Justifying the New South Wales Legal Profession 1976 to 1997

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I. Introduction

In 1976 the New South Wales (NSW) Law Reform Commission received terms of reference from then Attorney-General, Frank Walker, to inquire into the structure, organisation and regulation of the legal profession. In the twenty-one years since the inquiry began, a barrage of national and state inquiries, reports and reform proposals have challenged NSW lawyers to justify and adjust their regulation, organisation and practices to meet community expectations. Among the diverse criticisms of the high cost and low accessibility of lawyers, their restrictive practices and gender bias runs a consistent concern that the profession has not contributed as it should have to the practice of justice in Australian democracy.

While each Australian state jurisdiction introduced significant reform to their professions during the 1970s, 1980s and 1990s,[1] the NSW profession has sustained the most consistent and detailed attention and has also been the most closely researched state profession. It is also the largest state profession.[2] This paper outlines and evaluates the reforms to the NSW legal profession of the last 21 years by asking to what extent

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1 See Clarkson Committee, *Inquiry into the Future Organisation of the Legal Profession in Western Australia: Report*, Perth: Government Printer, 1983; G Craven, *Reforming the Legal Profession: Report of the Attorney-General's Working Party on the Legal Profession*, Victoria: Department of Justice, 1995; G Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, Ryde: Law Book Company Information Services, 1996 pp 11—12; Government of South Australia *A White Paper: The Legal Profession*, 1992; *Legal Practice Act* 1996 (Vic); S Ross *Ethics in Law*, Sydney: Butterworths, 1998 pp 72-83.

2 In 1996 there were over 13000 lawyers admitted to practice in NSW compared with approximately 8000 in Victoria, the next most populous state (figures from Law Council of Australia, March 1996).

community and state concerns have been met. Critics often assume that the legal profession can only be improved by abolishing self-regulation.[3] The evidence from NSW shows that improvements in the competitiveness and consumer orientation of the profession have been achieved by increasing the permeability of professional government to community and state concerns without abandoning self-regulation. However, the NSW profession is not yet responsive enough to legitimate concerns about its consumer service and competitiveness, while gender issues and excessive adversarialism have barely been addressed. The challenge is now to develop better ways of ensuring accountability from profession to community so that we no longer have to rely regularly on expensive and inefficient government inquiries and reform commission reports.

Section II begins by setting out the historical tradition of legal professional self-regulation and showing how it made the profession vulnerable to community and state challenge in the 1970s. Section III identifies the major themes of challenge and reform that have buffeted the NSW profession since the pinnacle of self-regulation was reached. Section IV uses the available empirical evidence to evaluate whether the resultant reforms have addressed the substantive concerns of state and community. Section V makes further proposals about how the self-regulation of the profession might be made more accountable and open to community and state concerns.

II. The Pinnacle of Self-Regulation

Traditionally, the structure, organisation and regulation of legal practice in common law countries was governed by the professional associations of barristers and solicitors without community or state interference. This tradition derives from the practice of English barristers who, from at least the end of the 15th century, were self-regulated by the strict hierarchies of Inns of Court where students, barristers and benchers lived together.[4] The other branch of the English profession—solicitors and attorneys—did not organise themselves into a professional association until the 18th century when they formed the Society of Gentlemen Practitioners in the Courts of Law and Equity and, in the 19th century, the Incorporated Law Society.[5] These societies were formed in a direct attempt to emulate the success of the Inns of Court at inculcating common standards of professional conduct and ethics through self-regulation.

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[3] For example, R Abel, "Between Market and State: The Legal Profession in Turmoil," (1989) 52 *Modern Law Review* 285.

[4] See J Disney, P Redmond, J Basten, & S Ross, *Lawyers*, Sydney: Law Book Company, 1986 p 6 and R Pound, *The Lawyer from Antiquity to Modern Times*, St Paul, Minnesota: West Publishing Co, 1953 pp 82ff.

[5] W Holdsworth, *A History of English Law Vol VI*, London: Methuen & Co, 1937 p443.

Self-regulation and the privileges that went with it were a gradual and precarious attainment for English solicitors. It took the whole of the 19th century and the first third of the twentieth to achieve:[6] In 1804 English solicitors bargained Prime Minister Pitt into granting them a monopoly over conveyancing to stop them protesting increased stamp duties on both their practising licenses and written conveyances.[7] By 1888, the *Solicitors Act* gave the Law Society's disciplinary committee the power to hear disciplinary matters and in 1919 it was given the power to exercise all the disciplinary powers over solicitors previously exercised by the court. The *Solicitors Act* of 1933 brought English solicitors full self-regulation by giving the Law Society power to make rules about keeping separate accounts for clients, and also to make rules about any other matter of professional practice, conduct and discipline of solicitors.[8]

The regulatory regimes that governed Australian lawyers over the same period mirrored the English developments. In 1828 the Supreme Court was granted powers of admission and regulation over the NSW legal profession.[9] The members of the Sydney Law Library Society established in 1842 decided in 1843 to form the NSW Law Society and similar societies formed in 1862 and 1872 with the purpose of pursuing ethical self-regulation. In 1884 the Incorporated Law Institute of NSW was established and later became known as the Law Society of NSW. It first acquired statutory powers of regulation in 1935 as a result of amendments to the *Legal Practitioners Act (NSW) 1898* and gained substantial powers comparable to those of the English Law Society by 1941.[10]

At the pinnacle of legal professional self-regulation in Australia, the law societies, including the Law Society of NSW, promulgated and enforced standards of professional conduct, investigated and prosecuted complaints, and provided the disciplinary tribunals to hear charges. They also decided on qualifications for admission, issued practising certificates, policed compliance with trust account rules and administered fidelity funds and insurance schemes.[11] Although the NSW Supreme Court officially exercised all regulatory authority over barristers until 1987, in practice it left day-to-day discipline and decisions on admission to the Bar Association, so that the intervention of the court was only necessary when the Bar Council wanted to use formal sanctions of disbarment or

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6 See A Paterson, "Professionalism and the Legal Services Market" (1996) 3 *International Journal of the Legal Profession* 137.

7 B Abel-Smith & R Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750–1965*, London: Heinemann, 1967 p23.

8 Abel-Smith & Stevens above at 187-192.

9 D Weisbrot, *Australian Lawyers*, Melbourne: Longman Cheshire, 1990 p 166.

10 New South Wales Law Reform Commission, *The Legal Profession: Discussion Paper No. 1: General Regulation*, Sydney: New South Wales Law Reform Commission, 1979 p 43. See R McQueen, "The Law Institute of Victoria 1885–1930—'A very powerful and far reaching trade union'" (1993) *University of Manitoba Canadian Legal History Project Working Paper Series* for a description of the politics of obtaining legal self-regulation in Australia.

11 Disney *et al* 1986 above n 4 at 37–38.

suspension from practice.[12]

For the better part of the twentieth century the NSW legal profession, the state and the community appeared to co-exist in a blissful relationship in which the profession claimed it ought to be trusted to self-regulate, and state and community accepted its right and ability to do so. As late as 1966 the NSW Law Society asked the recently established Law Reform Commission to abolish the category of licensed lay conveyancers, to strengthen solicitors' monopolies, and to give the Society greater regulatory powers to investigate trust accounts and financial affairs of solicitors. Legislation duly followed in 1967.[13]

During this time it was thought that self-regulation was particularly suited to the government of professions as communities of experts in crucial bodies of civic knowledge.[14] For lawyers, self-regulation was justified by their special responsibility for providing legal justice to the community. Since only lawyers were responsible for and learned in the law, it was thought that only their own associations could ensure they were suitably trained and certified to interpret, develop, improve and practically apply the law for the benefit of community. If they failed to serve the public interest by delivering a just legal system, the privilege of self-regulation would be taken away by the State. Thus self-regulation was seen as the product of a social bargain between profession and state in which the profession self-regulated in the public interest on pain of having their privileges removed.[15] This arrangement also allowed the profession to remain independent so that lawyers could defend individuals against the state where necessary without bias or fear of reprisal.

III. Two Decades of Challenge

The self-regulatory project inherited by Australian lawyers had been conceived in the middle of the 19th century at a time when the state was much less interventionist in its regulatory policy, and the community less demanding in its expectation of dynamic democratic involvement in

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[12] The Barristers Admissions Board was formed in 1848 and governed the conditions of admission to the Bar. It consisted of the judges of the Supreme Court, the Attorney General and 2 barristers: New South Wales Law Reform Commission above n 10 at 36-39.

[13] D Weisbrot, "Competition, Cooperation and Legal Change" (1993) 4 *Legal Education Review* 1 at 2.

[14] See for example T Parsons, "A Sociologist Looks at the Legal Profession" in T Parsons, *Essays in Sociological Theory*, Illinois: Free Press 1954, 370 at 381. Parsons was the pre-eminent sociological theorist of self-regulation of the time.

[15] See R Dingwall, & P Fenn, "'A Respectable Profession'? Sociological and Economic Perspectives on the Regulation of Professional Services" (1987) 7 *International Review of Law & Economics* 51, for a contemporary restatement of this view.

"private governments" than they are today.[16] By the 1970s professional self-regulation appeared to be an unjustifiably statist bargain that was undemocratic in its incapacity to countenance community concerns about access to justice, consumer service, controlling costs and gender bias. The government was supposed to have bargained as surrogate for the community, but the bargain was too static in its delegation of regulatory power to professional associations to solve day to day problems in the way the profession served the community. The profession became vulnerable to government intervention and community criticism.

The first (and perhaps most compelling) challenge to the self-regulatory bargain came in the early 1970s with the widespread recognition that lawyers' justice was not available, affordable or accessible to the poor and the disadvantaged. The private profession was criticised from without by the reformist Whitlam government and by the Commission of Inquiry into Poverty as it expanded to examine the legal system.[17] It was challenged from within by a rapidly growing movement of activist lawyers influenced by the welfarist new left politics of the day.[18] Virtually overnight Attorney-General Lionel Murphy established a national Legal Aid Office staffed by salaried lawyers, while radical lawyers worked with community groups and churches to establish "grass-roots" community legal centres. The mainstream profession reacted conservatively to both developments realising that they set a precedent for active government and community involvement in a profession that had previously been left to its own devices.[19]

The lawyers' fears were borne out: throughout the 1970s, 1980s and 1990s the legal profession was criticised by state and community for its failure to live up to its side of the self-regulatory bargain through its,

- lack of consumer orientation,
- restrictive and anti-competitive practices, and,
- gender bias.

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[16] See M Brazier, J Lovecy, M Moran, & M Potton, "Falling From a Tightrope: Doctors and Lawyers Between the Market and the State" (1993) 41 *Political Studies* 197 at 198. See C Tuohy "Private Government, Property, and Professionalism" (1976) IX(4) *Canadian Journal of Political Science* 668, for a conception of professions as private governments.

[17] See M Cass & R Sackville *Legal Needs of the Poor: Commission of Inquiry into Poverty: Law and Poverty Series*, Canberra: Australian Government Publishing Service, 1975.

[18] See J Basten, R Graycar, & D Neal, "Legal Centres in Australia" (1985) 7 Law & Policy 113; J Chesterman, *Poverty Law and Social Change: The Story of the Fitzroy Legal Service*, Melbourne: Melbourne University Press, 1996. See also S Ross, *The Politics of Law Reform*, Ringwood: Penguin Books, 1982, pp 43-53.

[19] See S Tomsen, "Professionalism and State Engagement: Lawyers and Legal Aid Policy in Australia in the 1970s and 1980s" (1992) 28 *The Australian and New Zealand Journal of Sociology* 307 for an account of the profession's reaction to the establishment of the Australian Legal Aid Office. See K Bell, "The Politics of Reforming the Legal Profession in Australia: A Case Study" (1985) 3 *Law In Context* 1, for an account of a struggle in suburban Melbourne between the private profession and radical lawyers intent on setting up a poverty law practice.

A 20 year reform process has coaxed, cajoled and often forced the NSW profession into significant reforms. While community involvement and state intervention through initiatives such as microeconomic reform, command and control regulation and independent regulators have increased, self-regulatory elements have not been completely jettisoned.

The Consumer Critique

In the midst of consciousness raising over lawyers' lack of concern for the poor, the NSW Law Reform Commission began its long and truly tortuous inquiry into legal professional regulation; an inquiry that lasted from 1976 until 1984 and provoked great resistance from the profession and dissension within it, particularly between barristers and solicitors.[20] For the first time in the profession's history minute attention was paid to every aspect of its workings from an external perspective. The Commission concluded that NSW lawyers had been immune to the consumer rights revolution and systematically failed to operate in a way oriented to the needs and concerns of their clients. However it took an extraordinarily long time to achieve consumer-oriented reform: Australian legal consumers are a diffuse and unorganised group dependent on government reformers to articulate and act on their concerns and at the mercy of politics to keep reform on the agenda.

The NSW Law Reform Commission found that the structure and organisation of the profession institutionalised restrictive practices that made legal services unduly expensive.[21] Individual lawyers were often uninformative and unhelpful to clients, particularly in explaining their billing practices, and showed insensitivity to client needs. The way the profession regulated itself and disciplined its members completely failed to address the issues that most frequently concerned clients. Delay and negligence were the most common causes of dissatisfaction with lawyers, along with poor communication and problems with charging.[22]

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[20] See Disney *et al* above n 4 at 210-227 and Weisbrot above n 9 at 183-185 for accounts of the inquiry and its effects.

[21] Such practices included requirements that clients could only hire a barrister by hiring a solicitor first; that if they hired a Queens Counsel (QC) they must also hire a junior barrister at two thirds the QC's fee; that lawyers were prohibited from using advertising to inform clients of their fees or the services they offered; that qualified conveyancers could not compete with lawyers; that solicitors' costs were governed by a scale of fees and it was prohibited to charge less than the scale fee

[22] New South Wales Law Reform Commission *The Legal Profession: Background Paper III*, Sydney: New South Wales Law Reform Commission, 1980; Weisbrot above n 9 at 210 shows that across all common law countries there is a consistent pattern of numerous complaints about delay, incompetence, overcharging and discourtesy while "the professional associations themselves focus on intraprofessional complaints (such as unfair attraction of business), practice by unauthorised persons (in breach of legal monopolies) and financial misconduct".

However the self-regulatory bodies used a disciplinary model of complaint handling that focused on fraud and dishonesty and were frequently unhelpful to complainants and clients:[23] Almost all of the eighty-two NSW solicitors struck off between 1968 and 1982 were disciplined for committing trust account breaches, a matter which accounted for only 2 percent of the complaints to the Law Society.[24]

In early discussion papers the Law Reform Commission made radical proposals for the reform of the profession by abolishing all restrictive practices, fusing the profession, taking away all self-regulatory functions and vesting them in an independent body that would be only partially composed of lawyers.[25] These early proposals met strong resistance from the profession and government support for radical change also faded with a change of Attorney-Generals. Julian Disney, principal investigator for the Law Reform Commission, negotiated with the Law Society and in 1982 the Commission's final recommendations were much less radical than earlier proposals. However the dialogue had also changed some Law Society attitudes: In July 1981 it introduced lay representation to its disciplinary tribunal and in its submissions to the Commission also adopted policies of common admission for barristers and solicitors, the inclusion of lay members on council, introduction of a public council on legal services and a new complaints and disciplinary system.[26]

The Law Reform Commission recommended that regulatory and complaint handling for the profession should remain self-regulatory but with the involvement of lay representatives and a more streamlined and professional process that would be more independent of the councils of the professional associations. (Ironically part of the implementation of this reform meant officially giving self-regulatory powers to the Bar Association for the first time.) A majority non-lawyer body, the Public Council on Legal Services should be established to monitor professional regulation but would only be able to advise the Attorney General; it would have no powers of its own. Practitioners should be admitted to both branches of the profession and distinctions between barristers and solicitors be eliminated to the extent possible although practising certificates would continue to be separate and the Bar Council should ease restrictive practices at the Bar.[27]

The recommended reforms, including the fusion of the profession, were about to be implemented with Law Society support in 1984 when the

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[23] New South Wales Law Reform Commission, *Second Report on the Legal Profession: Complaints, Discipline and Professional Standards*, Sydney: Government Printer 1982 p 20.

[24] Weisbrot above n 9 at 204.

[25] New South Wales Law Reform Commission, *The Legal Profession: Discussion Paper No. 1: General Regulation*, Sydney: New South Wales Law Reform Commission, 1979.

[26] Weisbrot above n 9 at 184. Surveys showed that between 1976 and 1979 NSW solicitors had changed their views to favour lay representation under the influence of the debate stimulated by the Law Reform Commission: Weisbrot above n 9 at 204-205.

[27] Weisbrot above n 9 at 184.

Attorney General, Paul Landa died.[28] In the absence of a strong legal consumer lobby, the proposed changes faded from government priority until May 1987 when a new state government finally enacted the *Legal Profession Act* 1987. It implemented the lay representation recommendations and the new complaints and disciplinary process but not the more radical proposals concerning fusion of the profession and abolition of restrictive practices. For the first time members of the community gained a (very small) opportunity to have their voices heard in the daily operation of the profession through lay representation. Some of the more obvious restrictive practices among solicitors were reformed later: In 1991 the Law Society relaxed its prohibition on advertising, allowing advertising as long as it could not "reasonably be expected to bring the profession into disrepute".[29] In 1992 the *Conveyancers Licensing Act 1992 (NSW)* removed the solicitors monopoly on conveyancing by allowing licensed lay conveyancers.[30] Many more of the Commission's 1982 recommendations were not implemented at all.

In 1989 the federal Trade Practices Commission (TPC; which later became the Australian Competition and Consumer Commission) announced an inquiry into the Australian legal profession's compliance with competition policy (see below). The threat of federal reform and regulation of state professions through the TPC prompted a number of state governments to announce their own reviews of the profession. By 1993 the NSW Law Reform Commission was again studying the profession at the request of the Attorney General.[31] It commissioned a Morgan poll of what people expected of lawyers, developed a set of best practice principles for complaint handling and replicated their earlier review of client complaints and how they were handled. Nothing had improved. Consumer complaints of delay, negligence and poor quality work were still at the top of the list, with poor communication not far behind and they were still not being adequately handled.[32]

This time the Commission made much more radical proposals for improving the consumer-orientation of the profession's complaints handling.[33] The centrepiece of the report was a recommendation to introduce an independent Legal Services Ombudsman to receive all formal complaints against solicitors and barristers, and then refer them to the Law Society or Bar Association for investigation and disciplinary action. The Ombudsman would monitor the handling of the complaints by these bodies and retain the power to investigate complaints itself or take over

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[28] S Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia*, Sydney: Butterworths, 1995 p 58.

[29] *Legal Profession Regulations* (NSW) Clause 20

[30] Now the *Conveyancers Licensing Act 1995* (NSW).

[31] In late 1992 the NSW Attorney General published an issues paper raising reform to the profession again and referred the matter to the Law Reform Commission: Weisbrot above n 13 at 7.

[32] New South Wales Law Reform Commission *Scrutiny of the Legal Profession: Complaints Against Lawyers: Report 70*, Sydney: New South Wales Law Reform Commission, 1993 p 39.

the investigation where necessary. A new independent Legal Services Tribunal for both branches of the profession would also be introduced to hear disciplinary matters. A distinction would be made between consumer-type disputes and disciplinary matters with greater emphasis on consensual dispute resolution, arbitration and compensation in the case of consumer disputes, functions that the Ombudsman would pursue.

In late May 1993 the Government released a policy statement adopting most of the Law Reform Commission's recommendations and the *Legal Profession Reform Act 1993* came into operation in July 1994. It not only introduced the Office of the Legal Services Commissioner to act as the "legal services ombudsman", it also broke down a number of restrictive practices that had been identified as against the public interest in the 1970s and 1980s and introduced other important consumer protection provisions. It deregulated fees by abolishing fee scales and required lawyers to disclose to clients their fees and basis for charging upfront. It also encouraged them to enter into written costs agreements.[34] It provided that the competition provisions of the Commonwealth *Trade Practices Act* would apply to the NSW legal profession and gave the Attorney-General the power to exempt rules in the public interest.[35] In this round of reforms, the Legal Profession Advisory Council (recommended back in 1982) was finally put into operation to advise the Attorney General on the rules and practices of the profession (including whether they are anti-competitive) and any proposed regulations put to it by the Attorney General.[36]

Micro-Economic Policy Rules

With the TPC's 1989 decision to review the legal profession came a much greater focus on its restrictive and anti-competitive practices. By 1993 the reform of the legal profession had become part of a wider national competition policy agenda because of the *Hilmer Report* which identified the professions, especially lawyers, as representing a significant gap in the implementation of micro-economic reform.[37] Both the TPC and Hilmer concluded that:

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[33] As above.

[34] It allowed the professional associations to authorise multi-disciplinary practices and profit sharing between lawyers and other professionals and also abolished the remaining restrictions on lawyers ability to advertise.

[35] This was an attempt to circumvent the possibility of the federal Trade Practices Commission being given a role in regulating the state profession.

[36] ss 57H, 58, 59 *Legal Profession Act* (NSW) 1987: The Attorney General has the power to declare any rule promulgated by the professional associations inoperative if the Advisory Council finds it imposes restrictive or anti-competitive practices that are not in the public interest.

[37] F Hilmer, M Rayner, & G Taperell, *National Competition Policy (The Hilmer Report)*, Canberra: Australian Government Publishing Service, 1993 pp 133—137.

> "The Australian legal profession is heavily over-regulated and in urgent need of comprehensive reform ... and those regulations combine to impose substantial restrictions on the commercial conduct of lawyers and on the extent to which lawyers are free to compete with each other for business. As a result, the current regulatory regime has adverse effects on the cost and efficiency of legal services and their prices to business and final consumers ... the principles of competition policy and law should be applied to the business and market activities of all legal practitioners in the same way as they apply to other business activities."[38]

The restrictive practices of the profession were now seen as not just an obstacle to consumer access to justice but also to the national and international competitiveness of Australian business. This galvanised both state governments and professions into reform for fear of a federal takeover of the regulation of lawyers. At the same time business consumers of legal services had already become more concerned about the cost and quality of legal services and were demanding better service. By March 1994 when the TPC's final report was released, the profession, or at least the solicitors who controlled the profession, had largely accepted the need to be responsive to competition policy.[39] In NSW the *Legal Profession Reform Act (1993)* had already applied the *Trade Practices Act* to the profession and begun to break down a number of restrictive practices.

In May 1994 the Access to Justice Advisory Committee (AJAC) published their *Action Plan* for reform to the legal system repeating the views of the TPC and Hilmer Committee on the legal profession.[40] But for AJAC the application of competition policy was just one in a string of reforms needed to improve the way the profession contributed to the Australian justice system. The critiques and reform proposals of the 1970s through to the early 1990s were seen as diverse and complementary ways of ensuring that lawyers lived up to the goal of helping members of the community achieve justice. Attention now turned to the profession's inability to do justice to its own members.

Women Speak Out

In 1971 women made up only 6% of Australian lawyers.[41] By 1993 in NSW they were 46% of those admitted to practice and 47% of law students.[42]

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[39] Trade Practices Commission *Study of the Professions: Legal: Final Report*, Canberra: Trade Practices Commission, 1994 pp 3—4.

[39] See below. A draft report had already been released in 1993.

[40] Trade Practices Commission above n 38 at 65—221.

[41] In New South Wales 6% of solicitors and 3% of barristers were women in 1975: Weisbrot above n 9 at 86.

[42] Keys Young, *Gender Bias and the Law: Women Working in the Legal Profession in NSW: Research on Gender Bias and Women Working in the Legal System*, Sydney: Department for Women, 1995.

Despite the fact that women now made up half of the profession, they were not progressing to the senior ranks.[43] Concerns were raised from within the profession by groups of women lawyers, and by the public. Governments had become more interventionist in their concern to remedy sexual discrimination through business regulation measures such as the Commonwealth *Affirmative Action (Equal Employment Opportunity for Women) Act,* and state anti-discrimination acts, but the profession had not been made accountable to equal opportunity concerns. In 1991 only twenty-two legal firms in Australia reported to the Director of Affirmative Action.[44]

In 1994 the Australian Law Reform Commission completed a large project on women's equality before the law and found that Australian women left the profession at a much higher rate than men and were clustered in the lower ranks, factors that could be explained by discrimination, sexual harassment, and structural and cultural barriers to equal participation in the legal workforce.[45] In 1993 the NSW Law Society's Equal Opportunity Committee produced a report showing similar results and its chair was removed from office three days later.[46]

In 1994 the NSW government tentatively intervened in the governance of the profession by hiring Keys Young consultants to undertake a statistical profile of women in the NSW profession and determine the extent of gender bias, barriers to equity and obstacles and opportunities for change.[47] The research found that in 1993 women held 60% of the legal positions in the community sector, 41% in government, 39% in legal academia and 38% in the corporate sector. They comprised only 23% of practitioners in private law firms, 10% of barristers (only 2% of Senior Counsel were women) and 8% of NSW judicial officers. They were

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[43] In all common law countries, women are still disadvantaged in terms of career advancement and finding jobs with flexibility to manage family care responsibilities: Canadian Bar Association Task Force on Gender Equality in the Legal Profession *Touchstones for Change: Equality, Diversity and Accountability*, The Canadian Bar Association, 1993; J Dixon & C Serron, "Stratification in the Legal Profession: Sex, Sector and Salary" (1995) 29 *Law & Society Review* 381; G Gatfield & A Gray, *Women Lawyers in New Zealand: A Survey of the Legal Profession*, 1993 Suffrage Centennial Project, 1993; J Hagan & F Kay *Gender in Practice: A Study of Lawyers' Lives*, New York: Oxford University Press, 1995.

[44] M Young, "Affirmative Action in the Legal Profession" 66 *Law Institute Journal* (1992) 1094 at 1095. The Australian Law Reform Commission *Discussion Paper 54 Equality Before the Law*, Commonwealth of Australia, 1993 p 77, refers to an unpublished study which evidenced minimal compliance with affirmative action legislation requirements among law firms in Victoria. But note that the legislation requires only those with 100 employees or more to report.

[45] Australian Law Reform Commission *Report No 69 Part II: Equality Before the Law: Womens Equality*, Sydney: Australian Law Reform Commission, 1994 para 9.1.

[46] M Thornton, *Dissonance and Distrust: Women in the Legal Profession*, Melbourne: Oxford University Press, 1996 p 215.

[47] As mentioned above, the Law Society of NSW had already published its own report on the progression of women solicitors through the profession, the rate at which they became partners and reasons for their continuing high attrition rate: *Getting Through the Door is Not Enough: An Examination of the Equal Employment Opportunity Response of the Legal Profession in the 1990s*, 1993.

disproportionately over-represented in the lower positions within private law firms, government, academia, the bar and the judiciary and were not reaching positions of seniority at rates proportionate to their numbers.[48]

The most disturbing finding was a comparison of women and men admitted to private practice in the same years which found that women had attained partnerships at much lower rates than men:

> "Of those admitted in 1991, only 5% of women had been made a partner by the end of 1994, compared with 15% of men. Among those admitted ten years ago, the gap was greatest: while the majority of male solicitors (60%) admitted in 1984 had attained partnership by 1994, only 22% of their female colleagues had been made a partner over the same time period."[49]

Women also earned considerably less than men: in 1991 only 10% of fulltime female law professionals earned over $70 000 compared with 41% of their male colleagues, while 64% of women earned less than $50 000 compared with 38% of men.[50] Various forms of gender bias that may have contributed to these outcomes were identified in a survey of women lawyers . In particular, one in five of the women interviewed claimed to have resigned or changed jobs as a result of sex discrimination or harassment.[51]

The Keys Young report identified the constraints and opportunities facing a variety of key actors and their capacity to effect change, and proposed 35 "actions for consideration". These included self-regulatory initiatives such as amending rules of professional conduct, affirmative action within the professional associations and gender equity education, as well as recommendations for initiatives by federal and state anti-discrimination agencies. The key actors responded positively to the report and their formal responses and commitments were published.[52] However, as I shall show below, their verbal commitments have not necessarily flowed into action.

IV. Are We There Yet?

By 1997 the NSW legal profession had been turned inside out by the scrutiny of reformers and researchers. What have two decades of challenge achieved? Is the profession more competitive, more consumer-

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[48] Department for Women & Keys Young Consultants, *Gender Bias and Women Working in the Legal Profession: Summary Report* Sydney, 1995 p2.

[49] As above at 4.

[50] As above at 9.

[51] As above at 11.

[52] Department for Women, *Response to Gender Bias and the Law: Women Working in the Legal Profession in NSW*, New South Wales Government, 1995.

oriented and fairer to women? The evidence in the following sections suggests that some improvements have been made to the performance of the NSW profession and that self-regulation is now much more permeable to community and state concerns and expectations than it was twenty-one years ago. But the profession is still far from responsive enough to community expectations.

A More Competitive Profession?

The threat of permanent federal governmental intervention in the regulation of state professions by giving, the TPC regulatory powers over the profession achieved significant de-regulation as judged by changes in the formal rules. The 1993 *Legal Profession Reform Act* (NSW) applied the competition principles of the *Trade Practices Act (CW)* 1974 to the NSW legal profession.[53] By 1996 a cooperative scheme of federal and state legislation applied the competition principles of the *Trade Practices Act* to all businesses throughout Australia including the professions.[54] A number of restrictive practices were abolished in NSW: Multi-disciplinary practices are allowed subject to certain restrictions,[55] clients may have direct access to barristers subject to restrictions,[56] QCs are no longer appointed by the Crown,[57] there is common admission to the profession for barristers and solicitors and common practising certificates, the two thirds rule has been abolished, and solicitors may act as advocates and as juniors for senior counsel,[58] contingent fee contracts are allowed,[59] restrictions on advertising have been lifted,[60] scale fees have been abolished and licensed conveyancers can compete with solicitors for conveyancing work.

The real test of reform is not changes in the rules, but changes in practice. All the indications are that competitiveness in the *commercial sector* has improved dramatically over the last twenty years: TPC and Hilmer Committee attention on the legal profession came after the 1980s boom and during a recession that made large firm lawyers realise they would have to become more competitive to survive anyway. Their corporate clients started requiring them to justify their bills and tender for work.

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53 ss38FA - 38FE *Legal Profession Act* (NSW) 1987.

54 *Competition Policy Reform Act 1995* (Cth) *and Competition Policy Reform (New South Wales) Act 1996* (and corresponding Acts in other states and territories): A Fels, "ACCC's View" in *Can the Professions Survive Under a National Competition Policy?* Australian Government Publishing Service (1997) 45; S Corones, "Solicitors Subject to Trade Practices Act" (1996) 16(6) *Proctor* 10.

55 ss48F, 48G, 48J *Legal Profession Act 1987.*

56 s38I *Legal Profession Act 1987,* Rules 74, 75, 80 *NSW Barristers' Rules.*

57 s38O *Legal Profession Act 1987.*

58 ss38N & 38M *Legal Profession Act 1987.*

59 ss186-188 *Legal Profession Act 1987.* Note that the amount to be paid to the legal practitioner cannot be calculated as a percentage of the amount recovered in proceedings.

60 s68J *Legal Profession Act 1987.*

Companies became much more willing to swap legal firms, use different firms for different tasks, employ inhouse counsel to do tasks at a fraction of the price external firms would have charged, and to use accountants and business advisers instead of lawyers.[61]

The mega-firms of solicitors with offices in several states are particularly supportive of competition reform. For these firms micro-economic reform became an opportunity to achieve some of the changes they already saw as necessary for them to improve their national market share and become more internationally competitive. It is in the interest of these firms to develop a national profession unhindered by state barriers so they can save money on practising certificates and avoid the cost of having to ensure compliance with differing rules in different jurisdictions.[62] It is also in their interests to break down the restrictive practices of the Bar so they can keep specialist advocates on their payroll and under their control.

The Law Council of Australia has thus driven the Council of Australian Governments micro-economic reform agenda for nationalisation of the profession by agreement between its constituent state legal professional associations.[63] NSW has passed model legislation, the *Legal Profession Amendment (National Practising Certificates) Act 1996* that allows mutual recognition of practising certificates so that there is no further need for dual practising certificates (and practising certificate fees).[64] Similarly the NSW *Professional Conduct and Practice Rules* have been adopted as a Model Code by the Law Council and are being adopted with local variations in most states. A national model code of trust account rules is also being developed.[65]

If the measure of success of micro-economic reform to the profession is greater national and international competitiveness of commercial solicitors' firms, then much has been achieved. The legal services market in the commercial sector is already competitive enough that it may be sufficient to leave it in the hands of the ACCC, the large law firms and their rival accounting firms to utilise the *Trade Practices Act* in the normal way to break down further restrictive practices. However if the measure of success for micro-economic reform is whether the profession has become competitive enough to deliver lower costs or better service to individual

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[61] See R Clifton-Steele, "Peak Bodies Tell the TPC the Legal Profession is Already Most Competitive" (March 1994) *Law Society Journal*, 66; C Parker, "Converting the Lawyers: The Dynamics of Competition and Accountability Reform" (1997) 33 *The Australian and New Zealand Journal of Sociology*39; S Ross, "The Economic Integration of the Australian Legal Profession" *International Journal of the Legal Profession*, forthcoming.

[62] It is also very much in the interests of other practitioners who practice across jurisdictions. For example 70% of ACT practitioners hold NSW practising certificates, and similarly on the border between Queensland and NSW: Ross as above.

[63] See D Williams "Competition Law and the (Legal) Profession(s) - A Commonwealth View" in *Can the Professions Survive Under a National Competition Policy?* Canberra: Australian Government Publishing Service, 1997, 1 at 11.

[64] Mirror legislation has also been passed in the ACT and Victoria.

[65] Ross above n 61.

consumers, then the assessment may be different.

A More Consumer-Oriented Profession?

Conveyancing:

Much has been achieved for NSW consumers of legal services in conveyancing. Already after the relaxation of the Law Society's restrictions on advertising in 1992 it was clear that advertised fees for conveyancing were much lower than scale fees.[66] In July 1994 the *Legal Profession Reform Act 1993* came into operation and effectively abolished fee scales, introduced rules requiring upfront disclosure of fees by lawyers and encouraging costs agreements, simplified procedures for handling client fee complaints and removed remaining restrictions on advertising.[67] A comparison of fees between 1994 and 1996 conducted by the Justice Research Centre found that the mean professional fees charged by small law firms for conveyances decreased in real terms by about 17% because of increased competition after these reforms came into operation.[68]

It was clear that the abolition of the fee scale was a significant factor in this decrease: The survey found that the most common method of setting fees before the reforms had been the scale (which was based on the value of the property) whereas in 1996 it had been replaced by a flat fee or a negotiated fee.[69] Advertising was also important: Firms that advertised conveyancing charged lower fees than those that did not advertise.[70] These are significant accomplishments given that conveyancing still dominates more NSW law firms than any other area of practice.[71]

However, the survey did not measure what effect the competition of licensed conveyancers may have had. In 1992 the TPC found that conveyancing fees tended to be lower in jurisdictions where non-lawyers

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[66] Trade Practices Commission, *The Legal Profession, Conveyancing and the Trade Practices Act*, Canberra: Trade Practices Commission, 1992, p 28. In 1993, Weisbrot above n 13 at 7 also thought that fees for residential conveyancing had dropped markedly since the introduction of advertising and the possibility of competition from licensed conveyancers.

[67] J Baker, *Conveyancing Fees in a Competitive Market*, Sydney: Justice Research Centre & Law Foundation of NSW, 1996 p 2.

[68] As above. Fees had remained relatively constant in Sydney CBD firms and decreased significantly in suburban and regional firms.

[69] As above at 23

[70] As above at 34. When similar reforms were introduced in Great Britain similar gains in competitiveness and drops in conveyancing fees occurred: S Domberger & A Sherr, "The Impact of Competition on Pricing and Quality of Legal Services" (1989) 9 *International Review of Law & Economics* 41; J Love, F Stephen, D Gillanders, & A Paterson, "Spatial Aspects of Deregulation in the Market for Legal Services" (1992) 26(2) *Regional Studies* 137; A Paterson, L Farmer, F Stephen, & J Love, "Competition and the Market for Legal Services" (1988) 15(4) *Journal of Law & Society* 361.

[71] A recent Law Society profile of its members showed that conveyancing/real property was the dominant area of practice for 35.5% of solicitors: "A Profile of the Solicitors of New South Wales" (1997) 35(1) *Law Society Journal* 84.

were allowed to compete with lawyers than where they were not.[72] But in NSW the *Conveyancers Licensing Act 1992* has been criticised for granting the Law Society regulatory control over their competitor conveyancers, and for setting the standards too high for many conveyancers to become licensed.[73] It may be that further reform to open up competition between lawyers and licensed conveyancers can further decrease conveyancing fees.

Consumer Complaint Handling:

It also appears that the Office of the Legal Services Commissioner (OLSC) has made the handling of client complaints substantially more consumer-oriented, although no data is yet available on consumer satisfaction with the new scheme. The OLSC is not overturning many of the disciplinary decisions of the legal professional self-regulatory bodies that it is asked to review – in 85% of cases the decision of the Law Society or Bar Association is upheld – although the fact that independent review is available may have improved the profession's performance.[74] However the main problem with self-regulated complaint handling was not that the profession was doing a bad job of those complaints it did treat seriously and investigate. The problem was that it simply did not do anything about the many consumer complaints it received that it felt did not justify disciplinary action–complaints of delay, negligence and unfair or incomprehensible billing.[75]

The evidence suggests that the OLSC has moved some way towards filling this gap and educating lawyers to be more consumer-oriented in their dealings with clients, at least after they have made a complaint. Complaints rose by 32% in the first year the OLSC was in business suggesting that consumers became more aware of and more confident in the process for complaining about lawyers.[76] In the second year written complaints went down slightly but phone inquiries increased by 31%.[77] A very large number of phone inquiries were handled by staff giving the inquirer information to empower them to go back and resolve the problem

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[72] Trade Practices Commission above n 72 at 14.

[73] Solicitors make up the Conveyancers' Licensing Committee that sets the standards for licensing.

[74] Office of the Legal Services Commissioner *Annual Report 1995-96*, Sydney: Office of the Legal Services Commissioner, 1997 at 20-21.

[75] See Office of the Legal Services Commissioner *Annual Report 1994-95*, Sydney: Office of the Legal Services Commissioner, 1996 p19.

[76] As above at 4.

[77] Office of the Legal Services Commissioner, *supra* n 74 p 5. Complaints must be written to be dealt with further: In the majority of cases callers are give information to help them go back and resolve the problem with their lawyer for themselves: Office of the Legal Services Commissioner above n 74 p 9.

with their lawyer for themselves. Many more complaints were successfully resolved through informal mediation by the OLSC. In 1995/1996 62% of written complaints were resolved following informal and formal mediation by the OLSC. A further 14% were still under mediation.[78] Most of these were complaints that would have been dismissed as unsuitable for further action under the old system.

The OLSC believes that over 60% of the complaints it receives are based on communication difficulties and is using videos, newsletters and talks to educate lawyers to communicate better with their clients.[79] Individual practitioners' experience of mediation may also help them learn how to serve clients better in the future. However a more comprehensive way of ensuring consumer-oriented legal practices would be to encourage law firms to introduce their own consumer complaint handling processes and make their clients aware of them like other business do.[80] The Law Society's *Client Care Guideline* seeks to encourage lawyers to tell their clients to whom they can complain, but few firms implement a complaint handling system aimed at improving client satisfaction.[81]

One of the problems of traditional self-regulation has been that consumer complaints have bottlenecked at the level of the professional self-regulatory association while the lawyers or firms that cause complaints have not been made responsible to solve their own problems. The OLSC is already overwhelmed with inquiries and complaints even without advertising its presence very aggressively. The best long term strategy for better consumer complaint handling in legal services is effective management within the firm where the problem arises. An important priority for the OLSC should be to break the bottleneck by ensuring that firms take self-regulatory responsibility for consumer complaints upon themselves. This would leave the OLSC free to concentrate on (i) disputes that are particularly intractable, (ii) serious misconduct, (iii) monitoring and encouraging law firms' consumer complaints schemes and (iv) looking for patterns in complaints and changing professional rules and practices as necessary to address them. The OLSC is already working on developing a model costs agreement.[82] They should also be developing model consumer complaints handling policies and seeking ways to encourage and reward firms for implementing them.

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[78] As above at 5.

[79] OLSC (1996) above n 75 p 21.

[80] Approximately 65% of Australian companies have a department or individual responsible for handling consumer inquiries and complaints: TARP, *American Express—SOCAP Study of Complaint Handling in Australia: Report Two: A Profile of Inquiry and Complaint Handling by Australian Business*, Sydney: Society of Consumer Affairs Professionals in Business Australia, 1995 p 4.

[81] NSW Solicitors Manual para 13575.. R North, "Encouraging Clients to Complain" (1997) 35(3) *Law Society Journal* 33.

[82] It will also include a clarification of when clients can expect to hear from lawyers.

Costs:

Lawyers' negotiation of fees with their clients is the area where their continuing lack of consumer orientation is most notable. The OLSC has noted that costs are raised in 40% of all complaints they receive with overcharging being the most common complaint and inquiries about fee agreements, billing methods and independent assessment of bills close behind.[83] Part 11 of the *Legal Profession Act 1987* gives lawyers obligations to disclose their fees in advance and in writing to clients. It encourages them to enter into written costs agreements by providing that lawyers cannot recover their fees until they have been independently assessed if there is no written agreement. Yet it seems that there is still a high degree of non-compliance with these requirements, and even where lawyers do try to comply "awkward expression [and] torturous sentences with double negatives" cause confusion.[84]

The 1996 Justice Research Centre study of conveyancing fees described above found that only 43% of small firms were entering into written costs agreements with their clients despite the encouragement of the Act to do so.[85] Eighty-six percent said they were disclosing fee estimates to their clients at the beginning of the relationship but 14% were not complying with the Act's requirement that they do so.[86] Law Society research has shown that consumers are not aware that solicitors are required to disclose their costs and still feel that costs are unpredictable and solicitors do not communicate effectively with clients about costs.[87] Unfortunately advertising has made the situation worse in some cases. For example, some solicitors advertise that the first appointment is free but charge for it if the client does not retain the solicitor, or charge for any time taken beyond the first twenty minutes.[88] As mentioned above, the OLSC are working on a model fee agreement that may help practitioners comply with the Act.[89]

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[83] OLSC above n 74 at 27.

[84] As above at 27.

[85] Under Part 11 a client's ability to dispute a bill where there has been a written costs agreement is greatly reduced unless there was an inequality affecting the bargain. Without a costs agreement clients can have costs assessed to a fair and reasonable amount regardless of the practitioner's normal charging rates. The Law Society have engaged Keys Young consultants to survey a sample of the profession on their views of the cost disclosure requirements: J Brookman "How Effectively are the Cost Disclosure Requirements Operating?" (1997) 35(2) *Law Society Journal* 73.

[86] s176 *Legal Profession Act 1987*. Baker above n 73 at 11.

[87] Brookman above n 85.

[88] OLSC above n 74.

[89] As above at 28. Now consumers can take a costs assessment under $2500 to informal mediation in the OLSC rather than going to the formal assessment system: As above at 31.

A Fairer Profession for Women?

Both the Law Society and to a lesser extent the Bar Association Council appeared to respond positively to the Keys Young proposals for eliminating gender bias in the profession. Both passed resolutions stating harassment and discrimination could amount to professional misconduct. The Law Society Council developed a *Code of Conduct on Equal Employment, Promotion and Harassment* for the profession and also a model *Equal Opportunity Policy*. Both were distributed to the profession.[90]

However the Law Society refused to follow the Keys Young recommendation to include sexual harassment and sex discrimination provisions in its *Professional Conduct and Practice Rules*. Its own Equal Opportunity Committee had drafted a suitable rule but after a lengthy process of consultation the Law Society council voted against its adoption.[91] A clear statement of the undesirability of discrimination and harassment in the rules, rather than tucked away in Council resolutions, would not have done any damage and would have been a useful indicator of desire to take responsibility for solving problems of discrimination and harassment. It is true that adding the rule would have been a mainly symbolic gesture: The Legal Services Commissioner and resolutions of the Law Society Council make it clear that sexual harassment and discrimination can amount to misconduct anyway.[92] However the symbolism of rejecting the adoption of the rule after it had been published as an exposure draft and against the recommendation of the Equal Opportunity Committee was bad faith to women lawyers.

The best hope for making the profession a fairer place for women is for individual firms to take responsibility for implementing their own equal opportunity policies to prevent harassment and discrimination in the first place, and provide internal remedies when it does occur. There is no data available on the extent to which NSW law firms have implemented equal opportunity policies since the *Keys Young Report*. An effective equal opportunity policy must be tailored to the particular organisation where it is to be implemented and involve preventive training and education

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[90] Attorney General's Department and Department for Women (NSW), *Gender Bias and the Law: Women Working in the Legal Profession: Report of the Implementation Committee*, Sydney: Government Printer, 1996 pp 60-62.

[91] As above p 66. If they had passed such a rule it would probably have been included in the Law Council of Australia model rules and therefore influenced all other state jurisdictions, but after the Law Society of NSW's decision the Law Council of Australia decided not to include it. At the same time the Law Society Council also opposed the introduction of mandatory continuing legal education units on equal opportunity and anti-discrimination issues. However it is developing a voluntary unit on legal risk management under the NSW Anti-*Discrimination Act* with the help of the NSW Anti-Discrimination Board.

[92] OLSC above n 75 at 29: "It is the Commissioner's position that complaints of discrimination or sexual harassment may amount to professional misconduct or unsatisfactory professional conduct regardless of whether or not there is a rule against such conduct."

for all staff.[93] The Law Society's actions in sending out a generic model policy is only a small first step. A further step would be for the Law Society (and Bar Association) to set up a mediation scheme to which women could appeal when they felt their firms were letting them down.[94] A well publicised scheme of this type would send a powerful message to lawyers and law firms about their responsibilities to eliminate gender bias, and to see the resolution of women's grievances about their firms as a normal part of business. Women should also, of course, have the option of taking serious or recurring complaints to the OLSC where disciplinary action can be initiated if necessary.

However for firms to take these responsibilities seriously it seems that further external scrutiny and incentives will have to be applied by external government agencies. *The Keys Young Report* recommended that the NSW Government introduce a contract compliance policy in relation to law firm adoption of equal opportunity policies. This would mean that firms without a policy would not be able to tender for government work.[95] This ought to be a priority area for government equal opportunity policy given the terrible record of women in the profession. It is a great pity that the legal profession could not have been a leader rather than a follower in the knowledge and practice of equal opportunity and anti-discrimination law. It says little for the possibility of lawyers meeting theircorporate clients' anti-discrimination risk management needs that they have largely failed to implement anti-discrimination measures in their own firms.

Excessive Adversarialism: A Forgotten Problem?

In 1993 the Cost of Justice Inquiry by the Senate Standing Committee on Constitutional and Legal Affairs reported on the "truly bleak picture" of the Australian justice system.[96] The inquiry noted lawyers' contribution to an adversarial culture that raised the cost of justice beyond what most people could afford and reported how highly paid lawyers would string out pre-trial discovery processes for rich clients to exhaust the resources

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[93] See M Osborne *Sexual Harassment: A Code of Practice*, Sydney: Human Rights and Equal Opportunity Commission, 1996.

[94] This was recommended as part of the Keys Young process and a proposal of this type from its Equal Opportunity Committee is presently before the Law Society Council. The Implementation Committee recommended that the Law Society and Bar Association adopt the voluntary conciliation model proposed by the Law Council of Australia Equalising Opportunities in the Law Committee. See Attorney General's Department and Department for Women above n 90 at 11 & 44.

[95] Both federal and state governments already apply this sanction for companies that fail to comply with the *Affirmative Action (Equal Employment Opportunity) Act* (CW). However most law firms are not caught because they have less than 100 employees.

[96] Senate Standing Committee on Legal and Constitutional Affairs *The Cost of Justice: Foundations for Reform*, Canberra: The Parliament of the Commonwealth of Australia, 1993 p 4.

of poorer adversaries:

> "Too many practitioners see the legal system as being in the possession of lawyers and capable of being operated properly only by them... Too many see their duty in handling matters as requiring them to exploit every avenue offering an advantage to their clients even when it borders on the unethical and even the unlawful".[97]

On the surface adversarialism appears to fulfil the lawyers' duty aggressively to advance their client's interests. In practice it suits their own interests in maintaining high fees for lengthy and complicated legal procedures for resolving disputes and suits rich clients who wish to bend the justice system to their own advantage. But it fails the ordinary citizen by building a legal system that costs far too much to effectively utilise. The Cost of Justice Inquiry did not find any solutions for a system that encourages an adversarialism in its lawyers that drives costs ever higher, and disregards the legitimate justice requirements of all but its richest litigants. Instead in its final pages the Cost of Justice report turned its attention to reducing monopoly practices as a means of creating a downward pressure on fees, and the problem of excessive adversarialism was overtaken by the demands of micro-economic reform.[98]

While reformers have been focusing on competition and consumerism, the problem of excessive adversarialism has remained largely unaddressed. NSW plaintiffs in civil cases still seem to suffer the effects of excessive adversarialism. The Justice Research Centre has found that personal injury plaintiffs are more satisfied with less litigious options like mediation and arbitration than with court.[99] 40% of the plaintiffs felt that their trial lawyers had not provided good value for money and 44% felt they could not completely trust their lawyer to act in their best interest.[100] Since the Cost of Justice Inquiry, initiatives such as alternative dispute resolution and case flow management that seek to avoid or ameliorate the excesses of adversarialism have become a more frequent part of the justice system. But there have been limits to these achievements, not least because of legal professional involvement. As Professor Stephen Parker shows, reforms aimed at reducing the effects of adversarialism often have the effect of spurring on the adversarial minds of lawyers to new heights of ingenuity in ways to overcome them.[101]

The Australian Law Reform Commission have also raised the issue of lawyers' litigation culture in their current inquiry into the adversarial

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97. As above pp 30-31.
98 As above pp 21-22; pp 31-33.
99 M Delaney & T Wright *Plaintiff's Satisfaction with Dispute Resolution Processes*, Sydney: Justice Research Centre & Law Foundation of NSW, 1997 at 64.
100 As above p73.
101 S Parker, "Islands of Civic Virtue? Lawyers and Civil Justice Reform" *Inaugural Professorial Lecture*, Brisbane: Griffith University, 1996 p 14ff

system of litigation. They point out that while lawyers are supposed to owe their highest duty to the administration of justice, this is usually overwhelmed by their apparent fulfilment of their duty to clients by using aggressively adversarial tactics. This produces undue delay, cost and unfairness in the whole system that ultimately disadvantages everyone except the lawyers.[102] Indeed the spectre of potential litigation haunts every area of legal practice and "brings with it a time-consuming, complex and costly regime directed at covering every circumstance and eventuality".[103]

Professor Stephen Parker suggests that solutions to the problem of excessive adversarialism must ultimately come from within the profession with an increased commitment to the integrity of the justice system and a recognition that excessive adversarialism is not in the interests of clients. As powerful business consumers of legal services continue to complain of lack of value for their litigation dollar, savvy law firms might develop their own internal best practice standards to keep adversarialism and costs under control.[104] In the commercial sector where legal services are a buyer's market, such standards could easily spread and eventually become a model for smaller firms.

Recent research in NSW vividly illustrates how the game of escalation of adversarialism cannot only make the parties the losers in civil and family litigation, but can also cause great distress and unfairness to third party witnesses in criminal cases. The authors of the *Heroines of Fortitude Report* studied all sound recorded sexual assault hearings (sentencing and trial) in the District Court of NSW for one year (May 1994 to April 1995) where the victim was an adult female. They found that provisions that had been introduced to protect the women's dignity in court were frequently flouted in the interests of a vigorous defence for the accused and ignored by prosecutors who did not do enough to maintain the integrity of the justice system by seeking to protect the dignity of these women.

Half the complainants were accused of making false reports based on ulterior motives such as vengeance, applications in Family Court proceedings and excuses for adultery and 32% were questioned about applications for victim compensation.[105] In 57% of trials the complainant was questioned about behaving in a sexually provocative way often in an insensitive or offensive way.[106] Despite the fact that s409B(2) of the *Crimes Act 1900 NSW* makes evidence of the complainant's sexual reputation

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[102] Australian Law Reform Commission *Review of the Adversarial System of Litigation: Issues Paper 20*, Sydney: Australian Law Reform Commission, 1997 para 1.1.

[103] As above paras 11.10 & 11.11.

[104] S Parker above n 101 pp 42-45.

[105] Department for Women *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*, Sydney: Department for Women, 1996 p 13.

[106] As above pp 14-15. 42% were asked about how they were dressed and 22% cross-examined about their responsibility for the offence. 43% were asked about why they were in that location, 82% cross-examined about lying, 37% cross-examined about resistance to assault and over two thirds were questioned about their lack of resistance.

completely inadmissible, evidence of sexual reputation was raised in 12% of trials.[107] Material relating to sexual experience is also inadmissible unless it relates to one of the exceptions in s409B(3) of the same Act. Yet such evidence was admitted into evidence in 84% of the instances in which it was raised and in 35% of instances it was admitted without prior application, in the absence of a jury, without challenge by either counsel, without justification by the judge and contrary to the legislation. The authors of the *Heroines of Fortitude* report recommend more enforcement of both defence and prosecution lawyers' ethical standards that would temper this sort of excessive adversarialism.[108] But it seems that at present in criminal as well as civil trials a narrow adversarial view of the lawyer's role dominates their duty to maintain justice. Again it is the self-regulatory promulgation of standards of practice within public prosecution and legal aid defence lawyers' offices that might begin to solve these problems. Such standards might eventually spread to smaller firms and solo practitioners through mechanisms such as the Legal Aid Office making appropriate standards of conduct a condition of funding.

V. What Does it Take to Justify the NSW Legal Profession?

Democratic Regulation of the NSW Legal Profession

In July 1994 David Fairlie, then President of the NSW Law Society described the 1993 *Legal Profession Reform Act* that was about to come into operation as "very much the product of compromises between political pressures for change - mostly legitimate - on the one hand, and the profession's desire to regulate itself on the other hand."[109] Despite its "imperfections" he urged the profession to support the introduction of the Act. That description of the 1993 reforms is an apt summary of the last twenty-one years of reform in NSW. Over those years the NSW profession has been forced to recognise the needs and concerns of consumers, women, competition policy and the poor, but has not been forced to completely abandon self-regulation.

In contrast to the highwater mark of professional autonomy, legal professional self-regulation shows a much increased permeability to democratic and community concerns. Government intervention in the very different areas of legal aid and competition policy have been largely accepted, at least to the extent they do not threaten the existence of the

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[107] As above p 20.

[108] Indeed in NSW prosecutors are under a particular duty to act impartially and fairly to assist the court arrive at the truth and to enable the law to be properly applied to the facts: *Revised Professional Conduct and Practice Rules* (1995) A.62-A.72; *NSW Barristers' Rules* 62-72.

[109] D Fairlie, "Commencement of the Reform Act" (1994) 32(6) *Law Society Journal*, 2.

profession as an independent body with self-regulatory functions. Indeed competition reform has already delivered NSW consumers lower fees for one of the most common services they buy from lawyers, conveyancing. The new complaint handling regime under the direction of the OLSC shows great hope for increasing consumer satisfaction with grievance handling and perhaps increasing the consumer-orientation of the profession as a whole. The profession's record on ensuring fairness to its women is more patchy, but increased scrutiny from within and without the profession by women lawyers and government departments and agencies has a real likelihood of forcing lawyers to be more consistent in their commitment to equal opportunity in the near future. The problem of excessive adversarialism remains an area where there is still much to achieve.

The successes and failures of reform over the last 21 years suggest that there is a place for professional self-regulation that is sufficiently accountable and responsive to community and government concerns, but great vigilance and creativity will be necessary to maintain sufficient democratic input into it. The advantage of maintaining elements of self-regulation include allowing space for lawyers' traditions of ethics and independence, and requiring lawyers to take responsibility themselves for creating institutions in which they will address community concerns.[110] Mutual trust and greater expertise can also make it more efficient for professional associations to take a large role in formulating, monitoring and enforcing standards.[111] The challenge is to make self-regulation more accountable and responsive, more permeable to community concerns.

For the last twenty-one years the people of NSW have had to use a very expensive and inefficient mechanism to hold the profession accountable and provoke debate about how it performs its duties – the string of Law Reform Commission studies, inquiries and reports described above. We need forums for engaging in this type of debate on a more regular and mundane basis, forums in which the profession must listen to community concerns and in which the community also learns from profession about its ideals and what can realistically be expected of it. How might the profession become subject to the texture of democracy on a daily basis without having to continually rely on extraordinary reform processes to bring it to book?

The democratic regulation of the profession should be tackled by increasing *the external accountability* of the profession to legitimate state and community concerns, and by nurturing *internal catalysts of change* within the profession itself.

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[110] See C Parker, "Competing Images of the Legal Profession: Competing Regulatory Strategies" (1997) 25 *International Journal of the Sociology of Law*, pp 385-409.

[111] See A Ogus, *Regulation: Legal Form and Economic Theory*, Oxford: Clarendon Press, 1994 p 107.

External Accountability

Many of the basic structures for ensuring the ongoing accountability and permeability of the NSW legal profession to external perspectives have now been put in place. The crucial issue will be whether they have enough resources, influence and power to be effective in the longer term.

The OLSC shows great promise as a means of encouraging the profession to adopt more of a consumer orientation. However its success will depend on whether it has the talent and support to identify and address major patterns of problem conduct. It has already begun to do so by targeting costs and communication problems and seeking to educate the profession and consumers accordingly. Ultimately its effectiveness at changing lawyers' practices to be more consumer oriented may depend on whether it successfully encourages individual firms to take responsibility for their own "self-regulation" by introducing their own internal complaints system and schemes for assuring quality of service and communication to clients. One way to do this would be for the Commission to adopt the policy of not pursuing disciplinary action against practitioners after successful mediations, on condition that the law firm not only address the particular complaint that gave rise to mediation but that they also introduce a better complaints handling or management system for future clients. Anti-discrimination agencies already use this sort of strategy in settling complaints of harassment and discrimination.[112] Similarly a fairer profession for women lawyers will now depend on whether women in the profession can work with professional associations and government agencies to coax, reward and sanction their firms into introducing effective equal opportunity policies. In both cases improving the profession means increasing, indeed enforcing, self-regulation at the level of the individual firm and lawyer at the same time as increasing external involvement in traditional self-regulation at the level of the whole industry. Greater external accountability at one level can lead to greater effectiveness in self-regulation at another.

External accountability also depends on whether the groups affected by legal professional practices - consumers, community groups, women lawyers - are able and willing to keep contributing to the regulatory process by scrutinising the profession and keeping the regulators engaged with community concerns. The NSW Law Reform Commission's 1982 recommendation for the creation of a community council as a peak public interest group relating to lawyers has been finally implemented in the

[112] For example when the Human Rights and Equal Opportunity Commission mediates complaints of sex discrimination or harassment between employers and employees, part of the settlement is usually that a wider anti-discrimination policy will be put into place to benefit all employees: See A Devereux "Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's use of Conciliation" (1996) 7 *Australian Dispute Resolution Journal* 280.

Legal Profession Advisory Council (LPAC) and it is this group which is supposed to provide the focus for ensuring continuing fresh community and consumer input into the profession.[113] In the original NSW Law Reform Commission proposal it was to consist principally of non-lawyers and have the functions of investigation, consultation, the expression of views and the selection of non-lawyer members for the main self-regulatory institutions of the profession. It would take the initiative in considering issues and making public and private reports and statements on the profession, and would be suitably resourced to play a watchdog role over the whole profession.[114] In its present incarnation LPAC consists of 11 members, of whom 5 must be legal practitioners and 5 must be lay persons. It has the function of advising the Attorney General in the use of his or her powers to disallow a rule made by the professional associations or to make his or her own regulation for the profession. This means that its influence and effectiveness are very much dependent on the will and engagement of the Attorney General in the regulation of the profession.

A more democratic regulatory structure for the profession might give LPAC its own power to veto rules, and might also give it a role in advising and overseeing the OLSC in the way it decides to handle cases and address recurrent problems in the profession. Consumer and community groups need a forum where their voice will count in deciding how the profession operates on a day by day basis. A more powerful LPAC could be very important in giving consumer groups a say in ensuring the profession does not capture the OLSC and also in giving the OLSC a forum for raising problematic patterns of behaviour that it notices. LPAC should also be funded at a level that allows it to sustain a secretariat that could regularly publicise its opinions on things like the Law Society's failure to introduce a rule against sexual harassment and discrimination, so that the profession feels the accountability of publicity.

Internal Catalysts of Change

A climate of willingness and ability to deliberate about the legal profession, its practices and institutions must not only exist outside the profession, but must permeate it from the inside. It is change that comes from within, when lawyers themselves identify with community concerns, that has the profoundest effects. The socialisation of law students and young lawyers, (and especially their growing awareness of the significance and content of ethical norms) will be crucial in this process, as will debate and discussion about the ethics and justifications for lawyering among

[113] ss58 to 59 *Legal Profession Act 1987* (NSW).
[114] See Disney *et al* above n 4 at 206–235.

practising lawyers.[115] In this process of debate, subcultures of lawyers and their visions of law and lawyering will be key provocateurs.

Committed lawyers who devote some time to an interest or action group can help make a difference to the way their profession operates. Subcultures of lawyers often mirror external social movements which motivate their actions and politics within the profession. Community interests and concerns thus permeate the profession from the inside, through the dual identification of lawyers with their profession and with wider community concerns. The particular concerns and ideals of subcultures of women, black or "new left" lawyers are often a goad to the kind of discussion about the ideals of law and lawyering that is necessary for the professional community to debate and pass on commitment to, and pride in, ideals of lawyering such as community service, and maintaining the integrity of the justice system through the curbing of excessively adversarial behaviour. A feminist lawyer group is a community in which members engage in thinking, discussion and action aimed at challenging the law and the profession to becomes more committed to women lawyers and women clients.[116] "Public interest subcultures", such as the groups of lawyers that run and volunteer at community legal centres, nurture commitment to the ethics of public service among diversities of lawyers. These "fringe" lawyers are "a vital source of new ideas and experimentation in the delivery of legal services" and "a constant gadfly within the legal profession and an important goad to change".[117] An important support for this process is opening up the legal profession to people from many different groups who will bring their interests and perspectives and pre-existing social commitments to the profession.

The nurture of internal catalysts of change within the profession begins at law school with the commitments and beliefs students develop during their first contacts with the profession. Yet the empirical evidence suggests that legal education tends to increase cynicism more than public-regarding idealism among students.[118] One study of Harvard law students showed that about a quarter said they entered law school to help people, seek social justice or achieve social change.[119] Yet during their education most students replaced a justice-oriented consciousness with a cynical,

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[115] See C Sampford with C Parker, "Legal Regulation, Ethical Standard Setting and Institutional Design" in S Parker, & C Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues*, Oxford: Clarendon Press, 1995, 11.

[116] See M Thornton above n 46 at 213–215.

[117] R Abel, "Lawyers and the Power to Change" (1985) 7(1) *Law & Policy* 5 at 6.

[118] H Erlanger, C Epp, M Cahill, & K Haines "Law student idealism and job choice: Some new data on an old question" (1996) 30 *Law & Society Review*, 851; R Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond*, New York: Routledge, 1992; A Goldsmith "Warning: Law school can endanger your health!" (1995) 21 Monash University Law Review; R Stover *Making It and Breaking It: The Fate of Public Interest Commitment During Law School*, Urbana: University of Illinois Press, 1989.

[119] Granfield as above at 38.

game-oriented consciousness.[120] Another study found that the number of students expressing a preference for doing public interest law work after law school was halved between the first and final years.[121] In both studies those students who were best able to preserve more idealistic conceptions of legal practice were those who joined subcultures with a public interest vision of legal justice while at law school through work in a community legal centre (via a clinical legal education unit), involvement in a politically oriented law student club or relations with groups outside the law school with similar concerns.[122] NSW law schools are developing the ability to teach the theory of "law in context" in the classroom. The research suggests that one of the most crucial things law schools can do to help their graduates transform the profession is to give them an opportunity to put theory into practice at law school through options like clinical legal education units that promote lasting public-regarding values.

Conclusion

The NSW legal profession has already come a long way in 21 years; from a state-delegated pinnacle of self-regulation to the beginnings of a dynamic democratic process of government in which both community and subcultures of lawyers contest traditional practices. The key to the continuing justification of the profession is to ensure sufficient democratic input into self-regulatory processes to keep lawyers focused on community service concerns. This need not mean complete abandonment of self-regulation. But it can no longer mean a self-regulatory bargain in which the state grants the absolute power of self-government to the profession and then is forced to intervene only through extraordinary law reform commission inquiries when things go wrong.

The profession has a role in its own government, but that self-government must be subject to the same democratic concerns that characterise the rest of our culture. One or two lay representatives on the council of a professional association is not enough. There must be a variety of avenues for consumer and community groups and independent regulators to have voice in how lawyers are doing their job. Specialist legal professional initiatives such as the Office of the Legal Services Commissioner and the Legal Profession Advisory Council together with generalist bodies such as the Australian Competition and Consumer Commission and

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[120] Granfield as above at 52.

[121] Stover above n 118 at 12.

[122] Stover as above at 103–115. Erlanger et al's above n 118 study of lawyers' first jobs after graduation compared with pre-law school interest in public interest work also showed that political commitment and involvement with a supportive subculture during law school were significant factors in determining whether students who had been interested in non-traditional practice actually took a job in public interest law.

the Affirmative Action Agency should strategically and creatively use their different and partial powers in relation to the profession to help persuade (and sanction) it into increasingly public-regarding practices. This has already begun to make a difference in NSW. Democratic concerns penetrate best when external community reformers make allies of individual and groups within the profession. In NSW the community legal centre lawyers of the 1970s and the feminist lawyers of today embody the permeation of democratic concerns into the profession through their dual identification with community and law. When subcultures of lawyers, like these, act on the public-regarding values they have learnt at law school or in life, then the profession can change. After all it is they who will have to justify their profession next time it is challenged.