

Legal practitioners in New South Wales

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Concepts such as a “single legal practitioner” and certification or registration of lawyers emerged recently at regular intervals from government circles and the Law Society of South Africa. A brief look at comparable jurisdictions abroad may shed some light on the effect that the possible introduction of these concepts may have on the South African situation and more specifically the Bar. As will appear from the following, the legal profession in NSW has successfully integrated these concepts in the legal system, without altering their basic structure.

Developments since 1990

In 1993 the Legal Profession Reform Act 87 of 1993 was passed by the New South Wales Parliament. The Act recognised the right of the Bar Council to make rules with respect to practice as a barrister. In terms of the Act:

- any inherent power or jurisdiction of the supreme court to admit persons as barristers and solicitors, was revoked;
- a Legal Practitioners’ Admission Board (LPAB) was constituted;
- the LPAB was given the power to admit and enrol natural persons as legal practitioners.

Legal practice

In terms of the Act a legal practitioner cannot practise as a barrister or solicitor without holding a current practising certificate. A legal practitioner may elect to practise as a barrister or a solicitor and is entitled to be issued with a practising certificate as either. It is important to note that a legal practitioner may not simultaneously hold valid practising certificates as barrister and solicitor.

The Bar Council is the issuing authority in relation to barristers’ practising certificates and the Law Society is the issuing authority in relation to solicitors’ practising

certificates.

The Act empowers a Bar Council to attach conditions to practising certificates provided they are of a kind authorised by the Act. It also stipulates that a legal practitioner, who is the holder of a current practising certificate, must comply with the conditions to which the certificate is subject.

The Act also empowers the Bar Council to attach certain conditions to the practising certificate of a barrister. A practising certificate can also be made subject to a condition which requires the holder to undertake and complete one or more courses of continuing legal education.

The executive officer of the Legal Practitioners Admission Board says that the law societies of the different states require a solicitor to undertake or complete one or more courses of continuing legal education, as well as having his trust account audited, before his current practising certificate is renewed. At present this condition does not apply to members of the particular Bars of the different states in Australia. A certificate (including that of a barrister) is renewed annually.

A council (including a Bar Council) may refuse to issue, and may even cancel or suspend a practising certificate if, in the opinion of the council, the holder failed to comply with a condition attached to the certificate. Should a council (including a Bar Council) refuse to issue a practising certificate or a certificate of a kind applied for, or attach a condition, or vary a condition attached to a practising certificate or cancel or suspend a certificate, the applicant or holder of such a certificate may appeal to the Supreme Court. The Supreme Court may then make an order as it deems fit.

Control

It appears from the Act and the NSW Barristers Rules that a Bar Council not only



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controls the limited practice of a person in pupillage, but also the practice of all practising barristers within a particular state. After all, a legal practitioner cannot practise as a barrister or solicitor without holding a current practising certificate. This control is strengthened by the fact that the Legal Profession Act now requires a council to keep, in such form as it thinks fit, a register of legal practitioners to whom it has issued current practising certificates.

The Rules provide that before admission as a legal practitioner it is now necessary for a person to undertake an accredited practical legal training course as a precondition to admission as a legal practitioner. This in general comprises a *fifteen week* course and a further *sixty six hours* of practical training as well as a *twenty four week* period of practical experience. One possible form of practical experience is experience *in* the chambers of practising barristers. The practical legal training course is presented by the College of Law (run by the Law Society) or other accredited institutions in New South Wales such as for instance the University of Wollongong.

Although, in theory, the difference between barristers and solicitors has been done away with by the introduction of an entity known as a “legal practitioner”, the difference for all practical purposes still exists. One can after all not hold a certificate as a solicitor and as a barrister at the same time. Furthermore, practitioners are

still known as either barristers or solicitors and they are subject to the control of different bodies, namely, the Law Society or a particular Bar.

Advantages


This fusion, as one might call it, does have advantages for the Bar. Qualification as a barrister has now become an additional and, it has to be said, a higher qualification to that of a solicitor. A prospective practitioner in NSW, after completion of the practical legal training course, and after having done a management practice course which includes office management and bookkeeping, is entitled to apply for a practising certificate as a solicitor. However, once a person has qualified as a legal practitioner, he or she still has to write the admission examination to the Bar and,

if successful, apply to a Bar to do the four week full-time course (the Bar Practice Course) which is followed by an additional eleven months of pupillage with one or more barristers (tutors of no less than seven years standing). The pupillage comprises twelve months in total.

The developments in New South Wales raise interesting questions with regard to South Africa. For instance, we know that people start practising as advocates (eg the so-called *criminal bar* and the *alternative* or *independent advocates*) without being members of a particular Bar and without having done any form of pupillage. Is this a desirable development or should the various Bars in South Africa also insist on the right of controlling the activities of all advocates, including those of non-members, by is-

suing certificates and insisting on some form of examination prior to commencement of practice?

The fact that there are different rolls, different registration certificates and different controlling bodies for solicitors and barristers in NSW, seems to underline the fact that the Law Society and the Bar represent two distinct professions offering services to the public according to the unique expertise of their members. These two professions are alive and well, despite the introduction of a "Single Legal Practitioner" in NSW.

Therefore, anomalous as it may seem, the introduction of a legal practitioner in South Africa may well have the effect of entrenching the Bar as a recognised and fully fledged referral profession in South Africa. 

Fusion of the legal profession

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As a result of many challenges and problems besetting the legal profession, there is a growing voice for the Bar and the attorneys' profession to be fused. It is argued that this will result in cutting legal costs, provide access to justice, and ensure uniform training and regulation. (See "Minister foresees single practising profession" 1999 August *De Rebus* 10; Discussion paper on transformation of the legal profession issued for circulation by the Policy Unit of the Department of Justice and Constitutional Development.)

In my view fusion of the profession is not an answer to the challenges facing the profession. The South African legal profession is not the only one debating the issue of fusion. In England solicitors now have the rights of audience before every court in relation to all proceedings. However, many solicitors have not yet applied for the rights of audience in the higher court. Recent studies by the University of Bristol, University of Westminster and the Whittington Working Party Report for the City of London Solicitors

Company revealed that:

- the vast majority of solicitors have no intention of applying for higher court rights of audience;
- the present division between the functions of barristers and solicitors operate satisfactorily for most solicitors because the Bar provides a generally efficient service of specialists at cost-effective rates;
- the demands of regular practice as an advocate are seen by most solicitors as inconsistent with litigation practice with its client demands and time pressures; and
- most solicitors regard higher court advocacy as uneconomical. (See Dan Brennan QC "Bar United-V-Solicitors Wanderers" 1999 April *Counsel* 3.)

That is the British experience, but what about South Africa where attorneys could also apply for the rights of audience in the higher court? If a study similar to the British one is undertaken in South Africa, what would be the results? I am convinced beyond a shadow of doubt that the results would be similar. Consequently I



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believe that the Bar should remain a referral profession and nothing else. Any attempt to interfere with this would sow seeds of confusion within the legal fraternity. One is, however, not totally opposed to the idea of some form of regulation, especially of the "independent advocates" practising at the moment outside the profession. However, any regulation should be kept to a bare minimum (see Seth Nthai "Advocates' ethics: a need for reform"? 1999 June *Consultus* 27). 