

reform

A regular bulletin of law reform news, views and information
Australian Law Reform Commission, Box 3708, G.P.O., Sydney, 2001, Australia
Editor: Mr. Justice Kirby

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Lawyers Under Fire

"Laws are like spiders' webs, which stand firm when a light, yielding object falls upon them, while a larger thing breaks through them and escapes."

Solon, circa 560 B.C.

The lead story in a recent issue of the U.S. *Judges' Journal* was "Why Litigants Hate Lawyers" by W. B. Lawless. It reports that the Chairman of the New York Stock Exchange told members of the State Bar Association that law firms "ought to go public" and offer investors a chance to invest in the "litigation boom". He described corporate legal practice as "one of the nation's most consistent growth industries". The "runaway costs of litigation" are ascribed to

"an over-zealous effort on the part of the Bar to prepare cases for trial with the precision of a moon-shot and elaborateness of a Metropolitan Opera production".

The soul-searching so common in the United States was stepped up last year following criticism of the legal profession by President Carter and Chief Justice Burger. The Presi-

dent criticised the growing tendency to submit every dispute to court-room resolution in an "over-lawyered society". The Chief Justice attacked the quality of performance of the American trial lawyer and the absence of continuing legal education programs to keep pace with exponential developments of the law.

In Britain a Royal Commission on Legal Services established by the Labour Government will now report to a new Administration. In Australia, the major re-examination of the legal profession in New South Wales is being conducted by the N.S.W. Law Reform Commission, headed by Mr. Justice Wootten of the Supreme Court of N.S.W. The Commission released its first discussion papers on 26 April 1979. The result has been a controversy, sometimes bitter.

The two papers released are:

D.P. 1 *The Legal Profession: General Regulation, 1979*

D.P. 2 *The Legal Profession: Complaints, Discipline and Professional Standards, 1979.*

In D.P. 1, the N.S.W.L.R.C. points out that, once licensed, lawyers enjoy a monopoly of extensive classes of legal work. Until now most decisions on the general regulation of the profession have been made by lawyers' own professional associations or by other bodies consisting exclusively of lawyers. The Commission suggests that the touchstone of regulation should be the public interest. The resolution of conflicts should not be left to professionals alone. According to the Commission, an independent regulatory body would be the best instrument for achieving satisfactory professional regulation. But effective public participation in such a body was necessary to ensure adequate communication between the professionals and the community. In the light of this approach the N.S.W.L.R.C. recommended the appointment of two bodies

- *A Legal Profession Council*: of 21 members, 11 to be elected by the practising profession. The balance would include one representative elected by law schools, 5 by the Community Committee on Legal Services, 1 nominated by the Commissioner for Consumer Affairs, 1 by the Attorney-General and 1 lay member nominated by the Legal Services Commission. The possibility of a judicial member is raised.
- *A Community Committee on Legal Services*: This would be an independent body and have up to 31 members nominated by various consumer, ethnic, trade union and other groups. Its functions would be to respond to consumer aspects of the administration of justice. A similar proposal for district boards was made recently by the Royal Commission on the Courts in New Zealand. An additional proposed function of the Committee is of interest to law reformers. "Law Reform Commissions are frequently disappointed by the small amount of discussion which their proposals evoke, even when their potential impact on the general community is considerable. This may be because most laymen are daunted by technical legal questions. The Committee would have some accumulated expertise in legal matters, and might often be a useful sounding board and source of ideas for, and critic of the Law Reform Commissions." (D.P.1, 193)

The Discussion Paper on *Complaints, Disci-*

pline and Professional Standards makes depressing reading. It examines the current means by which the N.S.W. Law Society (for solicitors) and the Bar Association (for barristers) presently investigate complaints against their members. It criticises

- excessive reluctance to take action
- inaction on complaints of delay and negligence
- unhelpful attitudes to complainants
- "perfunctory" investigation of many complaints
- excessive sympathy for and leniency to solicitors.

The Discussion Paper urges the need for a new discipline system, common to solicitors and barristers. It suggests that the proposed Legal Profession Council, which includes non-lawyers, should take over from "self-regulation". It calls for the appointment of a Director of Professional Standards and the creation, by statute, of a new Professional Standards Board and a Disciplinary Tribunal. Serious breaches would constitute "reprehensible conduct" would be dealt with by the Tribunal. Other failures termed "unsatisfactory conduct" would be dealt with by the Board. The latter would comprise six lawyers and three non-lawyers.

Before producing its Report, the N.S.W. Commission examined half of the 2,592 complaints against N.S.W. solicitors received by the Law Society between 1974 and 1976. Of the 1,296 investigated, it was found that 1,235 did not go beyond the Legal Department of the Law Society. The Discussion Paper devotes thirty pages to reporting files in which it claims a bias was shown towards solicitors. In one case a Supreme Court Judge had suggested that a solicitor had received certain money and used it contrary to instructions. The Judge accepted the complainant's version of the matter both on the basis of personal assessment and because it "accord(ed) with the probabilities". But before the Committee of the Law Society, it was held that "I myself would have doubt that a solicitor would make such a statement and I would at least give [the solicitor], a fellow practitioner, the benefit of the doubt". The N.S.W.L.R.C. concludes

"[F]or a member of the Complaints Committee to say that he would give the benefit of the doubt to a fellow practitioner is, to us, little short of amazing."

There are many other examples.

Acting President of the N.S.W. Law Society, Mr. Allan Mitchell, is reported as describing the suggested reforms as "innovative and radical". He pointed out that although in the past five years there had been 10,000 complaints this "is a very small percentage of the 2 million legal transactions . . . that take place each year". The President of N.S.W. Bar, Mr. T. R. Morling, Q.C., criticised the proposals. He rejected loss of regulation of the Bar to one "overall body".

"One can be excused for seeing in this proposal a first step towards the destruction of the independent Bar as we know it, the basic purpose of which is the protection of the public."

The news media have run hot with comment and editorials. One Sydney barrister launched into the Discussion Papers thus

"[They] are . . . marked with inconsistencies, logical fallacies and gross ideological prejudices . . . A fearless and independent judiciary backed up by an equally fearless and independent Bar are real obstacles in their path as they seek to make us all helots on the socially-engineered Nirvana of their dreams . . . The reasoning which runs through the reports is to me the reasoning of bureaucratic socialism of an extreme kind . . . The handing over of the administration of justice to a bloated and expensive bureaucracy in the firm grip of academic dreamers and social revolutionaries." (*S.M.H.* 28 April)

On the other hand the N.S.W. Premier, Mr. N. K. Wran, Q.C., told a law graduation ceremony at the University of New South Wales that the public would not accept "special pleading" from lawyers. All professions, including the Law, were the product of massive public investment by governments and taxpayers

"Workers' compensation, third party insurance, conveyancing—ultimately these are all matters where the public foots the bill. These are all reasons, therefore, why the public will demand, and has the right to demand, a much greater degree of public accountability from our profession than ever before . . . It might be quite offensive for some of us to have the profession depicted as one of those industries where the consumer has any rights at all . . . The fact is, of course, that clients are consumers, and they have rights in that role as much as consumers of any product or service."

A member of the Law Consumers' Association described the barrister's attack as "an amalgam of puff, pomposity and abuse" demonstrating a "siege mentality" by barristers, in sharp contrast to the response of the solicitors' Law Society.

In the end, the reader of the Discussion Papers is taken back again and again to the cases of demonstrated injustice in the investigation and determination of client complaints against lawyers. True it is, most of these complaints are against solicitors. In respect of such complaints, the Discussion Papers present a powerful case for the need for reform. Bringing barristers and solicitors under the one system of regulation and complaints machinery has implications for the future of the "divided" legal profession in Australia going far beyond these initial papers. The legal profession and law reformers in Australia (and beyond) will be watching closely the ensuing debate and the further papers which the N.S.W.L.R.C. has promised.

Processing Law Reform

"It's alright to hesitate if you then go ahead."
Bertold Brecht,
The Good Woman of Setzuan, 1940.

In April 1979 the Australian Senate asked the Standing Committee on Constitutional and Legal Affairs to look into three questions relevant to law reform in Australia

- methods of ensuring A.L.R.C. proposals are implemented or processed
- machinery for collecting and assessing law reform proposals by judges, organisations, and others
- co-ordination of law reform effort in Australia.

The Committee tabled its Report on 10 May 1979 and put forward some bold suggestions. The Committee Chairman is Senator A. J. Missen (Lib., Vic.). Other members at the time of the report were Senators Evans, Hamer, Keefe, Puplick and Tate. The Committee was helped by Mr. John Goldring, Fellow in Law at the Canberra C.A.E.

The report analyses in detail the organisation of law reform in Australia at both a