National Competition Policy Review

Legal Practice Legislation

Competition Impact Statement

June 2003

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1 LEGISLATION

Under the Competition Principles Agreement (CPA) and subsequent agreements between the Commonwealth and State and Territory Governments, the following legislation in respect of the regulation of the legal profession has been reviewed to assess whether identified restrictions on competition are in the public interest:

Queensland Law Society Act 1952
Queensland Law Society Rule 1987
Queensland Law Society (Indemnity) Rule 1987
Continuing Legal Education Rule
Queensland Law Society (Solicitors Complaints Tribunal) Rule 1997
Legal Practitioners Act 1995
Supreme Court of Queensland Act 1991
Solicitors' Admission Rules 1968
Barristers' Admission Rules 1975

2 BACKGROUND

This involved an assessment of the economic and social costs and benefits of current and alternative means of achieving the policy objectives as well as consideration of the impacts of current restrictions and alternatives on the whole community including particular sections of the community eg, regional communities and key stakeholders. The review was categorised as a "major review" as defined in the "Queensland Government's Public Benefit Test Guidelines", published by Queensland Treasury in October 1999.

The review was managed by a Committee comprising an independent Chair, Mr Henry Smerdon, a former Under Treasurer of Queensland and representatives for the Directors-General of the Department of the Premier and Cabinet and the Department of Justice and Attorney-General and the Under Treasurer. A firm of economic consultants with proven experience in National Competition Policy (NCP) issues, was engaged to undertake the Public Benefit Test ("the PBT") and to assist the Committee.

The review also took into consideration the regulation of the legal profession in other jurisdictions and the regulation of other professions generally.

3 CONSULTATION WITH STAKEHOLDERS AND THE COMMUNITY

The wider community was given the opportunity to take part in the review through the public release of a comprehensive Issues Paper, which was advertised nationally in November 2001, together with an invitation to forward written submissions to the review committee. A copy of the Issues Paper and invitation to provide a submission to the review was forwarded to each of more than 300 stakeholders ranging from representatives of professional organisations (legal and non-legal), relevant national and interstate organisations, including the Australian Competition and Consumer Commission, and others with an interest in reform of the legal system. All members of the Queensland Parliament were included in the list of stakeholders.

Consultation was arranged with a range of persons considered to have an interest in the legal profession and the outcome of the review. Where possible, face-to-face consultation took place with key stakeholders, including regional lawyers. The Committee was assisted, as needed, by a reference group of key stakeholders.

4 SUMMARY OF RESTRICTIVE PROVISIONS

The competition issues associated with the professions can be summarised as barriers to entry into the profession, the reservation of work to members of the profession and rules of conduct. The restrictions considered as part of the review were:

- **Admission**: Aspects which may restrict competition include:
  - requiring completion of recognised academic qualifications and specified practical legal training as a prerequisite to admission as solicitors or barristers;
  - imposing practice restrictions on practitioners from interstate or New Zealand and other specified overseas jurisdictions applying for admission in Queensland; and
  - the separation of the solicitors and barristers streams of the legal profession.

- **Practising certificates:** Solicitors must obtain a practising certificate from the Queensland Law Society each year in order to practise.

- **Reservation of legal work:** Certain work for a fee is reserved to barristers and solicitors including representation in court and the preparation of conveyancing and other documents. Persons (without practising certificates) are also prohibited from doing work (for a fee or otherwise) that amounts to acting or practising as a solicitor.

- **Restrictions on business structure**: Solicitors are not allowed to share business income with non-lawyers, effectively limiting the ability to incorporate or enter into multi-disciplinary practices.

- **Conduct rules:** The *Queensland Law Society Rule 1987* includes restrictions on how solicitors conduct their practices including controls on mortgage practices, requiring business names to indicate legal practices and controls on lawyers borrowing from clients.

- **Trust Accounts:** The legislation controls the operation of trust accounts in a number of respects primarily concerned with audit requirements.

- **Regulation of fees and related matters:** The legislation regulates fees and terms of provision of legal services by:
  - requiring a solicitor to have a client agreement specifying the work to be done, fees and specified disclosures;
  - allowing a client to dispute legal fees by applying for appointment of a cost assessor;
  - prohibiting contingency fees (fees based on a proportion of the damages payout in successful cases); and

- specifying scales of costs for use by cost assessors in fee disputes and quantification of court ordered costs. In the absence of a client agreement, solicitors are restricted to charging the scale.

- **Restrictions on advertising:** The *Queensland Law Society Rules 1987* prevents false, misleading or deceptive advertising.

- **Mandatory professional indemnity insurance:** Solicitors are required to have professional indemnity insurance. The Law Society has power to negotiate a master policy and, unless exempted, practitioners must take out insurance under the master policy as a condition for a practising certificate.

- **Fidelity Guarantee Fund:** Solicitors are required to contribute to a fidelity fund and the Queensland Law Society can impose levies when the Fund is insufficient to satisfy its liabilities.

- **Financial arrangements:** Interest on solicitors' trust accounts is used to subsidise the cost of regulating the profession, the Legal Practitioners' Fidelity Guarantee Fund and for other purposes including augmentation of Government funding of the legal aid system.

5 OBJECTIVES OF THE LEGISLATION

The legal practice legislation has the following objectives:

- to reduce the risks consumers face in legal services markets by ensuring that suppliers of those services deliver those services in a competent and ethical manner (**the consumer protection objective**);

- to ensure consumers can obtain redress for costs imposed through the incompetence or dishonesty of legal practitioners (**the compensation objective**); and

- to facilitate the administration of justice and the rule of law (**the justice objective**).

6 OUTCOME OF THE REVIEW

Attachment 1 sets out, for each identified restriction: the objective; options considered; an outline of the assessment of the restriction; and the Committee's recommendation.

Unless otherwise indicated, the Government has endorsed the recommendations. Attachment 1 also provides an update where events have overtaken the Committee's recommendations.

It had been expected that the outcome of the review would be announced with other legal profession reforms in the second half of 2002. However, substantial public and media criticism of the Queensland Law Society for its investigation of complaints against Baker Johnson Lawyers resulted in a review of the performance of its complaints and disciplinary functions by former Chief Judge Pat Shanahan and the Legal Ombudsman. The Legal Ombudsman's Report was received in late November 2002 leaving insufficient time for the Government to consider its recommendations before the Christmas recess.

National model laws for the regulation of the legal profession are being developed through the Standing Committee of Attorneys-General (SCAG). A draft Bill is expected to be finalised after consultation with key stakeholders for the August 2003 SCAG meeting. The Queensland Bill to implement the legal profession reforms (including for the national competition policy review) and the national model laws will be introduced soon after that meeting for passage by the end of this year.

7 DATE FOR REVIEW OF THE RESTRICTIVE PROVISIONS

A further review of the restrictive provisions to be retained will be carried out within 10 years of the completion of this assessment.

ATTACHMENT 1

NATIONAL COMPETITION POLICY REVIEW
QUEENSLAND'S LEGAL PRACTICE LEGISLATION
FINDINGS AND OUTCOMES

OBJECTIVES

Recommendation 1

The objectives of the legal practice legislation should be explicitly stated.

The objectives will be stated when the legislation to replace the current legislation is drafted.

ADMISSION

Recommendation 2

The requirement of admission for legal practitioners be maintained.

Provisions: *Solicitors' Admission Rules 1968* and the *Barristers' Admission Rules 1975*

Restriction: The admission process identifies those who are qualified, through the successful completion of their legal studies and practical experience, and suitable to be admitted as solicitors or barristers.

Nature of restriction: As a primary entry requirement for all legal practitioners, the requirement to seek admission is a restriction on entry to legal practice.

Objective: Setting prescribed minimum standards for legal education, practical experience and suitability (eg, past criminal history etc) contributes towards the objectives of consumer protection and the effective facilitation of justice. The contribution to the consumer protection objective is limited to the establishment of initial competence. It is not a guarantee of future performance.

Options: The review addressed the restrictions under the current admission arrangements as against alternatives to the current admissions process in light of:

- the need for some process to assess the academic and practical competency of those seeking to practise as legal practitioners;
- comparable processes in other States and Territories and the interests of national practice; and
- the supervision of the Supreme Court being integral to the admission process and the role of the court as supervisor at the apex of the profession.

Assessment: The current restrictions involve balancing two competing considerations - higher standards as a greater reassurance of sound academic/practical competence in law and the resultant restriction on the supply of lawyers. The review found that admission costs do not impose a significant cost on the community in terms of reduced supply or higher costs of legal services.

Recommendation 3

A system of common admission of legal practitioners as solicitors and barristers be adopted in Queensland.

Provisions: Sections 41, 42, 44 and 59 of the *Legal Practitioners Act 1995*.

Restriction: The admission rules provide for separate rolls for solicitors and barristers. A barrister is not entitled to practise as a solicitor and vice versa. Barristers of 3 years' standing and solicitors of 5 years' standing are able to switch rolls.

Nature of restriction: This constitutes a restriction on the conduct of practice. The qualification period for switching rolls, without meeting the specific admission requirements, also constitutes a barrier to entry to the alternate stream of the profession. In practice, the separate rolls have little impact on competition where solicitors and barristers have equal access to the courts and can compete freely in providing legal advice. In other areas of solicitors' work, barristers have chosen not to practise.

Objective: How the requirement for separate rolls for solicitors and barristers contributes to the objectives of the legislation is not clear. It may just reflect how the different streams of the profession developed historically.

Option: Common admission was considered as an alternative to maintaining separate rolls.

Assessment: Separate rolls impose a number of (minor) administrative and transaction costs, which impact on the cost and availability of legal services to consumers. Different requirements for moving from one branch of the profession cannot be justified where the academic requirement for admission of solicitors and barristers are the same. Common admission would reduce the cost of the admission process; would remove the costs of switching rolls when switching mode of practice; would make the position in Queensland consistent with other jurisdictions; and would not stop barristers from differentiating their services through separate practising certificates or membership of a voluntary bar.

Recommendation 4

The current academic requirements for admission be maintained.

Provisions: *Solicitors' Admission Rules 1968* and the *Barristers' Admission Rules 1975*.

Restriction: To be admitted as a solicitor, a person must have completed a recognised academic course and have completed specified core subjects (agreed by admitting authorities nationally) or be able to demonstrate an understanding of, and competency in, those areas. Completion of law degrees in other States and Territories are accepted where they include the equivalent of 3 years full-time study of law and have been approved by the admitting authority for that State. The *Barristers' Admission Rules 1975* provide similarly. While at present, barristers may complete Barristers' Board examinations as an alternative to study at a tertiary institution, the Government has announced the abolition of this option.

Nature of restriction: Admission requirements are restrictions on entry into legal practice.

Objective: As for 2 above.

Options: The following options for the academic qualifications for admission were considered:

- the status quo, that is, a law degree from an approved institution;
- a law degree from a tertiary institution; and
- a partial degree for specialisation.

Assessment: As the number of places in academic institutions is not restricted and pass rates are not unreasonably high, current educational requirements per se are not an additional restriction on competition. The current minimum academic requirements have been nationally agreed by admitting authorities as appropriate and are consistent with OECD requirements. The option of accepting any degree could result in a lowering of standards. The academic requirements for admission as a solicitor or barrister are appropriate to the achievement of the objectives of the legal practice legislation (in particular, the facilitation of justice objective).

Recommendation 5

Current practical legal training requirements be maintained except that:

(a) the term of articles for law graduates be reduced to one year;
(b) all practical legal training should be subject to national competency based assessment;
(c) Part 8 of the *Legal Practitioners Act 1995* (which provides for the admission of persons with a law degree and 10 years service in prescribed government legal offices) should be removed;
(d) rules relating to the qualifications and work environment for practitioners qualified to supervise articled clerks and other current geographic restrictions on service by articled clerks be modernised in the context of the competency standard approach (if not sooner).

Provisions: *Solicitors' Admission Rules 1968* and the *Barristers' Admission Rules 1975* and Part 8 of the *Legal Practitioners Act 1995*

Restrictions:

- For solicitors, there are alternative requirements for practical legal training as a condition for admission, namely 2 year articles of clerkship admission or practical legal training courses offered by various law schools. There are restrictions on persons with whom articles of clerkship may be served (viz, solicitors in practice on their own account in Queensland for 3 years and various Government law offices). Generally, a master cannot supervise more than 2 articled clerks.

- An applicant for admission as a barrister must have completed a course of practical legal training as the Barristers Board may determine. In practice, the completion of the Bar Practice Course (6-week course) is required.

- The legislation also provides for the admission of persons with a law degree and 10 years service in prescribed government legal offices.

Nature of restriction: Admission requirements are restrictions on entry into legal practice.

Objective: As for 2.

Options: The following options were considered:

- status quo, that is, articles of clerkship or practical legal training courses for solicitors and the Bar Practice Course for barristers;
- no practical legal training;
- abolish articles of clerkship and have only course-based practical legal training;
- modernise articles of clerkship (allowing a wider range of supervising practitioners and removing geographic restrictions); and
- assess practical legal training (whether through articles or a practical legal training course or a combination of both) according to consistent standards nationally (as recommended by the Law Admissions Consultative Committee).

Assessment:

- The practical legal training requirement would only be a barrier to entry if there were insufficient places in qualifying courses or articles and this is not the case.
- Some minimum level of practical legal training is required to meet the objectives of the legislation rather than to allow the legal practices to decide the amount of training that is needed for new recruits.
- The abolition of articles could reduce opportunities to enter the profession.
- The requirement of 2-year articles of clerkship was identified as excessive compared with the one-year requirement in other jurisdictions.
- The national competency standards approach recommended by the Law Admissions Consultancy Committee, was supported, although recognising that it may involve additional costs in gaining admission in some instances.
- A consequence of the competency based assessment would be the removal of Part 8 of the *Legal Practitioners Act 1995* which recognises service in Government offices for admission purposes.

Recommendation 6

Geographic, occupational and duration of practice restrictions on foreign lawyers should be removed.

Recommendation 7

Lawyers from other countries should be admitted subject to a formal evaluation of their academic studies and practical legal training against the admission requirements.

Provisions: Rules 74 and 76 of the *Solicitors Admission Rule*s *1968* and Rules 15(d) and 15B of the *Barristers' Admission Rules 1975*

Restriction: The *Solicitors' Admission Rules* provides for the conditional admission of persons who are entitled to practise as solicitors in England, Scotland or Northern Ireland. Admission can be made absolute after one year provided the person satisfies the Solicitors' Board that he or she worked as a solicitor, law clerk or legal officer in Queensland for 9 of the 12 months following such admission and intends to continue to do so.

The *Barristers' Admission Rules* provide for the conditional admission of a person who is a barrister-at-law or advocate in the United Kingdom, provided he or she has the intention of practising principally in Queensland. Admission can be made absolute provided the person satisfies the court that he or she has practised principally in Queensland and has not pursued any occupation or business other than one that is proper for a barrister.

Nature of restriction: The requirement of practice in 9 out of 12 months following admission places a restriction on the conduct of the practice. The requirements of practice in Queensland constitute geographic restrictions on practice. The recognition of only selected countries may unfairly restrict competition.

Objective: The provisions purport to meet the objectives of the legislation by allowing lawyers from selected other jurisdictions to be admitted and to ensure that only those who intend to practise in Queensland are admitted. The designation of countries reflects the view that the selected countries share similar legal systems which merit recognising lawyers trained under those systems.

Options: The following options were explored:

- status quo;
- foreign applicants subject to the same academic and competency standards as local applicants; and
- remove geographic, occupational and duration of practice restrictions.

Assessment: Geographic, occupational and duration of practice restrictions on foreign lawyers and the recognition of the qualifications of lawyers from selected countries are discriminatory and may unfairly restrict competition.

Update: The admission rules are under consideration as part of the national review of legal practice legislation through the Standing Committee of Attorneys-General (SCAG). It is expected that the identified deficiencies within the admission rules would be addressed in that context.

RESERVATION OF WORK AND TITLES

Recommendation 8

Conveyancers be licensed to operate in Queensland based generally on the regulatory arrangements operating in New South Wales.

Recommendation 9

At the end of a 2 year transitional period, the licensing of conveyancers to commence.

Provisions: Section 19 of the *Legal Practitioners Act 1995* and section 39 of the *Queensland Law Society Act 1952*

Restriction:

- It is an offence for a person who is not a solicitor or barrister or certificated conveyancer "for or in expectation of any fee gain or reward directly or indirectly draw or prepare any conveyance or other deed or instrument in writing relating to any real estate or any proceedings in law or equity". Since 1940, there has been no provision for admission as a conveyancer.

- It is an offence to directly or indirectly act or practise as a solicitor or conveyancer without a practising certificate.

Nature of restriction: While conveyancers are licensed to provide conveyancing services in other jurisdictions, the current restriction prevents similar service providers from operating in Queensland.

Objective: The reservation of work to lawyers is designed to meet the consumer protection and compensation objectives of the legislation through the admission, practice, ethical, fidelity cover and professional indemnity insurance regime that applies to solicitors.

Options: The following options were considered:

- removing the current reservation of legal work to lawyers and allowing all legal work to be performed by non-lawyers for a fee; and
- reserving conveyancing services to licensed conveyancers and lawyers that satisfy entry requirements and comply with restrictions on practice.

Assessment: A deregulated model was not favoured in view of the risk to consumers of legal services. Freeing up of the provision of legal services by non-lawyers would have implications for national practice. Other jurisdictions may be concerned if persons without suitable qualification and competence are able to provide legal services from Queensland on an unregulated basis.

Where conveyancing is a relatively risky activity, there is a case for reserving such work to lawyers and persons with a minimum level of competence in the conduct of conveyancing work. A full law degree is not necessary to the achievement of the objectives of the legal practice legislation with respect to conveyancing. If persons are able to meet standards of knowledge and practical training, allowing them to competently perform conveyancing services and have adequate professional indemnity and fidelity insurance, they should be permitted to compete in the market for conveyancing work.

The market for conveyancing services among solicitors is already highly competitive. It is not clear that the introduction of licensed conveyancers will result in lower fees being charged for conveyancing services but there is no evidence to indicate that fees will not be lower.

With regard to the concerns of rural and regional solicitors:

- it would be unlikely that licensed conveyancers would establish in rural areas;
- legal practices in metropolitan and regional centres are more diversified and less reliant on income from conveyancing and any loss of work by those practices should not impact on the availability of legal services;
- even if a conveyancer were to establish in competition with legal practitioners in rural or regional centres, existing legal practitioners would be unlikely to lose all or even a significant part of their conveyancing business as they would be able to compete with conveyancers and market the advantage of their current goodwill and higher qualifications; and

- rural and regional practitioners (in conveyancing and other areas of legal practice) are subject to competition from city legal firms and competition is likely to increase with advances in remote service delivery.

A two year transitional period would allow for:

- the development and implementation of the necessary policy and legislation;
- the establishment of the regulatory regime and supporting structures;
- the identification and approval of appropriate courses, accreditation and practical legal training requirements and insurance arrangements; and
- the development of suitable conduct rules etc.

Although this may delay potential public benefits, transitional arrangements would benefit the community by smoothing the social and adjustment costs of the reform.

Decision:

The Government does not support these recommendations:

- The circumstances are not the same as existed in NSW when licensed conveyancers were introduced. Significant competitive forces are already at work in Queensland. The inflated Law Society conveyancing scales which applied at that time have long been abolished. Solicitors are able to advertise their conveyancing services and prices. Lawyers charge different amounts for work based on the level of complexity. While maintaining appropriate supervision to ensure quality of service, solicitors maximise the work that is performed by administrative staff to keep prices down. Fixed conveyancing fees (some around $200) are being advertised in the multi-media, yellow pages, local papers, bill boards etc.

- There are over 5000 solicitors all competing with one another for legal work. Where conveyancing services can be provided remotely, competition is not confined to discrete geographic areas. Conveyancing services are now being purchased over the internet and competition will strengthen as consumer acceptance of remote service delivery grows.

- For the same reasons that fidelity and professional indemnity cover should be maintained by solicitors, conveyancers (if licensed) would also be required to have comparable cover. In the current uncertain insurance market, the Government is concerned about establishing a licensing regime for such a small occupational group who may not have the critical mass to support an appropriate level of cover or may be vulnerable to market failure.

- It is also noted that there is not a uniform position on this issue in other jurisdictions, with conveyancers in some jurisdictions being able to offer only limited services or not being legislatively recognised.

Recommendation 10

Court work should be reserved to solicitors and barristers.

Provisions: Section 209 of the *Supreme Court Act 1995*, section 52 of the *District Court Act 1967* and section 18 of the *Magistrates Courts Act 1921*

Restriction: Only solicitors and barristers are permitted to recover a fee for court work.

Nature of restriction: Barrier to entry for court work.

Objective: The restriction is essential to meet the consumer protection and justice objectives of the legislation by ensuring that the specialised area of court work is delivered by appropriately qualified and experienced suppliers and by recognising their special position as officers of the court and the consequences of that status.

Option: Consideration was given to the option of allowing court work to be performed by non-lawyers for a fee.

Assessment: Court work should be reserved to solicitors and barristers as officers of the court. A minimum level of knowledge of the law and court procedures and reliance on their duty to the court is necessary for the facilitation of justice and the efficient running of the courts. It is also in the public interest that there be minimum levels of competence where court cases create precedents that become part of the common law with implications for the community.

Recommendation 11

The titles "solicitor" and "barrister" should be reserved to those who are admitted as solicitors and barristers.

Restriction/Nature of restriction/Objective: As for 8

Option: The option of removing the reservation of title was considered.

Assessment: The reservation of the titles of "solicitor" and "barrister" should be maintained as the reservation is unlikely to impact on competition or the price of legal services and it provides valuable information to the consumer about the competency of the legal service provider.

Recommendation 12

The uncertainty associated with the scope of the current reservations and the NCP justification for any reservations of legal work to lawyers be resolved on a national basis as part of the current national review of legal practice legislation through the Standing Committee of Attorneys-General. In the meantime, should current reservations be found to restrict a group of non-lawyers from providing a legal service that they wish to provide, a merits review be conducted of the options of relaxing the reservation or regulating it as a controlled activity as for conveyancing.

REGULATORY FRAMEWORK

Recommendation 13

The practising certificate for solicitors be maintained.

Provision: Part 4 of the *Queensland Law Society Act 1952.*

Restriction:

- Solicitors are prohibited from acting or practising as solicitors unless they have practising certificates issued by the Queensland Law Society or, where their practising certificates are subject to conditions, unless they practise in accordance with those conditions.

- Persons are prohibited from directly or indirectly acting or practising as a solicitor or conveyancer without practising certificates (or not in accordance with the conditions of their practising certificates). This does not apply to a government lawyer acting in the course of his or her official duties.

- The issue of a practising certificate is conditional on the payment of a practising certificate fee and the prescribed contribution to, and any levy for, the Legal Practitioners' Fidelity Guarantee Fund.

- A person acting as a solicitor without a practising certificate cannot recover fees or disbursements etc.

- First time applicants for practising certificates who have not completed specified types of practical legal training as a prerequisite for admission are issued with conditional practising certificates requiring them to practise as employed solicitors for 1 year. This applies to practitioners admitted on the basis of the completion of a practical legal training course as against articles of clerkship.

- The Queensland Law Society can refuse to issue a practising certificate and the Council of the Society can cancel a practising certificate on various grounds. Grounds include: bankruptcy; conviction on indictment or for a summary offence involving moral turpitude or fraud; failure to comply with trust account requirements; failure to provide an explanation of professional conduct (in respect of possible charges) when requested by the Council; failing to fully comply with an order of the Solicitors Complaints Tribunal; practising without a practising certificate or during a period of suspension; and failure to reimburse the fidelity fund for moneys paid on his or her account. There are similar grounds for suspension of a practising certificate. The issue of a practising certificate can be refused on grounds of unfitness due to infirmity injury or illness. Grounds that raise restrictions on competition are a breach of the prohibition on the sharing of receipts with unqualified persons and failure to comply with the Indemnity Rule.

- While there is no practising certificate scheme for barristers, one has been foreshadowed as part of the Government's December 2000 proposals.

Nature of the restriction: The requirement to hold a practising certificate is a restriction on entry to legal practice.

Objective: The requirement to hold a practising certificate serves the objective of consumer protection. The requirement ensures prescribed standards of competence for legal practitioners and the imposition of restrictions on practice that are designed to protect consumers from incompetent and dishonest service providers.

A certificate scheme for barristers would ensure that barristers, like solicitors, are subject to appropriate complaints and disciplinary processes and other appropriate conditions on practice, such as professional indemnity insurance, that are demonstrated to be in the public interest.

Options: The following options were explored:

- status quo;
- negative licensing;
- mandatory code of practice; and
- no regulation.

Assessment: The various classes of practising certificates for principal and employee practitioners and the application of the mutual recognition legislation to practising certificates were considered.

The requirement to hold a practising certificate is necessary to achieve the consumer protection objectives of the legal practice legislation as it is the vehicle by which the restrictions in the legislation, which are deemed to be in the public interest, are imposed and enforced.

The practising certificate requirement itself imposes only a minor cost on practitioners resulting in an insignificant increase in the price of legal services.

Consumers are protected in that all solicitors with a practising certificate:

- have met certain basic academic and practical entry standards for admission;
- have not been found guilty of unprofessional, unethical or illegal conduct warranting their removal from practice;
- continue to meet a range of ongoing regulatory requirements including restrictions on conduct and holding professional indemnity insurance; and
- are subject to disciplinary processes in the event of misconduct.

Consideration was given to whether these objectives could be achieved in a less restrictive way as under negative licensing or mandatory codes of practice. However, it was concluded that negative licensing is likely to provide inadequate protection for consumers because incompetent or dishonest service providers are only regulated after the harm has occurred. A negative licensing scheme would not allow the regulator to screen suppliers of legal services or enforce conduct restrictions. There were concerns about a self-regulatory approach to the setting of conduct rules should the profession have regard to its own interest rather than the interests of clients or the broader public. The enforcement of a mandatory code of conduct would require a register of suppliers, which would be little different to a basic licensing scheme.

Recommendation 14

A practising certificate requirement for barristers should be introduced.

Assessment: The direct costs of administering a practising certificate scheme for barristers would be relatively minor and, therefore, unlikely to impact significantly on the costs of services. Existing safeguards, such as the Trade Practices legislation, are available to minimise the likelihood of barristers imposing anti-competitive conduct restrictions. Moreover, as barristers were already subject to an admissions requirement and a voluntary 'code of conduct', extension of the practising certificate regime would impose relatively little additional restriction on competition.

Offsetting benefits would include an enhanced ability to impose and enforce restrictions, judged to be in the public interest, on the conduct of barristers. The introduction of a practising

certificate was a key component of the proposals to introduce common admission for Queensland practitioners and to join the national practising scheme.

Under common admission, barristers will have the opportunity to carry out the same work as solicitors. In the absence of a practising certificate, barristers would be able to avoid the restrictions currently placed on solicitors raising significant competitive neutrality issues that could undermine the effectiveness of restrictions placed on the profession in the public interest.

Currently, most of the work undertaken by barristers is subject to the direct scrutiny of judges. Common admission may mean that an increasing portion of the work of some barristers may be beyond the scrutiny of the courts.

Stakeholders identified deficiencies in the current system. The voluntary nature of the Bar Association means that if, for instance, allegations of misconduct were brought against a member of the Bar Association, that barrister could resign from membership and be beyond the jurisdiction of the Bar Association. Whilst the Bar Board (and possibly the Bar Association) would have standing to apply to Court to have the barrister struck off, neither body has the necessary supporting investigative or inquiry powers. The Court also does not have any investigatory capacity.

Recommendation 15

The practice management course be maintained as a requirement for the award of a solicitor's principal's practising certificate.

Provision: *Continuing Legal Education Rule*

Restriction: The Society may consider practical legal education necessary or desirable for practitioners or intending practitioners. Principals, as a condition for the issue of a practising certificate, are required to have a Practice Management Certificate.

Nature of Restriction: The practice management course requirement adds to the cost of entry. Through the course content, standard of assessment and the number of places available, the *Continuing Legal Education Rule* creates the potential for the profession to restrict entry of principals to the market.

Objective: The practice management course was introduced to ensure that practitioners who commence practice as principals have a sound knowledge of how to operate a trust account and the principles of practice management. The purpose is to reduce the risk to clients.

Option: The option of not requiring the Practice Management Course as a condition for a principal's practising certificate was considered.

Assessment: There would be benefits from the course in terms of better practice management and reduced risk to consumers as a result. The course is not a significant impost as many would choose voluntarily to undertake the course. A small net benefit from the restriction was assessed. The abolition of the course could lead to a deterioration of practice management standards, particularly for new practitioners.

Recommendation 16

Continuing legal education to be voluntary and not made mandatory as a condition for a practising certificate.

(Whether practical legal training proposed by the Bar Association for newly admitted barristers can be justified in similar terms to the practical management course for solicitors could be subject to its own PBT in due course.)

Provision: *Continuing Legal Education Rule*

Restriction: The Society may consider practical legal education necessary or desirable for practitioners or intending practitioners. While the Rule would allow for mandatory continuing legal education, aside from the practice management course, the Queensland Law Society does not enforce the provision.

Nature of restriction: Failure to comply with the requirement could risk a practitioner being excluded from practice.

Objective: The potential requirement of mandatory continuing legal education as a condition for the issue of a practising certificate is intended to enhance professional competence and reduce the potential for harm to the public from poor or incorrect legal advice by ensuring that competency standards met at entry are maintained throughout the solicitor's career.

Options: Whether continuing legal education should or should not be required as a condition for a practising certificate was considered.

Assessment: Mandatory continuing legal education would add to the cost of practice. Mandatory continuing legal education was not supported. Solicitors working in a competitive market have every incentive to remain up to date. If lawyers are forced to undertake training against their wishes, there is no guarantee that their intended objectives will be achieved.

INCORPORATION AND MULTI-DISCIPLINARY PRACTICES (MDPS)

Recommendation 17

The incorporation of legal practices and MDPs should be permitted based on the New South Wales model with the following key features:

(a) relying on solicitors who provide legal services as officers and employees of an incorporated legal practice to retain the professional obligations of a solicitor and not lose their professional privileges as a solicitor;

(b) providing that at least one director of the incorporated legal practice must be a solicitor with an unrestricted practising certificate and for such solicitor-directors to be generally responsible for the legal services provided by the incorporated legal practice;

(c) not restricting shareholdings in incorporated legal practices to legal practitioners or the business of the incorporated legal practice to legal services;

(d) legislating to ensure that the matters that are regulated in respect of legal practice are effectively regulated where incorporated legal practices are involved (eg, limiting investigations to matters relating to legal services, provisions relating to external administration and disqualified persons, contributions to the Fidelity Fund).

Provisions: Section 41(1)(f) of the *Queensland Law Society Act 1952* and Rule 78 of the *Queensland Law Society Rule 1987*.

Restriction: A practising certificate can be refused or cancelled if a practitioner is sharing or has shared receipts from a business of a nature usually performed by a practising practitioner. Rule 78 of the *Queensland Law Society Rule 1987* also prohibits practitioners from sharing the receipts of his or her practice with unqualified persons.

Nature of restriction: These restrictions effectively prohibit practitioners from incorporating their practices or becoming part of MDPs and restrict them to sole practice or partnership business structures.

Objective: Controls on ownership of legal practices were originally seen as necessary to ensure lawyers were held properly accountable for their special duties to the court, other lawyers and clients thereby ensuring effective administration of justice and consumer protection.

Options: The following options were explored:

- maintaining the status quo with prohibitions on MDPs and incorporation;
- allowing MDPs and incorporation but imposing special conditions not applying to other professional services businesses such as:
  - unlimited liability for corporation and directors;
  - the creation of a special corporate form (as against under Corporations Act);
  - requiring all equity owners (or a majority) to be legal practitioners;
  - prohibiting public offers; and
- no restrictions on business structure.

Assessment:

The current restriction avoids the conflicts that could otherwise arise between a lawyer's professional and ethical duties (to the court, clients and other practitioners) and the financial interests of non-lawyers through the corporation or membership of the multi-disciplinary practice.

Of particular concern are:

- the risk of over-servicing and the pecuniary interests of the MDP or equity participants overriding the client's interests; and
- pressure being put on practitioners in conflict with their duties to the court (ie, not to pursue hopeless cases, not to allege fraud without proper foundation, not to abuse the processes of the Court, not to mix their affairs with those of the client, to ensure proper discovery by the client during litigation and to inform the court of the clients' actions which could tend to corrupt the administration of justice).

The review questioned whether the current restrictions achieved their intended objectives. It found that the same conflicts that the current restrictions are designed to avoid could arise in any sole practice or legal partnership where there are financial pressures.

It found that the restrictions came at the cost of law firms being unable to adopt business structures that are the most efficient and that this raised the costs of practice and undermined practitioners' ability to compete with other professions not subject to the same restrictions. It noted that, if corporate and multi-disciplinary structures are permitted, legal practices would (on their own or with other service providers) be free to raise capital and structure their operations and staff and provide returns on capital in ways that enable them to take advantage of market trends, new ideas, beneficial tax regimes and business structures.

Regulating the structure of legal practices restricts competition by preventing lawyers from choosing the most efficient ownership and organisational arrangements to reduce costs, efficiently manage risk and provide more efficient client services. These restrictions may also disadvantage lawyers in competition for various services with other professionals, such as accountants and management consultants etc, who do not face similar restrictions.

The review examined the part deregulation in Victoria and Tasmania and a previous New South Wales scheme which restricted share-ownership to director and employee practitioners and directorships to current practitioners, and did not offer limited liability. The low rate of take up of incorporation under those schemes was noted.

The review also considered the new New South Wales legislative model for MDPs and the incorporation of legal practices which places no restrictions on shareholding and provides for the corporation to have limited liability.

The review noted that:

- there could be advantages to solicitors and accountants in country towns being permitted to share overheads;
- the objectives of the restrictions could be achieved through restrictions on the conduct of lawyers rather than on the form of business structure in which they operate; and
- incorporation and MDPs had been allowed in a number of jurisdictions.

The review noted advice that minor changes to the New South Wales model are being considered through the Standing Committee of Attorneys-General to facilitate a nationally uniform approach and ensure that consumer protection issues associated with the new business structures are properly taken into account. Any restrictions on competition in that legislation would be subject to its own public benefit test analysis.

With regard to business structures, the review also considered but made no recommendation on the sole practice rule for barristers. There is currently no practising certificate scheme for barristers and the sole practice rule applies on a voluntary basis to members of the Bar Association of Queensland. As noted in the Issues Paper, there are competing views in respect of the competition issues raised by this rule.

The review noted that, under the Government's December 2000 proposals, barristers wishing to adopt more flexible forms of practice other than sole practice could apply for practising certificates as "solicitors and barristers". Allowing separate practising certificates for those who wish to practise in the traditional manner as a barrister (adopting the sole practice rule) allows them to badge those aspects of their method of practice that they consider to have a benefit in the public interest. The review noted this as analogous to licensing a niche market without limiting the capacity to join the general licensing scheme.

PROFESSIONAL CONDUCT RULES

Recommendation 18

The Queensland Law Society should make the professional conduct rules applying to holders of "solicitors and barristers" practising certificates.

Recommendation 19

The Bar Association of Queensland should make the professional conduct rules applying to holders of "barristers" practising certificates.

Recommendation 20

The conduct rules should be required to be approved as subordinate legislation, as is the current situation for solicitors.

Recommendation 21

The Legal Ombudsman should be consulted on any proposed changes to professional conduct rules.

Provisions: *Queensland Law Society Rule 1987* and section 5A of the *Queensland Law Society Act.*

Restriction: The *Queensland Law Society Rule 1987* includes a number of professional conduct rules, which supplement those applying at common law. Breach of the rules can give rise to professional conduct charges. The Rules are made by the Queensland Law Society and must be approved by the Governor in Council as subordinate legislation.

Nature of restriction: The rules place restrictions on the manner of a practitioner's legal practice, which may add to the costs of the business or prevent the practitioner from providing some services.

Objective: The purpose of the professional conduct rules is to ensure that appropriate professional standards are maintained and the public are protected from unprofessional or unethical behaviour.

Options: The review examined the following options for the rule-making process:

- as currently for the solicitors conduct rules (made by the professional body and approved by the Governor in Council)
- rules set by the Queensland Law Society alone with legislation to specify that the rules are not to be discriminatory, anti-competitive or contrary to the public interest; and
- code of conduct set by regulation.

Assessment: The review favoured the status quo of the conduct rules being made by the professional bodies and approved as subordinate legislation. It concluded that the benefits from the conduct rules were more likely to be maximised under a model which ensured significant input and ownership by the profession while involving external scrutiny by those with broader consumer and public interest perspective.

Recommendation 22

Rule 79 which requires a practitioner carrying on business under a business name to indicate in that name that the business carried on is a legal practice should be abolished.

Restriction: The following conduct rules under the *Queensland Law Society Rule 1987* were identified as restrictions on practice:

- rule 79 which requires a practitioner carrying on business under a business name to indicate in that name that the business carried on is a legal practice;
- rule 84 which prevents a practitioner borrowing from or being guaranteed by a client;
- rule 85 which prevents a practitioner from acting for both parties to a mortgage;
- rule 86 which prevents a practitioner borrowing from or being guaranteed by a client; and
- rules 87 and 87A which impose restrictions on how solicitors conduct their mortgage practices that do not apply to other market participants in such practices (eg. fidelity insurance).

Nature of restriction: The rules place restrictions on the manner of a practitioner's legal practice which may add to the costs of the business or prevent the practitioner from providing some services.

Objective: The purpose of the professional conduct rules is to ensure that appropriate professional standards are maintained and the public are protected from unprofessional or unethical behaviour.

Options: The review considered retention or possible abolition of the specified rules.

Assessment: Except for rule 79, the specified rules were not considered to be significant restrictions on competition but were aimed at reducing or eliminating conflicts of interest in the conduct of the solicitor's practice.

COMPLAINTS AND DISCIPLINE

Recommendation 23

A co-regulatory approach apply to the regulation of the profession.

Provisions: Various in *Queensland Law Society Act 1952.*

Restriction: The Queensland Law Society has the statutory responsibility for regulating the solicitors' stream of the profession including:

- the issuing practising certificates (and enforcing professional indemnity insurance requirements);
- the investigation of complaints and prosecution of disciplinary proceedings;
- the management of the fidelity fund; and
- making the professional conduct rules.

The Legal Ombudsman monitors the complaints and disciplinary processes but has limited powers and resources where the position is only part-time.

Under other review recommendations, a practising certificate regime and statutory complaints and disciplinary processes would be newly introduced for barristers.

Nature of restriction: The cost of these processes to the extent that they are met through practising certificate fees may affect the costs of practice and, indirectly, legal services.

Objective: The objectives of the regulatory framework are to achieve consumer protection and maintain professional standards for the facilitation of justice.

Options: The following options were considered:

- self-regulation by the profession;
- co-regulation; and
- regulation by an independent statutory body.

Assessment: The review examined:

- the current co-regulatory New South Wales model (where independence has been brought to the complaints and disciplinary process through the establishment of the Office of the Legal Services Commissioner);
- the enhancements to the Queensland regime announced by the Queensland Government in December 2000 which included:
  - enhancing the powers and resources of the Legal Ombudsman (including giving the Legal Ombudsman the power to investigate complaints) and giving the Legal Ombudsman a more strategic role in his oversight of the complaints and disciplinary regime;
  - making the professional bodies more accountable for their complaints and disciplinary functions. in particular, in the areas of client service; and
  - providing greater independence for the new Disciplinary Tribunal which would hear professional conduct charges against solicitors and barristers and would be headed by a Supreme Court Judge.

The review noted the establishment of a Client Relations Centre by the Queensland Law Society to assist in the resolution of solicitor/client disputes.

For an independent regulator model, the review examined the regulatory framework outlined in the 1999 Green Paper. It also considered the co-regulatory approach recommended in the review of the Regulation of the Victorian Legal Profession by Sallman & Wright under which a regulator, with an independent Board, would be responsible for issuing practising certificates and receiving all complaints against lawyers (dealing with consumer disputes and referring most conduct matters to the professional bodies for investigation).

The review noted the potential for the credibility and efficiency of the regulatory system to be undermined if the complaint and disciplinary processes are not sufficiently robust.

It found the following deficiencies under the current Queensland complaints and disciplinary regime:

- the need for greater independence in the investigation of complaints and associated disciplinary processes;
- the absence of complaints and disciplinary processes for barristers;

- dissatisfaction with the Queensland Law Society's handling of complaints against solicitors; and
- dissatisfaction with the composition of the Solicitors Complaints Tribunal which has a majority of professional members.

The principles for assessing complaint-handling against lawyers adopted by COAG were applied under the assessment.

It was concluded that:

- self-regulation would lack independence and transparency and would have the potential to operate for furthering the interests of the profession;
- an independent regulator would risk alienating the profession and inducing poor compliance with rules developed without the ownership of the profession;
- the current complaints and disciplinary processes suffer from perceptions that they are biased to lawyers and lack transparency and accountability; and
- there was little difference in practical effect between any models and little difference in cost, although the independent model would be more expensive.

Recommendation 24

Enhancements to the complaints and disciplinary processes as announced by the Queensland Government in December 2000 which included:
(a) a statutory complaints and disciplinary regime for barristers;
(b) strengthening the powers and resources of the Legal Ombudsman to give the Legal Ombudsman the power to investigate complaints and adopt a more strategic role in relation to the complaints and disciplinary system; and
(c) a disciplinary tribunal headed by a Supreme Court Judge for greater independence and accountability,
be implemented

Assessment: The review concluded that the December 2000 proposals should be implemented combining greater independence from the profession and scrutiny while still allowing the profession to play an active role in the regulation of its members.

It noted that the December 2000 proposals will only be able to be effectively evaluated when the legislation and the supportive administrative arrangements and protocols were detailed.

Where the proposed enhancements would:

- more clearly specify the responsibilities of the professional bodies;
- expand the powers and resources for the Legal Ombudsman to monitor and investigate complaints; and
- provide for the Legal Practice Tribunal to be headed by a Supreme Court Judge,

the review was satisfied the proposals would be positively assessed against the COAG principles.

Update: The Government has announced its proposals for more independent, accountable and transparent complaints and disciplinary processes for lawyers.

The key elements of the reforms are:

- a new Legal Services Commissioner, with an independent investigative capacity, to deal with all complaints;
- a new Legal Practice Tribunal, chaired by a Supreme Court Judge;
- a new Legal Practice Board; and
- a public register to record any findings of professional misconduct.

Barristers will be subject to the same accountability measures as all other members of the profession.

The Legal Services Commissioner will be the first contact for those with concerns about the actions or behaviour of a lawyer. All outcomes of investigations will be monitored by the Legal Services Commissioner. If there is a need, the Commissioner will also be able to call upon the existing investigative capacity of the Queensland Law Society or the Bar Association.

Serious matters that could involve a lawyer being struck off or suspended will be heard by the Legal Practice Tribunal. The Commissioner will be able to refer less serious charges of unsatisfactory professional conduct to the Legal Practice Board, which will comprise a mix of solicitors, barristers and lay members.

TRUST ACCOUNT REQUIREMENTS

Recommendation 25

The provisions relating to the audit of solicitors' trust accounts should be located in the *Trust Accounts Act 1973.*

Recommendation 26

Under the Trust Accounts Act, the Queensland Law Society would have the power to appoint auditors of solicitors' trust accounts, although the Minister would also have the right to do so.

Recommendation 27

The extension of the $10,000 bond requirement to solicitors should be subject to a review of the effectiveness of that requirement as a safeguard in the event of misappropriation and the exemption policy for the security bond requirement as it applies to the accounting profession.

Provisions: Sections 31-36 *Queensland Law Society Act 1952*

Restriction: Solicitors and accountants are permitted to operate trust accounts under the *Trust Accounts Act 1973* (TAA) which specifies a range of procedural matters for the depositing and receipting of trust funds. Sections 31-36 under the *Queensland Law Society Act 1952* (QLSA) are additional requirements.

- Under section 31, the Society can appoint an accountant or employee of the Society to audit a practitioner's accounts.
- Section 33 provides for when the report of an auditor of a trust account may not be accepted. This is already provided for in the TAA.
- Section 34 bans solicitors from auditing trust accounts. The TAA sets out the qualifications for auditors.

- Section 35 provides for who is to pay the audit fee in default by the practitioner (the Fidelity Fund). The TAA provides for payment by the regulator.

Nature of Restriction: The trust account and audit requirements are restrictions on practice.

Objective: The review found that the provisions relating to the audit of trust accounts serve the objective of consumer protection.

Option: The review considered whether the additional trust account requirements provisions in the *Queensland Law Society Act 1952* were necessary.

Assessment: The review found that the auditing of trust accounts brings significant benefits to consumers and that the costs associated with such auditing are justified. However, the provisions of the TAA and the *Queensland Law Society Act* are similar and the additional provisions in the *Queensland Law Society Act* are unnecessary.

The review concluded that there was no reason to expect that auditors of the Society or a statutory body (as supervising entity for solicitors' trust accounts under the TAA), would not do this job conscientiously, whether or not the Fidelity Fund is continued.

The Minister should have the power to direct an audit of a solicitor's trust account.

The exemption from the $10,000 bond (which may apply to accountants) under the TAA may give solicitors a competitive advantage over accountants. However, the extension of the $10,000 bond requirement to solicitors should be subject to a review of the effectiveness of that requirement as a safeguard in the event of misappropriation and the exemption policy for the security bond requirement as it applies to the accounting profession.

Update: Uniform trust account provisions for legal practitioners are being developed as part of the SCAG national model laws Bill.

PROFESSIONAL INDEMNITY INSURANCE

Recommendation 28

The issue of a practising certificate to be conditional on minimum standards of professional indemnity insurance cover for solicitors and barristers, respectively.

Recommendation 29

For solicitors:

(a) The current master policy arrangements would be retained under transitional arrangements for a period of two years.
(b) Following that, solicitors would be free to purchase insurance from suppliers of their choice, subject to meeting minimum standards of cover.

(*Barristers will be free to purchase insurance from suppliers of their choice or to participate in any master policy negotiated collectively from the introduction of the requirement of mandatory insurance.)*

Provision: *Queensland Law Society (Indemnity) Rule 1987.*

Restriction:

- The Queensland Law Society has the power to take out a master policy in respect of the professional indemnity insurance for practitioners.
- The insurance must be for $500,000 per claim (or such greater amount as the Council may require, currently $1.1M) and is subject to such premiums, premium contributions, excesses and deductibles as the Council may determine.
- The Council can fix different amounts of premiums and premium contributions for different classes of practitioners.
- Practitioners are required to have insurance under the master policy unless the Council approves that they take out other insurance. A practitioner must have a certificate of insurance from the Council to obtain a practising certificate. The Rule applies to practitioners who are principals in private practice in Queensland.
- The Society can exempt practitioners from the Rule including where they do not maintain an office in Queensland or conduct private practice in another State/Territory where they hold cover under a compulsory professional indemnity insurance scheme.
- Practitioners must pay an administration levy and any levy for the purposes of the Law Claims Levy Fund. The Fund is available to meet costs of investigating or defending a claim against a practitioner, meeting the master policy or other professional indemnity insurance premium and administrative expenses.
- The Society can determine the deductibles payable by a practitioner or class of practitioner. The Council can appoint a supervising practitioner to inspect and report on the files and office systems of an assured practitioner.
- Breach of the rule can give rise to proceedings for professional misconduct (section 5A(7) of the *Queensland Law Society Act 1952)*.

Nature of restriction: The restrictions involve two issues - mandatory insurance and monopoly of supply. Depending on the required level of insurance, the restriction could constitute a barrier to entry. Small and part-time practitioners may be unable to obtain insurance at a price they can afford. As an ongoing cost, insurance can affect the price of legal services and competition with non-lawyers who are not required to have that insurance. To the extent that premiums do not fully reflect the risk, solicitors with better performance will subsidise those with worse performance and the incentives for the worst performing solicitors to leave the industry will be reduced.

Objective: The objective of the professional indemnity insurance requirement is to ensure that consumers can obtain financial redress where professional negligence or incompetence is proven and harm has resulted.

Options: The review explored the following options:

- status quo: compulsory insurance and monopoly supply;
- compulsory insurance and competitive supply;
- voluntary indemnity insurance.

Assessment: Restrictions in this area can impose costs to the extent that they affect the decisions of practitioners in relation to the purchase of professional indemnity insurance, the amount of the insurance that they would otherwise take out and from whom they would purchase the insurance.

These requirements are not imposed on many other professions. However, many lawyers providing these services willingly take out the cover as a sensible precaution against the risk of

substantial claims. Larger bodies may self insure, although this is not common. The level of indemnity required will vary with the nature of legal services and value of transactions to which the legal services are applied. The risk profile of practitioners will also differ. A rational decision based on these considerations may be to not take out insurance or to take out less than the current minimum cover.

In a competitive market, low risk practitioners would pay lower premiums and high risk would pay higher premiums than under a master policy model. The review found that a competitive insurance market better reduces the risks facing consumers of legal services by reducing the aggregate level of risk by not insuring the highest risks (forcing them to exit the market) and providing incentives for those insured to reduce their risks.

The review noted the arguments in favour of the master policy as:

- automatic run off cover even though a practitioner may have ceased to practise;
- details of profession and claims history helps in negotiating premium and for the purposes of risk management and loss prevention;
- the master policy gives wider coverage than would ordinarily be available;
- greater purchasing power; and
- all solicitors are able to access insurance and none are left to the vagaries of the insurance market.

However, it found these arguments to be questionable where:

- run-off cover is available in competitive markets;
- the current arrangement may contribute to a greater risk of claims (in that, under a competitive insurance model, if solicitors were at risk of losing their practising certificate they may be more client-focussed and adopt risk management strategies);
- the benefits of purchasing power are not evident where premiums in Queensland have been very high compared with some other States.

The review acknowledged the state of the insurance market following September 11, the demise of FAI and HIH and the contraction in the market following the tightening by APRA of the prudential standards for insurers, the departure of the Queensland Law Society's main professional indemnity insurer and current Government reviews of the increased cost of public liability and professional indemnity insurance cover.

The review concluded:

- There is a case for mandating that solicitors take out professional indemnity insurance. Where most solicitors would choose to do so in absence of compulsion, the added cost would only apply to those who would otherwise opt not to take out insurance. Therefore, compulsion would have a negligible impact on fees.
- Under a voluntary scheme, high-risk solicitors may not insure because of the prohibitively high premiums but may not leave the market.
- If high risk solicitors can be forced to leave the market, the aggregate risk to consumers and the cost of insurance premiums for remaining solicitors is reduced.
- A compulsory scheme with competitive supply will deliver lower premiums than a master policy and will reduce risk to consumers.
- The current minimum level of cover should be increased from $1.1M to $1.5M (to bring it in to line with most other States).

- The current monopoly arrangements for the Queensland Law Society master policy should be abolished.

Under other recommendations, barristers would be newly required to apply for a practising certificate in order to practise. Similar considerations would apply in respect of the requirement of professional indemnity insurance as a condition for the issue of a barrister's practising certificate.

Update: The professional indemnity insurance arrangements for lawyers are under consideration as part of the SCAG national model laws Bill.

CLIENT AGREEMENTS

Recommendation 30

The requirement for client agreement between solicitors and client should be maintained.

Recommendation 31

Enhancements should be considered to make client agreements more user-friendly for both solicitors and clients and maximise their benefits and minimise their costs.

Provision: Section 48 of the *Queensland Law Society Act 1952.*

Restriction: Solicitors are required to make a written agreement with the client specifying the work to be done and the fees and costs payable by the client in accordance with the matters specified in the Schedule to the Act. Exempted from the requirement are urgent work, work for a maximum fee less than $750 and cases of clients who are public companies, government departments etc. In the absence of a client agreement, solicitors are restricted to charging according to the court scale or an amount assessed as reasonable by a cost assessor.

Nature of restriction: The restriction imposes a restriction on the manner in which solicitors can contract with clients. Failure to comply with the restriction can result in practitioners not being able to charge their usual market rates but only according to the scales of costs (if applicable) or an amount assessed to be reasonable where there is no scale.

Objective: The objective of the requirement is to reduce the "information asymmetry" problem placing customers in a better position to negotiate fee arrangements and make informed choices about whether to pursue a matter and as to which lawyer to engage. It would also reduce the cost of disputes between solicitors and clients over fees.

Options: The review considered the options of:

- no client agreement requirements;
- the status quo;
- a modified status quo (excluding further classes of sophisticated client, simplifying agreements in some areas, better information where small amounts of work are involved, ensuring that where changes are made to estimates the practitioner is acting reasonably); and
- making comparative price information available to consumers (as a supplement to the above options).

Assessment: The review acknowledged the difficulty in providing meaningful comparative price information given the wide range of circumstances involved in legal matters. The review concluded in favour of the requirement for client agreements on the basis that they are likely to provide greater certainty to clients and involve minimal cost to practitioners over and above the information that they would provide voluntarily to clients. Where concern has been expressed that client agreements are too complex and in need of simplification, the review recommended that, where possible, simplification be explored.

COST ASSESSMENTS

Recommendation 32

Cost assessors (private or court-employed) be under the supervision of the Supreme Court.

Provision: Part 4B of the *Queensland Law Society Act 1952*

Restriction: A client who wishes to dispute solicitor client costs can apply for the appointment of a cost assessor. Cost assessors are appointed by the Solicitors Complaints Tribunal. A client may not apply for an assessment of costs where the client agreement is for a lump sum. Having applied for the appointment of a cost assessor, the client may not subsequently challenge the validity or enforceability of the agreement. Unless the bill is reduced by 15% or more as a result of the assessment, the client must pay the cost assessor's fee. The need for cost assessments can also arise in actions for recovery of fees and complaints to the Society that a practitioner has overcharged a client.

Provision: Rule 18A of the *Queensland Law Society (Solicitors Complaints Tribunal) Rule 1997*

Restriction: The rule sets out the qualifications for cost assessors. Under the rule, the cost assessor for the tribunal must be:

- a solicitor who has been in actual practice for at least 5 years; or
- a person who has practised as a cost assessor for at least 5 years; or
- a person the tribunal considers has appropriate experience to be a cost assessor for the Tribunal.

Nature of restriction: The cost assessment process could restrict competition if it interfered with market prices or if inconsistent assessments by different assessors interfered with competition among practitioners.

Objective: The objective of the provision is to provide an independent mechanism for quickly resolving cost disputes between clients and solicitors without going to court.

Options: The review considered the options of:

- status quo with cost assessors appointed by the Solicitors Complaints Tribunal;
- abolish the cost dispute process and rely on court action; and
- court-employed cost assessors with possible enhancements to address specific concerns.

Assessment: The review did not favour abolishing the cost dispute process and instead relying on court action. Court action would be more expensive and would result in referral by the court to some intermediate process such as mediation anyway. The review found that, in practice,

cost assessments are not a significant competition issue as most disputes are resolved without utilising this process.

Whether the process is supervised by the Court or a disciplinary tribunal was not identified as a major competition policy issue and would not affect the benefits derived from providing the method of resolving disputes. The review noted that court-employed cost assessors would restore faith in the independence, integrity, consistency and competence of those conducting the assessments. The use of case appraisers by the Court was noted as an option for addressing criticisms of the use of court employed assessors for more complex commercial matters.

Update: The Government has decided to return responsibility for cost assessments to Court taxing officers.

SCALES OF COSTS

Recommendation 34

That the scales of costs be retained.

Recommendation 35

The extent of itemisation under the scales should be reviewed for simplification.

Recommendation 36

The quantum of the current scales be reviewed on an ongoing basis to ensure that they reflect the market for legal services.

Provisions: *Uniform Civil Procedure Rules* and section 48 of the *Queensland Law Society Act 1952*

Restriction: The scales of party and party costs for the Supreme Court, District Court and Magistrates Court are set out in the *Uniform Civil Procedure Rules* which are made as Rules of Court and approved as subordinate legislation. Under a client agreement, practitioners are required to provide clients with a copy of any applicable scale. In the absence of a client agreement, practitioners are restricted to charging the applicable scale or an amount assessed as reasonable by a cost assessor.

Objective: The scales provide a fair and reasonable basis for determining party and party costs. In this way, the restriction has implications for the objectives of consumer protection, compensation and the facilitation of justice.

Options: The review considered the options of:

- maintaining the current scales;
- no scales; and
- maintaining the scales on a simplified basis.

Assessment: Scales of costs may establish an effective floor price for services and discourage price competition between suppliers to the detriment of the consumer. The extent of the restriction depends on the method for determining scales. Cost plus approaches give little incentive to improve efficiency and, if based on time and items, may lead in the long run to over-servicing and inefficiency. The scales do not affect the fees that can be negotiated between

solicitors and their clients and therefore have little implication for competition. If the scales depart significantly from market fees, they may introduce distortions (in the absence of a client agreement) if used to determine reasonable fees.

The shortcomings of a "no scale" approach are the cost and time in determining party and party costs on a case by case basis and a lack of guidance in these matters. The scales would not be adequate for providing consumers with information about reasonable bases for charging for legal services. The review noted the view of practitioners that the current scales are too low and complex.

The review concluded that the scales serve a purpose and involve minimum, if any, restriction on competition. The review concluded that the scales of costs be maintained and that simplification and regular updating to keep scales consistent with market determined fees would retain the benefits of the scales at little additional cost.

Update: The scales are under review by the Rules Committee.

FIDELITY FUND

Recommendation 37

The Fidelity Fund should be maintained.

Recommendation 38

The requirement that solicitors contribute and pay levies to the Fidelity Fund should be maintained.

Recommendation 39

The adequacy of the current cap be reviewed.

Recommendation 40

Consumers be informed of any cap on claims, for example, at the time of engagement and on trust account receipts.

Recommendation 41

The Queensland Law Society conduct a risk management review of the circumstances potentially giving rise to claims on the Fund and practices that could reduce or avert those claims.

Provisions: Part 3 of the *Queensland Law Society Act* and Part 7 of the *Legal Practitioners Act 1995*

Restriction: The Legal Practitioners' Fidelity Guarantee Fund reimburses persons who suffer pecuniary loss through stealing or fraudulent misappropriation of money or property entrusted to a solicitor. The Fund receives half of the interest from the Interest on Solicitors' Trust Accounts Account or the amount required to restore the fund to a balance of $5M, whichever is the lesser. The remainder is paid to Legal Aid. There is a cap on claims to $60,000 per practitioner but it has not been enforced in practice with practitioners being levied for the shortfall. Solicitors are required to make a small annual contribution to the Fund and the

Queensland Law Society can impose levies when the Fund is insufficient to satisfy its liabilities. Such amounts are required to be paid as a condition for the issue of a practising certificate.

Nature of Restriction: The requirement for solicitors to contribute to the Fidelity Fund increases the cost of their practices, a cost not borne by other professionals with whom they compete in providing legal services

Objective: The current arrangements have the dual objectives of compensating clients who suffer loss through fraud and promoting public confidence in the profession and its duties to clients.

Options: The review explored the following options:

- maintaining the status quo with contributions from the Fidelity Fund and practitioner contributions and levies subject to any of the following possible modifications:
  - removing the cap on the fund;
  - setting a realistic cap on claims;
  - ongoing levies until the Fidelity Fund builds to a sustainable level;
  - setting levies according to the risk profile of the type of practitioner;
  - allowing exemption on the basis that an approved category of employer excludes self from claiming on the fund;
  - broadening coverage of the Fund to require barristers and Government lawyers to contribute to the Fund;
- fidelity insurance as an alternative to the Fund; and
- no Fidelity Fund.

Assessment: Given the level of risk having regard to the mode of a barrister's practice (including the prohibition on the operation of trust accounts), barristers should not be required to contribute to the Fidelity Fund. Fidelity Fund cover is not needed for government employee solicitors. Contributions by Government lawyers would be a subsidy to private sector lawyers.

The review made the following observations on the cost of the restriction:

- the current annual cost of contributions to the Fidelity Fund ($20 contribution and $300 levy) are too small to significantly impact on costs, the price of legal services and therefore solicitors' ability to compete against other professions;
- solicitors' clients are the main contributors to the Fund through the contribution from interest on solicitors' trust accounts;
- based on the average claims history of the Fund, only a modest annual contribution (similar to the present level) would be required even if funding from that interest were not present;
- in respect of the exposure of practitioner in the event of extraordinary claims, the potential liability has been reduced by amendments in 1999 excluding investment claims; and
- the risk of high levies would also be reduced if the current cap were enforced. While the cap would provide a base level of claim for consumers (which could be supplemented by top up insurance), enforcing the cap could raise concerns that victims would not be able to obtain full compensation.

The following benefits of the restriction were identified:

- Given the nature of legal services, solicitors are entrusted with money and property where other professions may not (as executors of estates, assets held under powers of attorney, moneys held under undertakings, proceeds of court settlements, titles to property), sometimes by those who are vulnerable and cannot safeguard their own interests.

- In absence of the Fidelity Fund, the Government may need to consider further restrictions on practice in light of the potentially serious consequence for individual clients, for example, co-signatory requirements for estates and powers of attorney and a prohibition of receiving fees in advance into a trust account. The Fidelity Fund has an insurance role. Like other insurance it provides compensation in case of low risk of a significant financial loss.
- In terms of the insurance option, it makes no difference whether the solicitor or the client pays. However, there would be difficulties in making client insurance compulsory and without it the coverage would not be universal. The option of the profession managing the risk of the Fund through insurance was also considered with premiums for individual practitioners to take into account of risk factors.

The review noted one argument against the Fund and fidelity insurance requirement is that it is unfair for lawyers to bear the cost of the actions of their dishonest colleagues. Under this approach, it would be up to clients to pursue their remedy through the courts. However, history indicates that in most cases solicitors who have misappropriated funds do not have the resources to repay and that victims may not have the resources to pursue their claims through the court.

The views of those who sought the abolition of the Fund and the view that the profession should not be held responsible for the action of individual members over which they have no influence were noted. At the same time, the review acknowledged that there would be concerns among consumers if the Fund was abolished and that the level of contribution by practitioners is minor.

On balance, the review recommended that the requirement that solicitors contribute to the Fidelity Fund should be retained. The circumstances in which solicitors receive trust moneys distinguish them from other professional groups. Given the position of trust in which solicitors hold clients' money and property and where clients can be vulnerable to an abuse of that trust, some coverage of all practitioners at reasonable risk of misappropriation is justified.
Where all Australian jurisdictions require contribution to a fidelity fund, the review concluded that the future of fidelity funds should be addressed in the national legal practice project.

The contribution to the Fund from interest on solicitors' trust accounts is justified as analogous to an insurance contribution by clients whose funds are at risk.

There is little difference from a competition perspective whether the coverage is provided by insurance by the client or by the practitioner and passed on through increased legal fees. In light of possible gaps in coverage if left to consumers (those most vulnerable may not insure), universal coverage by practitioners is preferable.

It is a matter for commercial assessment whether the risk of the Fidelity Fund is best managed internally (balancing claims and contributions and levies) or through insurance. Given the relatively minor contribution that has been required of practitioners over time, contributions and levies should not impact on competition.

While, on average, the claims history has required only a small contribution by practitioners, the review acknowledged the concern of practitioners at the prospect of a single substantial levy in the event of an extraordinary claim. A more realistic cap on claims, as under the *Property Agents and Motor Dealers Act 2000* (ie, for non-marketeering matters - $200,000 per claim and $2M per practitioner*),* may be worthwhile considering. A cap would also ensure some level of fair sharing of the Fund as against it being exhausted by a single claim to the disadvantage of subsequent claims.

The review also recognises that the current cap on claims of $60,000 per practitioner and reliance on the Society to exercise discretion to exceed the cap does not give consumers certainty. The expectation that claims will be met in full based on the history of the fund may

provide consumers with a false sense of security. The public would also need to appreciate the significance of the cap. It is not a guarantee. Whether claims are met in full would still depend on the volume of claims, the state of the Fund and the extent to which it is reasonable for practitioners to contribute. Disclosure options should be considered to ensure that consumers are properly informed. Consumers can also adopt strategies to minimise their risk. The review noted that, as a result of investment claims being excluded, there is now less chance of extraordinary claims.

Options for the cap would be for it to apply in each instance or only when the state of the Fund (taking into account the prospect of reasonable levies) requires it. Under any proposal to cap liability, it may be desirable for a discretion to reside for the cap to be exceeded in special cases (should the state of the Fund or reasonable levies allow).

The Queensland Law Society should conduct a risk management review of practices that could be implemented to reduce the risk of claims on the Fund.

ADVERTISING

Recommendation 42

The current restrictions which are limited to banning advertising which is false, misleading or deceptive should be maintained in the public interest.

Recommendation 43

Guidelines are legitimate for illustrating what "misleading and deceptive" means for legal sector advertising.

(This recommendation applies to solicitors' advertising generally. The Committee has not formed a view on the new restrictions on advertising in the Personal Injuries Proceedings Act 2002 noting that those restrictions would require their own PBT.)

Provision: Rule 80 of the *Queensland Law Society Rule 1987*

Restriction: A solicitor practitioner who advertises or promotes the practitioner's expertise in a way that:

- is false misleading or deceptive;
- would contravene the *Fair Trading Act 1989*; or
- if done by a corporation would contravene the *Trade Practices Act 1974 (Cth*),

commits professional misconduct.

Nature of Restriction: The restriction places limits on the manner in which practitioners can advertise their services and their fees which accords with their obligations under fair trading legislation.

Objective: The objective of this restriction is to protect the consumer from misinformation and false or deceptive conduct.

Options: The following alternatives were considered:

- maintain the status quo;
- other strategies directed at consumer education and cost agreements to address the public concerns on no win no fee advertising; and
- targeted rules that provide clear guidance to assist practitioners in avoiding practices that are likely to be false or contrary to the public interest.

Assessment: The current restrictions which are limited to banning advertising, that is false, misleading or deceptive, to be justified in the public interest.

Update: The *Personal Injuries Proceedings Act 2002* places restrictions on advertising by solicitors of personal injuries legal services. Such advertising can now only state the name of the solicitor or firm and contact details with information about any area of practice or specialty of the solicitor or firm. It must also be by an approved publication method. Advertising of such services on a no win no fee or other speculative basis is prohibited.

The Act also prevents solicitors from attracting business through intermediaries such as hospital staff.

The following alternatives were considered:

1 Maintain status quo: A practitioner who advertises or promotes the practitioner's expertise in a way that:

   - is false misleading or deceptive;
   - would contravene the Fair Trading Act 1989; or
   - if done by a corporation would contravene the *Trade Practices Act 1974* (Cth),

   commits professional misconduct.

2 Rely on legal advice that "no-win, no-fee advertising" is misleading and deceptive and will constitute a breach of the conduct rules in the absence of a full costs indemnity being given by the solicitor to the client. (Despite practitioners being notified of this advice, there is no evidence that they restricted their "no win no fee" advertising.)

3 Rely on the Australian Plaintiff Lawyers Association voluntary code of conduct which specifically addresses soliciting at times of trauma or distress or in a manner which is likely to offend or distress and the visiting of accident scenes for solicitation. (The Code applies to Association members and, not all plaintiff legal firms are members.)

4 Rely on the existing provisions in the *Criminal Code Act 1899* prohibiting the payment of secret commissions. (The offence provision would not apply where the claimant discloses the payment of a commission.)

5 Allow solicitor advertising and touting to continue and accept further increases in insurance premiums as necessary to accommodate increasing numbers of claims.

The following community benefits of the new measures were identified

- *Insured:* Maintains affordability of the insurance and diminishes the risk of insurers pricing on over estimating claims liabilities.
- *Injured Parties:* Promotes environment where unfettered common law scheme can continue.

- *Insurers:* Greater level of certainty in premium pricing which decreases the risk in underwriting the product and hence less capital exposure.
- *Lawyers:* Lawyers can continue to advertise the fact that they provide personal injury services.

These benefits were considered to outweigh the following community costs:

- *Injured parties:* Any restrictions on marketing could result in injured parties not being apprised of their rights to compensation. (However, solicitors will still be able to advertise that they offer personal injury services).
- *Lawyers*: May have a reduction in business as a result.

FINANCIAL ARRANGEMENTS

Recommendation 44

Interest on solicitors' trust accounts be collected by the Department of Justice and Attorney-General and continue to be available for specified public purposes as at present, namely, Legal Aid, the Supreme Court Library and contribution to the costs of the Fidelity Fund and regulating the legal profession not according to prescribed percentages but on a rigorous budgetary basis, overseen by the Government, based on need.

Recommendation 45

The interest should not be available for funding private Queensland Law Society member services such as library and publications and continuing legal education.

Recommendation 46

Improvements to the current arrangements for the payment of interest on solicitors trust accounts be explored including the possibility of simpler arrangements for the payment of interest which would not involve payments into a deposit account, combining interest from the Interest on Trust Accounts Account and the General Trust Account Contribution Fund and improving the accountability for the allocation of public moneys.

Provision: Part 7 of the *Legal Practitioners Act 1995.*

Restriction: Two-thirds of the lowest annual balance of each solicitor's trust account is deposited to the Interest on Trust Accounts Account (ITAA). Financial institutions pay interest at retail rates on these deposits. The Legal Practitioners' Fidelity Guarantee Fund receives half of the interest from the ITAA or the amount required to restore the Fund to a balance of $5M, whichever is the lesser. The remainder is paid to Legal Aid. The Queensland Law Society deducts its regulatory expenses from the Legal Practitioners' Fidelity Guarantee Fund.

Financial institutions pay interest on an *ex gratia* basis on moneys remaining in solicitors' trust accounts after the ITAA. This interest is paid into the General Trust Accounts Contribution Fund (GTACF) which is distributed by statute, as follows:

Legal Aid Queensland	75%
Supreme Court Library	10%
QLS Contributions Distribution Account	10%
Grants Fund	5%

The moneys received by the Queensland Law Society from the GTACF can be used for a purpose approved by the Minister including continuing legal education.

Nature of Restriction: The deposit of moneys from solicitors' trust accounts to the ITAA is a minor administrative requirement.

Objective: The requirement is directed at maximising interest raised on the trust account funds.

Options: The following options were considered:

- returning the interest to clients whose moneys are held in trust accounts; or
- should that option not be feasible, the possibility of simpler arrangements for the payment of interest which would not involve payments into a deposit account, would combine interest from the ITAA and the GTACF and would improve the accountability for the allocation of public moneys.

Assessment: If feasible, interest paid on clients' funds in solicitors' trust accounts should be credited to the client. However, if the amount of a client's funds or the period for which they are to be held make it worthwhile, they could be transferred to an interest-bearing investment account and it is common practice for this to occur.

Further, moneys paid into a solicitor's trust account are also not analogous to the client banking the money and being paid interest. For example, fees in advance would usually be paid into the account by the client with no prospect of return. Advance payments under contracts with other service suppliers do not normally result in the payment of interest to the purchaser of services. In other cases, clients' money is held on a temporary basis pending the deduction of disbursements.

Given valuable contribution that revenue from interest on solicitors' trust accounts makes to a range of public purposes, there would need to be some certainty that revenue of an order foregone would in fact be returned to clients before changes to the current arrangements were proposed.

There are a number of reasons to suspect that this might not occur including that: solicitors might opt for non-interest bearing cheque accounts to avoid having to allocate small amounts of interest to individual client ledgers; transactions costs; without pooling a high interest may not be paid; and if not available for public purposes, there would be no motivation for Government to legislatively approve and administer such pooling. There would be public concern that significant revenue foregone for public purposes was instead reallocated to financial institutions and solicitors.

As to the use of the interest:

- Some contribution of the interest to the Fidelity Fund as appropriate as a source of revenue from the client group potentially affected by misappropriation.
- As a general principle, if possible, the Queensland Law Society should meet the regulatory costs for the solicitors' stream of the profession from its own resources. At the same time, the Committee acknowledges that legal practitioners are, unlike most other professions, subject to statute based complaints and disciplinary processes which it is important be adequately funded. The Committee does not oppose some level of contribution to those regulatory costs subject to proper budgetary analysis.
- Interest on solicitors' trust accounts are used for public purposes in all other States and Territories and in the USA.

- The indirect public funding of the regulation of the legal profession and the Fidelity Fund has been criticised as discriminating over other market participants whose professional/industry regulation is self-funded.
- Even if that use of funds can be justified in the public interest, moneys deducted for regulatory purposes are not the subject of independent rigorous budgetary analysis. The level of funding deducted by the Queensland Law Society for regulatory purposes impacts on the need for Fidelity Fund levies and funding available for other purposes including Legal Aid.

Update: The Government's announced legal profession reforms include taking control of interest on solicitors' trust accounts from the Queensland Law Society.