From the President

Legal Profession Reform Bill 1993 (No 2)

The Legal Profession Reform Bill 1993 (No 2) passed through both chambers of the Parliament on Friday 19 November last. Its various provisions will become law on dates to be proclaimed.

The Legal Profession Bill (No 1) was first introduced into the Legislative Council by the Attorney-General on 16 September 1993. After the Attorney-General's speech, consideration of the Bill was adjourned and it did not return to the Council until 27 October 1993.

Between the dates referred to, and as a consequence of further consultation between the Bar Association, the Law Society and the Attorney-General, some sixty amendments were introduced into the Bill. Accordingly, a revamped Bill was introduced into the Council by the Attorney on 27 October 1993 as the Legal Profession Reform Bill (No 2).

Apart from some amendments proposed by the Bar Association which the Attorney accepted and which were incorporated into the No 2 Bill, there were six further amendments sought by the Association but which the Attorney-General rejected. In proposing those amendments, the concern was to limit them to what was the minimum necessary to protect the public interest and to ensure that a fair system was incorporated into the Bill with respect to the review of professional rules. In summary, the amendments proposed (and rejected) were as follows:

1. The co-advocacy provision (Section 38M) was to be amended by a requirement that it should not operate unless and until joint rules were in place so as to ensure that it was not misused or abused by some solicitors who might regard its passing as being for their own (as distinct from their clients) financial benefit;
2. The power of the Attorney-General to disallow professional rules on the basis that they imposed restrictive or anti-competitive practices which were not in the public interest (Section 57(I)) was to be amended by providing for a full right of appeal to the Supreme Court;
3. The constitution of the Advisory Council (Section 58(3)) was to be amended so as to provide for the Chief Justice or his nominee to be the Chairperson and the lay members of the Council to be appointed by the Chief Justice and the selection of the nominees of the professional bodies being the sole prerogative of those bodies rather than of the Attorney, chosen from a panel of five nominated by those bodies;
4. Section 37 was to be amended by reinstating the power which currently exists under the Legal Profession Act of the Bar Council to refuse, suspend or cancel a practising certificate to any person who does not intend to or is not practising as a barrister during the period covered by the certificate;
5. The Legal Practitioners Admission Board (Section 10) was to be amended so as to ensure that the judges constituted a majority of its members (as is the present case with each of the Barristers' and Solicitors' Admissions Boards);
6. The right to form a partnership with a person who is neither a barrister nor a solicitor (that is, with anyone), (Section 48G), was to be deleted upon the basis that such partnerships would increase costs and/or would entitle a legal practitioner to be in partnership with a person who was not subject to the same professional rules or disciplinary regime as that practitioner. Apart from the foregoing, the Bar Council was prepared to accept the Bill in the form presented. The Bill has been shaped as a consequence of extensive negotiations and consultation between representatives of the Bar Council and representatives of the Attorney-General including, from time to time, the Attorney-General himself.

A Position Paper was prepared by the Bar Council with respect to the six amendments to the Bill sought by the Bar Association which included the precise form of the amendments sought. Sadly, these amendments were not supported by the Law Society.

The Position Paper was presented to the shadow Attorney-General, each of the Independents in the Legislative Assembly, each of the Democrats and the Reverend Fred Nile in the Legislative Council. It was also provided to Mr Gerry Peacocke MP and Mr Joe Shipp MP, who had indicated support for the Bar's proposals. The matters in the Position Paper were addressed by the Council's representatives at length in numerous conferences with those politicians in order that there was a full and complete understanding of the purpose of the proposed amendments. Regrettably, our amendments failed to obtain decisive support in either House of Parliament. Amendment number 5 supra (Legal Admissions Board) was moved in the Legislative Council and defeated on the casting vote of the presiding Officer. Amendments 2 and 3 supra were moved by Mr Nile and defeated by Government members. Opposition members abstained after the amendment on the Legal Admissions Board was defeated.

None of the Bar's amendments were taken up in the Legislative Assembly, either by the Opposition or the

Independents. The Bill, with minor amendments from passage through the Council, was moved in the Assembly by the Premier. The Opposition and the Independents submitted amendments. The Bar provided a detailed response to an Opposition amendment which sought to apply, without any relevant modification, the provisions of the Trade Practices Act to the legal profession.

This amendment was also opposed by the Government and on 12 November the Attorney wrote to all members to that effect. The Law Society also strongly opposed this amendment. The Labor Council and several major unions also recorded their concerns about the ramifications of this proposal.

Our response made the point that while some of the anti-competitive prohibitions contained within the Trade Practices Act could be applied to the legal profession, to apply the whole of the provisions of that Act without adaptation and without consultation was both inappropriate and bad government. This position was strongly and publicly supported by the Chief Justice of New South Wales, the Solicitor-General of New South Wales, the President of the Law Council of Australia and the Law Society of New South Wales.

Our representations to MPs highlighted that this amendment would preempt one of the major tasks of the recently appointed Sackville Committee, which is to determine the extent and manner of application of the Trade Practices Act to the legal profession.

On 18 November, the Government circulated its own trade practices type provision which was more appropriately drafted than the earlier version. At about this time, Parliament was awash with rumours that, following negotiations with the Independents, the Bar and the Law Society had agreed to support the initial trade practices amendment. Shortly after midnight on 19 November, the Premier was informed that any such rumour was entirely wrong. At that point, the Premier advised the Senior Vice-President that the Government would not now support the trade practices amendment they had circulated or the earlier version.

The Premier indicated that he hoped to have the support of the Independents for the withdrawal of the amendment if the Government and the professional bodies agreed to co-operate in preparing a set of trade practices type provisions for insertion in the Act in the New Year. This proposal was accepted and confirmed in writing to the Premier on the morning of 19 November. The proposal was also accepted by the Law Society.

This proposal, however, found no favour with the Independents. The Government sponsored amendment was moved by Mr Hatton with the support of the other Independents and the Opposition. Other amendments moved by the Independents and the Opposition were also passed, including a provision which subjects Supreme Court practice notes to disallowance by either House of Parliament. Neither the Supreme Court nor the legal profession were favoured with notice of this proposal.

Following the Report of the Sackville Committee in March 1994, is is highly probable that uniform national provisions for the application of the Trade Practices Act to the legal profession will be implemented. The Bar, in co-operation with the Law Society, will make submissions to the Sackville Committee and the New South Wales Government on the issues stated in the letter to the Premier on 19 November. In this way, the unintentional consequences and other anomolies contrary to the public interest may be erased from the present legislation.

A comprehensive overview of the new legislation is in course of preparation and will be distributed to all members as soon as it is available.

The Bar will submit its rules which are in the process of being revamped in light of the new Act, to the Advisory Council as provided for in the new legislation. We will also seek to make a full presentation about these rules to the Advisory Council when that Council begins its deliberations. The Bar Council, as with the Association's membership, firmly believes that, subject to some updating and codification, the present Bar Rules as to practice are not contrary to any anti-competitive principles and are not contrary to the public interest. Our rules promote an efficient legal profession centrally focused on the administration of justice and the protection of client's interests. The integrity and independence of Barristers, as "Servants of all, yet of none", is critical to freedom and justice in our community, and shall remain our fundamental commitment. ❑ M H Tobias QC