicable.
>
> 5. While ensuring that specified standards of minimum competency are achieved, admitting authorities should render practical legal training requirements sufficiently flexible o permit a diversity of approaches and delivery models.
>
> 6. The federal Attorney-General should facilitate a process bringing together the major stakeholders (including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australasian Professional Legal Education Council, and the Australian Law Students Association) to establish an Australian Academy of Law. The Academy would serve as a means of involving all members of the legal profession - students, practitioners, academics and judges - in promoting high standards of learning and conduct and appropriate collegiality across the profession.
>
> 7. As a condition of maintaining a current practising certificate, all legal practitioners should be obliged to complete a program of professional development over a given period three year period. Legal profession associations should ensure that practitioners are afforded full opportunities to undertake, as part of tis regime, instruction in legal ethics, professional responsibility, practice management, and conflict and dispute resolution techniques. ..."

[117] ALRC DP 62 August 1999, pages 40-57
[118] ALRC DP 62 August 1999, pages j57
[119] ALRC 89 January 2000

13.4.3 Law Admissions Consultative Committee

The Law Admissions Consultative Committee[120] responded to the ALRC's proposals as follows:[121]

- In respect of ALRC recommendation 2, not yet established that the suggested approach is satisfactory or preferable, let alone the only approach that should be followed by Law Schools;
- It is yet to be determined or demonstrated that a satisfactory standard (for practical training of the kind aimed for in post graduation practical training) can be achieved reliably at undergraduate level. In particular it cannot be assumed that this will be possible without increasing the length of present courses and committing additional resources to them;
- Law Schools don't just produce graduates for the legal profession. Accordingly there is an obvious difficulty with the notion of requiring all undergraduate courses to be required to accommodate extra material to fit graduates better to practise law;
- Australia's Legal Profession Admitting Authorities already have a flexible approach in respect of standards. They are kelt under review by the relevant authorities; and
- An Academy, along the lines of that suggested by the ALRC, should not have the task of appraisal and accreditation of courses and degrees. Those functions should be performed by an informed body with the necessary capacity, professional knowledge and detachment.

13.4.4 Assessment

Limitations on who can provide training may restrict the number of persons who can commence business as legal practitioners. Part 8.10 of the Issues Paper set out the limitations concerning the number of articled clerks who may be employed by legal practitioners. The articled clerks issue is further discussed in Part 14.

However, many practitioners may rarely use the knowledge obtained in these 'core' legal subjects and instead apply legal skills to a range of other areas of legal work. In addition, academic training is of little use without practical experience and a practitioner will often have insufficient skills to take instructions in any area outside his or her normal areas of practice.

For the purposes of this NCP review, it probably is not necessary to further investigate this debate. Whichever side is taken there seems to be little debate about the length of the course (at least 4 years) or the need for academic qualifications. Nonetheless, National Competition Policy suggests that these requirements be justified as being in the public interest.

There are National Competition Policy issues concerning the type of practical training that is required in order for a person to be admitted to practise as a legal practitioner and to then practise on his or her own behalf. The requirements for practical experience/training are anti-competitive in the sense that the need for them imposes barriers to entry and they impose costs on the profession and the community.

In other jurisdictions there may also be competition policy issues about who can provide legal services training. However, this does not appear to be an issue, of any practical significance, in the Northern Territory. At the most the Northern Territory is subjected to restrictions in other places because of the Northern Territory's recognition of interstate qualifications with those qualifications being based on interstate requirements.

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[120] insert details

[121] Letter of 17 July 2000 from Chairman of the Law Admissions Consultative Committee, the Hon Justice LJ Priestley to Northern Territory Attorney-General (with similar letter to other State, Territory and Commonwealth Attorneys-General)

The WA NCP Draft Review[122] analysed data from the Australian Bureau of Statistics concerning the costs of training. It found (Australia wide) that:

- the total cost of outside training for legal businesses was 0.5% of total expenses for legal practices[123];
- there is a relative over supply of legal practitioners; and
- starting salaries for the legal profession were low compared to other professions.

The Review Team also noted that the *Legal Practitioners Act,* in section 25, provides that the period of post admission experience for legal practitioners varies, for purposes of eligibility for an unrestricted practising certificate, on the type of practical training. If the practical training involves one year of articles then the post admission period is 12 months whereas if the practical training was obtained by coursework the period is 2 years. This appears to be an unfair discrimination. The Law Society Northern Territory is of the view that the period should be standardised at 2 years. There is no reason to oppose this view – mainly because the general assumption has always been that the period is two years and that it is something of a recently revealed drafting oversight that the articled clerk's period is only one year. However, it can also be noted that the length of this period is the subject of a review at a national level. It is an issue that, having regard to mutual recognition principles and the travelling practising certificate scheme, should be standard around Australia

The Review Team draws the following conclusions concerning training:

- There is a need for training in order for a person to be able to properly perform the functions of a legal practitioner;
- The statutory requirements (for training) would little or no impact on operating costs or fees (when compared to what the position would be if there were no statutory requirements);
- The requirements for post admission training should be the same for graduates of practical training colleges as for persons who have completed articles of clerkship.
- The requirements for training appear to have a net public benefit on professional standards and in providing a level of assurance for the community and the courts concerning the skills, knowledge and ethics of legal practitioners with whom they deal.

13.5 FINDINGS (INCLUDING ALTERNATIVES)

1. The training requirements for legal practitioners are anti-competitive.
2. The framework contained in the Act regarding training requirements for legal practitioners has a net public benefit.
3. There are no alternatives to this framework.
4. The requirement that legal practitioners to hold practising certificates (local or interstate) is anti-competitive.
5. The requirement that legal practitioners hold such practising certificates has net positive value.
6. The differential (in section 25 of the *Legal Practitioners Act*) (dealing with post admission experience) should be standardised at either 2 years or whatever national standard may be agreed between State and Territory Attorneys-General.

[122] WA NCP Review, pages 84-94

[123] ABS (2000) Legal Services Industry 8667.0

7. There is no practical alternative to the need for a practising certificates.

14 LIMITATIONS ON THE NUMBER OF ARTICLED CLERKS WHO MAY BE EMPLOYED

14.1 ISSUE

Rule 29 of the Legal Practitioners Rules provides that a legal practitioner shall not have more than two articled clerks. There are exemptions concerning certain government legal practitioners. Part 10 of the Issues Paper set out the limitations concerning the number of articled clerks who may be employed by legal practitioners.

The probable reason for this restriction is that of ensuring that articled clerks receive a high level of training. However, it may well be that this restriction on the number of articled clerks is irrelevant to the quality of the training. It may be that some legal firms could operate more efficiently if they were permitted to employ more articled clerks.

14.2 CURRENT POSITION

In some other jurisdictions, articles as the main form of practical training have been replaced, in whole or in part by practical training courses. For example, in NSW it is not possible to receive or give training by way of articles. The NSW College of Law is the main provider of such training. There is no such institution in the Northern Territory. Nor does it seem practical to establish such an institution in the Northern Territory. A person who completes a practical training course elsewhere in Australia is accepted, for Northern Territory admission purposes, as having obtained the necessary qualifications.

14.3 LIMITATION ON THE NUMBER OF ARTICLED CLERKS THAT MAY BE EMPLOYED – QUESTIONS

The issues paper sought comments on the following:

1. *Does the legislation restrict competition by limiting the number of clerks articled to a practitioner?*
2. *In what ways? How significant is any such restriction in terms of its impact on the economy? What are the public benefits and what are the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of the restriction? Is there evidence available as to the relative magnitude of these benefits and costs? Which effects might be decisive in determining whether each such restriction is in the public interest?*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by other less restrictive or less costly means?*

14.4 SUBMISSIONS AND OTHER COMMENTS

14.4.1 Law Society Northern Territory

The Law Society Northern Territory states[124] that the restriction on the number of articled clerks is warranted due to the education process involved between articled clerk and principal legal practitioner. The articled clerk derives legal education by working with and observing the legal practitioner in the course of that practitioner's practice. The legal practitioner must explain to the articled clerk the complexities of the work being performed and this cannot be done with multiples of articled clerks. The training of articled clerks should simply be seen as a step in the process which produces a particular kind of product in the legal services market. Without this step the particular product cannot be produced.

[124] See Law Society Northern Territory Submission, 25 October 2000, pages 20-21

The Law Society Northern Territory also emphasises that articled clerks are not a form of cheap labour. This appears to be an argument based on ethical concerns about using unqualified persons combined with the fact that articled clerks usually do not have the skills to provide legal services that can be billed.

14.4.2 Others

Nil.

14.5 Discussion

14.5.1 Potential Disadvantages[125]

- Higher legal fees payable by consumers of legal services because the limit on articled clerks reduces the number of legal practitioners providing services at any one time.

14.5.2 Potential Advantages[126]

- Minimises risk of negligence by ensuring that junior lawyers are properly trained and adequately supervised.

14.5.3 Assessment

The objective in limiting the number of Articled Clerks that they may employed by a legal practitioner is that of ensuring that they receive adequate training and supervision. It is a method of providing training that has worked over time without undue external regulation. The Review Team has noted that some other jurisdictions have introduced greater structure however this is an issue outside the scope of this review.

Additionally, it can be noted that whilst this provision does not represent a major restriction on competition, it should be noted that there are commercial incentives to limit the number of articles clerks employed. It is likely that firms will only employ clerks up to the point where they make a productive contribution to the enterprise. The commercial factors that could serve to limit the demand for articled clerks include:

- the observation that work undertaken by articled clerks is not usually billed;
- engaging too many articled clerks, relative to qualified lawyers, could have an adverse impact on the quality of services provided to consumers; and
- the costs of employing an assistant to undertake tasks of an administrative nature could be less than the costs of employing an articled clerk.

Additionally, the Review Team notes that certain 'corporate' legal practitioners may employ more than two articled clerks[127]. It also notes that an earlier NCP report on the *Legal Practitioners (Incorporation) Act* recommended that the rules concerning incorporated legal practitioners be relaxed but subject to a high level of responsibility being placed on supervising legal practitioners. It seems appropriate that such persons, along with other persons who are responsible for legal services provided through a corporate body, should also have this capacity subject to the Legal Practitioners Rules. Such rules might, for example, limit the number of clerks by reference to the scale of the business and the number of persons employed who can provide the necessary training.

[125] Draft WA NCP Legislation Review (April 2002); page 189

[126] Draft WA NCP Legislation Review (April 2002); page 189

[127] Secretary, Department of Justice Director, Legal Aid Commission and Director of Public Prosecutions

14.6 FINDINGS (INCLUDING ALTERNATIVES)

1. Limiting the number of articled clerks that may be employed is anti-competitive.
2. The framework for this limitation is for the net public benefit.
3. Corporate legal practitioners should, through the legal practitioner in control of the professional side of the corporate practice, have the capacity, subject to the Legal Practitioners Rules, to employ more than two articled clerks.
4. The Northern Territory does not have a comprehensive alternative (such as a local practical legal training course).

15 APPOINTMENT OF A PERSON AS A QUEENS COUNSEL

15.1 ISSUE

Statutory appointment of legal practitioners as Queens Counsel gives appointees a competitive advantage over other legal practitioners. Part 8.12 of the Issues Paper sets out the requirements for the appointment of Queens Counsel.

15.2 CURRENT POSITION

Section 20 of the *Legal Practitioners Act* provides for the appointment of legal practitioners as Queen's Counsel. Such appointments are made by the Administrator on the advice of the Executive Council.

The appointment of a person as a Queens Counsel may give such a person a significant competitive advantage over other members of the legal profession. The appointment sends signals to consumers of legal services (including the judiciary) as to the quality of the services and the level of charges.[128]

In general terms, only legal practitioners who specialise as barristers can aspire to become Queens Counsel. There are currently 32 legal practitioners whose main legal work is local practise as barristers. Of these legal practitioners, five have the status of Queens Counsel. Additionally, three government lawyers are also Queens Counsel.

15.3 APPOINTMENT OF QUEENS COUNSEL – QUESTIONS

The issues paper sought comments on the following:

1. *Does the legislation restrict competition by providing for the appointment of Queens Counsel or through recognition, powers or limits on holders of such titles? In what ways?*
2. *What are the public benefits and the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such restriction?*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by other less restrictive or less costly means?*
5. *Should there be a more open and accountable process for the appointment of Queens Counsel (including that the expertise of legal practitioners in areas other than the bar be recognised)?*[129]

15.4 SUBMISSIONS AND OTHER COMMENTS

15.4.1 Law Society Northern Territory

The Law Society Northern Territory submits[130] that the appointment of Queens' Counsel is not of itself anti-competitive. The office is a recognition of the skill and expertise attained by the members of the profession who are appointed as Queen's Counsel. Further, it states:

- There is no requirement on the consumers of legal services to retain Queen's Counsel;
- Minimum fees are not fixed in the Northern Territory for services provided by Queen's Counsel. To a large degree the market place determines the fees able to be charged;
- The public benefit from being made aware that particular members of the legal profession have

[128] See Western Australian NCP Issues Paper Issues Paper, page 68
[129] Such as in commercial law, in litigation, in government or in politics
[130] See Law Society Northern Territory Submission, 25 October 2000, pages 22-23

attained superior skills in their area of practice and are advocates of a high calibre;

- It is a condition of the Office that its recipients undertake some pro bono work which is in the public interest in order to allow indigent litigants to pursue causes of action from which they would otherwise be precluded;
- Queen's Counsel are also obliged by reason of their appointment to the Office to assist more junior members of the legal profession in the conduct of their practices. This supervisory and assisting role is clearly in the public interest; and
- The office works in much the same way as do specialist medical and engineering qualifications.

15.4.2 Ward Keller, Lawyers

The appointment serves no purpose other than an indication of competence. The system for appointment lacks transparency and is subjective and unreliable. Solicitors brief Counsel on the basis of their own knowledge and experience; the appointment is of no assistance to them[131].

15.5 DISCUSSION/ASSESSMENT

It has been estimated[132] that some 16% of sole practitioner barristers are now Queens Counsel. This percentage is understood to be somewhat greater than in the ACT or in the Australian States.

Appointments of Queens Counsel in the Northern Territory have, over the past 10 years, been the subject of much public controversy as well as controversy within the legal profession. In part this arises because of the involvement of both the Executive and the Judicial arms of government in the process. There is probably a need to decide which arm of government should have prime responsibility. Elsewhere in Australia it is generally the judicial arm and/or the legal profession.

Removal of the legislative controls would not effect persons currently appointed as Queens Counsel. Additionally, removal of controls may also, in theory, lead to a closed shop approach to the appointment of new Queens Counsel/Senior Counsel. However, the risk is negligible given that the Supreme Court will still have significant control and that it is in its interest to send clear signals as to whom it considers should have senior standing in the profession.

15.6 FINDINGS (INCLUDING ALTERNATIVES)

1. The appointment of individuals as Queens Counsel is anti-competitive.
2. A framework that permits merit based appointments is in the public interest.
3. There is a better alternative. It is to remove the provisions concerning Queens Counsel from the *Legal Practitioners Act* and thus permit the profession (with the Supreme Court) to develop its own merit based scheme for recognition of especially skilled legal practitioners. It would be a matter of detail as to whether any new appointees would be called "Queens Counsel" or "Senior Counsel".

[131] Ward Keller, Lawyers 24 October 2000

[132] This percentage varies depending on whether government counsel are included (eg Solicitor-General, DPP lawyers and Legal Aid lawyers)

16 PROFESSIONAL CONDUCT RULES

16.1 ISSUE

Statutory recognition of professional standards and rules may permit arrangements that might otherwise be in breach of legislation such as the *Trade Practices Act 1974.* Part 8.14 of the Issues Paper describes the provisions dealing with professional conduct rules.

16.2 CURRENT POSITION

The *Legal Practitioners Act* has been amended since the release of the issues paper. New professional conduct rules have been made. There have been calls for more prescriptive rules regarding advertising.

16.2.1 The New Legislative Provisions

Section 44 of the *Legal Practitioners Act* sets out general principles of professional conduct. Section 45 provides that the Law Society Northern Territory may make professional rules. Under the Act, the Law Society Northern Territory has a number of choices:

- Firstly, pursuant to section 45A, the Law Society Northern Territory can make professional conduct rules that have the force of law. These rules have the status of Regulations and accordingly are subject to disallowance by the Legislative Assembly[133]. In addition the Attorney-General has the power to disallow the rules within 12 months of the Rules being made. The Law Society, in making the rules, is required to engage in general public consultation and, in particular, is required to consult with the Chief Justice and the President of the Bar Association. This method of making the Rules replaces the former method whereby the Law Society made the Rules but they did not become operational until approved by the Chief Justice; and
- Secondly, section 45A(8) recognises the making of non-statutory professional rules of conduct. The Law Society, along with any other professional organisation, can make rules that only provide evidence of a breach of professional conduct. Any such other rules would operate subject to the anti-competitive provisions contained in Part IV of the *Trade Practices Act 1974.*

16.2.2 The Current Rules of Professional Conduct

The Law Society Northern Territory has made rules under section 45A[134]. They are closely based on Model Rules developed by the Law Council of Australia. The main provisions of the rules are:

Relations with clients

- Only taking on the obligation to provide a service if the lawyer can do so competently, honestly, fairly and with diligence and reasonable promptness;
- Confidentiality (with the duty going beyond that associated with legal professional privilege and with that duty extending to not acting against a former client if the lawyer has acquired confidential information in that capacity which might affect the proceedings);

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[133] The NSW NCP Report stated:
Given their importance and their status under the Act, it might be argued that the rules should be made in the same way as subordinate legislation. This would ensure Government scrutiny of any restrictions sought to be placed on the profession by the professional Councils: and
Conversely, it might be argued that the rules represent an aspect of the self regulation of the profession and that the Act should not confer any additional status on them. If this were so, a breach of a rule would be regarded as evidence of conduct that was not accepted within the profession, and as possible evidence of unsatisfactory professional conduct or professional misconduct, but would not carry the greater weight which is given to a breach of the rules at present.

[134] These Rules commenced operation in April 2002.

- Limitations on when a retainer can be terminated - particularly withdrawing from a criminal matter merely because of the client's failure to pay;
- Duty to retain documents and to hand-over documents on the completion of a retainer;
- Rules concerning acting for more than one party to a transaction or proceeding (certain duties of disclosure and certain obligations to withdraw;
- Avoidance of conflicts of interest;
- Various duties when a legal practitioner may obtain a benefit under a will that he or she is preparing; and
- Limitations on borrowing money from clients.

Duties to the Court

- Duty to terminate a retainer if the client is withholding information from the court with the intention of misleading the court;
- Duty not to draw certain affidavits unless the legal practitioner considers that there are grounds that support the affidavit;
- Duty not to interrogate or interview the opposing party;
- Duty not to both advocate and witness;
- Duty not to put a case to the Court that is inconsistent with an admission of guilt;
- Duties if client commits perjury;
- Duty of advocate to act for client regardless of personal views about the client;
- Duty of advocate to make sure the client understands the case (so that client is in a position give instructions, particularly regarding proposed settlement);
- Duty of advocate not to act as mere mouthpiece - must exercise forensic judgments;
- Advocate must be frank to the court (ie duty not to make misleading statements, duty to make corrections);
- Various duties concerning the use of privilege whilst in the court room;
- Duty not to suggest the evidence that should be given;
- Duty not to make false statements to an opponent in relation to a case, limitations on dealing with an opponent client;
- Duty not to publish material concerning hearings without the consent of the client or an instructing solicitor; and
- Duties of prosectors.

Relations with other lawyers

- Communications with other practitioners are to be courteous;
- Duty to honour undertakings;
- Duties when taking over a matter from another legal practitioner;
- Duties when transferring practice to another person; and

- Duties when communicating with another practitioner's client.

Relations with third parties

- Duties when obtaining services for a client (eg obligation to pay or to disclose how payment will be made);
- Duty to honour certain undertakings to third parties;
- Duty concerning the accuracy of communications with third parties; and
- Duty not to permit use of name etc by a debt collector or mercantile agent and various other duties when acting from a client creditor.

Legal practice

- Duty, when conducting another business, to ensure that it does not impair legal professional business etc;
- Duty to accept retainers when client is referred for a fee paid to a third party;
- Duty to not seek instructions in such a way that is harassment etc; and
- Duty not to act for a client in dealings with a third party if the third party may, in some way, provide some reward to the legal practitioner (various conditions).

The Northern Territory Rules are based very closely, in terms of content, structure and drafting on the model national rules. The main difference is Rule 30, which makes solicitors responsible for the payment of fees due to barristers.

These Northern Territory Rules were made under the *Legal Practitioners Act* by way of a process that required public consultation. The Rules were made over the course of 2000/2001. The Rules were assessed by the Northern Territory Government in terms of National Competition Policy. The view reached by the Department of Justice was that the Rules contained no minor or significant anti-competitive provision. A few provisions, such as Rule 30, were identified as being problematic but only to a trivial extent. Thus they did not warrant any substantive NCP legislation review.

16.3 Rules of Professional Conduct –Questions

The Issues Paper sought comments on the following:

1. *Are such rules made by professional associations necessary or are the obligations placed on solicitors and barristers by the Act, general statute law and the common law sufficient to govern the profession?*
2. *Would the absence of the rules setting out in detail many of the obligations of practitioners toward the court, each other and to clients mean that the public might have insufficient protection from incompetent or dishonest lawyers?*
3. *Do the model rules governing conduct of legal professionals restrict competition?*
4. *Should such Rules operate outside of the legislative framework (and thus be the responsibility of those members of the profession who agree to be bound by them)?*

16.4 SUBMISSIONS AND OTHER COMMENTS

16.4.1 Law Society Northern Territory

The Law Society Northern Territory states[135] that the professional conduct obligations placed on the profession by the provisions of the Act and at common law are not sufficient to adequately regulate the legal profession. It is desirable and in the public interest that the ethical duties of legal practitioners are delineated in detail and in discrete document so that members of the public may have ready access to them. The Law Society Northern Territory has adopted the national Model Conduct Rules for this purpose. The Law Society Northern Territory has also noted that its preferred option was that the model rules should operate within a legislative framework and be applicable to all legal practitioners (ie not just those who are members of the Law Society Northern Territory).

16.4.2 Other submissions – local legal practitioner

"These rules recognise the professional obligations of legal practitioners including their duty to the court. They are generally worthwhile. However, many of them will be otiose if non-legal practitioners are allowed to compete[136]*."*

16.5 DISCUSSION

The general principle currently adopted with legislative provisions that enable the making of delegated legislation which may contain anti—competitive provisions is that it is the delegated legislation, rather than the empowering provision, that should be subjected to NCP analysis.

On this basis, the Review Team accepts that the process for the making of the Rules was sufficient to identify anti-competitive issues. It also sees no reason to challenge the Department of Justice's conclusion to the effect that there the Rules contain no minor or substantial anti-competitive provisions.

16.6 FINDINGS (INCLUDING ALTERNATIVES)

1. The professional conduct rules contain no minor or substantial anti-competitive provisions.

[135] See Law Society Northern Territory Submission, 25 October 2000, pages 24-26.
[136] *Ward Keller, Lawyers 24 October 2000.*

17 REQUIREMENTS FOR DEALING WITH TRUST MONIES

17.1 ISSUE

The Act limits the discretions that legal practitioners and clients might otherwise have in respect of trust monies. Part 8.16 of the Issues Paper sets out the requirements for dealing with trust monies.

17.2 CURRENT PROVISIONS

The provisions in the *Legal Practitioners Act* dealing with the accrual of interest on monies held in trust reflect arrangements developed some time ago. Significant reforms have occurred in other legislative schemes dealing with trust monies which might well be adopted concerning the holding of monies in trust by legal practitioners.

Additionally, the *Law Society Public Purposes Trust Act* provides that the Law Society Northern Territory may, in respect of trust monies held by legal practitioners, enter into agreements with financial institutions concerning the payment of amounts (equivalent to interest) to the Public Purposes Trust.

Part VII of the *Legal Practitioners Act* sets out detailed requirements governing the way in which legal practitioners hold clients' monies. These main requirements are:

- that the monies be held in trust. Most monies are held in a general trust account, however, clients can instruct that monies be held in a special trust account;
- that a certain proportion of the monies be held by the Master of the Supreme Court; and
- the need for compliance with various bookkeeping rules.

No interest should accrue on the monies held by legal practitioners in general trust accounts. The interest that accrues on the monies held by the Master accrues for the benefit of the Fidelity Fund. The balance of the monies are held by financial institution with an interest-equivalent amount being paid by the financial institutions to the Law Society Public Purpose Trust Fund. The financial institutions would not have to make such payments but for the operation of the *Law Society Public Purposes Trust Act.*

There appear to be two main reasons for these provisions. They are:

- to set up a structure that minimises the possibility of theft of the trust monies by either the legal practitioner or by any person who works in the office of the legal practitioner; and
- to provide a source of monies for the Fidelity Fund (which in turn provides a compensation fund for defalcations of legal practitioners in respect of trust property) and the Law Society Public Purposes Trust Fund (which supports legal education, research and various lawyer's community and public relations activities).

These provisions may impose unnecessary administrative and compliance costs. Additionally, in respect of the accrual of interest they may reflect practical difficulties of the past concerning the allocation between clients of relatively minor amounts of interest. The legal restrictions on investing monies held in trust may place a constraint on legal practitioners not faced by professional rivals. Such rivals may more easily be able to hold general trust monies in ways that accord with the client directions concerning the monies being held so as to earn interest for the client.

It is also very likely that the amount of interest earned may not be being maximised. This is because interest only accrues on segmented parts of the total pool (ie the monies held by the Master and the

monies that remain under the control of the legal practitioners) and in segmented funds (ie Fidelity Fund, trust committees' fund and the public purposes trust). Alternate schemes, such as the one put in place in 1989[137] concerning real estate agents trust monies, ensure that interest accrues on the whole of the monies. Such schemes have always resulted in higher income for the relevant Fidelity Fund coupled with reduced compliance costs. However, such schemes suffer the disadvantage that the trust monies remain under the direct control of the relevant legal practitioner.

17.3 REQUIREMENTS FOR DEALING WITH TRUST MONIES –QUESTIONS

The issues paper sought comments on the following:

1. *Do the requirements on legal practitioner's practices as to how they deal with funds held on trust restrict competition? In what ways?*
2. *What are the public benefits and the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such restriction?*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by other less restrictive or less costly means?*
5. *Does the legislation restrict competition by providing that the interest earned by legal practitioners general trust accounts be paid into a Fidelity Fund? In what ways?*
6. *What are the public benefits and the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
7. *How do the benefits (if any) compare with the costs (if any) of any such restriction?*
8. *If any such restriction does provide net public benefit, could those benefits be achieved by other less restrictive or less costly means?*
9. *Should the current arrangements be replaced by a requirement that legal practitioners hold general trust monies with authorised deposit taking institutions with interest accruing on all such monies and with that interest being paid to the Fidelity Fund in accordance with an agreement between the Fidelity Fund Committee and the relevant authorised deposit taking institution?*[138]

17.4 SUBMISSIONS AND OTHER COMMENTS

17.4.1 Law Society Northern Territory

The Law Society Northern Territory noted that "Funds placed in... a general trust account do not generate interest for the client concerned. The reason for this is that in a practical sense it is almost impossible to allocate interest to individual interest to individual clients who have monies held on their behalf... However it is possible for clients to instruct that their funds be held in a special trust account which will generate interest for the client concerned. This occurs generally when larger sums of money are involved which are held for longer periods of time and where the administrative costs are not disproportionate to the amount held."[139]

The Law Society Northern Territory supports the continuation of the statutory requirement that trust monies not be intermingled with other monies. However, it can be noted that this statutory principle mimics non-statutory law.

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[137] *Land and Business Agents Amendment Act 1989*

[138] This is the model used throughout most of Australia concerning trust monies held by real estate agents. See section 50 of the Northern Territory *Agents Licensing Act*

[139] See Law Society Northern Territory Submission, 25 October 2000, pages 26-28

The Law Society Northern Territory further notes that a specified percentage of trust monies are placed with the Legal Practitioners Trust Committee and that interest generated from those monies (currently $1 million) finances the Legal Practitioners Fidelity Fund Committee (which covers solicitor's defalcations of up to $50,000) and the Law Society Public Purpose Fund (which is used for public legal education, legal community services and law reform). The Law Society Northern Territory characterises this arrangement as "user pays".[140]

The Law Society Northern Territory says that "regardless of how the funds generated on legal practitioners' general trust accounts are held, transferred and regardless of who controls their administration, the public derives substantial benefit in that the current scheme allows interest which would otherwise be incapable of being distributed to be used to fund two schemes which perform great public service at minimal cost to legal practitioners."[141]

17.4.2 Others

No other submissions were received on this issue.

17.5 Discussion

The objective of the restriction is to ensure that, in the absence of an agreement with their client to the contrary, funds held on trust by lawyers are deposited only in financial institutions that are sufficiently regulated so as to pose minimal risk to the safety of those funds. The further objective is to facilitate the Fidelity Fund (by the conveyance of interest earned from lawyers' general trust funds), and to ensure that lawyers keep account of trust money and maintain books of account in a form that can be audited.

To make provision for the application to public purposes of the interest earned from practitioners' general trust funds (that is, trust funds held in a pooled account rather than in an account maintained for a specific person).

17.5.1 Potential Disadvantages[142]

- The compulsory application to public purposes of interest earned on practitioners' general trust accounts, whereby that interest cannot be apportioned to clients on whose funds the interest was earned, will result in practitioners being unable to compete more effectively with non-practitioners, who are not subject to similar constraints.
- The compulsory application to public purposes of interest earned on practitioners' general trust accounts, whereby that interest cannot be apportioned to clients on whose funds the interest was earned, will result in clients foregoing interest on funds held in trust.
- The prescribed requirements for dealing with trust funds lead to additional administrative and compliance costs, which are passed onto consumers in the form of higher fees.
- Lower interest generated on general trust funds because bank accounts generate lower levels of interest.
- Higher income generated by banks compared with other deposit-taking financial institutions.
- The current systems verge on being dysfunctional for legal practitioners who practise either nationally or on a cross border fashion.

[140] See Law Society Northern Territory Submission, 25 October 2000, page 27
[141] See Law Society Northern Territory Submission, 25 October 2000, page 27
[142] Draft WA NCP Legislation Review (April 2002); page 197, 203 and 211

17.5.2 Potential Advantages[143]

- The compulsory application to public purposes of interest earned on practitioners' general trust accounts furthers the general and specific public purposes to which these earnings are applied.
- The prescribed requirements for dealing with trust funds reduce the risk to consumers of financial mismanagement or theft of trust monies by legal practitioners.
- Lower risks to consumers because funds are prohibited from being deposited with less secure financial institutions.

17.5.3 Analysis

There was no challenge to the need to ensure that legal practitioners hold client monies in trust accounts regulated by the legislation. Nor is it apparent that it is worthwhile to insist that legal practitioners set up systems so that interest is paid to beneficial owners of the money in trust. There would be substantial costs in doing this. It is likely that such costs would be such that the net amount of interest that would be paid to clients would be less than the amount that currently accrues for the long term benefit of profession and its clients (ie in the form of Fidelity Funds and public purpose funds). However, it should never be assumed that such will always be the case.

There is no apparent reason for having three bodies administering the trust monies, the interest earned on such monies and the subsequent holding and further investment of such monies. It would seem simpler, from all viewpoints (the profession, clients and government) that, as far as possible:

(a) there be a unitary process of the management of the monies; and

(b) the legislation spell out how the income is to be apportioned.

However, the national profession project (as outlined in part 4.6) is also looking into this issue. There appears to be a practical need to accommodate legal practitioners who conduct business in border areas, or who work from place to place or which conduct a national business.

The Review Team identified one option that appears to be desirable. The ACT legislation provides that legal practitioners must, if monies are to be held for more than the prescribed time, advise clients that monies can be held in a special trust account. This means that clients have the choice of whether to hold monies with the legal practitioner as some kind of stakeholder or in the trust account. In the former case the client receives the interest on the monies. However, the holding of money in this way would move the money (in terms of it being protected by the Fidelity Fund) outside the scope of such protection.

Additionally, the national profession project is examining best practise in this area of regulation. It seems appropriate to hold off implementation of any reform until such time as the national profession project comes up with recommendations.

17.6 FINDINGS (INCLUDING ALTERNATIVES)

The findings are:

1. There is a need to ensure that client's monies are held in regulated trust account.
2. All trust monies should remain in the legal practitioners trust account (and thus there should be a

[143] Draft WA NCP Legislation Review (April 2002); page 197, 203 and 211

dropping of the requirement that a portion of the trust monies be deposited with a statutory body).

3. That legal practitioners be obliged to advise clients whose money is likely to be held for more than the prescribed time that, at the cost of the client, the legal practitioner will arrange for the monies to be held by the legal practitioner as stakeholder with the income to be paid to the client or clients.
4. Monies held in such a stakeholder account are not to be protected by the Fidelity Fund.
5. There is a need for a single body responsible for entering into agreements with financial institutions concerning the payment of notional interest on such trust monies.
6. This single body should be the Law Society Northern Territory.
7. The interest from the trust accounts should be disbursed to the Fidelity Fund and the Public Purpose Trust in accordance with a formula to be contained in the *Legal Practitioners Act* or in Regulations under that Act.
8. Implementation of these changes should be delayed pending the outcomes of the national legal profession project.

18 AUDIT REQUIREMENTS

18.1 ISSUE

Trust monies held by legal practitioners are required to be audited by registered company auditors. Part 8.19 of the Issues Paper sets out the requirements for the auditing of trust accounts.

18.2 CURRENT POSITION

Section 67 of the *Legal Practitioners Act* requires that trust accounts be audited on an annual basis. Section 68 goes on to provide that the basic qualification for an auditor be that of a person who is a registered company auditor under the *Corporations Act 2001*. Such audits are organised and paid for by the relevant legal practitioner. Thus the legal practitioner is the client of the auditor despite the fact that the auditor has independent duties to the Master.

It may be that this qualification is overly restrictive in so far as it excludes other accountants from providing these audits.

Additionally, it may well be that the requirement for annual audits organised by legal practitioners may not be the best way of ensuring that legal practitioners comply with trust keeping requirements. It may be the case that inspections organised by the regulatory authorities could be more effective at less overall cost to the profession and the community.

18.3 AUDIT REQUIREMENTS – QUESTIONS

1. *Does the legislation restrict competition by providing for the need for audits from "registered auditors under the Corporations Law"? In what ways?*
2. *What are the public benefits and the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such restriction?*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by other less restrictive or less costly means?*

18.4 SUBMISSIONS AND OTHER COMMENTS

18.4.1 Law Society Northern Territory

The Law Society Northern Territory notes that the prohibition on the intermingling of trust monies with other monies necessitate the inauguration and maintenance of a regular system of audit to prevent as far as possible potential infringement of trust regulations. It says that it is of the view that:

- the highest possible standards need to be applied in auditing trust accounts and that therefore high minimum standards need to be applied and maintained; and
- audit costs are not a significant cost to law forms and have no measurable effect on competition or the level of fees charged to consumers.[144]

18.4.2 Others

Nil.

[144] See Law Society Northern Territory Submission, 25 October 2000, page 29

18.5 Discussion

The objective is to ensure that only competent persons provide lawyers with audit reports, upon which the Law Society Northern Territory must rely in issuing annual practice certificates.

18.6 Potential Disadvantages[145]

- Higher prices for legal services as a result of higher auditing fees.

18.7 Potential Advantages[146]

- Lower risk of financial losses to the consumer by ensuring higher quality and frequent audits on money held in trust on the consumer's behalf by a lawyer.

18.8 Analysis

Developments in New Zealand

In the early 1990's, two legal practitioner partners in a New Zealand's regional law firm independently committed defalcations in the order of $32 million. Consequently:

(a) all New Zealand practitioners paid an annual levy of $10,000 for 2 years; and

(b) the New Zealand Law Society commissioned a report (E-DEC Report) (October 1995).

The E-DEC Report identified that the New Zealand scheme had a number of major flaws in detecting defalcations. They were:

(a) defalcations were not being detected by legal practitioners' auditors;

(b) defalcations were not being detected by inspectors (employed by the Law Society) until a complaint was lodged by a client; and

(c) the regulatory system was very expensive (for legal practitioners) with no measurable gain.

The E-DEC Report recommended various changes. The proposals were implemented on 1 April 1999. The E-DEC scheme appears to comprise the following:

(a) outsourced compliance monitoring of trust accounts;

(b) abolition of audit requirements;

(c) introduction of the trust account partner concept (which requires each firm to appoint a partner who is responsible for compliance with trust account requirements) with mandatory educational requirements for the partner;

(d) monthly returns;

(e) solicitor data base;

(f) supervisory board; and

(g) risk based/cause driven inspection program (operated by the local regulatory authority) and supported by a 1800 hotline.

[145] Draft WA NCP Legislation Review (April 2002); page 207

[146] Draft WA NCP Legislation Review (April 2002); page 207

Developments in South Australia

The implementation of a scheme along the New Zealand lines has been considered in some detail by the South Australian regulatory authorities and Government. The South Australian Law Society commissioned a report from Pricewaterhousecoopers. These accountants considered:

(a) retaining the current scheme;

(b) retaining the current scheme but making minor improvements to the current scheme (that is, no legislative change, complaints hotline, risk based data base[147], increased education requirements and filing of annual returns);

(c) retain the current position with the operational changes referred to in (b) and necessary legislative change in order that audits only be conducted by specially trained audit firms retained by the Law Society;

(d) the New Zealand scheme.

Pricewaterhousecoopers recommended in favour of (d) – with the main difference between (c) and (d) being one of cost. However, the South Australian Law Society prefers (c). It is of the view that there is a worthwhile deterrent value in requiring regular audits[148]. Such audits would be arranged by the regulator but paid for by the legal practitioner.

It appears that in most jurisdictions that the current requirements are costly in terms of outcomes.

There appears to be a solid case for more focussed audits with the regulatory authority taking a more controlling role in arranging the conduct of the audits. However, it also appears that there may be some duplication between the roles of auditors and the roles of inspectors employed by the regulatory authorities.

The main issue appears to be whether it is better to:

(a) rely on broad statements of outcomes; or

(b) rely on prescriptive rules.

It appears that the legal professions' regulators[149] prefer strict prescriptive rules as per the NSW Regulations.

There is a need to develop model prescriptive rules governing the management of trust accounts. It appears that the NSW Legal Profession Regulation is a good starting point.

There appears to be a need to clarify the extent to which payments in and out of trust accounts can occur electronically.

It may be the case that development and implementation of best practice rules concerning the regulation of trust accounts may only significantly benefit local firms and the local regulatory authorities.

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[147] Such a database would be established to record information relevant to the maintenance of trust accounts qualified audit finings and complaint data and to attach a risk weighting to each firms and each practitioner to enable more accurate prediction of practitioners at risk requiring cause driven inspections

[148] Each 2 years is the suggested period

[149] Advice dated 12 January 2002 from the Law Society Northern Territory. This also seems to be the position advocated in the 1996 Working Report referred to in Part 4.3 of this Paper.

In particular, there appears to be a need to formulate options about national trust accounts.

National firms, border firms and roaming legal practitioners will also benefit to the extent that compliance rules would be common throughout the country. However, they would remain subject to the inherent duplication involved in the need to comply with local requirements.

However, the Review Team notes the Law Society Northern Territory point that the audit costs do not have any significant impact on prices.

18.9 FINDINGS (INCLUDING ALTERNATIVES)

1. The audit requirements are anti-competitive.
2. The audit requirements can be justified as being for the public benefit.
3. The audit requirements could be made more efficient by:
   (a) the audits being independent of the legal practitioner; and
   (b) the audits being targeted.

19 FIDELITY FUND

19.1 ISSUE

The issue is whether the Fidelity Fund should be abolished and replaced by an insurance scheme. The issue has been raised because it may not always be the case that the Fidelity Fund can be funded by clients (from interest on trust monies). The longer term possibility is that legal practitioners, via levies or some other mechanism, might have to provide the funding.

19.2 CURRENT POSITION

Section 89 of the *Legal Practitioners Act* provides for the establishment of a Fidelity Fund. The Fund is managed by the Legal Practitioner's Fidelity Fund Committee. This is a Committee comprising the Master of the Supreme Court and two legal practitioners nominated by the Northern Territory Law Society. Claims can be made against the Fidelity Fund by clients of legal practitioners in respect of pecuniary losses suffered because of defalcations committed by legal practitioners. The claims are considered by the Legal Practitioner's Fidelity Fund Committee. Decisions of the Legal Practitioner's Fidelity Fund Committee may be reviewed by the Supreme Court. The maximum amount that may be claimed in respect of any one defalcations is $50,000. This amount is set by section 97 of the *Legal Practitioners Act.*

The additional cost to legal practitioners is the levy imposed or imposable under sections 90A and 101 of the *Legal Practitioners Act.*

The monies in the Fidelity Fund come from:

(a) Payment by the "investment income" of the Legal Practitioner's Trust Committee[150] into the Fidelity Fund. This income comes from the deposit of trust monies by legal practitioners with the Legal Practitioners Trust Committee;

(b) Annual contributions from legal practitioners. The maximum amount payable cannot exceed $1500 in any one year. The Committee must determine, for each year, the amount payable. The amount payable may depend upon the class of legal practitioners to which an individual legal practitioner belongs. In determining the amount of the levy the Committee is to have regard to actuarial advice concerning the actual or contingent liabilities of the Fidelity Fund. Under section 90A each legal practitioner in private (solicitor's practice) must pay an annual levy. This currently is $100 per private legal practitioner;

(c) Levies on legal practitioners who maintain a trust account– the maximum amount that can be levied in any one year is $500. The total amount payable in the career of a legal practitioner cannot exceed $1500. Such a levy is only payable where the Committee is of the view that the Fidelity Fund is unable to meet its obligations. A levy under section 101 has never been imposed.

19.3 FIDELITY FUND – QUESTIONS

The issues paper sought comments on the following:

1. *Do the requirements on legal practitioners practices in respect of the Fidelity Fund restrict competition? In what ways?*
2. *What are the public benefits and the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*

[150] This Committee is a separate Committee from the Legal Practitioner's Fidelity Fund Committee. However, both Committees are chaired by the Master and comprise two members nominated by the Law Society.

3. *How do the benefits (if any) compare with the costs (if any) of any such restriction?*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by other less restrictive or less costly means?*
5. *Are there other NCP issues concerning the structure of the Fidelity Fund scheme and/or its relationship with the requirements concerning Indemnity Insurance?*

19.4 SUBMISSIONS AND OTHER COMMENTS

19.4.1 Law Society Northern Territory

The Law Society Northern Territory states that the Fidelity Fund provides a cheap and quick method by which victims of defalcations may be reimbursed their losses. The Law Society Northern Territory notes that the Fund is financed as follows[151]:

- Annual contributions from the holders of persons with unrestricted practising certificates (other than persons practising solely as barristers). The amount paid in 1999/2000 was $15,400;
- Income generated from investment of trust monies held by the Fund - $46,688 in 1999/2000; and
- Levy - of up to $1,500 (not imposed in 1999/2000).

The Fund also accrues interest on its corpus (currently $4.3 million).

The Law Society Northern Territory says that the public benefits of this scheme are great. The public is provided with a scheme of compensation at no direct cost to themselves (except for the absence of payments for interest on monies held in trust for them). The amounts required to be paid by legal practitioners are modest and cannot be said in any realistic sense to add to the cost of providing legal services.

19.4.2 Others

Nil.

19.5 DISCUSSION

The previous discussion concerning trust accounts has considered the main regulatory impose on legal practitioners concerning the Fidelity Fund. This discussion also considered the main consumer detriment (ie that clients don't receive interest on trust monies). The analysis of the Fidelity Fund arrangement does not provide a strong case for its retention.

However, any claim that the costs of making contributions to the Fund are borne solely by legal practitioners is weak. It could be argued that Fund contributions are business inputs. Whether the contributions are sourced from operating fees, wages or from retained profits could vary from practice to practice.

Nonetheless, the costs of contributions represent a very small proportion of total costs and, as a consequence, are unlikely to have any material impact on the prices charged for legal practitioner services.

The public benefits associated with the Fund arise from the potential avoidance of litigation and the expedient recovery of misappropriated monies in cases where the lawyer is insolvent and/or has absconded. In economic terms, the Fund is designed to address information asymmetry, as it is difficult

[151] See Law Society Northern Territory Submission, 25 October 2000, pages 30-31

for a consumer to assess the risk of defalcation prior to engaging the services of a particular legal practitioner. However, as the balance of misappropriated monies above $50 000 can be pursued through the courts (assuming the lawyer has been apprehended and is not insolvent), the benefits associated with the Fund are maximised where the amounts in question are below $50 000 or where there is no chance of restitution for amounts over and above the cap (which would seem to apply in most cases).

19.6 FINDINGS (INCLUDING ALTERNATIVES)

1. The requirement to pay maintain a Fidelity Fund is anti-competitive (including the obligations to contribute to the Fund).
2. The requirement is justified as being in the public good.
3. There is no non legislative alternative to such a Fidelity Fund.

20 COMPLAINTS AND DISCIPLINARY SYSTEM

20.1 ISSUE

The legislation contains complex mechanisms for disciplining legal practitioners. It may be that the mechanisms are not appropriate to a growing profession. It may also be the case that the objectives of the disciplinary scheme are not fully understood. Part 8.21 of the Issues Paper deals with the disciplinary system that applies to legal practitioners.

20.2 CURRENT POSITION

The legislation provides a structure of disciplinary proceedings which regulates the conduct of practitioners. These provisions provide support for the internal self-regulation of the profession by the Law Society. Additionally it leaves in place the powers for the Court to regulate the profession. Finally, it provides links between the Law Society, the statutory provisions and the Court's powers.

At present, a complaint is made to or by the Law Society who then investigates the complaint. Upon investigation, the Law Society may dismiss the complaint, seek to conciliate, determine the complaint or lay charges before the Complaints Committee. The Complaints Committee has a panel of potential members. This panel is made up of a Chairperson (a legal practitioner appointed by the Attorney-General)) the Ombudsman (with the Ombudsman having an alternative member), five legal practitioners nominated by the Law Society Northern Territory, three legal practitioners appointed by the Attorney-General and three members who are not legal practitioners. Three members constitute a quorum. The Complaints Committee can entertain an appeal by a legal practitioner against a decision of the Law Society or it can determine charges of misconduct laid before it.

The Complaints Committee may hear and determine that charge or may recommend the charge be referred to the Supreme Court for disciplinary proceedings. The nature of proceedings before the Committee are partially inquisitorial although parties may be represented. An appeal lies to the Supreme Court against any order.

The Attorney-General or the Law Society may instigate proceedings in the Supreme Court regardless of whether there is a recommendation by the Complaints Committee.

The powers upon a finding of misconduct are of a disciplinary nature. There is no provision for the resolution of cost disputes or compensatory orders.

The costs of operating the Northern Territory disciplinary system have not been quantified. However, it can be noted that in NSW the anticipated cost in 1996/97 was $5,615,000.00 comprising $1,595,000.00 to be paid to the Legal Services Commissioner, $3,082,000.00 to the Law Society and $ 938,000.00 to the Bar Association. If these costs are applied pro-rata for the Northern Territory, the cost for the Northern Territory can be assumed to be in the order of $120,000. These costs are shared between the Law Society and the Fidelity Fund. The Fund pays for the costs of administering the Legal Practitioners Complaints Committee.

In summary:

(a) there are three bodies with the capacity to deal with disciplinary complaints, namely the Law Society, the Legal Practitioners Complaints Committee and the Supreme Court;

(b) there is no independent body with the responsibility for receiving and investigating complaints (noting that the Law Society Northern Territory cannot, despite its best endeavours, be truly

independent because it has both investigatory, disciplinary and representational roles). Similarly with the Supreme Court to the extent that it is theoretically possible that it appoint a judge to conduct an investigation; and

(c) there are a number of bodies and persons with the power to institute proceedings (namely the Law Society, the Supreme Court, the Attorney-General).

The result of all of this may be overlap and a lack of focus as to whom, within the regulatory scheme, has the most responsibility for ensuring that legal practitioners comply with the Act. It is also a system in which relatively minor complaints can quite easily escalate into extremely time consuming and expensive matters from the points of view of the complainant, the legal practitioner and the members of the disciplinary authorities.

These are competition policy issues because these complaint processes may lead to the imposition of additional costs on the members of the legal profession. The purpose of any reform is to ensure that the system for dealing with complaints against practitioners is accessible, independent and open to public scrutiny. There is an apprehension that the current procedures are 'run by lawyers for lawyers' and accordingly do not approach best practice. The Law Society Northern Territory has recognised that there is a problem[152].

Principle 1 of the COAG Working Party Report provided for member Governments to agree that legislation regulating the legal profession should include a disciplinary and complaints mechanism independently monitored within each State.

Principle 6 stated that the COAG Working Party supported the general principles established by the New South Wales Law Reform Commission[153] to establish a harmonised, fair and efficiently administered complaints systems.

The principles are:

- independence and impartiality;
- identification of the multiple aims of the system, both to address the needs of individual consumers and to maintain the standards of the profession;
- accessibility; efficiency and effectiveness;
- procedural fairness;
- openness and accountability;
- external scrutiny and review;
- the use of experience in complaints handling to inform the profession; and
- proper funding and resources.

20.3 COMPLAINT HANDLING AND DISCIPLINARY MECHANISMS - QUESTIONS

The following questions were asked in the Issues paper:

1. *Do the statutory disciplinary mechanisms restrict competition? In what ways?*

[152] The Law Society Northern Territory is understood to be of the view that the current system could be improved. In its 1999 Strategic Plan, it sought to review the remedies available for dealing with unprofessional conduct as well as to streamline the complaint handling system, and for the public reporting of details and Findings (including alternatives) arising from disciplinary proceedings

[153] Law Reform Commission (LRC 32).

2. *What are the public benefits and the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such restriction?*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by other less restrictive or less costly means?*
5. *Are many disciplinary complaints in fact consumer disputes that should be handled outside the disciplinary system. For example, by the development of a consumer complaints scheme that could more efficiently handle business/consumer disputes.*
6. *Does the disciplinary scheme for addressing complaints about lawyers hinder competition in the profession? Do the costs imposed on the profession and clients by the existence of the complaints and disciplinary system outweigh the benefits to consumers? Does the existence of disciplinary sanctions enhance the standards of practice?*
7. *Does the vagueness of the nature of the standard of professional conduct expected restrict competition?*[154] *Should the standard be based on the standards of conduct expected by the profession, or on that of a 'reasonable person'?*
8. *Comment is sought as to any perceived anti-competitive effects of the disciplinary structure and process created by the Act, and as to less regulatory or less costly alternatives which would confer similar benefits.*
9. *Is it appropriate to take the view that "incompetence" is not something that can be punished and that rather it is something that is the ground for a person being removed from the profession with the consequence that it should only come into the statutory disciplinary system if it is of such an order as to warrant an individual being removed from the profession or being subjected to some kind of restricted right to practise.*
10. *Is it appropriate that there be an agency or person to act as a 'gatekeeper' for making decisions about any one particular complaint against a legal practitioner ought to lead to disciplinary action.*[155]*?*

20.4 SUBMISSIONS AND OTHER COMMENTS

20.4.1 Law Society Northern Territory

The Law Society Northern Territory says that the current disciplinary scheme is "unnecessarily cumbersome and complex". It advises that it will shortly be suggesting to Government a model that has the following features:

- The appointment of a "designated officer" (legal practitioner of not less than 5 years standing);
- All complaints to be referred to the designated officer;

[154] The standard of conduct required by a professional is determined by the profession, rather than by the reasonable man.

[155] It is largely irrelevant who appoints the Gatekeeper – it could be government, it could be the Law Society. It would be important that the Gatekeeper been seen to act independently of the profession. Given that the number of complaints may not justify a full time employee, it could be that the Gatekeeper be a government official with other like roles to perform. This could be the case even if the Gatekeeper is appointed by or with the approval of the Law Society. The roles of the Gatekeeper would be to receive complaints from clients, the Law Society Northern Territory, the Attorney-General or from a judicial officer; to ascertain the nature of the complaint; if the complaint involves only ethical matters, refer the complaint to the Law Society or the Bar Association, to formally investigate complaints that involve alleged breaches of the Act, the principles of professional conduct or the professional conduct rules (with the decision would be a robust one made on the basis that the complaint was one that raised serious matters and for which there was a good prospect of the Complaints Committee making a finding of guilty and imposing a penalty) if the complaint involves service quality provide assistance for the complaint to be handled through appropriate mediation, court or consumer affairs offices; if the complaint shows a serious act of incompetence or if there is a history of incompetence, prosecute the complaint before the Complaints Tribunal (however, this should only occur if the Gatekeeper forms the view that the Complaints Tribunal is likely to impose restrictions on the right of the legal practitioner to practise the profession of the law; and the Gatekeeper would have the power to enter into arrangements with the Law Society Northern Territory by which it could, by agreement, undertake particular investigations on behalf of the Gatekeeper.
This structure would not affect the inherent jurisdiction of the Courts over legal practitioners. Decisions made by the Gatekeeper and the Complaints Tribunal would be subject to appeal to the Supreme Court on the basis of merits.

- The designated officer to have the power to investigate complaints and to dismiss them if they are vexatious or if they don't reveal any breach of the rules. There is to be a power for a complainant to obtain a review by the Vice President of the Law Society Northern Territory of the decision of the designated officer;
- If the designated officer is of the view that there has been a breach, the compliant is referred to either the Ethics Committee of the Law Society Northern Territory or to the Legal Practitioners' Disciplinary Committee;
- The complaints referred to the Ethics Committee will be those involving a minor breach of the regulations with only the possibility of a small fine being paid. It is proposed that there be no appeal from any decision of the Ethics Committee;
- Complaints of a serious kind will be referred to the Legal Practitioners' Disciplinary Tribunal. In determining whether an alleged breach is "serious" the principle will be that of whether the material discloses a breach of the Act or the regulations and whether in all the circumstances there should be a further enquiry or hearing;
- The Legal Practitioners' Disciplinary Tribunal will replace the Legal Practitioners Complaints Committee. The Committee will be comprised of two legal practitioners and one lay person. The Tribunal is to have the power to impose fines up to $10,000, strike practitioners off the roll, cancel or suspend practising certificates or order a person to engage in further training;
- If the complaint is particularly serious the Tribunal may refer it to a single Judge of the Supreme Court;
- A right of appeal, *stricto sensu*, from the Tribunal's decisions to the Supreme Court;
- In respect of matters before the Ethics Committee, proceedings will be conducted in camera and that only the outcomes (not names) will be published;
- In respect of matters before the Disciplinary Tribunal, it is proposed that there be specific time limits, that the complainant be fully advised at each stage, that all parties will be entitled to representation, that proceedings be open to the public. There would be no publication of proceedings until the Tribunal makes a decision. There be a publication of guilty findings (together with the name of the legal practitioner and the legal practitioner's firm) in the Law Society Northern Territory's monthly Journal. There would be no limitations concerning the further publication of such outcomes;
- In respect of "time limits" it is proposed that before any matter is forwarded by the designated person to the Committee or the Tribunal, the complaint will be outlined in detail to the legal practitioner. The legal practitioner will be required to make a response within a specified time. If there is no response within that time (or with an extended time) the complaint will be determined in the absence of a response; and
- It is proposed that there be no costs in a member of the public making a complaint. However, practitioner complainants would be required to pay but would be entitled to a refund if the complaint is made out.

In respect of the general issue of whether there should be a specialist disciplinary scheme the Law Society Northern Territory comments:

- Statutory disciplinary mechanisms do not restrict competition as their sole purpose is the maintenance of appropriate professional standards in the public interest and in the interest of the administration of justice generally;
- The public benefit of a statutory disciplinary mechanism is the maintenance of public confidence in

the capacity of the legal profession to discharge its functions at a recognised and consistent minimum level of qualifications; all complaints should be handled by a legal complaint mechanism that is regulated by the profession in accordance with statutory and regulatory procedures. Such an approach maintains professional cohesion, ensures the profession is able to maintain a consistent and fully integrated overview of the standard by which legal practitioners service clients and carry out their duties in accordance with their obligations as officers of the Court. There should be no distinction between disputes and the maintenance of professional responsibility. Often they are one and the same and should be dealt with under the heading of *Ethical Practice*;

- The cost of a complaints mechanism to the profession does not and can not outweigh benefits to consumers as it is integral to the maintenance of professional standards that are part and parcel of the particular obligations accepted by a person who is admitted to practise as a legal practitioner;
- Disciplinary sanctions enhance the standard of practice in that they enable the legal profession to, in the first place, remove from practice and therefore contact with the public as an legal practitioner any person who fails to maintain appropriate standards. In the second place, it ensures that members of the public are protected from overcharging, poor accountancy practice, inefficiency, disingenuity, and appropriate levels of personal presentation and behaviour;
- Standards of professional conduct should always be based upon the standard established by the profession as distinct from more vague criteria such as the "*reasonable person*". It is the experience of the Law Society that practitioners are more harshly dealt with by members of their own profession that would be the case if standards other than standards acceptable by the profession were used to determine a breach of ethical conduct; The Law Society accepts that disciplinary procedures will always be costly but that the benefit of a regulatory scheme administered by efficient procedures and overseen by the profession is of particular benefit to the profession and *ipso facto* in the public interest; and
- The Law Society is unable to advance any other less costly alternatives. The main anti-competitive effect of an appropriate disciplinary structure is to prevent incompetent and/or dishonest practitioners form offering their services.

20.4.2 Others

20.4.2.1 Queensland Green Paper on the Legal Profession

The Queensland Green Paper noted the following comments from the Queensland Law Society:

> "... any model which involves, directly or indirectly, the staff of the Law Society Northern Territory in the administration of complaints and disciplinary regime for solicitors would remain open to ill-informed criticism of basis and may not accordingly attract the required level of public confidence."[156]

The mechanisms are unduly complex. If the professional status of legal practitioners is to be preserved, then the entitlement to practice ought to depend on maintenance of appropriate standards of professional conduct. If non-legal practitioners are allowed to compete then it would be sufficient for the public to be safeguarded by wide-ranging consumer protection legislation and their remedies at law[157].

20.5 Discussion

To facilitate the maintenance of standards and skills in the legal profession and to help address the

[156] Queensland Government Green Paper *Legal Profession Reform* June 1999, page 6. However, it appears that this comment was made in the context of a debate about the extent to which the Queensland Government should openly support the efficacy of the Law Society's current disciplinary processes

needs of aggrieved consumers of legal services within the Northern Territory.

The Review Team notes:

(a) that considerable reform work is occurring elsewhere in Australia. Particularly in Victoria;

(b) that complaints and disciplinary matters are being examined as part of the national legal profession project [see Part 4.6]; and

(c) that the *Legal Practitioners Amendment Act 2001* introduced a number of reforms designed to improve the administrative efficiencies of the Legal Practitioners Complaints Committee.

20.5.1 Potential Disadvantages[158]

- Weaker regulation of practitioners' conduct in so far as the Legal Practitioners' Complaints Committee is dominated by members of the legal profession.
- Lower levels of innovation and adaptability by lawyers as a result of complying with standards of conduct.

20.5.2 Potential Advantages[159]

- Minimises risk of harm to consumers by excluding unethical or incompetent service providers from the legal services market.
- Consumers of legal services might avoid excessive market search and transaction costs that they might otherwise have to incur in order to obtain legal services from ethical and competent suppliers.

20.5.3 Findings (including alternatives)

The findings are:

1. The imposition of a disciplinary system is anti-competitive.
2. The framework can be justified as being for the public benefit.
3. There is no alternative framework.
4. There is room to improve the framework with the main issues to be considered to include:
   (a) the institution of a gatekeeper/designed scheme for the purposes of having an authoritative process for investigating/classifying initial complaints;
   (b) a simpler mechanism for determining which complaints need to be dealt with by the professional body and which should go into the more formal (government) disciplinary system; and
   (c) greater accountability – such as publication of outcomes of both complaints (eg. what happened to them) and of disciplinary decisions[160] (eg. what are the findings against legal practitioners).
5. The Government, in conjunction with the Law Society Northern Territory and the national reform agenda, identify best practice concerning the disciplining of legal practitioners.

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[158] Draft WA NCP Legislation Review (April 2002); page 216

[159] Draft WA NCP Legislation Review (April 2002); page 197, 216

[160] See, for example, clause [40], Schedule (proposed Division 9A (sections 171LA-171LF), NSW Legal Profession Amendment (National Competition Policy Review) Bill 2002 which contains detailed provisions concerning the publication of disciplinary matters

21 ADVERTISING RESTRICTIONS

21.1 ISSUE

At the time of the release of the Issues Paper, there were rules in place that restricted the advertising of services by legal practitioners[161]. Part 8.23 of the Issues Paper dealt with advertising-control issues. However, these Rules have now been reviewed. However, pressure currently exist for the imposition of new Rules based on the NSW Legal Profession Amendment (Advertising) Regulation 2002.

21.2 CURRENT POSITION

In the Northern Territory there are no specific advertising prohibitions. Elsewhere in Australia there are legislative provisions that give a special status to persons who have completed accreditation schemes.[162]

History suggests that restrictions on advertising and self-promotion can go too far. For example, in 1973 the Law Society issued the following ethics ruling:

> *"[T]hat no practitioner permit himself to be described as such by or through any media when at the same time his name or photograph was used. In any published item a practitioner may use his name without statement of his profession or may be anonymous and stated to be a member of the profession. An obligation rests upon the practitioner to ensure that the media concerned complies with this ruling."* [163]

The National Model Conduct Rules do not contain any restrictions on the use of advertising. This is also the case with the Northern Territory Rules.

It should be noted that the National Competition Council has commented on the advertising controls applying to legal practitioners in the Northern Territory. However, as mentioned above, the provisions on which the NCC may have made its comments no longer apply.

21.3 ADVERTISING - QUESTIONS

The issues paper sought comments on the following:

1. *Should there be the possibility of rules of professional conduct that protect consumers by ensuring that legal practitioners can only claim specialist accreditation if the accreditation is approved by the relevant professional organisation or should the control of such claims be left to general statutes such as the Consumer Affairs and Fair Trading Act?*

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[161] Rule 3.1 of the Law Society's Professional Conduct Rules provides that:

"A practitioner may advertise in connection with the practitioner's practice if the advertising:

(a) is not false;
(b) is not misleading or deceptive or likely to mislead or deceive;...and
(c) does not use the words 'specialist' or 'expert' or a direct derivation of those words."

Rule 3.2 goes on to provide 13 compliance rules about the advertising of fees. Some of them are prescriptive, for example, whether additional amounts will be charged for disbursements. Others spell out consequences. For example, the fees apply to all clients (whether or not they saw the advertisement) and the fees must stand for so long as the advertisement is current. Additionally legal practitioners must be able to substantiate claims of "average fees", "fee discounts" and "fee comparisons" In respect of advertising of specialisations (as restricted by Rule 3.1(c), Rule 3.4 states:

"A practitioner may advertise in connection with the practitioner's practice that the practitioner is an accredited specialist in a particular field of practice provided that the practitioner so described has passed an accredited specialist accreditation course approved and authorised by the Council from time to time and that the practitioner has maintained such accreditation as required by the appropriate body."

[163] Barbara James, *Twenty Years On A history of the N.T. Law Society (1969-1988) And A Glance at Pre-Society Legal Life in the North*, 16th page.

2. *Is it appropriate to support principle 3 of the COAG Working Party report - namely that lawyers should have the freedom to inform their clients by means of advertising and promotion and related forms of information disclosure, subject only to rules which prevent false, misleading or deceptive representations and conduct?*
3. *Is it appropriate that controls over advertising be outside of the ambit of the Legal Practitioners Act?*[164]
4. *Is it justifiable that legal practitioners have an onus of having to justify claims in advertisements concerning fees?*

21.4 SUBMISSIONS AND OTHER COMMENTS

21.4.1 Law Society Northern Territory

The Law Society Northern Territory has stated its position is that advertising by lawyers should not be restricted other than by trade practices law. If a legal practitioner within the Northern Territory made an assertion about a special accreditation to which the legal practitioner was not entitled he or she would be liable to the sanction of the *Consumer Affairs and Fair Trading Act.*[165]

21.4.2 Others

The Insurance Council of Australia has stated that:

> *"The Insurance Council Of Australia (ICA) does not object to any organisation correctly advertising its products or services and, in this respect, regards advertising by lawyers as a normal business or commercial activity.*
>
> *However, as the respondent to most of the "claims" generated by such advertising and as the payers of the majority of legal fees incurred, licensed insurers have concerns for:*
>
> - *The fairness and accuracy of any advertising;*
> - *The impact of such advertising on the climate of expectation generated in the public at large; and*
> - *The incentive to proceed with unmeritorious cases is of little substance. This could create a commercial imperative to dispose of cases for relatively small settlements rather than mount a full defence. Whilst any single instance of this is not a major concern, the cumulative effect has been seen to be costly to insurers and impacts on the premiums paid by the insured.*
>
> *Insurers' main concerns relate to advertising which uses the catch phrase "no win, no pay" or versions of that statement. These are almost exclusively associated with personal injury claims especially motor vehicle accidents. Insurers believe the statement is simplistic to the extent of being potentially misleading. In this regard we reproduce an extract from comments by Mr Steve Mark, the Legal Services Commissioner for New South Wales in the Autumn 1998 Journal of National & International Law Reform: -*
>
> "An advertisement that says "no win, no pay" can mean very different things to members of the public and to lawyers. A lawyer will read such an advertisement with knowledge of the complicated

[164] This is the approach that is being taken elsewhere. The NSW Legal Profession Reform Act 199? inserted Section 38J into the Act, which provided that a solicitor or barrister could advertise in any way they saw fit, subject only to the limitations set out in the *Trade Practices Act 1974* and the Fair Trading Act 1987, or any similar legislation. The removal of restrictions on advertising was consistent with the recommendations of the Law Reform Commission and is also consistent with the approach adopted by the Trade Practices Commission.[24]

[165] See Law Society Northern Territory Submission, 25 October 2000, pages 37-38

costs rules, involving concepts such as party/party and solicitor/client costs. Without an explanation, a client is entitled to believe that unless they win, they will not get a bill. How far does a practitioner have to go to explain exactly what a client might be up for, even if they do win? Clients may have to pay at least some of their own costs, or disbursements in, for instance, a personal injury matter. If the case is lost, they may have to pay the other side's costs. It is indeed a balancing act for the lawyer enticing a client to explain in simple language the prospects of success and the foreseeable costs, without on the one hand promoting litigation with all its attendant costs to the community or, on the other hand, driving the potential client out the door.

On the subject of that first meeting, what about those solicitors who offer the first consultation free? What happens when the allotted half hour of free time is up and the client is still explaining their problem? Does the solicitor stop the client to let them know that the free time has expired and that they will now be charged for the solicitor's services? This may destroy any atmosphere of trust and empathy which has been established. In the same vein, we also receive complaints from clients who attended a free first consultation and, upon deciding not to proceed with that practitioner, receive a bill based on the practitioner's argument that the first appointment would only be free where there was a second fully charged appointment. While we can often resolve these disputes through the complaint handling process, the real solution lies in good communication with the client from the beginning of the interview".

With the "first consultation free" type of advertising, insurers believe this actively discourages potential clients from consulting other practitioners, or even finding out about their fee structures, because once inside the solicitor's office, having described the nature of their claim, it is very difficult for a client to go elsewhere, and perhaps it is just too much trouble.

It would be of benefit to introduce controls making it compulsory for solicitors to include their fee structure in the advertisement. Quotes or fees should be specific and relate to the particular service performed. They should be expressed as being either inclusive or exclusive of disbursements and the individual disbursements specified. Offers of conditional fees must disclose whether the client will have to pay court costs or other expenses including the other party's fees in the even of an unsuccessful outcome. This would engender competition policy amongst the profession, which is the reason for initial removal of restrictions on advertising.

Since the removal of restrictions on general advertising by solicitors and barristers, the general public has been subjected to a barrage of radio, newspaper and even "shop-a-docket" advertising[166].

21.4.3 New Development

The NSW Legal Profession Amendment (Advertising) Regulation[167] amends the NSW Legal Profession Regulation 1994 so that Barristers and solicitors cannot advertise person injury services except by means of a statement:

- containing only the name and contact details of the barrister or solicitor together with information as to any area of practice or speciality of the barrister or solicitor; and
- that is published only by means such as printed publications and electronic databases and directories that are accessible on the Internet (ie. television and radio advertising is not possible).

The regulation prohibits the public exhibition of such a statement or the display of the document on any printed document sent or left around a hospital.

[166] *Daryl G Cameron (Group Manager WA & NT), Insurance Council of Australia 12 October 2000*
[167] The Regulation operates with effect from 1 April 2002

For the purposes of the regulation, a person advertised a person injury service if he or she published a statement that may reasonably be thought to be intended or likely to encourage or induce a person to make a claim for compensation or damages in respect of a personal injury to use the services of a barrister or solicitor in connection with the making if such a claim.

A breach of the regulation is professional misconduct.

The NSW Premier in announcing the regulation said that its purpose was to reduce:

- lawyers engaged in ambulance chasing; and
- excessive litigation (and thus, reduction of the costs of insurance)[168].

These changes appear to have the strong support of the NSW Legal Profession[169].

21.5 ASSESSMENT

There are no anti-competitive provisions concerning advertising. The new NSW provisions and the comments of the ICA are of relevance to future developments. However, they are largely irrelevant for this Report. It is not a function of an NCP review to come up with new anti-competitive provisions.

21.6 FINDINGS (INCLUDING ALTERNATIVES)

The findings are:

1. There are no anti-competitive advertising controls.
2. The imposition of new controls is outside the scope of this Review.

[168] News Release 27 February 2002, Premier of NSW
[169] Press Release 27 February 2002, Ms Kim Cull, President, Law Society of New South Wales

22 COSTS THAT MAY BE CHARGED BY LEGAL PRACTITIONERS – LEGAL PRACTITIONERS ACT

22.1 ISSUE

The legal profession is subject to fee controls in ways not faced by any other profession or occupation in the Northern Territory. Parts 8.25 and 8.26 of the Issues Paper described the controls that exist concerning the fees charged by legal practitioners.

22.2 CURRENT POSITION

Section 129 of the *Legal Practitioners Act* provides that a legal practitioner may enter into an agreement with a client concerning professional work done or to be done. There must be a note or memorandum in respect of such an agreement. Section 130 of the *Legal Practitioners Act* provides that the Supreme Court may direct that the amount payable under an agreement be reduced or may declare that the agreement is not binding. Such a power can be made if the Court is satisfied that the agreement is "not fair and reasonable".

Where there is no agreement under section 129, sections 119-128 of the *Legal Practitioners Act* apply. Section 128 provides that a legal practitioner cannot commence legal proceedings for the recovery of costs or disbursements concerning work of a professional nature unless he or she has delivered a statement that accords with the requirements set out in Section 119. The client may insist on being provided with an itemised bill of costs. Recovery proceedings can be commenced after the expiry of one month from delivery.

Section 120 of the *Legal Practitioners Act* provides that a person who has been delivered an itemised bill of costs may seek a taxation of those costs by the Master of the Supreme Court. Effectively the Master can review the costs. Section 123 of the *Legal Practitioners Act* sets out that in assessing what is the proper sum in respect of which no charge is provided for in a scale of costs prescribed in or under an Act:

> *"...allow such sum as is just and reasonable having regard to all the circumstances of the case, .. the Master shall take into account the amount, if any, from time to time recommended by the Law Society as the appropriate charge for the doing of that act."*

Section 124 of the *Legal Practitioners Act* provides that the legal practitioner is liable for the costs of the taxation if the amount due, in taxation, is reduced by a 1/6th part or more. If it is less than 1/6th the client pays the costs of taxation. The Supreme Court has the power to review the taxation decisions made by the Master.

22.3 CONTROLS OVER FEES PAID TO LEGAL PRACTITIONERS –QUESTIONS

The issues paper sought comments on the following:

1. *Does the regulation of legal fees restrict competition? In what ways? How significant is any such restriction in terms of its impact on the economy?*
2. *What are the public benefits and the costs to the community of any such restriction? Is there any evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such restriction? Is there evidence available as to the relative magnitude of these benefits and costs? Which effects might be decisive in determining whether each such restriction is in the public interest?*

4. *Do costs disclosure rules lead to the development of a more competitive market for legal services?*[170] *That is, has the system for costs disclosure, as put in place in jurisdictions such as New South Wales, fostered the development of a market for legal services? Do consumers have sufficient information to shop around for legal services? Are consumers in a position to judge the quality of practitioners?*
5. *Would the publication by an independent body of comparative price information be an alternative to the current after the event controls over fees?*[171]
6. *Is it correct that legal costs have risen significantly in New South Wales since the abolition of scales and that these increases can be attributed to the lack of incentive of plaintiffs to instruct lawyers to contain costs.* [172]
7. *Is it correct that the existence of the right of a client to seek a review of fees by the Master of the Supreme Court means that legal practitioners must take a responsible or professional approach in calculating fees?*
8. *Does this relatively straightforward mechanism for solving disputes over legal costs serve the economic interests of legal practitioners as a whole because the results are predictable?*

22.4 COURT COSTS' SCALES

Order 63 of the Supreme Court Rules, sets out rules for the calculation of fees for services provided as part of litigation. The Rules are structured so that there is an administrative process by which the Chief Justice can amend the operation of them.

Part 38 of the Local Court Rules provides for costs in Local Court matters. The costs are related to those calculated in accordance with the Supreme Court Rules. For matters involving disputes of $50,000 or less, costs are specified in terms of percentages of those calculated under the Supreme Court Scale. Thus, for example, it is 80% for claims between $10,001 and $50,000 and 50% for claims of $10,000 or less.

The Law Society's Professional Conduct Rules provide that a practitioner may, in any matters other than criminal and matrimonial matters, agree that in the event of the action being unsuccessful, the practitioner either will not charge the client or will charge only the disbursements or some defined amount or proportion of the disbursements. In the event that the action is successful the practitioner is entitled to charge a solicitor-client fee which constitutes up to double the fees to which the practitioner would otherwise be entitled if those fees were charged according to the schedule of fees in the Rules of the Supreme Court. A practitioner can only enter into a contingency fee agreement where, in his or her professional judgment, the client's claim has some prospect of success but the risk of the claim failing and of the client having to meet his or her own costs is significant.[173]

22.5 SUBMISSIONS AND OTHER COMMENTS

22.5.1 Law Society Northern Territory

The Law Society Northern Territory states that it is important to recognise that legal practitioners render

[170] The NSW Report noted that this objective may not be achieved because consumers have insufficient information to shop around for solicitors
[171] The NSW NCP Report noted that there are several threshold issues to be addressed if comparative fee information is to be collected and published. They include the identification of the agency responsible for collecting information; whether the information should simply consist of the fees charged by practitioners or whether the material would be independently scrutinised to ensure that the fees were reasoneble; and how a 'reasonable fee' could be calculated. Comparative fee information could become little more than a scale fee if it were universally used by practitioners to set fees, and could have an anti-competitive effect. The publication of comparative tables of fees might not overcome difficulties faced by consumers seeking high quality services, who may have limited knowledge of the nature of the legal services they require and cannot make qualitative comparisons. Further, information about charge out rates is treated by many firms as a commercial secret.
[172] The NSW report notes this as a claim made by insurers.
[173] Rule 8.10.

bills rendered by reference to work performed by two different and distinct areas. Firstly, for work performed in defending or initiating litigation. Secondly, for performing work in relation to commercial matters. The subject matter of a bill is irrelevant to the method of its calculation. The Courts developed costs for litigious matters because of the view that such a system provided a more equitable and effective means of compensating a successful litigant than making an award for general damages attributable to costs at the conclusion of the hearing. Court costs are therefore essentially designed for litigation matters and do not readily translate to commercial and non-litigious matters.

The Law Society Northern Territory states that its position is that Part X of the *Legal Practitioners Act* should have no application to non-litigious legal work and in there application to such work are anti-competitive and not in the public interest. The charges levied by legal practitioners for commercial and non-litigious work should be governed by the market.

The Law Society Northern Territory further notes:

- that a cost scale is appropriate for unsophisticated litigants unwillingly drawn into litigation to redress wrongs inflicted on them. However, more sophisticated clients do not require the protection of court scales; and
- that it is difficult for a legal practitioner to provided to a client at the outset of litigation an accurate estimate of the quantum of costs likely to be incurred. In such cases cost rules are appropriate as they amount to a default charging system. That is, in the event that there is no solicitor/client agreement the cost scale appropriate to the matter applies. This benefits a consumer of legal services in a litigious matter in that it tends to limit the amount that can be charged by a legal practitioner to an amount that is within the boundaries of the de facto approval by the Court.

The Law Society Northern Territory states that commercial matters of all types are more easily capable [of being reduced to estimates of anticipated costs than litigious matters. Consumers such as banks and insurance companies do not rely on cost scales but instead contract with lawyers at particular rates which may or may not be based upon the scales, but nonetheless are the result of market forces and not the scales. Because of their size and business acumen they are to bargain with various providers for the best price for the provision of legal services be it for the preparation of a simple document of a complex financial transaction.

The smaller consumer of commercial non litigious legal service is in a similar position. Such a person is in a position to bargain with legal service provides for the provision of services by obtaining quotes for the provision of say simple documents from several providers. This has been the experience of the deregulation of the conveyancing market where consumers have driven down the price of individual transactions by searching out the best rate for a completed package from a provider. This simply cannot occur with litigious legal work.

The Law Society Northern Territory advises that it has introduced a client/lawyer agreement that promotes the establishment of a written basis for client costing. This is the benefit of the consumer.

The Law Society Northern Territory has expressed the following view:

> "... [I]t is inappropriate for the fees charged by lawyers for non-litigious work (commonly called commercial work) to be regulated by Part X[174] of the *Legal Practitioners Act* because:
>
> (a) if lawyers are to compete in an open market then there should be no limitation upon the fees

[174] This Part permits Bills to be taxed and for unfair costs agreements to be put aside.

charged by commercial lawyers for non-litigious work. Their charges should be governed by the market; and

(b) the Supreme Court Scale is essentially designed for litigation matters and does not properly contemplate the practice of commercial or non-litigious law."[175]

The former Trade Practices Commission recommended that fee scales should be replaced with the introduction of statutory information disclosure requirements, together with periodic surveys showing the range of fees being charged for various services in different locations to provide more relevant information on legal fees to clients and taxation officers.[176]

The Western Australia NCP Issues Paper[177] noted that the central issues when considering the costs and benefits of controls over legal practitioners fees is whether the removal of the controls would stimulate greater price competition and consumer choice or whether the cost for legal fees would increase generating supernormal profits for legal practitioners at the expense of consumers. The Western Australia NCP also noted[178] that:

- the use by legal practitioners of prescribed procedures as a pre-requisite for the recovery of fees and the use of fee scales where fees are not otherwise agreed may reduce the transaction costs incurred by both clients and legal practitioners in resolving potential disputes about fees; and
- prescribing procedures for the recovery of fees may increase the administration costs for legal practices which may be passed on to clients.

22.6 OTHERS

22.6.1.1 Queensland Green Paper on the Legal Profession

The Queensland Green Paper summarised submissions on this issue as follows:

"Some practitioners were of the view that the client agreement had not been in long enough to be evaluated. Others criticised the requirements as being overly prescriptive and client unfriendly. Practitioners experience uncertainty where the client agreement is not returned. Practitioners have submitted that the threshold for such agreements needs to be increased.

Clients complain that the agreements are difficult to understand and that any benefit of the estimate of the costs is removed by clauses reserving the right of the practitioner to not be bound by the estimate. Clients complain that low fees are promised but a higher bill is delivered to just below the threshold amount for a client agreement.

Clients are seeking a reliable estimate of costs, which identify the work the solicitor is undertaking, divided according to the variations stages with timeliness for each stage. One respondent has suggested that the cost of delays should not be met by the client unless attributable to the client. When presenting a bill, they suggest that solicitor should not reserve the right to increase the bill if the client requires the bill in taxable form.

Submissions were divided on whether the current cost assessment regime should continue. A number of submissions sought a return to the taxing Officer scheme. A number of submissions favoured the Victorian tribunal system for determining cost disputes. Other supposed it as being too costly for the

[175] Steve Southwood, President, Law Society Northern Territory, *Bulletin to the Managing Partner Deregulating the Profession*, January 1999.
[176] page 169.
[177] Page 47.
[178] Page 48.

relatively small number of costs disputes previously determined by taxing officers and currently being considered by cost assessors.

The views in public submissions on (scale of costs) issue were diverse as follows:

- that scales should be abolished;
- that scales are a useful guide provided that they are kept up to date;
- that scales have a role in deterring unscrupulous overcharging;
- that scales erode the rights of the successful litigant;
- that scales support exorbitant charging rates by practitioners relative to other professions;
- that lawyers seeking remuneration above the scale is a matter of greed; and
- that client liability for above scale costs ensure the client has an active interest in the case and encourages the settlement of actions."[179]

A. Costs – Scales

Legal practitioners are already competing in an open market for some non-litigious services. It is inappropriate and unfair that the fees charged by lawyers for this work be subject to Part X of the Legal Practitioners Act.

In our view Part X serves a useful purpose in litigious matters where it affords litigants and intending litigants a measure of protection against their exposure to costs. Once again, these controls are appropriate only if participation in litigious work is restricted to legal practitioners.

B. Disclosure

Costs disclosure rules can be useful but any proposal to introduce them in the Northern Territory should be considered carefully. In many legal matters it is impossible to give a genuine precise estimate of costs. Compliance with costs disclosure rules is being achieved elsewhere by providing "ball park" estimates which do not advance the intended purpose of the rules.

In our view disclosure should be limited to informing the client of –

(a) the rate of charge;

(b) the amount incurred to date; and

(c) an estimate of future costs only if it can be made with reasonable precision[180].

ICA strongly supports the current system of contingency fee agreements and would oppose contingency fees as they substantially increase the cost of litigation[181].

22.7 DISCUSSION

The legislation aims to protect consumers of legal services from paying too high a price for legal services.

[179] Queensland Government Green Paper *Legal Profession Reform* June 1999, page 29
[180] Ward Keller, Lawyers 24 October 2000
[181] Daryl G Cameron (Group Manager WA & NT), Insurance Council of Australia 12 October 2000

22.7.1 Potential Disadvantages

- The regulation of legal fees inhibits price competition and reduces incentives for suppliers to cut costs, resulting in higher costs to consumers.
- The regulation of legal fees could result in sub-optimal allocation of resources as between practitioners and any non-practitioners with whom they compete in relation to particular legal services.
- The regulation of legal fees provides a disincentive for legal practitioners to enter into speculative fee arrangements with clients, other than through a special fund administered by the Law Society, which reduces the incentive and could impede competition to provide pro bono work on a no win/no fee basis, and this in turn reduces access to the legal system for some groups of society.

22.7.2 Potential Advantages

- The regulation of legal fees provides consumers with pricing information prior to engaging a legal practitioner, which together with the method of Court "taxation" that allows the revision of fees charged, reduces the risk of consumers paying excessive fees.

22.8 FINDINGS (INCLUDING ALTERNATIVES)

1. Controls over fees are anti-competitive.
2. The controls over fees for litigation can be justified as being in the public good.
3. The controls over fees to be conducted for work outside of the courts and tribunals would not appear to be justifiable.

23 PROVISIONS CONCERNING INTERSTATE PRACTITIONERS

23.1 ISSUE

The South Australian NCP Issues Paper noted that systems of admission and enrolment may inhibit the movement of legal practitioners between jurisdictions if legal practitioners admitted in another jurisdiction are unable to practise in another. Such a restriction reduces the pool of legal practitioners within the Northern Territory and thereby reduces the level of competition between legal practitioners.

The admission and practising certificate regime established under the Act, does not, however, restrict the movement of legal practitioners between jurisdictions in Australia due to the operation of the system of mutual recognition established under the Commonwealth *Mutual Recognition Act 1992.*

Mutual recognition enables legal practitioners admitted and entitled to practise in another jurisdiction in Australia to practise in the Northern Territory. A legal practitioner registered pursuant to the mutual recognition regime is subject to the same laws regarding practice as other legal practitioners admitted and holding practising certificates in the Northern Territory except in regard to the laws requiring attainment or possession of some qualification or experience relating to fitness to practise (see section 17 of the *Mutual Recognition Act*). The scheme of the legislation is that a legal practitioner who satisfies the requirements for admission interstate will be registered in the Northern Territory Australia without undertaking further training. Similar rules apply in respect of New Zealand legal practitioners[182].

The L*egal Practitioners Act* was amended in 2000 to implement the national practising certificate scheme developed by the Standing Committee of Attorneys-General, whereby a practising certificate issued in one State or Territory would be automatically recognised in another State or Territory. This reflected the recommendation of the COAG Report, and also the views of the legal profession, expressed in the Law Council's 1994 resolution. The efficacy of the scheme is limited because it is based on reciprocity. The scheme applies only between those States and Territories that have enacted corresponding legislation. To date corresponding laws have been enacted in NSW, Victoria, South Australia, Tasmania and the ACT. It is not clear that all jurisdictions will participate in the scheme.

Practitioners in those jurisdictions that do not participate in the scheme will continue to face barriers to practising in the Northern Territory. These difficulties might be addressed by the removal in the Northern Territory of the requirements of a corresponding law to be enacted in each Australian jurisdiction. This may place Northern Territory practitioners at a competitive disadvantage compared with their interstate colleagues.

23.2 PROVISIONS CONCERNING INTERSTATE PRACTITIONERS – QUESTIONS

The Issues Paper sought comments on the following:

1. *Do the notification requirements imposed on interstate practitioners restrict competition? In what ways? How significant is any such restriction in terms of its impact of the economy?*
2. *What are the public benefits and what are the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such restriction Is there evidence available as to the relative magnitude of these benefits and costs? Which effects might be decisive in determining whether each such restriction is in the public interest?*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by other*

[182] *Trans-Tasman Mutual Recognition Act 1997*

less restrictive or less costly means?

5. *Does the requirement for corresponding laws to exist before an interstate practising certificate is recognised in the Northern Territory constitute a restriction of competition? In what way?*

23.3 SUBMISSIONS AND OTHER COMMENTS

23.3.1 Law Society Northern Territory

The Law Society Northern Territory supports the rights of its members and the rights of members of the other Australian law associations to practise nationally - ideally where one practising certificate granted by one jurisdiction is recognise everywhere in Australia without further requirements. The Law Society Northern Territory also notes there is an issue, in respect of the travelling practising certificate scheme in the Northern Territory, as when an interstate legal practitioner is taken to have established a practice in the Northern Territory.

The Law Society Northern Territory states that the notification requirements in the *Legal Practitioners Act* concerning interstate legal practitioners are minimal and that the impact is far outweighed by the benefit of having a uniform and comprehensive consumer protection and insurance. [183]

23.3.2 Others

23.3.2.1 Queensland Green Paper on the Legal Profession

The Queensland Green Paper summarised submissions on this issue as follows:

> "Submissions were generally supportive of facilitating national practice through participation in the national practising regime. A number of respondents expressed the desire for one national licensing authority. Until then, it was submitted barriers to national practice would add costs and restrict competition. It was also submitted that local practitioners should be permitted to share income with persons qualified to practise law in other jurisdictions to facilitate national integrated practices.
>
> It was suggested that the current national practising certificate legislation could be improved through protocols in the areas of complaints, trust account inspections, appointments of receivers to the interstate practice and exchange of information between jurisdictions."[184]

23.4 DISCUSSION

There would not appear to be any issues that are additional to those that exist concerning other legal practitioners.

23.5 FINDINGS (INCLUDING ALTERNATIVES)

The findings made in respect of legal practitioners also apply to interstate legal practitioners.

[183] See Law Society Northern Territory Submission, 25 October 2000, page 46
[184] Queensland Government Green Paper *Legal Profession Reform* June 1999, page 30

24 FOREIGN LAW

24.1 ISSUE

Part XII of the *Legal Practitioners Act* imposes on persons who practice foreign law in the Northern Territory much the same controls as exist in respect of practitioners of local law. Part XII was enacted in 1999 as part of a national scheme dealing with foreign lawyers. For the purposes of this review it is assumed that the general issues (and outcomes) as exist in respect of local lawyers also exist in respect of foreign lawyers. Accordingly, the specific provisions will not be separately examined. They are, however, listed in the tables in Appendix 1.

24.2 SUBMISSIONS AND OTHER COMMENTS

24.2.1 Law Society Northern Territory

No comment made.

24.2.2 Others

No other comments.

24.3 DISCUSSION

There would not appear to be any issues that are additional to those that exist concerning other legal practitioners.

24.4 FINDINGS (INCLUDING ALTERNATIVES)

The findings made in respect of legal practitioners also apply to foreign lawyers.

25 LAW SOCIETY NORTHERN TERRITORY: STATUTORY RECOGNITION AND POWERS

25.1 ISSUE

The Law Society Northern Territory is incorporated by statute. In much the same way as its peers in other jurisdictions it is given various statutory powers and responsibilities concerning the whole of the profession. However, it also performs membership roles in respect of those members of the legal profession who choose to join the Law Society. There are other organisations that represent parts of the legal profession. These organisations receive little or no recognition or support under the Act. Part 8.34 of the Issues paper dealt with the status of the Law Society under the *Legal Practitioners Act.*

25.2 STATUTORY RECOGNITION OF THE LAW SOCIETY NORTHERN TERRITORY – QUESTIONS

The Issues Paper sought comments on the following:

1. *Does the statutory recognition of, and statutory powers given to, the Law Society Northern Territory restrict competition? In what ways? How significant is any such restriction in terms of its impact of the economy?*
2. *What are the public benefits and what are the costs to the community of any such restriction? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such restriction? Is there evidence available as to the relative magnitude of these benefits and costs? Which effects might be decisive in determining whether each such restriction is in the public interest?*
4. *If any such restriction does provide net public benefit, could those benefits be achieved by other less restrictive or less costly means?*

25.3 CURRENT POSITION

The regulation of the legal profession in the Northern Territory relies heavily on the Law Society Northern Territory, the Supreme Court and individual members. There is minimal executive government or Departmental involvement in the day to day regulation.

The Law Society Northern Territory is constituted by statute. Its constitution is approved by the Attorney-General. Aside from various reporting obligations the Law Society is subjected to minimal external regulation. The Law Society is largely funded by practising fees paid to the Law Society Northern Territory by all legal practitioners regardless of whether they are members of the Law Society Northern Territory.

Additionally, it can be noted that the Attorney-General may give directions that certain complaints be investigated, may withhold approval from certain matters being referred to the Legal Practitioners Complaints Committee and may disapprove the Rules of Professional Conduct.[185]

The Law Society Northern Territory is established by the *Legal Practitioners Act* despite the fact that its membership potentially comprises all the members of the profession. Under the *Legal Practitioners Act* it is given various statutory powers and functions. It is also provided with revenue. No other professional organisation has any statutory powers or any revenue under the Act. This contrasts with the position in other parts of Australia where recognition is given to the possibility and the actuality that other professional organisations may have statutory roles. The leading example in many jurisdictions is the Bar Association in respect of persons who specialise as barristers.

[185] This right came into existence on the commencement of the *Legal Practitioners Amendment Act 2000* (1/10/2000).

Finally, self regulation by professional bodies which also act as representative associations may lead to anti-competitive practices and limit the remedies of consumers and other market participants who are adversely affected.

Additionally, the Law Society carries out two functions that may be incompatible. They are:

- to represent the economic interests of its members; and
- to act as regulator, on behalf of the government and the people of the Northern Territory, in respect of all legal practitioners.

The NSW NCP Report noted that:

- the current system (in NSW) may inhibit debate within the profession about ethical matters, business practices and appropriate restrictions on practice;
- the current system may impair the ability of practitioners to diversify their services because of the existence of a single set of rules governing all solicitors and all barristers;
- it might be argued that the public would benefit from a separation of the representative and regulatory functions of the professional organisation and that practising certificates should be issued by a Government body, rather than by the members of the profession. Such a scheme might ensure greater transparency in the issuing of practising certificates and the making of rules; and
- it might be in the public interest, and that of the profession, to permit the registration of alternative bodies, as in Victoria, and enable those bodies to establish their own systems for regulation and governance, supervised by a statutory body.

The NSW NCP stated that:

- the traditional model for regulation of the legal profession was self regulation;
- within the self regulation model, formal regulatory power over the profession was conferred by Government on the professional associations;
- regulatory powers exercised by the professional associations included the determination of entry standards and regulation of lawyers professional conduct;
- the self regulation of the legal profession was traditionally regarded as integral to professional practice because it ensured the independence of the profession from Government intervention in its affairs and ensured that members of the profession were judged by their peers;
- the existing system promotes uniformity and consistency within the profession and clients can rely on adherence to the same rules by all solicitors and all barristers. The current system may also promote ethical practices and mutuality among members of the profession because of the commonality of profession membership. In addition, members of the profession may be best placed to make and enforce practice rules and set conditions for practice; and
- perhaps because of the accountability mechanisms, there appears to be little evidence that widespread concerns are held about the current system (where the professional association performs both regulatory and non-regulatory functions.

The COAG Working Party report did not canvass the role of self regulation in legal profession regulation, or the extent to which self regulation should be given legislative backing.

The Law Council of Australia adopts the view that:

> "..... the independence of the legal profession is dependent upon the profession's right to self regulation."

Self regulation suggests the absence of legislation. However, in most jurisdictions, self regulation includes legislation which mandates the controls that the professional associations might have over the whole of the legal profession. This means, for most jurisdictions, the best characterisation of the regulation is one of co-regulation by the profession associations, that Executive Government and the Judicial arm of government.

For example, the NSW NCP report states:

> "...[T]hat the model which has been adopted in the *Legal Profession Act* is that of co-regulation. The role of the Law Society and the Bar Association as the regulators of the profession has been largely preserved. The Act provides a legislative mandate to the role of the professional bodies in matters such as rule making and the administration of the disciplinary system on one hand and scrutiny of the exercise of their powers on the other. The professional bodies have both representative and regulatory roles. However, the Act sets standards to be applied by the professional councils and provides for external scrutiny of their actions."

There are a number of problems with this regulatory scheme as it exists in the Northern Territory. These include:

- the absence of any provisions for the scrutiny of the statutory roles of the Law Society' such as complaints handling processes. There is no requirement for the publication of an annual report; and
- the fact that the statutory functions possessed by the Law Society may stop solicitors and barristers from exercising choice in professional association. They are required to submit to the rules of the Law Society even if they choose not to belong to the Law Society.

25.4 SUBMISSIONS AND OTHER COMMENTS

25.4.1 Law Society Northern Territory

The Law Society Northern Territory states:

- statutory recognition of the Law Society Northern Territory is a direct and simple mechanism for the regulation of the legal profession; and
- the requirement that all legal practitioners in the Northern Territory are members of the Law Society Northern Territory promotes a uniformity and consistency within the profession that ensures that members of the pubic can rely on adherence to the same rules and standards of practice whether the legal practitioner chooses to practice sole as a solicitor, solely as a barrister, or carries on a hybrid practice incorporating the functions of both barrister and solicitor.

The Law Society Northern Territory also advanced the following reasons in support of the view that should only be one profession based regulatory authority:

- Given the size of the legal profession in the Northern Territory it is in the interest of the members of the profession and in the public interest that the legal profession is regulated and controlled by a single body to which all matters relating to the legal deregulation and maintenance of the legal

profession in the Northern Territory can be referred. It is therefore a matter of efficiency, convenience, and economic good sense that the Northern Territory legal profession be administered by a single piece of legislation; and

- The legal profession in the Northern Territory is not a split profession with the result that the administration of the legal profession in the Northern Territory is appropriately confined to a single piece of legislation.

25.4.2 Others

25.4.2.1 Queensland Green Paper on the Legal Profession

The Queensland Green Paper summarised submissions on this issue as follows:

> "Some responded support the Queensland Law Society continuing its role as regulator. Others saw that its role as inconsistent with its role of representing the interests of its members and that an independent body is required. There were a number of submissions from consumers expressing dissatisfaction with the Queensland law Society's handling of their complaints and claims... There were concerns that the New South Wales and Victorian regulatory models would be too costly."[186]

We feel that the Law Society is not an appropriate body to act as a regulator of professional conduct. The small population of the legal profession in the Northern Territory results in a high degree of contact between the members of the Committee of the Law Society and the profession as a whole. This contact can give rise to unsatisfactory perceptions about the complaints handling process. In our view, this function should be discharged by a statutory committee composed of both legal practitioners and non-legal practitioners.

The statutory committee should preserve confidentiality while a complaint is under investigation but adverse findings should be publicised periodically[187].

25.4.3 New Development in April 2002 NSW

The NSW Legal Profession Amendment (National Competition Policy Review) Bill 2002 provides for:

(a) the determination of practising fees so that they pay for regulatory functions (effectively separating regulatory and membership functions in terms of fees determination) (see proposed sections 29A and 29B); and

(b) independent (Government directed) audits and budgets concerning the monies raised by practising fees (see proposed sections 29D and 29E).

25.5 Discussion

25.5.1 Objective

To provide efficiency in the administration of consumer protection, by empowering a sole professional organisation with the responsibilities of carrying out a number of administrative and probity duties.

25.5.2 Potential Disadvantages[188]

- Inhibits the ability of other professional organisations, which do not possess the same powers as the Law Society, to attract members.

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[186] Queensland Government Green Paper *Legal Profession Reform* June 1999, page 5

[187] *Ward Keller, Lawyers 24 October 2000*

[188] Draft WA NCP Legislative Review (April 2002)

- The Law Society may discriminate against non-members when exercising its statutory powers on indemnity insurance matters, thus imposing a competitive disadvantage to non-members.

25.5.3 Potential Advantages[189]

Minimises insurance costs (premiums and administration levies) to legal practitioners.

25.6 Discussion

In theory, the statutory entrenchment of the Law Society's powers and functions is anti-competitive because the consequence is that it is virtually impossible for any other body to achieve the same kind of standing. The Victorian Legal Practice Act 1997 contains an attempt to neutralise the application of the legislation as regards professional bodies. In that Act, there is a generic recognition of RPA's (being Regulated Professional Associations). The Law Institute and the Bar Association are then recognised as RPAs. However, the main outcome appears to be the creation of legislation that containing a complicated structure and obscure terminology. It seems simpler to accept the basic proposition that the Law Society is the only professional body in a position in the Northern Territory to perform the functions that the Act wishes to allocate to the profession.

If, in future times, the Bar Association or some other local or national body might achieve the support of the profession the Act can be amended so as to identify the functions of such a body.

The other issue to address is that of the status of the Law Society. Until 1974, the Law Society Northern Territory was an association incorporated under the *Associations Incorporation Ordinance.* On the commencement of the *Legal Practitioners Ordinance 1974* the Law Society Northern Territory ceased to be an association. The Law Society Northern Territory became a statutory body. However, it is not, in practice, subject to the various rules that apply to other statutory and regulatory bodies by virtue of specific legislative provisions or by general laws such as the *Financial Management Act.* There are no statutory controls on the Law Society. In essence, in respect external supervision, the Law Society is effectively subject to the personal supervision of the Attorney-General. For example, the Law Society Northern Territory cannot change its constitution without the approval of the Attorney-General.

However, the supervisory scheme is weak. There are no formal accountability provisions nor is there any power for any external person to investigate the financial affairs of the Law Society Northern Territory. Given that the Law Society Northern Territory is a body with significant statutory powers handling large amounts of money raised by virtue of statutory law it would seem appropriate that the *Legal Practitioners Act* be amended so that an accountability framework is established in respect of it.

Such a framework should include:

1. A requirement to produce an annual report in respect of its statutory functions and the expenditure of monies obtained because of the *Legal Practitioners Act.*
2. The identification of an external supervisor. The main choices appear to be the Attorney-General or the Registrar of Associations. The latter seems more appropriate. This is the model adopted in respect of the Real Estate Institute of the Northern Territory (which is currently recognised in various ways by the *Agents Licensing Act*).

[189] Draft WA NCP Legislative Review (April 2002)

25.7 FINDINGS (INCLUDING ALTERNATIVES)

The findings are:

1. There is no need to alter the *Legal Practitioners Act* in respect of the statutory powers and functions of the Law Society Northern Territory.
2. The amendment of the *Legal Practitioners Act* so that the Law Society Northern Territory is obliged to provide a budget to the Attorney-General, an audit to the Attorney-General and an annual report to Parliament in respect of its statutory powers and functions and its expenditure of monies raised by virtue of the operation of the *Legal Practitioners Act*.
3. That the Law Society Northern Territory be deemed to be a body incorporated under the *Associations Incorporation Act*.

26 TRADE PRACTICES ACT 1974 (COMMONWEALTH)

26.1 ISSUE

Much of the impetus for questioning the possible anti-competitive effect of provisions of legislation such as the *Legal Practitioners Act* stemmed from views of the former Trade Practices Commission[190] concerning the anti-competitive effect of the legislation. Part 9 of the Issues Paper raises the prospect that some provisions in or under the *Legal Practitioners Act* may offend against the spirit of the *Trade Practices Act 1974.*

26.2 CURRENT POSITION

Part IV of the *Trade Practices Act 1974*, in its application to the Northern Territory, prohibits a person from engaging in certain anti-competitive practices. The Northern Territory Competition Code is in substantially the same terms as Part IV of the *Trade Practices Act 1974.*

Part IV of the *Trade Practices Act 1974* includes the following provisions:

- Section 45: This prohibits the enforcement of exclusionary provisions, whether or not they are anti-competitive, and arrangements which have the effect of substantially lessening competition;
- Section 45A: This deems horizontal price fixing to be anti-competitive, subject to some exceptions; and
- Section 45B: This proscribes covenants that have the effect of substantially lessening competition. In the case of price fixing covenants, these prohibitions are absolute.

Part IV does not apply to activities which are expressly authorised by Northern Territory statutes. A provision can only provide such an authorisation if it states that it is an authorisation for the purposes of section 51 of the *Trade Practices Act 1974.*

26.3 TRADE PRACTICES - QUESTIONS

1. *Are there any arrangements under the Legal Practitioners Act that may breach Part IV of the Trade Practices Act 1974 and, if so, what are they?*
2. *What are the public benefits and what are the costs to the community of any such arrangement? Is there evidence available as to the existence of these benefits and costs?*
3. *How do the benefits (if any) compare with the costs (if any) of any such arrangement? Is there evidence available as to the relative magnitude of these benefits and costs? Which effects might be decisive in determining whether each such arrangement is in the public interest?*
4. *If any such arrangement does provide net public benefit, could those benefits be achieved by means that are less anti-competitive?*

26.4 SUBMISSIONS AND OTHER COMMENTS

26.4.1 Law Society Northern Territory

The Law Society Northern Territory states that the *Trade Practices Act 1974* does not provide sufficient regulation of the legal profession. It is still necessary to have appropriate professional conduct rules and a self regulating profession if consumers are to be adequately protected.

[190] Now the Australian Competition and Consumer Commission

26.4.2 Others

"The legal market in the Northern Territory has a different character than elsewhere in Australia. Isolation generally is a factor. In addition, there is a special commercial difference in that legal practitioners do not generally act as mortgage brokers in the Northern Territory.

Travelling practising certificates facilitate competition and reduce the local character of the market. The same process facilitates the dominance of large interstate firms in the Australia-wide market (including the Northern Territory). This occurs because of (a) the connections which the interstate firms have with large entities doing business in the Northern Territory but based interstate and (b) the larger size of the interstate firms enabling them to more easily absorb the cost of entering a new market.

It is vital to the reasonable commercial and social expectations of citizens of the Northern Territory that a Northern Territory-based profession be preserved utilising local knowledge and dedicated to the development and observance of Northern Territory laws and appropriate standards of conduct of legal practitioners practising in the Northern Territory. Due weight should be given to these objectives in any legislation seeking to promote competition.

By and large, the existing regime serves consumers well. Legislators should recognise this and be cautious about introducing changes unless significant advantages can be demonstrated[191]*."*

26.5 Discussion

This issue was raised with the view to ascertaining whether the *Legal Practitioners Act* protects any practices that might otherwise be unlawful. There was no serious suggestion that the *Trade Practices Act 1974* could either form the basis of regulation. Nor was it seriously considered that the *Trade Practices Act 1974* should not apply to legal practitioners[192].

The only potential problem identified relates to indemnity insurance. This dealt with in Part 21. There appears to be some possibility that the Act and the Regulations purport to permit arrangements that may be in breach of Part IV of the *Trade Practices Act 1974.* However, in the absence of the wording contemplated by section 51 of the *Trade Practices Act 1974* neither the Act nor the Regulations will operate so as to save the arrangements from Part IV.

To the extent that the current arrangements (whereby all legal practitioners are obliged to use the insurer chosen by the Law Society Northern Territory) are potentially in breach of Part IV this is an issue that is only resolvable in the long run by the Law Society Northern Territory obtaining a relevant authorisation under the *Trade Practices Act 1974.*

However, from the point of view of the Northern Territory profession, it seems appropriate that the Law Society, in respect of its members, have the right to bargain on their behalf and that members be bound to use the insurer that has entered into the bargain with the Law Society Northern Territory. Individual legal practitioners can opt out of the scheme by dropping their membership of the Law Society.

It can be noted that all legal practitioners who have practising certificates are entitled by virtue of the practising certificate, to membership of the Law Society. Most legal practitioners have taken up this entitlement. However, the Law Society Northern Territory does not have 100% coverage.

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[191] *Ward Keller, Lawyers 24 October 2000*

[192] Noting that the *Trade Practices Act 1974* has always applied to legal practitioners in the Northern Territory. Unlike the position in the Australian States.

26.6 FINDINGS (INCLUDING ALTERNATIVES)

The finding is that there is nothing in the Act that purports to authorise a breach of Part IV of the *Trade Practices Act 1974*.

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27 PUBLIC BENEFIT TEST UNDER THE COMPETITION PRINCIPLES AGREEMENT

The public benefit test identifies the nature and incidence of the costs and benefits to the community of restricting competition. If the net effects from deregulation are negative, there is a net public benefit for retaining the existing arrangements.

The costs and the benefits will be identified following consideration of the responses to the Issues Paper. It is most likely that it will not be possible to quantify in monetary terms the value of these costs and benefits. It is noted that other competition policy reviews for the legal profession in other jurisdictions and similar occupations in and outside the Northern Territory have not attempted such quantification.

27.1 CLAUSE 1(3) OF THE COMPETITION PRINCIPLES AGREEMENT

Additionally, as a tool in the application of clause 5(2) of the Competition Principles Agreement, clause 1(3) of that agreement provides as follows:

"Without limiting the matters that may be taken into account, where this Agreement calls:

(a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or

(b) for the merits or appropriateness of a particular policy or course of action to be determined; or

(c) for an assessment of the most effective means of achieving a policy objective;

the following matters shall, where relevant, be taken into account:

(d) government legislation and policies relating to ecologically sustainable development;

(e) social welfare and equity consideration, including community service obligations;

(f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;

(g) economic and regional development, including employment and investment growth;

(h) the interest of consumers generally or of a class of consumers;

(i) the competitiveness of Australian businesses; and

(j) the efficient allocation of resources."

28 COSTS AND BENEFITS OF LEGISLATION

The NSW NCP Report[193] noted that the threshold issue to be considered is whether solicitors and barristers should be licensed under a statutory scheme at all. The NSW Report went on to note, in respect of the compulsory licensing of lawyers, and the common standard which is a prerequisite to licensing, that:

- The transactions in which lawyers are involved are often significant and in the absence of a formal licensing system, vulnerable clients would be exposed to exploitation. In addition, compulsory licensing enables clients to have access to information about the minimum qualifications and skills of lawyers and the disciplinary system ensures that high ethical and professional standards are maintained by all licensed members of the profession;
- The role of a lawyer is distinguished by his or her duty as an officer of the court, whose professional obligations are supervised by the Supreme Court. The system of admission by the Supreme Court rests on the established traditions of lawyers adhering to professional and ethical rules, and the courts permit appearances by admitted lawyers because admission denotes adherence to those rules. In the absence of a statutory admission scheme, the Court would be required to recognise and supervise practitioners by some other means. Lawyers also have established duties to clients and to each-other which are not shared by members of other professional groups;
- There are some services that cannot be provided by those without legal qualifications. Litigation and court advocacy, which are bound by technical procedural and evidentiary rules, are two examples of such services, and a person who seeks to represent a party and who is not a legal practitioner generally relies on the leave of the court in order to appear. If there were no formal admission clients would have no guarantee that the courts would recognise the right of practitioners to act as advocate on their behalf, unless this issue was dealt with through other statutes or court rules;[194] and
- Further, lawyers hold funds on behalf of clients and the comprehensive statutory regulation of trust accounts and other funds money belonging to clients which are held by lawyers ensures that the public is better protected against incompetence and fraud.

However, the NSW NCP report also noted:

> *"... many lawyers rarely practise in areas which require the handling of clients' funds. A less onerous registration system might be appropriate for such practitioners. Alternatively, the rules which govern lawyers holding trust accounts and other funds could apply to any person, including non-lawyers, holding funds on behalf of another person, without the need for a comprehensive licensing system which applies to all lawyers."*

Potential advantages

28.1.1 General Costs of Regulation

Regulation must be assessed for the costs it imposes by way of costs associated with administration compliance and enforcement and costs associated with detrimental effects of regulation on competition and hence on economic efficiency.[195] Additionally, there are the costs of a maintaining practising certificate (including the professional indemnity insurance premium). These costs could impact on

[193] *National Competition Policy Review of the Legal Profession Act 1987*, NSW Attorney General's Department Report, November 1998.
[194] However, note that there are reports that the Australian Taxation Office is seeking that some of its expert officers have the right to represent, in courts, the Commonwealth in respect of taxation matters.
[195] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 12.

competition if they are sufficient to dissuade participation in the market for legal services or are substantial and passed on to consumers as an element of the price charged for legal services.

In respect of occupational regulation the costs consist of:

- Entry costs for persons who want to enter the occupational group;
- Compliance costs for those who are regulated;
- Costs to the public particularly in the form of the higher cost of services;
- Costs for government arising from the administration of the regulatory system[196]; and
- Economic costs in terms of distortions on competition.

Restrictions on admission and/or practice could affect the ratio of the supply of practitioners to the demand for practitioners. Variations in this ratio could have an effect on the price of legal services. Competition policy reviews are only concerned with the provisions that materially restrict competition and not those who impose only insubstantial costs on participants.[197] The Freehills Regulatory Group,[198] identified the following impacts that flow from occupational regulation:

- Point of entry controls which restrict supply - may be a resultant increase in the price of services;
- Inhibition of innovation through lack of service differentiation or lack of technological advancement;
- Conduct prescriptions may limit the way service providers compete in terms of price, service, technology and/or quality;
- Prescriptions on standards and conduct may impede the ability of the occupation to respond to changes in the industry;
- Prescribed training standards may impede the ability of training providers to respond to the changing needs of industry;
- Functional separation on an industry which limits the functions that can be performed by lesser trained persons. This can be a competitive restriction which leads to an increase in the cost of the service; and
- Lack of consistency and transparency in the administration of an Act may result in restrictions on competition – eg. where an Act gives the regulator large discretions.

28.1.2 General benefits of regulation

Benefits of occupational regulation may consist of:

- Benefit for the group in having a better image;
- Benefit for the group by improving their competitive position concerning the others who are not regulated with some elements of monopoly;
- Benefit to the public by reducing risks to health and safety;
- Reducing financial risks for members of the public;
- Reducing risks resulting from lack of information; and
- Reducing risks of dishonest or inappropriate behaviour.[199]

[196] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 12.
[197] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 11.
[198] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, at page 11.

29 DESCRIPTION OF ALTERNATIVE REGULATORY MODELS

Even if the regulatory (licensing) restrictions in the *Legal Practitioners Act* can be justified in the public interest as producing a net public benefit, there is an expectation that they will be removed if the policy objectives could be achieved by other less intrusive means.

There are various other general regulatory options that may be available. They include:

1. Self-regulation - This involves the affected occupation formulating rules and codes of conduct, with industry being responsible for enforcement. Such rules and codes of conduct would not be dependent on statute;
2. Quasi-regulation - This involves government supported or endorsed codes of practice. Such codes are possible under Sections 238-243 of the *Consumer Affairs and Fair Trading Act*. In essence, under those provisions, industry has a code of practice endorsed by Government. Breaches of the Code can be dealt with by injunction-like action taken by the Commissioner of Consumer Affairs. Other codes may not have the same legislative support. Such a code will exist under the *Legal Practitioners Act* in respect of the Law Society's professional rules of conduct;
3. Co-regulation - Effectively this is a regulatory system whereby legislatively based controls are given to industry organisations (with some degree of government and/or client/consumer participation). In many ways the *Legal Practitioners Act* reflects the co-regulatory model; and
4. Explicit Government rule based regulation/negative licensing - This involves the legislation containing prescriptive rules with the breaches of the rules constituting offences that can be subject to prosecution in the courts. These rules can include rules that might be that the practitioners have to notify a government agency or industry association of the fact that they are practising the occupation. Equally a rule could be that a person may not practise unless he or she has a particular qualification. One of the penalties for breach could be disqualification.

Additionally, specific alternate models are being developed in relation to certain professions and occupations. They aim to replace in whole or in part some of the rationale for the detailed regulatory provisions contained in legislation such as the *Legal Practitioners Act*. One such scheme is that set up under the professional standards legislation in place in Western Australia and New South Wales.

The New South Wales *Professional Standards Act 1994* provides for the Professional Standards Council to register schemes developed by occupational groups. Once a scheme has been approved by the Council, it operates to limit the liability of members of the relevant body who adhere to the rules of the scheme. Schemes cover matters such as professional indemnity insurance, risk management, complaints and disciplinary mechanisms, and professional rules.

The establishment of a scheme may act as a substitute for Government regulation of an occupational group that has comprehensive self-regulation of its members. The Institute of Chartered Accountants and the Australian Society of Certified Practising Accountants adhere to a common scheme that has been approved by the Council. The New South Wales Law Society has also established a scheme with the approval of the Council.

[99] Freehills Regulatory Group, Issues Paper for the Department of Justice (Vic) on the NCP Review of Private Agents Legislation, pege 13, Victorian Regulation Review Unit and Law Reform Commission, 1988, *Principles of Occupational Regulation*.

29.1 SUBMISSIONS AND COMMENTS

29.1.1 Law Society Northern Territory

The Law Society Northern Territory stated:

> *"Due to the limited resources available to the Law Society Northern Territory and the period of time that it had available to it to respond to (the issues paper) ... it has been unable to conduct any surveys to establish the impact upon the economy of the Northern Territory of the requirement that in order to practice as a legal practitioner a person is required to comply with the provisions of the Legal Practitioners Act;*

For similar reasons it says:

> *"the Law Society is unable to provide evidence of the relative magnitude of benefits as against the costs of the administration of the legal profession by the operation of the Legal Practitioners Act. However, the sole purpose of the Legal Practitioners Act is to ensure a regulated profession meets particular standards of practice and is able to discharge its responsibilities in the course of the administration of justice while being accountable to members of the public ...The costs of regulation are borne almost entirely by the profession itself and access to the system of complaints by any member of the public is fee of charge. Consequently as the Legal Practitioners Act is designed to protect the members of the public and to promote the administration of justice coupled with the fact that the cost of administration of justice is almost entirely borne by the profession itself the net result is that the statutory recognition of, and statutory powers given to, the Law Society provide a net public benefit."*[200]

29.2 DISCUSSION

No additional discussion.

29.3 FINDINGS (INCLUDING ALTERNATIVES)

No additional findings.

[200] See Law Society Northern Territory Submission, 25 October 2000, page 49-50

30 MARKET FAILURE

The Review is required by its terms of reference to identify any issues of market failure which need to be, or are being addressed by the legislation.

Concerns have been expressed that the market may not deliver indemnity insurance coverage to all legal practitioners unless the right to cover some legal practitioners is linked to an obligation to cover all of them.

There would be patent problems if there were to be such a failure whilst, at the same time, there is a retention of the requirement that all private legal practitioners must have indemnity insurance. Effectively, the absence of insurance might force a practitioner out of business.

On the basis that the objective of the legislation is that consumers be able to deal with legal practitioners safe in the knowledge that they have indemnity insurance any legislative scheme would be defective to the extent that it failed to provide for universal coverage. The only apparent tool for achieving this is that any insurance company providing indemnity insurance in the Northern Territory be obliged to provide it to all practitioners at a price commensurate to the risk. A failure to do this would be an offence.

In the event of dispute about the price there would need to be recourse to some independent third party. There is some doubt whether, over time, this position is sustainable. It is one that is heavily dependent on the regulatory system ensuring that only competent legal practitioners have practising certificates.

The Tasmanian Regulatory Impact Statement contained the view that that the market would tend to operate imperfectly in this field, mainly because it would not provide for universality of cover.[201]

30.1 QUESTIONS

Are there any market failures that are remedied by the legislation?

30.2 SUBMISSIONS AND COMMENTS

No submissions were made.

30.3 DISCUSSION

No market failures have been identified other than those discussed in respect of the particular restrictions identified in the paper,

201 [Tasmania] National Competition Policy Legislation Review Legal Profession Act 1993 regulatory Impact Statement – April 2001, page 59 [Part 6.9]

31 APPENDIX 1 – TABLES SETTING OUT ANTI-COMPETITIVE PROVISIONS

These terms, "trivial", "minor" and "substantial" are taken to have the following meanings:

Term	Meaning
Trivial	A trivial restriction is one that may look as if it could have some impact on competition but, for all practical purposes, appears to have no actual impact. Such trivial restrictions will not be analysed in detail.
Minor	A minor restriction is one that may have some actual minor impact on competition. Such restrictions will be analysed.
Significant	A substantial restriction is one that may have a major impact on competition. Even if the actual impact appears minimal such restrictions will, nonetheless, be subjected to analysis

Description of the restriction	Competition or economic effects	Severity of the Restriction and Preliminary comment
Legal Practitioners Act		
S 7 provides for the incorporation of the Law Society, gives certain people a statutory right of membership and provides that changes of the constitution must be approved by the Attorney-General.	Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition.	Minor. This method of establishing the Law Society effectively creates a professional representative association as a statutory body with some of the controls and benefits ordinarily applicable to government agencies but without the external accountability mechanisms in place for government agencies – that is, it is assumed that the *Financial Management Act* does not apply. Other accountability Acts, such as the *Corporations Act 2001* and the *Associations Incorporation Act* do not apply. That are some doubts as to whether this is an NCP issue. However, similar points have been addressed in the WA NCP review of the WA Legal Practitioners Act 1893 and in the Northern Territory *Agents Licensing Act* (concerning the statutory privileges given to the REINT)

S.8 creates the Legal Practitioners Admission Board. The Board is comprised of the Master of the Court and 6 lawyers appointed by the Chief Justice. The function of the Board, as contained in S 13, is to provide advice to the Supreme Court as to whether a person seeking to become a legal practitioner is of good fame and character, a fit and proper person to practise, has completed the academic requirements and has complied with the practical requirements.	Governs the entry or exit of firms or individuals into or out of markets. Is likely to confer significant costs on business.	Trivial The query is as whether the Board should comprise only of legal practitioners – with 6 of the 7 being appointed by the Chief Justice. Unlike other licensing schemes there are no consumer representatives and there are no appointees of executive government. It should, however be noted that the Board has a limited role in determining applications made under the *Mutual Recognition Act 1992* and the *Trans Tasman Mutual Recognition Act 1997.* It should be noted that the Board merely advises the Court as to whether or not a person should be admitted - see S13 of the *Legal Practitioners Act.*
S 11(1) gives the Judges of the Supreme Court the power to make rules that govern qualifications etc. for admission to practise and for articles of clerkship. S 11(1A) and (1B) provide that the Judges of the Supreme Court can make rules in relation to and incidental to persons seeking admission under the *Mutual Recognition Act 1992* or the *Trans-Tasman Mutual Recognition Act 1997.*	Govems the entry or exit of firms or individuals into or out of markets. Restricts the quality, level or location of goods and services available. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant The Judges supervise lawyers because they rely on lawyers in the courts to behave in certain ways. This supervisory role is based in history. It is not obvious why the Judges should make rules that govern lawyers in fields that have only the most minimal of connection with the Courts.
S 13 sets out the powers and functions of the Admissions Board. These are discussed in the commentary on S 8.	-	Minor It is not plain as to why the power to make the admission decision should not rest with the Board rather than with the Supreme Court. However, the symbolism of admission by the Court may be significant in giving legal

		practitioners an understanding that they are part of a profession.
S 14A provides for the fees that are payable on admission. The fees are set by the Administrator by way of regulation with the fees being paid to the Law Society.	Is likely to confer significant costs on business.	Significant The fees are paid to the Law Society Northern Territory notwithstanding that the licensing process is largely funded by Government.
S 15 gives the Law Society Northern Territory a right to object to a person's admission.	Governs the entry or exit of firms or individuals into or out of markets. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Minor Most occupations whose entry processes are up to some form of public scrutiny would permit members of the general public to object to the entry of a person into the occupation.
S 16 makes it a criminal offence for a person whose name is entered on the Roll as "Counsel" to otherwise than as an independent barrister. The maximum penalty is 50 penalty units (current $5,000[202]).	Governs the entry or exit of firms or individuals into or out of markets. Restricts the quality, level or location of goods and services available. Restricts price or type of input used in the production process. Is likely to confer significant costs on business. Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition.	Minor This is connected to section 90A which, when read with Section 85, means that Counsel are not obliged to contribute to the Fidelity Fund.
S 18 provides that a legal practitioner is an officer of the Court and is subject to the inherent jurisdiction of the Court.	Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant This places legal practitioners in some parts of the profession under supervisory controls not faced by members of other professions carrying out the same tasks (eg the provision of taxation advice by accountants).
S 19 provides that subject to the Act	Is likely to confer significant	Minor

[202] This will be $5500 following the enactment and commencement of the Penalties Amendment Bill 2002.

a person whose name is on the Roll as a barrister or solicitor, as a barrister or as a solicitor and has a right of audience in any court of the Territory.	costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	This gives legal practitioners an advantage over all others who may wish to represent someone in Court. For other persons they could, regardless of qualifications, only perform this function with the consent of the Court. However, this provision merely backs up provisions contained in rules of court
S 20 provides for the appointment of Queen's Counsel. A fee is paid to the Northern Territory.	Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition.	Minor This may be anti-competitive because it gives some legal practitioners, in some parts of the legal profession, status over other legal practitioners in circumstances where the honour given is not necessarily based on merit. Effectively, it is a Government supported mechanism for providing a merit 'qualification'.
S 22(1) provides that a person must not practise in the Territory as a legal practitioner unless he or she holds an appropriate practising certificate.	Govems the entry or exit of firms or individuals into or out of markets. Restricts the quality, level or location of goods and services available. Restricts price or type of input used in the production process. provides advantages to some firms over other by, for example, shielding some activities from pressures of competition. Is likely to confer significant costs on business.	Significant This section needs to be read with section 25 (which sets out the basis upon which practising certificates are issued). Practical training is training or experience required after completion of an academic course in law. It is a prerequisite for admission and the issue of a practising certificate of one kind or another. A person must, in the vast majority of cases, complete a course of practical training prior to being admitted as a legal practitioner. Such training can be on the job (as an articled clerk) or by way of completing a course at one or other of Australia's practical legal training colleges. There is no such college in the Northern Territory. Most

		Northern Territory trained lawyers who obtain their initial admission in the Northern Territory complete articles. This clause is part of an elaborate mechanism for ensuring that regulatory fees are paid and that there is compliance with various regulatory requirements (eg payment of indemnity insurance).
S 22(3B). This subsection, when read with section 23(1) means that a person cannot practise as a legal practitioner when working for another person unless that person performs prescribed functions.	Governs the entry or exit of firms or individuals into or out of markets. Restricts the quality, level or location of goods and services available. Restricts price or type of input used in the production process. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant This can adversely affect community or special purpose legal aid organisations.
S 22(4) provides that a legal practitioner cannot recover fees unless he or she has an appropriate practising certificate.	Restricts the quality, level or location of goods and services available. Restricts price or type of input used in the production process. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant
S 23 provides that applications for practising certificate are made to the Law Society.	See discussion of S 23.	See discussion of S 23.
S 24 provides for the issue of practising certificates by the Law	Governs the entry or exit of firms or individuals into or out	Minor Effectively an occupational

Society.	of. Is likely to confer significant costs on business.	body controls who may or not practise the profession of the law in the Northern Territory. However, the impact appears very minor because the rules for the issue of a practising certificate are very precise and prescriptive. This issue (namely the fact that the industry body issues the practising certificates) will not be taken any further. The real issue is the basis on which the certificates are issued.
S 25 limits the circumstances in which the Law Society can issue practising certificates. These restrictions relate to the need to have practised for certain periods of time during the period leading up to the application for the practising certificate.	Governs the entry or exit of firms or individuals into or out of markets.	Significant Effectively this section means that a person must maintain consistency of apparent employment as a legal practitioner. The assumption that the fact of practise indicates a maintaining of professional qualifications may not be soundly based.
S 26 provides that a person cannot be issued an unrestricted practising certificate unless the Law Society is satisfied that he or she has an adequate knowledge of accounts and legal ethics.	Governs the entry or exit of firms or individuals into or out of markets. Is likely to confer significant costs on business.	Significant It is not clear, in the legislation, how this requirement is related to the academic requirements, (S 11) and the practice requirements (S 25).
S 27 provides various grounds on which the Law Society may refuse to issue or may refuse to grant or my cancel a practising certificate. These include that the applicant is in gaol or has been found guilty of certain offences (eg. Crimes and offences involving dishonesty), bankruptcy, failure to comply with Act or rules and regulations under the Act. One of the grounds is a broad discretionary ground (see S 27(1)(k)).	Is likely to confer significant costs on business.	Significant
S 27A prohibits the issue of a practising certificate if the applicant cannot produce evidence of having any indemnity insurance that may be	Restricts the quality, level or location of goods and services available.	Significant This may be a significant problem. Effectively, the Government is setting the

required by the Regulations made under the Act.	Restricts price or type of input used in the production process. Is likely to confer significant costs on business.	terms for insurance. There is no requirement that those terms be set having regard to the level of risk that may be faced by any particular legal practitioner. In fact the converse occurs. All legal practitioners within a particular class pay the same insurance premium.
S 32 provides for fees to be paid for practising certificates. The fees are payable to the Law Society Northern Territory.	Is likely to confer significant costs on business.	Minor The fees are prescribed. The basis for the calculation of the fees is not set out in the Act or the Regulations. The other rules that govern the setting of the "fees" are common law rules concerning what is a "fee". In brief the "fee" must not be a tax - it must be relatable to the services that are provided. In this case it is noted that in 1999 these practising fees constituted most of the income of the Law Society Northern Territory. This funded all of the activities of the Law Society Northern Territory – not just those that may be characterised as "regulatory".
S 33A provides a requirement to advise both the Law Society Northern Territory and the Master of the Supreme Court of changes of address, and employment.	Is likely to confer significant costs on business.	Minor This is a normal attribute of a licensing scheme. The need, however, for the two notices might be questionable.
S 34 provides a prohibition on Law Society issuing a practising certificate unless the applicant has compiled with the requirement to pay application fees (S 32), Fidelity Fund contribution (S 90B) and any relevant levy.	N/A	This issue will be taken up in the discussion of Sections 32, 90B and 101A.
S 35B provides a requirement to pay indemnity insurance (needs to be read in conjunction with the Legal Practitioners (Professional Indemnity Insurance) Regulations. Similarly for interstate legal practitioners (S 134L),	Is likely to confer significant costs on business. Restricts the quality, level or location of goods and services available.	Significant

foreign registered legal practitioners (S 135W).	Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition.	
S 43-45A are provisions dealing with professional misconduct. S. 44 sets out general principles of behaviour. S. 45A provides for the making of further prescriptive rules by the Law Society.	Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition. Controls prices or production levels. Restricts the quality, level or location of goods and services available. Restricts advertising and promotional opportunities. Restricts price or type of input used in the production process. Is likely to confer significant costs on business.	Significant It might be thought that the imposition onto the legal profession of rules that ought to be left to the client and the service provider to sort out between themselves should be subject to ordinary laws. Thus, for example, the *Consumer and Fair Trading Act* might regulate "excessive charging" or the Courts might have responsibility for regulating the behaviour of legal practitioners in or in respect of court proceedings. Arguably, members of the legal professional are under greater disciplinary control than others (eg accountants) who compete in certain areas of advice.
S 46-52A provide for disciplinary processes.	Is likely to confer significant costs on business.	Significant. The disciplinary process involves can complaints, the Law Society, the Supreme Court, the Legal Practitioners Complaints Committee, the Attorney-General. Any of three bodies (Law Society, the Supreme Court, the Legal Practitioners Complaints Committee) may hold inquiries and impose penalties. The processes may involve costs in terms of money and time to the profession, the community and clients that outweigh the value of the benefits.

S 54 provides joint and several liability of partners in relation to obligations concerning trust account records, audit and deposits with the Trust Committee.	Is likely to confer significant costs on business.	Significant However, it may be that this issue is outside the scope of the review – excepting to the extent that the policy reason for the section is the same as that relating to the limitations on ownership and control of legal practise companies- see discussion of the *Legal Practitioners (Incorporation) Act.* [cf *Partnership Act*].
S 55-60 provide requirements concerning the opening and operation of trust accounts. Similarly for foreign registered legal practitioners (S 135X).	Is likely to confer significant costs on business.	Significant
S 63-65 requirements concerning records (trust monies).	Is likely to confer significant costs on business.	Significant
S 66-67-78 provides the requirement for annual audits.	Is likely to confer significant costs on business.	Significant
s.68 sets out the qualifications of auditors of legal practitioners trust accounts	Is likely to confer significant costs on business Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition	
S 69 provide a requirement to comply with the requirements of auditors >>>	Is likely to confer significant costs on business.	Significant
S.70, 71 and 72 Duties on the auditor to provides reports in prescribed form to legal practitioners and to the Master. There is also a requirement to provide interim reports if it appears that there has been some kind of deficiency or loss.	Is likely to confer significant costs on business.	
S.75 Trust monies examiners appointed by the Supreme Court – including the payments of the costs incurred by the examiner.	Is likely to confer significant costs on business.	
S 79-84 provide for the requirement to deposit portion of trust monies with the Legal Practitioners' Trust	Is likely to confer significant costs on business.	Significant Other regulatory schemes have developed more

Committee. Establishment by the Trust Committee of an account to hold these monies		efficient ways of achieving the objectives of these provisions.
S.84A –provides that the income obtained by the Trust Committee is paid to the Fidelity Fund (which covers defalcations). The Trust Committee may, with the approval of the Attorney-General, pay half of the investment income for legal aid or the promotion of legal education and research.		
S. 86 – 88 provide for the establishment of a Fidelity Fund Committee that administers the Fidelity Fund (referred to in section 89)		
S 89 provides for the establishment of Fidelity Fund (separate fund to the account in which trust monies' deposits are held).	Is likely to confer significant costs on business.	Significant
S 89A provides that the Fidelity Fund Committee may allocate monies from the Fidelity Fund for the purposes of legal aid schemes and to assist and promote legal education and legal research. In any event no further allocations can be made (the final date for the making of such payments was 12 January 1996).	Is likely to confer significant costs on business.	Significant It does not seem fair that one section of the profession (namely persons other than Counsel and government lawyers) should be liable to make contributions to legal aid (though in fact the contributions from the pockets of individual legal practitioners are very minor). Most of the Fund's income is derived from interest on client's monies.
S 90A and 90B provide for an obligation to annually contribute to the Fidelity Fund (if an amount is fixed by the Fidelity Fund Committee). Barristers, including interstate barristers, are not obliged to contribute to the Fund. See S 85 (definition of 'legal practitioner').	Is likely to confer significant costs on business.	Significant Claims against the Fund can only be made in respect of pecuniary losses arising from defalcations in trust monies. This narrow basis of claim is presumably the reason why barristers are not required to contribute.
S.91 – 100 provide for payments of compensation from the Fidelity Fund following declarations by legal		

practitioners		
S 101 and 101A provide for the obligation to pay levies (up to $1500) if the Fund is unable to meet liabilities.	Is likely to confer significant costs on business.	Minor
S.101C – 101N provides for the appointment of managers by the Law Society Northern Territory.		
S 102-118 the Court may appoint receivers of a practice.	Is likely to confer significant costs on business.	Significant These costs may be incurred if a receiver is appointed in circumstances where, for other kinds of businesses, a receiver might not be appointed.
S 119 provides a prohibition on instituting proceedings to recover costs and disbursements unless an appropriately itemised account has been rendered.	Is likely to confer significant costs on business.	Significant
S 120 – 130 provide for the right of clients to seek to have bills of costs reviewed (taxed) by the Master of the Supreme Court (except where there is an agreement (S 129) which agreement has not been set aside for being not fair or not reasonable (S 130). In determining what are fair and reasonable costs for an act, the Master of the Supreme Court can take into account "the amount, if any, recommended by the Law Society as the appropriate charge for doing that act" (S 123(2)).	Is likely to confer significant costs on business. Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition. Controls prices or production levels. Restricts the quality, level or location of goods and services available. Restricts advertising and promotional opportunities.	Significant Disadvantages some lawyers who are competing with others (eg accountants) in providing certain advice services.
S 131 provides a prohibition on non lawyers from holding out as being a lawyer.	Governs the entry or exit of firms or individuals into or out of markets. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets	Significant

S 132-133 provides restrictions on non lawyers preparing wills, probate documents and agreements regulating property rights (but operates subject to licensed conveyancing agents – *Agents Licensing Act*).	Governs the entry or exit of firms or individuals into or out of markets. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets.	Significant
S 134F imposes on interstate legal practitioners the same rules concerning practising certificates as apply to local legal practitioners – see S 22.	See S 22.	See S 22.
S 134G provides that interstate legal practitioners may practise law in the Northern Territory on the same terms and conditions as the interstate legal practitioners may practise in the jurisdiction in which he or she has a practising certificate. Additionally, interstate legal practitioners who are "barristers" are subject to the same restriction contained in S 16.	The same restrictions apply as apply to Northern Territory local legal practitioners. The discussions of those restrictions will be taken to apply to interstate legal practitioners.	Minor This is minor in the sense that the section simply applies to interstate legal practitioners the same rules as apply to legal practitioners.
S 134J provides the requirements that must be met by interstate legal practitioners who practise in the Northern Territory.	Is likely to confer significant costs on business.	Minor The section imposes notification requirements. The requirements are minimal compared to the alternate requirements for obtaining a right to practice. However, it could be argued that the notification requirements could be reduced if the right to practice in the Northern Territory was a consequence of simply having an appropriate interstate practising certificate or some kind of national accreditation.
S 134K imposes on interstate legal practitioners the obligation to advise the Law Society of changes in particulars.	Is likely to confer significant costs on business.	Minor.
S 134L imposes on interstate legal	Is likely to confer significant	Significant

practitioners the need to have appropriate indemnity insurance.	costs on business.	This issue will be covered in the discussion of Sections 35A-35B.
S 134M imposes on interstate legal practitioners the need to comply with the trust moneys and Fidelity Fund provisions.	Is likely to confer significant costs on business.	Significant This issue will be covered in the discussion of Sections 53-75. Such a discussion will need to consider whether there is any unnecessary duplication between the Northern Territory and the interstate Acts.
S 134N imposes on local legal practitioners the duty to have indemnity insurance in respect of activities for Northern Territory clients in places outside of the Northern Territory.	Is likely to confer significant costs on business.	Significant
S 134Q-134V provide for the application of local and interstate disciplinary processes concerning legal practitioners who are practising the profession of the law under cover of an interstate practising certificate.	Is likely to confer significant costs on business.	Significant
S 135C –135F restriction on non Northern Territory legal practitioners practising foreign law unless registered by the Law Society.	Governs the entry or exit of firms or individuals into or out of markets. Restricts the quality, level or location of goods and services available. Restricts price or type of input used in the production process. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets.	Significant
S 135E and S 135J place an obligation on foreign lawyers to pay a registration fee and an annual fee.	Is likely to confer significant costs on business.	Minor
S 135G power of the Law Society to impose conditions on the registration	Is likely to confer significant costs on business.	Significant

of persons practising foreign law.		
S 135K imposes an obligation on foreign lawyers to advise the Law Society of changes in particulars.	Is likely to confer significant costs on business.	Minor
S 135L provides the circumstances where the registration of a foreign lawyer may be cancelled.	Is likely to confer significant costs on business.	Significant
S 135N defines the scope of practice of foreign lawyers.	Restricts the quality, level or location of goods and services available.	Significant
S 135P prescribes the legal form under which a foreign lawyer can carry on business.	Governs the entry or exit of firms or individuals into or out of markets. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets.	Significant
S 135Q imposes on foreign lawyers the same professional conduct rules as apply to legal practitioners.	Restricts the quality, level or location of goods and services available. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets.	Significant
S 135R imposes applies the disciplinary procedures to foreign lawyers.	Is likely to confer significant costs on business.	Significant
S 135S and S 135T impose controls concerning the use of letter head and designations.	Is likely to confer significant costs on business. Restricts advertising and promotional opportunities.	Minor
S 135U imposes controls on advertising. The Law Society may impose restrictions and the foreign	Is likely to confer significant costs on business.	Significant

lawyer must also comply with whatever restrictions are imposed in the foreign country whose law they are practising.	Restricts advertising and promotional opportunities. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets.	
S 135V restriction on domestic lawyer practising domestic law if employed by a registered foreign lawyer.	Governs the entry or exit of firms or individuals into or out of markets. Restricts the quality, level or location of goods and services available. Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets.	Significant
S 135W imposes onto foreign lawyers the requirement to hold indemnity insurance.	Is likely to confer significant costs on business.	See discussion in relation to Sections 35A-35B.
S 136 imposes a restriction on sharing profits with non lawyers (unless family).	Governs the entry or exit of firms or individuals into or out of markets. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets.	Significant
S 137 places a prohibition on employing former legal practitioners (except with the consent of the Master of the Supreme Court).	Governs the entry or exit of firms or individuals into or out of markets. Restricts price or type of input used in the production process.	Significant

S 137A places an imposition on legal practitioners to produce evidence to Courts and Tribunals that they have a right to practice.	Is likely to confer significant costs on business.	Minor
S 140A places an imposition on the Law Society of a duty to maintain a register of legal practitioners and foreign lawyers.	Is likely to confer significant costs on business.	Minor

Description of the restriction	Competition or economic effects	Severity of the restriction and preliminary comment
Law Society Public Purposes Trust Act		
S. 3(1) provides that the Law Society Northern Territory may enter into arrangements with financial institutions whereby the financial institutions pay to the Law Society amounts equivalent to the interest that would have been paid on trust monies held by legal practitioners. S. 3(2) provides that the interest paid to the Law Society Northern Territory is to be held in trust in accordance with the Deed of Trust set out in the schedule to the *Law Society Public Purposes Trust Act*	Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition. Is likely to confer significant costs on business	Minor.

Legal Practitioners Rules

Description of the restriction.	Competition or economic effects.	Severity of the restriction.
Legal Practitioners Rules		
R 4 and 5 – Requirement of persons to take oath or affirmation prior to being admitted to practice and to also sign the roll. Persons admitted under the mutual recognition principles may take the oath in the place of admission.	Is likely to confer significant costs on business.	Trivial
R 7 sets out the requirements for admission. Effectively, a court action has to be commenced.	Is likely to confer significant costs on business.	Significant
R 8 sets out that applications for admission are considered and determined by the Court.	Is likely to confer significant costs on business.	Significant

R 10 sets out the academic for admission of Australian practitioners.	Is likely to confer significant costs on business.	Significant
R 11 sets out the practical requirements for admission.	Is likely to confer significant costs on business.	Significant
R 12 sets out the academic and practical requirements for persons from New Zealand seeking admission.	Is likely to confer significant costs on business.	Significant
R 16-19 sets out the academic and practical requirements for persons from places other than Australia or New Zealand. Such a person must satisfy the Court that they have sufficient command of the English language to practise as a legal practitioner of the Supreme Court.	Is likely to confer significant costs on business.	Trivial
R 20 provides that the Admissions Board must report to the Supreme Court on applications for admission. A copy of such a report must be provided to the applicant for admission.	Is likely to confer significant costs on business.	Trivial
R 21 provides that the Law Society may object to the admission of a person and that it may be heard by the Supreme Court in the hearing of the application.	Is likely to confer significant costs on business.	Trivial
R 22 provides for the entry into articles of clerkship. Rules 23-30 set out various prescriptions concerning articles.	Is likely to confer significant costs on business.	Significant

Legal Practitioners Regulations

Description of the restriction.	Competition or economic effects.	Severity of the restriction.
Legal Practitioners Regulations		
Regulation 2 sets the prescribed fee for the purposes of section 20(3) of the *Legal Practitioners Act* as $500. (fee relates to a person's appointment as a Queens Counsel).	Is likely to confer significant costs on business.	Significant
Regulation 2A sets out the functions that can be performed by a person with a restricted	Governs the entry or exit of firms or individuals into or out of markets	Significant

practising certificate class 3. This regulation prescribes persons and functions for the purposes of S 22(3B) of the *Legal Practitioners Act*. This subsection permits a person to perform certain legal functions notwithstanding that they may not be employed by a person with an unrestricted practising certificate or may not otherwise be excepted from the need to have such a practising certificate.		
Regulation 2B sets out the organisations that are prescribed employers for the purpose of assessing whether a person has the required practical experience to qualify for the issue of an unrestricted practising certificate.	Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition of firms or individuals into or out of markets.	Significant
Regulation 3 sets out the fees for the issue of practising certificates. They are $1000 for an unrestricted practising certificate and $800 for a restricted practising certificate.	Is likely to confer significant costs on business.	Significant

Professional Conduct Rules

Description of the restriction	Competition or economic effects	Severity of the restriction
(not identified at this time)		

Legal Practitioners (Professional Indemnity Insurance) Regulations		
Description of the restriction	**Possible competition or economic effects[203]**	**Severity of the Restriction and Preliminary comment[204]**
Regulation 4 – this provides that, for the purposes of s35B, the	Provides advantages to some firms over others by,	Trivial. Indemnity insurance ensures the legal practitioner is

[203] The comments in column 2 are stated in terms of one or other of the 7 criteria identified by the NCC. This means that they reflect the highest possible level of impact. The judgment about the actual level of impact is set out in column 3.

[204] These terms, "trivial", "minor" and "substantial" are taken to have the following meanings:

Term	Meaning
Trivial	A trivial restriction is one that may look as if it could have some impact on competition but, for all practical purposes, appears to have no actual impact. Such trivial restrictions will not be analysed in detail.
Minor	A minor restriction is one that may have some actual minor impact on competition. Such restrictions will be analysed.
Significant	A substantial restriction is one that may have a major impact on competition. Even if the actual impact appears minimal such restrictions will, nonetheless, be subjected to analysis

prescribed class of legal practitioners is all legal practitioners and former legal practitioners except a legal practitioner employed or previously employed on a full time basis by the Territory, the Commonwealth or an authority of either the Territory or the Commonwealth.	for example, shielding some activities from pressures of competition.	able to cover liabilities. The Northern Territory and Commonwealth Governments are of such a size that they are able to cover liabilities. There is an issue concerning s35B of the Act (in the sense that it could provide for a much wider range of de facto exemptions)
Regulation 5(1) – this provides that legal practitioners in the prescribed class must, unless exempted, take out and maintain insurance that accords with the Master Policy (as set out in schedule 1 to the Regulations).	Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.	Significant
Legal Practitioners (Professional Indemnity Insurance) Regulations		
Regulation 5(3) – this permits the Law Society, with the prior approval of the Attorney-General, to exempt a legal practitioner from compliance with regulation 5(1). It is understood that: (a) There are such exemptions in respect of employees and barristers; and (b) The barristers' exemption is to the effect that the barristers must have insurance that satisfied the Law Society Northern Territory; and (c) There are new arrangements (under s35B) which mean that the "master policy" (as contained in the Regulations) is not the current policy.	Provides advantages to some firms over other by, for example, shielding some activities from pressures of competition	Significant
Regulation 7. This provides that the *Arbitration Act, 1891*, is not to apply in respect of disputes arising under the Master Policy.	Provides advantages to some firms over others by, for example, shielding some activities	Trivial. The regulation appears to have no operation, given that the Master Policy in the regulations no longer applies. Additionally the *Arbitration Act 1891* has been repealed and replaced by the *Commercial Arbitration Act*
Regulation 8. This requires that legal practitioners must provide certain information (in the form of statutory declarations) if they think that they are entitled to a reduced premium.	Is likely to confer significant costs on business. Provides advantages to some firms over	Trivial. The regulation appears to have no operation, given that the Master Policy in the regulations no longer applies. Additionally, the *Arbitration Act 1891* has been repealed and replaced by the *Commercial Arbitration Act*

	others by, for example, shielding some activities	
Regulation 9. This requires that legal practitioners must provide certain information in respect of adjustments of premiums.	Is likely to confer significant costs on business. Provides advantages to some firms over others by, for example, shielding some activities	Minor
Regulation 10. Requirement to pay interest at 15% for late payments of premiums.	Is likely to confer significant costs on business	Minor

32 APPENDIX 2- HISTORY OF THE REGULATION OF LEGAL PRACTITIONERS IN THE NORTHERN TERRITORY

32.1 REGULATION FROM THE TIME OF THE NORTHERN TERRITORY BECOMING PART OF SOUTH AUSTRALIA.

An Ordinance to regulate the Profession of the Law in South Australia (No 6 of 1845)

The provisions included:

V. Prohibition, in the absence of judicial consent, on recovery of charges until one month or more after rendering a Bill;

VI. Requirement to have a practising certificate (issued by the Master of the Supreme Court). Cost of one shilling. Penalty of 50 pounds for practising without such a certificate; and

X. The word "practitioner" included anyone admitted as a Barrister, Attorney, Solicitor or Proctor" but the Supreme Court was given the power to separate the profession into one class comprising Attorneys, Solicitors or Proctors and the other comprising Barrister and Advocates.

It appears, however, that the requirements under this Act to have a practising certificate were not being complied with in the Northern Territory by the time of the repeal of this law in 1974.[205]

Real Property Act 1858, and Real Property Act 1886

These Acts permitted land brokers to recover fees for work done for registration of interests in land. These provisions were repealed in 1918.

32.2 REGULATION FROM THE TIME OF THE NORTHERN TERRITORY BECOMING A COMMONWEALTH TERRITORY

Supreme Court Ordinance 1911[206]

Section 18 of the *Supreme Court Ordinance 1911* provided for the admission of persons as practitioners of the Supreme Court. A person could be admitted if they met the qualifications or passed the examinations set under the Rules of Court. Such persons were entitled to practice law in any court in the Northern Territory so long as they remained admitted and paid the admission and other fees prescribed by Rules of Court.

Section 19 of the *Supreme Court Ordinance 1911* provided that the Supreme Court could, on the basis of a practitioner's "misconduct in the practice of his profession" suspend the right of a person to practise or remove the name of a person from the Roll of Practitioners. Repealed in period 1961-1966.

Real Property Ordinance 1918

This provided for the repeal of right for land brokers to be registered and to recover fees for work done under the *Real Property Act* 1886. Effectively, this Ordinance re-created the 'lawyer's professional monopoly" concerning conveyancing. Policy position reversed in 1992.

[205] NT Hansard, 1974, page 585. Apparently the Act was re-discovered in 1974.
[206] This Ordinance was repealed *Supreme Court Ordinance Repeal Ordinance 1965.*

Legal Practitioners (Trust Accounts) Ordinance 1930

This provided, in respect of the Territory of North Australia, an obligation to hold monies in trust accounts. The Judge of the Northern Territory was entitled to make rules dealing with audits. This Ordinance came to apply to the whole of the Northern Territory. Duplicated 1845 legislation and supplanted by 1974 legislation.

Supreme Court Act 1961 (Cth)

This Act abolished the Supreme Court established in 1911. However, it appears to have given the new Supreme Court the powers previously possessed by the 1911 Supreme Court concerning legal practitioners. Repealed in 1979.

Legal Practitioners Ordinance 1965

This provided for the admission of legal practitioners by the Supreme Court. The Court was also given the power to suspend a legal practitioner from practice if such a person was found guilty of misconduct. Repealed in 1974.

Supreme Court Ordinance Repeal Ordinance

This Ordinance repealed the 1911 Ordinance which gave the Supreme Court certain powers and functions concerning Legal Practitioners. Repealed in 2000 (*Law of Property Act 2000*).

Legal Practitioners Ordinance 1970

This dealt with service as a Judges' associate counting for the purpose of service in articles.

Legal Practitioners Ordinance 1974

This Bill was introduced by a non-government member[207] and was said to be sponsored by the Law Society Northern Territory.

The Ordinance provided for:

- the establishment of an Admissions Board (largely under the control of the Judges);
- for the specification in the legislation of the educational qualifications required for admission;
- for the specification in the Act or the regulations of the requirements for practical training;
- disciplinary proceedings (largely under the control of the Master of the Northern Territory Supreme Court and the Supreme Court;
- accounting rules;
- a Fidelity Fund; and
- for automatic rights of admission for lawyers admitted in other Australian and Commonwealth jurisdictions.

[207][207] RC Ward, later Mr Justice Ward of the Northern Territory Supreme Court.

Legal Practitioners (Incorporation) Ordinance 1974.

This provided a right for legal practitioners to conduct their practices under corporate legal identities. There were limitations on ownership, activities and retention for personal liability of the dictators of such companies for the debts of the company. This Ordinance was repealed and replaced in 1989.

Legal Practitioners Ordinance 1977

This provided for the establishment of the Legal Practitioners' Trust Committee. This replaced the Master of the Supreme Court as the authority responsibly for managing trust monies deposited by legal practitioners.

32.3 REGULATION FOLLOWING NORTHERN TERRITORY SELF-GOVERNMENT

Legal Practitioners Ordinance 1978

This provided for the following:

- for an increase in the number of members of the Legal Practitioners Admission Board from four to seven, including the Master of the Supreme Court;
- for the Admissions Board to recognise additional educational qualifications;
- that the Master of the Supreme Court must consult the Law Society before fixing the fees payable by practitioners for practising solicitors;
- the position requiring that a person needed prior approval of the admission board before articles could be effected, was amended to allow a person to enter articles up to 90 days before the boards approval, in order to eliminate difficulties encountered in entering into articles of clerkship under the principal ordinance; and
- acknowledging one half ie. six months of a person's associateship to a judge as comprising part of the requisite period of twelve months articles, as is common in other jurisdictions.

Legal Practitioners Amendment Act 1981

This Act added trustee companies and the Public Trustee to the list of those persons who are not subject to prohibition against non-lawyers charging fees for the preparation of papers relating to the application for probate contained in Section 133(2) of the *Legal Practitioners Act.*

Legal Practitioners Amendment Act 1982

This Act established a basis for further self-regulation of the legal profession in the Territory. It was enacted with the stated objectives of providing sufficient protection for both the practitioners themselves and the public, by making it simpler for lawyers who had misbehaved to be called into account and made answerable to their peers in the Law Society.

The significance of the implementation of legal practitioners liability was summarised by a member of Parliament who expressed the following view:

> "For too long, some legal practitioners and some medical practitioners have regarded themselves as the sacred cows of the professions. Like Caesar's wife, they have regarding themselves as

> being above suspicion. Some legal practitioners exhibit an arrogance which is hard to penetrate and can be so overbearing as to intimidate ordinary men and women who do not have legal training. This can be carried to such an extent that clients are often put at a disadvantage by engaging certain legal practitioners instead of being advantaged by the fact they have outlaid a fee and expect a return. Because they trust lawyers implicitly or are too overawed to question lawyers' actions, clients often come out of encounters with a lawyer holding the rough end of the pineapple. They feel they have no recourse for an injustice because their protest will be heard in Court by more lawyers, cost a lot of money and time with only two chances of winning - Buckley's and none"[208].

The Act covered three areas connected with the regulation of the legal practice in the Territory including:

- the taking over of responsibility from the Master of the Supreme Court, in regards to the issuing of practicing certificates by the Law Society;
- making provision for a compulsory professional indemnity insurance scheme; and
- the establishment of a statutory committee to hear serious complaints against legal practitioners.

Legal Practitioners Amendment Act (No. 2) 1982

This Act obliged legal practitioners employed by the public service of the Northern Territory Government to hold practising certificates. It replaced the previous discretionary option to do so.

Legal Practitioners Amendment Act 1983

This provided for the establishment of a system of pupillage in the Territory, introducing a new type of restricted practising certificate relevant to pupils.

Legal Practitioners (incorporation) Act 1989

This Act repealed and replaced the *Legal Practitioners (Incorporation) Ordinance 1974.* The new Act did not substantially change the nature of the controls over incorporated legal practices. The changes were more of a statute law nature arising out of the Northern Territory taking on corporation law reforms made in the early 1980s.

Legal Practitioner Amendment Act 1990

This Act provided for the admittance to articles of clerkship of graduates of law faculties upon becoming eligible for the admission to the Degree of Bachelor of Laws, after their exams are passed but before those degrees are actually conferred.

Legal Practitioners Amendment Act (No. 2) 1990

This Act provided for the transfer of power from the Attorney-General to the Chief Justice in regards to the prescription of the appropriate standards of behaviour for legal practitioners, in accordance with the promotion of self regulation by the profession. This will to be changed by *Legal Practitioners Amendment Act 2000.*

[208] NT Hansard, 1982 page 2762.

Further, this Act provided that, in respect of appropriate qualifications, for the recognition of law degrees issued by the Northern Territory University and such other universities as approved of by the Admissions Board. This principle was changed in 1993 so that the Court became responsible for all matters concerning qualifications.

Land and Business Agents Amendment Act 1991

This Act opened up conveyancing to persons ("licensed conveyancing agents") other than legal practitioners. It also made consequential amendments to the *Legal Practitioners Act.*

Legal Practitioners Amendment Act 1993/Mutual Recognition Act 1992

This Act provided for the Judges of the Supreme Court to assume responsibility for setting educational and experience requirements for admission. This responsibility formerly rested with the Admissions Board.

This Act, together with the *Mutual Recognition Acts* of the Commonwealth and the Territory, also provided for automatic rights of admission for persons admitted in other Australian States and Territories.

Legal Practitioners Amendment Act 1999

This Act provides for the registration by the Law Society Northern Territory of foreign lawyers - that is, persons who practise foreign laws in the Northern Territory.

Trans-Tasman Mutual Recognition Act 1999

This Act extended the mutual recognition principle to New Zealand occupations and professions.

Legal Practitioners Amendment Act 2000

This Act provides for the removal of some of the impediments which exist concerning:

- the practice of law in the Northern Territory by lawyers who are entitled to practise law in interstate jurisdictions; and
- the practice of the law in interstate jurisdictions by layers entitled to practise law in the Northern Territory.

Effectively, the Act removes the need for interstate legal practitioners to seek admission in the Northern Territory or to obtain a practising certificate from the Law Society Northern Territory. However, they will be obliged to comply with certain notification requirements and, in some cases, comply with Northern Territory regulatory requirements concerning matters such as fidelity insurance, trust money controls and the Fidelity Fund. They will also be subject to Northern Territory disciplinary controls.

The Act also contains proposals to bring about greater public accountability for statutory rules of professional conduct made by the Law Society Northern Territory concerning legal practitioners. The Act also makes it clear that the Law Society Northern Territory may make non-statutory rules of professional conduct.

33 APPENDIX 3 – LAW COUNCIL POLICY DOCUMENTS

*The following are reproduced copies of the **Law Council of Australia's**:*

- **Policy Statement on the Reservation of Legal Work for Lawyers**
- **Model Legislative Scheme**
- **Explanatory Memorandum**

33.1 POLICY STATEMENT ON THE RESERVATION OF LEGAL WORK FOR LAWYERS AW COUNCIL OF AUSTRALIA

The Law Council's policy on the reservation of legal work for lawyers has been formulated having regard to the following public interest considerations:

(a) the special and unique role that lawyers undertake in relation to the administration of justice and the facilitation of commerce;

(b) national competition policy principles; and

(c) consumer protection principles.

The unique and distinguishing characteristics of a lawyer, in addition to the nature of his or her educational, training and experience qualifications, are:

(a) his or her admission to the Court to practise law as an "Officer of the Court"; and

(b) the ethical duties and responsibilities of a lawyer to the Court, to the administration of justice and to the client.

The role of a lawyer as an Officer of the Court should be recognised in the core area of legal work reserved for lawyers.

The core areas of legal work should:

(a) relate to appearances in Court and matters incidental to that right, such as

  (i) advice on prospects in proposed or pending litigation;

  (ii) advice on the legal aspects of contentious matters before litigation is proposed;

  (iii) preparation and conduct of proceedings;

  (iv) legal professional privilege.

(b) relate to the drawing, filling up or preparing an instrument or other document for fee or reward that:

  (i) is a will or other testamentary instrument;

  (ii) creates, regulates or affects rights between parties (or purports to do so); or

  (iii) affects real or personal property on behalf of another person.

(c) relate to probate work being:

  (i) taking instructions for grant of probate or letters of administration; or

  (ii) drawing up and preparing papers on which to found or oppose a grant of probate or letters of administration.

The public interest in consumer protection is not well served by permitting persons without knowledge and competence in the law to undertake for fee or reward matters which fall into the core areas of legal work (as defined).

The Law Council recognises that each State and Territory Government may determine that economic, social or demographic factors in the State or Territory justify, in the public interest, the reservation of

other areas of work to qualified lawyers.

It should be a criminal offence for a non-lawyer to hold himself or herself out as a qualified lawyer admitted and entitled to practise law.

A lawyer should not be excluded from any area of activity for which the lawyer is qualified.

A legislative scheme to give effect to this policy is set out in Part 34.2.

33.2 LAW COUNCIL PROPOSAL ON THE RESERVATION OF LEGAL WORK - MODEL LEGISLATIVE SCHEME

33.2.1 Reserved Legal Services

1. A person who is not a legal practitioner[1] must not for fee or reward on behalf of another person[2] provide any of the following services:
   (a) represent any party to proceedings in a Court or Tribunal;
   (b) issue or prosecute proceedings in any Court or Tribunal;
   (c) advise on the prospects of or in relation to any proceedings in a Court or Tribunal;
   (d) draw, fill up or prepare an instrument or other document that:
      (i) is a Will or other testamentary instrument;
      (ii) creates, regulates or affects rights between parties (or purports to so); or
      (iii) affects real or personal property on behalf of another person.
   (e) probate work being:
      (a) taking instructions for a grant of probate or letters of administration;
      (b) drawing or preparing papers on which to found or oppose a grant of probate or letters of administration; and

      and
   (f) other legal services prescribed by regulation[3].

Note: Breach of this paragraph would constitute a criminal offence and attract the other penalties set out in paragraph 7.

33.2.2 Provision of Legal Services by Non-Lawyers Subject to Consumer Protection and Transparency Safeguards

1. Subject to the consumer protection and transparency safeguards set out in paragraphs 3 and 4, any person may provide the following legal services:
   (a) give advice on or make representations as to the legality or the effect in law of a dealing, document or transaction;
   (b) provide mediation, conciliation or arbitration services[4];

[1] Defined as an admitted lawyer who is entitled to practice.
[2] The scheme is not intended to preclude an unqualified person providing in-house legal services as outlined in Section 2 for his or her employer.
[3] This provision would enable a State or Territory Government to expand the list of reserved areas of work where it considers that economic, social or demographic factors in that particular State or Territory justify in the public interest, the reservation of other areas of work to the legal profession, eg conveyancing.
[4] The Law Council notes that other groups with ADR focus, are currently discussing national competency standards and guidelines for mediators. The structure and width of this subparagraph will require review when those discussions result in widely accepted recommendations

(c) other legal services prescribed by regulation.

2. A person, before providing any of the legal services listed in the preceding paragraph for fee or reward on behalf of another person, must comply with the consumer protection and transparency safeguards set out in paragraph 4.1 and 4.2, and thereafter must comply with the further standards set out in paragraph 4.3, unless the person is:

(a) a legal practitioner; or

(b) a person who is a member of a class of persons specified in the regulations who may provide the services subject to such restrictions and conditions as may be prescribed.

Note: Breach of the provisions of paragraph 4 would not be a criminal offence, except in the case of 4.l(a)(i) and (ii), but would attract the other penalties set out in paragraph 7. This means it would be an offence for an unqualified person providing legal services not to notify the recipient that he or she is not a legal practitioner or not to advise about insurance.

4.1 The person providing any of the legal services listed in paragraph 2, must:

(a) notify the recipient of the services:

(i) that the person is not a legal practitioner;

(ii) whether or not the person has professional indemnity insurance and/or fidelity insurance equivalent to that required for legal practitioners;

(iii) the basis of the proposed charge for the services;

(iv) before receiving any trust money during the course of the rendering of the services, whether or not the person is not subject to any regulations regulating the manner in which the person accounts for such trust money or relating to audit of the accounts of such person in relation to trust money.

(b) comply with any conditions or restrictions prescribed by regulation.

4.2 In addition, the person providing any of the legal services listed in paragraph 2 must:

(a) possess the qualifications and experience for particular legal services as may be prescribed by regulation[5]; and

(b) be in participant in an approved external complaint handling scheme.

4.3

(a) Before any action for the recovery of fees for legal services, or before the appropriation of money towards such fees, a bill specifying the total amount of the fees and describing the services to which the fees relate must be delivered to the person liable for the fees.

(b) The person liable for the fees may at any time within 6 months from delivery of such a bill request a statement showing in detail how the amount of the fees to which the bill relates is made up.

(c) The Court may rescind or vary any agreement for fees if it considers that any term of the agreement is not fair and reasonable.

4.4 A qualified person in a company or firm that provides any of the legal services listed in paragraph 2 is subject to unlimited personal liability for any claims arising out of the manner of

[5] An example of principles which could be used to draw up appropriate regulations for each jurisdiction is attached as Annexure A

delivery of such services[6].

33.2.3 Holding out as a Qualified Lawyer

(a) A person who is not a legal practitioner must not hold himself or herself out, or permit another to hold him or her out, as:

(i) being entitled to provide any of the services listed in paragraph 1;

(ii) being entitled to provide any of the services listed in paragraph 2 as a legal practitioner; or

(iii) a lawyer[7], barrister, barrister and solicitor, legal adviser, Notary Public, Proctor or Attorney[8].

33.2.4 Local Exemptions

1. The prohibitions and requirements set out in paragraphs 1 to 4 do not apply to the following persons or activities:

[here insert local exemptions - those which might apply in South Australia are set out below by way of example.]

33.2.4.1Court Proceedings

(a) an (unqualified) person from representing a party to proceedings in a court or tribunal for fee or reward, if the person is authorised by or under the Act by which the court or tribunal is constituted, or any other Act, to do so;

(b) a person licensed or registered under the Land Agents, Broker and Valuers legislation from representing, for fee or reward, a party to proceedings before an assessment revision committee constituted under Local Government legislation;

(c) an (unqualified) person who is an employee or officer of an association of employers or employees from representing the association or any of its members in proceedings brought pursuant to an Act relating to industrial conciliation or arbitration provided that the unqualified person (as distinct from the association of which the person is an employee or officer) makes no charge for providing the representation;

(d) an (unqualified) person who is an employee of a body corporate that is a party to proceedings brought pursuant to an Act relating to industrial conciliation or arbitration from representing the body corporate in the proceedings;

(e) an (unqualified) person from serving any process for fee or reward where the person is authorised or permitted by statute to do so;

(f) a clerk employed by a legal practitioner from serving any process for fee or reward;

33.2.4.2Wills

(g) a body corporate authorised by a special Act of Parliament of a State or Territory to administer the estates of deceased persons from preparing a Will or other testamentary instrument where the body corporate is named as the executor, or one of the executors, of the Will or other testamentary instrument and the body corporate does not seek to recover any fee or reward in respect of the preparation of the Will or testamentary instrument beyond the commission or other remuneration allowed under the special Act;

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[6] This restriction is based upon the restrictions currently imposed on legal practitioners.
[7] It is not the intention of this paragraph to prevent academic lawyers and corporate lawyers describing themselves as such.
[8] It is not intended to prevent patent and trademark attorneys describing themselves as such.

(h) a body corporate authorised by a special Act of Parliament of a State or Territory to administer the estates of deceased persons from preparing a Will or other testamentary instrument for fee or reward where the Will or other testamentary instrument is prepared by a legal practitioner employed by the body corporate;

33.2.4.3Share Transfer/Companies

(i) an (unqualified) person from preparing, for fee or reward, any instrument relating to the transfer of shares or securities issued, or made available, by a body corporate;

(j) a person from selling a suite of documents suitable for the incorporation of a company provided that the suite and the instructions for use have been approved by a legal practitioner;

33.2.4.4Property Documents

(k) an agent licensed under the *Land Agents, Brokers and Valuers Act 1973* from preparing for fee or reward:

(i) a tenancy agreement –

A relating to residential premises

B under which a rental not exceeding a maximum prescribed for the purposes of this subparagraph is payable; or

(ii) a tenancy agreement -

A arising from transaction in respect of which the agent has acted as agent;

B relating to non-residential premises; and

C under which a rental not exceeding a maximum prescribed for the purposes of this subparagraph is payable

provided that the instrument is prepared by the agent personally or by a registered manager or registered salesman in the agent's employment;

(l) a licensed land broker from preparing a fee or reward an instrument registrable under the *Real Property Act 1886*, the *Community Titles Act 1996*, the *Strata Titles Act 1988*, the *Bills of Sale Act 1886*, the *Stock Mortgages and Wool Liens Act 1924* or the *Liens on Fruit Act 1923*;

(m) a licensed land broker from preparing for fee or reward –

(i) a contract for the sale and purchase of land or a business;

(ii) a tenancy agreement;

(iii) an assignment of the benefit of a contract for the sale and purchase of land or a business or of a tenancy agreement;

(iv) an instrument that arises from, and is incidental to, a contract, agreement or assignment of the kind mentioned in subparagraph (I), (ii) or (iii);

(n) an agent licensed under the *Land Agents, Brokers and Valuers Act 1973*, being the employer of a legal practitioner or licensed land broker from charging a fee for the preparation of an instrument of a kind mentioned in paragraph (k) or (l) where –

(i) the instrument is prepared by the legal practitioner or licensed land broker; and

(ii) the agent is authorised by the *Land Agents, Broker and Valuers Act 1973* to charge a fee for the preparation by the legal practitioner or licensed land broker of instruments registrable under the *Real Property Act 1886*;

(o) an (unqualified) person from charging a fee for the preparation of a bill of sale, stock mortgage or lien over wool or fruit to which the person is the party in whose favour the security is given or an instrument varying or discharging a bill of sale, stock mortgage or lien over wool or fruit to which the person is such a party;

(p) an (unqualified) person from charging a fee for the preparation of a mortgage over land to which the person is the party in whose favour the security is given, or an instrument varying or discharging a mortgage over land to which the person is such a party, provided that the mortgage or other instrument is prepared by a legal practitioner or licensed land broker;

33.2.4.5Miscellaneous

(q) an (unqualified) person from charging a fee for the preparation of an instrument provided that –

(i) the instrument is prepared by a legal practitioner in the employment of that (unqualified) person; and

(ii) the legal practitioner has been in the employment of that (unqualified) person continuously since 1 July 1980;

(r) an agent who has been commissioned to sell *[or licence the use of personal property]* goods or let them out on hire, or to contract for the performance of services, from preparing a contract for the sale or hire of goods or the provision of services provided that the agent is remunerated only by salary or commission and no separate charge is made by the agent or the principal for the preparation of the contract;

(s) the preparation for fee or reward of an opinion on a question of law by a member of the faculty of law of a university provided that the opinion is prepared at the request of a legal practitioner, the Attorney-General of the State or of the Commonwealth, the Crown Solicitor or the Australian Government Solicitor or the Director of Public Prosecutions;

(t) the preparation for fee or reward of any prescribed instrument or the performance for fee or reward of any prescribed services.

33.2.5 Penalty

It would be a criminal offence to breach paragraphs 1, 4(a)(i) and 4(a)(ii) and 5 only.

Breach of the consumer protection and transparency safeguards in paragraph 4 could attract one or more of the following sanctions:

(a) Civil penalty of up to $1,000 per offence, recoverable in proceedings able to be instituted by:

- the Crown
- Commissioner for Consumer Affairs;
- Law Council constituent body;
- Legal Practitioners Conduct Board.

(b) Unenforceability of fee agreement;

(c) Obligation to disgorge fees received for unlicensed legal services;

(d) Court discretion in proceedings for breach of the standards or negligence to order that a person be barred from undertaking any legal services indefinitely or for a period.

33.3 LAW COUNCIL PROPOSAL ON THE RESERVATION OF LEGAL WORK MODEL LEGISLATIVE SCHEME PRINCIPLES FOR REGULATORY DEFINITION OF ADEQUACY OF EDUCATIONAL QUALIFICATIONS AND EXPERIENCE

1. A person who provides the services of preparation of instruments referred to in paragraph 2(a), (b) and (c) must have:

   1.1 satisfactorily completed a course offered by a recognised institution (to be defined) in the areas of knowledge and including the topics set out below:

   - Professional Conduct (without Court related sections);
   - Contract
   - Property
   - Equity
   - Company Law

   (content of this and other courses referred to, to be similar to that specified for these subjects by the Priestley Committee of the Council of Chief Justices courses to be accredited/subject to random audit or monitored or negatively licensed by the jurisdiction's Consumer Affairs Department or other appropriate body).

   1.2 have worked for at least 12 months under the supervision of a legal practitioner or other qualified person which work included a substantial portion of work related to the particular services of preparation of instruments;

   1.3 satisfactorily completed a course of practical training provided by a recognised institution (to be defined) in the following areas of practice:

   - Property Practice
   - Wills and Estate Management Practice
   - Commercial and corporate Practice
   - Legal Writing and Drafting
   - Negotiation and Dispute Resolution
   - Legal Analysis
   - Work Management
   - Interviewing

2. A person who provides advice on or makes representations as to the legality or effect in law of the dealing, document or transaction, as referred to in paragraph 2(d) must have:

   2.1 satisfactorily completed a course offered by a recognised institution (to be defined) in the areas of knowledge and including the topics set out below:

   - Contract
   - Property

- Equity
- Company Law
- Criminal concepts and Doctrines (ie. not detailed substantiative law, but including burden of proof, strict responsibility, mens rea, parties etc.)
- Federal and State Constitutional Law
- Doctrine of Precedent
- Civil Procedure
- Evidence

2.2 have worked for at least 12 months under the supervision of a legal practitioner or other qualified person which work included a substantial portion of work related to the particular service of advice;

2.3 satisfactorily completed a course of practical training provided by a recognised institution (to be defined) in the following areas of practice:

- Property Practice
- Wills and Estate Management Practice
- Commercial and Corporate Practice
- Legal Writing and Drafting
- Negotiation and Dispute Resolution
- Legal Analysis
- Work Management
- Interviewing
- Advocacy and Litigation

3. A person who provides mediation, conciliation or arbitration services must have:

3.1 satisfactorily completed a course offered by a recognised institution (to be defined) in the areas of knowledge and including the topics set out below:

- Contract
- Equity
- Civil Procedure
- Evidence
- Professional Conduct

3.2 satisfactorily completed a course of practical training provided by a recognised institution (to be defined) in the following areas of practice:

- Negotiation and Dispute Resolution
- Legal Analysis

- Interviewing
- Advocacy and Litigation

33.4 LAW COUNCIL OF AUSTRALIA - POLICY STATEMENT ON RESERVATION OF LEGAL WORK FOR LAWYERS - EXPLANATORY MEMORANDUM

33.4.1 Introduction

In February 1994, the Council of Australian Governments (COAG) determined that it wished to assist in bringing about a more competitive and integrated national market, and more efficient and effective arrangements for the delivery of services in the areas of shared responsibility between Governments.

COAG's decision adopted the principles of competition policy, articulated in the Hilmer Report. That report made wide-ranging recommendations, including the application of competition principles to Commonwealth and State Government agencies and authorities, the creation of a new Australian Competition and Consumer Commission, and a micro-economic reform agenda to ensure the general application of competition policy principles, including in relation to the legal profession.

Specifically in relation to the legal profession, it sought to have developed detailed proposals for further reform of the legal profession:

> *"with the objective of removing constraints on the development of a national market in legal services and developing other efficiency-enhancing reforms."*

In July 1994, the Law Council of Australia released a Blueprint for the Structure of the Legal Profession which articulated a plan for the establishment of a national legal services market which was directed to achieving COAG's objectives in relation to the legal profession.

The Law Council's Blueprint ensures the following general principles and objectives:

1. national competition policy principles apply to the legal profession;
2. lawyers admitted in any State or Territory of Australia are able to practise law throughout Australia;
3. existing constraints which prevent a lawyer's right to practise without restriction throughout Australia are removed in order to facilitate the development of a national market in legal services;
4. recognition that the independence of the legal profession is dependant upon the profession's right to self regulation;
5. the system of regulation of the legal profession is implemented by uniform State and Territory legislation;
6. the self regulation of the legal profession is subject to an external and transparent process of accountability to ensure that the rules of the professional bodies are not inconsistent with national competition policy principles;
7. the protection of consumers of legal services through comprehensive education and training of the legal profession and the development of a uniform standard of client care;
8. proper information is available for consumers of legal services as to quality and cost of legal services.

Since the review of the Blueprint in July 1994, the Law Council has worked closely and cooperatively with the Commonwealth, State and Territory Governments on the implementation of a national legal services market (NLSM) throughout Australia. The notable achievement has been the endorsement by

the Standing Committee of Attorneys-General of a travelling practising certificate regime which is a cornerstone of the Law Council's Blueprint. The enabling legislation for the travelling practising certificate has been enacted in the Australian Capital Territory, New South Wales and Victoria. The legislation in South Australia has been passed by the Parliament and was proclaimed on 1 February 1999. The Tasmanian Attorney-General proposes to introduce the legislation into Parliament, with high priority, during the early part of 1999. While the matter is ultimately in the hands of those States and Territories that have not yet introduced the enabling legislation, there may be a reasonably good expectation that by the end of 1999, the travelling practising certificate scheme may be operational throughout Australia.

The implementation of the NLSM throughout Australia is one of the highest priorities for the Law Council. The approach the Law Council has adopted is to take the policy initiative itself in reforming the practices and structures of the profession but in close consultation with government. During the past twelve months the Law Council has marshalled the profession's resources to take forward a reform agenda on a broad range of topics including the difficult issue of the reservation of legal work for lawyers.

The Law Council has advanced this major reform initiative under the ruberic of its National Cooperation project. The Law Council's work has coincided with the requirement of the Competition Principles Agreement, endorsed by COAG in April 1995, for each Government in Australia to "review and, where appropriate, reform all laws which restrict competition by the year 2000". As part of that comprehensive review of legislation, each State and Territory Government is required to review legislation regulating the legal profession in its particular jurisdiction.

The Competition Principles Agreement requires that legislation must not restrict competition unless it can be demonstrated that the benefits of the restrictions to the community outweigh the costs, and that the objectives of the legislation can only be achieved by restricting competition.

33.4.2 Reservation of Legal Work: Methodology and underlying principles adopted by the Law Council

The Law Council's examination of the existing legislative provisions relating to the reservation of legal work and the development of its policy in this area has been significantly informed by the principles guiding the legislative review required under the Competition Principles Agreement, referred to in the preceding paragraph.

Another fundamental policy consideration which the Law Council acknowledged in the formulation of its policy was the need to protect consumers from incompetent service providers. The Law Council contends that any serious examination of the policy underlying the concept of the reservation of certain areas of legal work to lawyers must commence with an acceptance of the basic principle that an incompetent or inadequately trained legal adviser is in a position to inflict great harm upon a client.

The Report of the New South Wales Attorney-General's Department on the National Competition Policy Review of the Legal Profession Act 1987, which was released in November 1998 also recognised that primary consideration should be given to consumer interest principles. The Report justified a uniform government licensing scheme for lawyers on the following public interest grounds:

> *"The regulation by Government of the provision of general licences to solicitors and barristers promotes the protection of consumers from incompetent service providers. The scheme for universal licensing of lawyers can be justified by the requirement for legal practitioners to adhere to common ethical and professional rules, the complexity of legal work and the need for clients to be*

assured of access to an independent complaints handling and disciplinary process."

At the same time, the Law Council's examination of the existing statutory provisions relating to the reservation of legal work in each State and Territory showed that the provisions were not always uniform and that some of the expressions were vague and inadequate and consequently were largely unenforced. Accordingly, the Law Council decided that, in assembling the building blocks of a new uniform policy on the reservation of legal work, the foundation of the new policy should be the special and unique role that lawyers undertake in relation to the administration of justice. The Law Council also considered that the contribution of the legal profession to a civil society in Australia, and particularly a well managed economy should be recognised in the policy statement, eg property, finance, contracts, regulation and the rule of law.

33.4.3 Paragraph 1 of Policy Statement

The first paragraph of the Policy Statement brings all these fundamental considerations together and expressly embraces the following public interest principles as the basis of the Law Council's policy:

(a) the special and unique role that lawyers undertake in relation to the administration of justice and the facilitation of commerce;

(b) national competition policy principles; and

(c) consumer protection principles.

33.4.4 Paragraph 2 of Policy Statement

Paragraph 2 of the Policy Statement builds on the principles in paragraph 1 and recognises that the unique and distinguishing characteristics of a lawyer are:

(a) his or her admission to the Court to practise law as an "Officer of the Court";

(b) the ethical duties and responsibilities of a lawyer to the Court, to the administration of justice and to the client; and

(c) a lawyer's educational, training and experience qualifications.

The significance of admission to practice as an Officer of the Court and the nature of the Supreme Court's inherent jurisdiction to admit legal practitioners was explained by the then Chief Justice of the New South Wales Supreme Court - and now Chief Justice of Australia, the Hon Justice Murray Gleeson AC - on the occasion of the opening of the Centre for Legal Education on 30 April 1992:

"The subject of legal education, and the related subject of qualifications and requirements for admission to practice, are of continuing importance and interest ... The same issues are also of special interest to the Supreme Court of New South Wales. After all, persons who apply for admission as solicitors or barristers in this State, whether they come from New South Wales, or from elsewhere in Australia, or overseas, are applying to be admitted as officers of the Supreme Court of New South Wales. Since 1824 the Court has exercised an overriding and independent power to admit, or refuse admission to, or disbar, legal practitioners, and that power is expressly preserved by the Legal Profession Act of 1927. Whilst, in practice, the great majority of applications are processed by the Barristers Admission Board or the Solicitors Admission Board, which certifies to the Court fitness for admission, the Court has the power to admit or decline to admit regardless of what the Boards certify. If an applicant for admission is aggrieved by a decision of one of the Boards, the proper remedy is to make an application to the Court. That application is not in the nature of an appeal from the relevant Board. It is an application which invokes the Court's original

and overriding power to admit.

Furthermore, in practice, questions of educational qualifications and practical experience are often bound up with questions of personal fitness, and once again, notwithstanding the existence of other disciplinary and regulatory authorities, it is the Court that has the overriding power to control and discipline its officers. Practitioners who appear in the District Court or the Local Court or, for that matter, the Federal Court when it operates in New South Wales, ordinarily have their right of appearance by virtue of their admission to practice as a barrister or solicitor of the Supreme Court."

The overriding public interest benefit to society of a lawyer's ethical duties and professional responsibilities is explained in the introduction of Riley's Solicitors Manual published by the Law Society of New South Wales:

"The true profession of law is based on an ideal of honourable service. It is distinguished by unique responsibilities. The function of the lawyer is to serve the community in the regulation of its social structures, in the conduct of its commerce and in the administration of justice.

The social and economic interdependence of persons and institutions in contemporary society leads to increasingly complex legislation and regulation, which seek to balance individual rights and community needs. The work of modern lawyers is, accordingly, more diverse and more sophisticated than ever before.

Rapid changes in the law and technology and increasingly competitive commercial environment place great pressure on lawyers who seek to maintain competence and their personal integrity. The well-being of society and its institutions depends in large measure on the recognition and acceptance by the legal profession of its special responsibilities. The awareness of individual lawyers of the fact that they share a common duty to maintain and regulate a competent, trustworthy profession, is the basis of professional responsibility and the logical foundation of a system of professional ethics."

The Law Council's Model Rules of Professional Conduct and Practice have summarised a lawyer's duties to the Court and to the client in the following terms:

"PRACTITIONERS' DUTIES TO THE COURT

Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour.

Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.

RELATIONS WITH CLIENTS

Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests.

Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat

the ends of justice or is otherwise in breach of the law."

Reference has been made in paragraph 2 of the Policy Statement to a lawyer's educational, training and experience qualifications because these requirements are imposed, as a precondition to the right to practise as a legal practitioner, to ensure that there is an adequate level of protection of the public.

Paragraph 3 of the Policy Statement

Paragraph 3 of the Policy Statement expressly requires that the role of a lawyer as an officer of the Court should be recognised in the core area of legal work reserved for lawyers.

33.4.5 Paragraph 4 of the Policy Statement

The core areas of legal work that should be reserved for lawyers are defined in paragraph 4 of the Policy Statement. It is important to note that the New South Wales Attorney-General's Department Report relating to the review of the New South Wales Legal Profession Act in accordance with the Competition Principles Agreement which was published in November 1998 concluded that there did not appear to be any objections on competition policy grounds against restrictions on non-lawyers undertaking defined areas of legal work:

> *"There does not appear to be general concern about any anti-competitive effects flowing from the reservation of certain categories of work to solicitors and barristers. The criteria for any reservation of work should be based on the potential harm to the public if the work is undertaken by a person who is not a solicitor and barrister or a barrister. However, some potential for harm is likely to arise if any legal work is undertaken by unqualified persons."*

The first area of work recognised in paragraph 4(a) of the Policy Statement relates to appearances in Court and matters incidental to that right including:

(i) advice on prospects in proposed or pending litigation;

(ii) advice on the legal aspects of contentious matters before litigation is proposed; and

(iii) preparation and conduct of proceedings.

These areas of work relate directly to Court proceedings and the unique responsibilities of a lawyer as an officer of the Court.

Legal professional privilege has also been enshrined in paragraph 4(a) of the Policy Statement not only because of its significance in the context of Court proceedings but also in the context of the administration of justice and the lawyer's role as a "minister of justice".

Legal professional privilege attaches to confidential communications passing between a client and his or her legal adviser if the communications were made for the sole purpose of:

- enabling the client to obtain or the adviser to give legal advice; or
- litigation that is actually taking place or was in the contemplation of the client.

(Grant v. Downs [1976] 135CLR674 and Baker v. Campbell [1983] 153CLR52).

It cannot be emphasised too strongly that the privilege is that of the client and not that of the lawyer. It does not exist to give an advantage to the lawyer or the client over others. It exists in the public interest.

The rationale of the privilege was succinctly explained by Dawson J in Baker v. Campbell in the following terms:

"... it is now established that [the doctrine's] justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients. That is why the privilege does not extend to communications arising out of other confidential relationships such as doctor and patient, priest and penitent or accountant and client: see D v. NSPCC [1978] AC171 at 238, 239. The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be co-incidental in the case of other confidential relationships."

Paragraph 4(b) of the Policy Statement is based on the existing restrictions defined in section 48E(1) of the NSW Legal Profession Act 1987 and relate to the "drawing, filling up or preparing" of an instrument or other document for fee or reward that:

(i) is a will or other testamentary instrument;

(ii) creates, regulates or affects rights between parties (or purports to do so); or

(iii) affects real or personal property on behalf of another person.

Paragraph 4(c) is also based on a provision in section 48E(1) of the NSW Legal Profession Act 1987 and relates to probate work.

The core areas described in paras (b) and (c) are necessary for the benefit of the public as they provide protection for clients from incompetent service providers in relation to legal rights and obligations.

The public interest requires that a legal practitioner has a sound understanding of the historical development of the law and how complex principles and technicalities in areas such as real and personal property and in relation to contractual and other obligations interact to form a coherent system.

33.4.6 Paragraph 5 of the Policy Statement

This paragraph of the Policy Statement provides that the public interest in consumer protection is not well served by permitting persons without knowledge and competence in the law to undertake for fee or reward matters which fall into the core areas of legal work as defined in the preceding paragraphs. This reinforces the paramountcy of the need to protect the public from incompetent service providers.

The overall scheme of the Policy Statement reserves to lawyers all steps in the advice and representation of persons involved in proceedings before any Court and the preparation for reward of instruments which affect legal rights.

The Policy Statement does not seek to protect the mere giving of legal advice independently of any Court proceeding.

33.4.7 Paragraph 6 of the Policy Statement

Paragraph 6 merely recognises that a State or Territory Government may determine that economic, social or demographic factors in that State or Territory may justify, in the public interest, the reservation

of other areas of work to qualified lawyers.

33.4.8 Paragraph 7 of the Policy Statement

Paragraph 7 of the Policy Statement provides that it should be a criminal offence for a non-lawyer to hold himself or herself out as a qualified lawyer admitted and entitled to practise law.

It is instructive to note the conclusions of the New South Wales Attorney-General's Department on this issue which is contained in its November 1998 report of the National Competition Policy Review of the *Legal Profession Act 1987:*

> ***"3.1 What effect, if any, would the removal of the statutory reservation of titles have on markets?***
>
> *It appears that the removal of the restrictions would permit the entry of unqualified service providers into the market. In an unrestricted market, consumers would be at risk of misleading conduct by these service providers.*
>
> ***3.2 Given that most practitioners belong to the Law Society or Bar Association, and that the representative roles and standards of those bodies are widely recognised, is there a need for statutory protection of titles?***
>
> *Statutory protection of titles can be justified by the application of the provisions of the Act dealing with legal practice, complaints handling and discipline to practitioners who adopt those titles.*
>
> ***3.3 Do the public benefits of restrictions on the use of titles outweigh the barriers they create?***
>
> *The reservation of certain titles to solicitors and barristers appears to be generally accepted in the community. It allows the public to distinguish practitioners who are subject to the regulatory scheme set out in the Act, regulations made under the Act, and professional rules, from other participants in the legal services market.*
>
> ***3.4 Should the Act reserve the use of titles to qualified practitioners who hold practising certificates?***
>
> *Yes."*

33.4.9 Paragraph 8 of the Policy Statement

The Policy Statement asserts that a lawyer should not be excluded from any area of activity for which the lawyer is qualified. The purpose of this provision is to reiterate the Law Council's opposition to any Statute which prohibits or restricts a lawyer from representing a client before particular tribunals, small claims courts or other such decision making bodies which affect a person's interests or rights, particularly when the "other party" is the government.

33.4.10 Paragraph 9 of the Policy Statement

A model legislative scheme has been prepared to give effect to the Law Council's policy on the reservation of legal work for lawyers and is attached to the Policy Statement.

34 BIBLIOGRAPHY – OTHER NCP REVIEWS

The Northern Territory NCP Review of the *Legal Practitioners Act* is but one of the 8 Reviews that are being conducted in respect of the legal profession. Other issues papers and reports might provide useful background in developing responses to the matters raised in the Northern Territory Issues Paper. These other papers include:

- Issues Papers August 1998 National Competition Policy Review of the *Legal Profession Act 1987*, NSW Attorney-General's Department

- Report November 1998 National Competition Policy Review of the *Legal Profession Act 1987*, NSW Attorney-General's Department

- Discussion Paper Legal Profession Reform December 1998 Queensland Department of Justice and Attorney-General

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