THE DEVELOPMENT OF THE DIVIDED LEGAL PROFESSION IN QUEENSLAND

MICHAEL WHITE*

I INTRODUCTION

The structure of the Queensland legal profession today is a product of a series of historical developments that can be traced to the beginnings of the legal profession in England. A proper understanding of the present practice and structure of the Australian legal profession needs an understanding of these English origins and then of the profession's introduction into Australia. It is proposed, therefore, to give a brief outline of the development of the legal profession in England and then to deal with the early years of the profession in the Colony of New South Wales after British settlement. The article will then describe the development of the profession in Queensland after separation from New South Wales in 1859 with some emphasis on the major changes relating to the roles of barristers and solicitors.

One theme which emerges from the history of the legal profession is that the structure of the profession has always been dynamic. Tenets of the profession which are sometimes advanced as fundamental can almost always be seen as a reaction to forces that were particular to a certain time or place. The special mode of dress adopted by barristers and retained to this day is a good example.[1] Nothing in the organisation of the profession, the method of practice, the terminology or the social structure, has stayed the same for more than a century or so. As social mores and economic demands have changed, so has the legal profession.

II THE ORIGINS OF THE LEGAL PROFESSION IN ENGLAND

Attempts have been made to trace the role of the lawyers from the Roman period, to Normandy, and thence to England after the Norman invasion (by William the Conqueror in 1066).[2] The place of the clergy in the administration

* BCom, LLB (UQ), PhD (Bond); Queen's Counsel (Qld); Reader in Law; Executive Director, Centre for Maritime Law; TC Beirne School of Law, The University of Queensland. The author acknowledges the assistance received from Ms Allanah Bigg (TC Beirne School of Law) and Ms Alannah Barry (Supreme Court Library). He is especially appreciative of the research assistance provided by Mr Stephen Knight in the preparation of this article.

[1] Whilst now considered one of the fundamental traditions of the Bar it is well known that the plain black robe worn in Court by practicing barristers was only adopted by English barristers in 1685 as a sign of mourning at the death of Charles II. For mention of this as well as a broader examination of the history of the attire worn by practitioners and judicial officers see Charles Yablon, 'Judicial Drag: An Essay on Wigs, Robes and Legal Change' (1995) *Wisconsin Law Review* 1129.

[2] Herman Cohen, *History of the English Bar and Attornatus to 1450* (1929), especially the sections on 'The Anglo-Saxon Period', 'Roman Influence', 'Edward the Confessor', 'Continental Europe' and 'The Norman Conquest'; John Baker, *An Introduction to English Legal History before the Time of Edward I* (2nd ed, 1979);

of justice in the Anglo-Saxon courts was fundamental, but William the Conqueror introduced a distinction between the lay and the church administrations of justice and, thereafter, the ecclesiastical courts sat separately from the lay, civil and criminal courts.[3]

The names and functions of the various persons who practised in the law varied over the centuries. They have been known as scriveners, conveyancers, proctors, attorneys, solicitors, counsellors-at-law, professors of the law, lawyers, apprentices-at-law, barristers, serjeants-at-law, King's Counsel, Queen's Counsel, Senior Counsel and advocates.[4] There was a tendency for a separation of the functions performed in court from those performed outside the court (although this was not a strict separation). Even those persons who performed functions out of court had a tendency to separate into smaller groups.

While the common law and common lawyers eventually came to dominate the English legal system there always was, and still is to some extent, an influence from the civil law and the civil lawyers. As Prest writes:

> The main split within the lawyers' ranks divided practitioners of common law (common because received throughout the realm) from those who professed the civil law (civil because derived and adapted from Justinian's *Corpus Juris Civilis*, the great sixth-century codification of the Roman law). As befitted the heirs of a still vigorous classical tradition, the civilians were graduates of Oxford or Cambridge and sometimes held higher degrees from Continental universities .... After Henry VIII prohibited the teaching or practise [sic] of canon law in England, the civilians inherited the business of the ecclesiastical courts, which maintained an extensive jurisdiction, especially over probate of wills, matrimonial causes, and a wide variety of moral and sexual offences. Civilians also held office and practised in various more recently established conciliar jurisdictions, notably the Court of Chancery, the High Court of Admiralty, and the Court of Requests in London, as well as the Council in the North at York and the Council in the Marches of Wales at Ludlow. Some also assisted the state in diplomatic negotiations and with advice on international law.[5]

A *The Serjeants*

During the 14th century the advocates, or *narrotores*, practising in Common Pleas and Kings Bench (common law courts) became organised and developed into a guild or society known as the 'Order of Serjeants-at-Law'[6] (*servientes ad*

Frederick Pollock and Frederic William Maitland, *The History of English Law before the time of Edward I* (1895). For one of the most authoritative works see William Holdsworth, *A History of English Law* (1972).

[3] Cohen, above n 2, 144.

[4] For one source, see Wilfrid Prest, *The Rise of the Barristers: A Social History of the English Bar 1590–1640* (1986) 54–5.

[5] Ibid 3–4. For further detail see CR Chapman, *Ecclesiastical Courts: Their Officials and their Records* (1992).

[6] Butterworths, *Halsbury's Laws of England*, vol 3(1) (4th ed, 1989) Barristers, 'The Profession' [353]. For a definitive account of the serjeants-at-law, see John Baker, *The Order of Serjeants at Law* (1984).

legem).[7] The rank, or degree, was conferred by the judges of Common Pleas and the successful applicants were admitted to the bar of the court.[8] They had the exclusive right to plead and practise in the Court of Common Pleas. During the fourteenth and fifteenth centuries the bulk of the civil litigation was conducted in this court so the Order then reached the height of its vigour and success. The prestige of the order was eventually to decline in line with the movement of civil litigation away from the Court of Common Pleas. The serjeants also had the right to appear in the King's Bench and other courts but they there had to compete for the work against the apprentices-at-law, who became the barristers. From 1846, the right to practise in Common Pleas was opened up to competition from barristers.[9] Until 1 November 1875, possession of the degree of serjeant-at-law was a necessary qualification for the office of a judge of the superior courts of common law, but from the sixteenth century such appointments from outside the order were common, with formal appointment to the order merely preceding appointment to the bench. The last non-judicial serjeants were created in 1868. The property of the order, mainly that comprised of the two Serjeants' Inns, was closed in 1877 and the order became extinct.[10]

B *King's and Queen's Counsel*

In the fifteenth and sixteenth centuries a new rank of barrister began to develop, the 'King's Counsel Learned in the Law', taking precedence over other barristers and ranking next under the serjeants-at-law.[11] In the fifteenth century they were described as being of the 'King's Council' and were obliged only to act for the sovereign and not to take a fee from elsewhere.[12] Queen's Counsel originated in Elizabeth I's reign when leading barristers were appointed as counsel to the Crown.[13] They were, and some still are, appointed by Letters Patent. It was their duty to render services to the Crown if required.[14] No particular obligation is now owed to the Crown and the granting of 'silk', as it is commonly called,[15] now mainly denotes a successful practice and a high standing amongst fellow barristers. At one stage it was a rule of conduct that

---

[7] Theodore Plucknett, *A Concise History of the Common Law* (3rd ed, 1940) 198. Often referred to as the Order of the Coif, after the head dress they wore.
[8] Butterworths, above n 6.
[9] Ibid.
[10] Ibid.
[11] Plucknett, above n 7, 206.
[12] Cohen, above n 2, 379.
[13] Glen Williams, *Harrison's Law and Conduct of the Legal Profession in Queensland* (2nd ed, 1984) 4. See also *A-G (Canada) v A-G (Ontario)* [1898] AC 247; *Seldon v Croom-Johnson* [1932] 1 KB 759. The King's Counsel had emerged from the offices of solicitor and attorney-general and '[i]t was Bacon who did a great deal to define the position of King's Counsel and secured for them a life fee': Plucknett, above n 7, 206.
[14] Initially, there was a retainer of £40 per annum, which later became the normal fee for services rendered: Williams, above n 13, 4. In some jurisdictions they have been replaced by 'Senior Counsel' who perform the same function and have similar standing.
[15] The granting of the rank of King's or Queen's Counsel carried with it the right to a gown made of silk, whereas those barristers other than KCs or QCs are required to have their gown made of stuff. The bar jacket for a silk is also more elaborate than that for a junior. On ceremonial occasions silks wear a long bottomed wig (as do judges), but this practice is declining in Australia.

silks appeared only in court with a junior and that the junior was to be paid two-thirds of the senior's fee.[16]

C *Barristers*

The earliest known instance of the use of the term 'barrister' is in 1455, in the Black Books of Lincoln's Inn, where there is mention of 'two of the best barristers'.[17] From the inns' mooting proceedings have derived, also, the terms 'benchers', who were masters of the bench, and 'utter barristers', who were those members of the inns who argued moots from the utter or outer bar (the serjeants argued from the inner bar). The appointment to be a barrister was initially to a rank or degree within the inns but gradually they came to have standing in their public role. They were recognised in directions in a royal proclamation of 1518 and by the judges in 1559, who ruled that 'Masters of the Utter Barre' should not be allowed to plead at the bar of any court unless they were of 10 years' standing in their inns.[18] The reference to the bar, or 'barre', derives from the arrangement in the inns whereby there was a railing, or bar, which separated the outer part of the (dining) room where the moots were held from the other, more prestigious, inner part. The utter-barrister's transformation from mootman to advocate was a slow and tentative process.

The business of the central courts was not opened up to barristers until a 'massive expansion in the volume of litigation during the second half of the 16th century, when the amount of the business handled by the two major central courts of Common Pleas and King's Bench appears to have more than trebled'.[19] The serjeants and the apprentices had to give way to the new rank of practitioners, the barristers, and this, in turn, led to the judges laying down rules as to the minimum education and experience required before the barristers had right of pleading in the various courts.[20]

---

[16] See, amongst other writings, Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750–1965* (1967); Raymond Cock, 'The Two Counsel Rule and the History of the Bar's Regulations' (1976) 92 *Law Quarterly Review* 512; Alexander Johnston, 'The History of the Two Counsel Rule in the Nineteenth Century' (1977) 93 *Law Quarterly Review* 190. In Australia, Attorneys-General for the Commonwealth and the States, provided they had been admitted to the Bar, used to be appointed as silk irrespective of whether they could otherwise command that standing. The appointment of QCs is under review in some States, with Queensland and New South Wales already retiring the old title. In its place there has been a move towards the appointment of Senior Counsel (SC). Appointment to this rank is generally made by the relevant State Bar Association in association with the State Chief Justice and not by Letters Patent (signed by the Governor on the advice of the Governor-in-Council) as was the usual practice for the appointment of QCs. It is still expected of silk that they be leaders in and out of court and that their ethical conduct be above reproach. For the most part, this expectation is met. See JM Bennett (ed), *A History of the New South Wales Bar* (1969); JM Bennett, 'Of Silks and Serjeants' (1978) 52 *Australian Law Journal* 264 and Jeremy Finn, 'Political or Professional Honours: Queens Counsel in Australia 1839-1875' (1996) 2 *Australian Journal of Legal History* 61.

[17] Butterworths, above n 6, fn 1.

[18] Judges' Orders of 1559; Ibid, fn 8.

[19] Prest, above n 4, 5–6.

[20] Ibid 6. Of the many rules that evolved the one that a barrister should not deal directly with lay clients has attracted much attention. It is well summarised by Justice Glen Williams as follows: 'The modern rule that a barrister does not accept a brief from a lay client did not come into full effect until the eighteenth century. Until then they had frequently dealt directly with the client. But from Elizabeth's time [1536-1603] it became more usual for the barrister to deal with an attorney rather than the client, and towards the end of the seventeenth century it had become a regular practice, although it had not even then hardened into a strict rule of professional etiquette'; see Williams, above n 13, 5. See also Michael Birks, *Gentlemen of the Law* (1960) 103–108; HHL Bellot, 'The Exclusion of Attorneys from the Inns of Court' (1910) 26 *Law Quarterly Review* 137;

D *Solicitors, Proctors and Attorneys*

The word 'attorney' signifies anyone who acts in the place of another and used to be in common usage when many solicitors described themselves as 'solicitors and attorneys'. Until the thirteenth century a suitor was required to appear in person at the first instance and thereafter representation could be by attorney appointed by Letters Patent or Act of Parliament. By 1235 all freemen could conduct a suit by attorney.[21] During the seventeenth and eighteenth centuries the use of the word and the functions of the 'attorney' were gradually replaced by the 'solicitor', and the two functions were usually combined in the one practitioner.[22] By the *Supreme Court of Judicature Act 1873* (UK) all of the 'solicitors', 'attorneys' and 'proctors' became solicitors of the Supreme Court and, as such, they all became officers of the court.[23]

For a long period attorneys and solicitors were included among the members of the Inns of Court, but during the eighteenth century the division of the profession gradually saw the attorneys gathered in the Inns of Chancery and the barristers in the Inns of Court. In 1762 a rule of the Committee of the Inns of Court was passed to the effect that no attorney or solicitor was to be called to the bar until he had discontinued practice as such for two years and a later rule excluded all attorneys and solicitors from membership of the barristers' Inns of Courts.[24] The solicitors and attorneys had, of course, their own inns and this move was only one of several moves towards specialisation within the profession. One reason for this separation was the class distinction in England under which the barristers were usually drawn from a class of persons more elevated in society than the solicitors. As Prest has put it:

> The lines of demarcation between what eventually came to be known as its upper and lower branches, composed of barristers and solicitors respectively, were primarily social, not vocational. Membership of the inns of court was the sole avenue of entrance to the bar, and membership of these 'honourable

---

Butterworths, above n 6, [356]–[357]. Another change that has attracted considerable attention occurred in the 17th century involving the right of the barrister to sue for fees. In earlier centuries pleaders as well as attorneys had enjoyed and exercised this right. Later, the barristers began to feel that their superior position required them not to sue for their fees and in 1629–1630 this was laid down as a rule of law. It appears to have been influenced by the Roman law rules as to the relation of members of the learned professions with their clients. Only in 1888 was it laid down as a rule of conduct of the Bar that there not be any direct access to the client, when the Attorney-General, Sir Richard Webster, so declared in Parliament in answer to a query from a barrister, Robert Yerburgh MP: see Butterworths, above n 6, [358], fn 3 for details of where the documents were published.

[21] Butterworths, *Halsbury's Laws of England*, vol 44(1) (4th ed, 1989) Solicitors, 'Solcitors' Profession and Qualifications' [1].

[22] A possible explanation for the usurpation of the word 'attorney' by that of 'solicitor' is that for the ordinary practitioners in the country towns it was sufficient to be attorneys, who were attached to the courts of common law, whereas the leaders of the profession, who were in London, were also solicitors and were attached to the Court of Chancery. The explanation may lie in the wish for the country practitioners also to be known by the style of the more prestigious city practitioners: Geoffrey Cross and GDG Hall, *Radcliffe and Cross: The English Legal System* (4th ed, 1964) 382, fn 1. In England the 'attorney' developed a poor public image ('pettifogging attorney') and thus practitioners there preferred 'solicitor', although not necessarily so in the colonies; but for a detailed history see Robert Robson, *The Attorney in Eighteenth-Century England* (1959).

[23] Butterworths, above n 21.

[24] Ibid.

> societies' was of itself a token of gentility; attorneys and solicitors, on the other hand, were theoretically confined to the subordinate *hospitia monora*, the inns of chancery. A relative lack of occupational specialization meant that barristers handled various tasks, most notably conveyancing, which were to be largely taken over by attorneys and solicitors after the Civil War, besides dealing directly with their own clients. The niceties of professional etiquette prescribing an exact division of work between upper and lower branches seem not to have been fully worked out until the later nineteenth century. The basic distinction between the counsellor's honorium and the attorney's or solicitor's fee, however, had been widely accepted by the end of our period [1640], lending further force to the disjunction between the *officium ingenii* of the upper branch and the *officium laboris* below the bar.[25]

England had a hierarchical social and legal structure which gave rise to this distinction. Only those from the upper echelons were admitted to the bar.

Also in England the attorneys, solicitors and proctors became organised into the Society of Gentlemen Practisers in the Courts of Law and Equity from 1739, which oversaw the education of professional interests of that branch of the profession until about 1816.[26] In 1831 the Society of Gentlemen Practitisers and some other smaller associations of a similar character were amalgamated to form the Law Society[27] and a charter was granted to the Law Society which then controlled legal education and conduct.[28] The *Solicitors Act 1877* (UK) continued the powers in the Law Society over such matters.[29] It is against this background that the development of the Australian legal profession, first in New South Wales and then in the other colonies, must be seen.

III THE EARLY AUSTRALIAN LEGAL PROFESSION

As European settlement in New South Wales in 1788 brought with it the English system of justice, so too came the English system of courts and structure of the legal profession. As was aptly said by one of Australia's leading lawyers, Sir Victor Windeyer: 'It was natural for judges and counsel in Australia to take the ways of the courts at Westminster as the model of their methods and conduct'.[30] The same may also be said for the attorneys and solicitors of the colony. Because the early colonies in New South Wales and Van Dieman's Land (Tasmania) were military ones it was only after a substantial number of free settlers had arrived that the rights and freedoms of the British legal system were introduced. The structure was slow, then, to adjust to a system of legal education, admission and promotion in the colony. It was not until after 1848, some 60 years after British settlement, that any members of the bar who had not been called in the United Kingdom could be admitted to practise in Australia,

[25] Prest, above n 4, 9.
[26] Butterworths, above n 21; Cross and Hall, above n 22, 381–2.
[27] Cross and Hall, above n 22, 382.
[28] Butterworths, above n 21, [2].
[29] Ibid.
[30] Sir Victor Windeyer, 'Preface' in JM Bennett (ed), *A History of the New South Wales Bar* (1969) 1.

and it was not until 1861 that local members of the bar were eligible to be appointed as Australian judges.[31]

The original British settlement had a Court of Judicature,[32] established under the *First Charter of Justice*,[33] but no qualified legal practitioners.[34]

If there was ever doubt as to the need for a structured profession with suitable legal ethics, a recitation of the conduct of Australia's first lawyers should put paid to it.[35] The turmoil experienced in the administrations of the early governors and in the colony generally, to say nothing of events such as the Rum Rebellion, meant that it was difficult to attract persons who might have improved the calibre of lawyers in the colony. At the end of 1809 Ellis Bent arrived (with Governor Macquarie) and in 1814 his brother, Jeffery Hart Bent, also arrived. The two brothers played what Sir Victor Windeyer has described as 'their troublesome parts'.[36] Judge-Advocate Ellis Bent and Governor Macquarie proposed reforms to the criminal and civil jurisdiction, and Bent was keen for the advent of competent practising lawyers. The Letters Patent of 4 February 1814 became the *Second Charter of Justice*[37] which left the criminal jurisdiction unchanged but introduced the Governor's Court, the Supreme Court and the Lieutenant-Governor's Court for civil jurisdiction.

The question of the right to practise in the courts then became an issue and the emancipists (former convicts) with legal training were steadily excluded. Only practitioners of good standing had the right to appear in court.[38] Legally trained free settlers began to arrive in the colony and helped lift the standards of the profession. Two respectable solicitors, Frederick Garling and William Henry Moore, had been chosen to go to New South Wales to practise, each on a salary,[39] the former arriving in 1815.[40] The control over the conduct and standing of lawyers was exercised when Justice Barron Field struck off TS Amos, solicitor, in 1819 for being in a secret partnership with a convict (Crossley).[41] There were then no barristers in the colony.[42]

The *Third Charter of Justice*, in 1823,[43] established the basis for proper courts and a respectable legal profession. A controversy arose over whether solicitors

---

[31] Ibid.
[32] 27 Geo III, c 2.
[33] It was a warrant issued under the Great Seal, dated 2 April 1787; see Lawrence Whitfeld, *Founders of the Law in Australia* (1971) 3.
[34] Bennett, above n 30, 4–5.
[35] Ibid 6–10.
[36] Ibid 14.
[37] *Historical Records of Australia*, Series 1, vol viii, 139.
[38] Bennett, above n 30, 24. It was important that lawyers be persons of integrity, even more so in a predominantly convict settlement than elsewhere.
[39] *Historical Records of Australia*, Series 1, vol viii, 139.
[40] Ibid 674.
[41] Bennett, above n 30, 23.
[42] Ibid 25.
[43] 4 Geo IV, c 96.

should be allowed the right of appearance in the Supreme Court of New South Wales. At that time it was the English position that solicitors had no right of appearance in the superior courts. Messrs William Wentworth and Robert Wardell, both admitted as barristers in England, applied for and were admitted as barristers in New South Wales and then moved the court to exclude solicitors and attorneys from appearances in the Supreme Court. The motion was refused on the grounds that the Charter did not bear the construction for which they contended.[44]

The next step in a divided profession occurred in 1828 when a statute allowed the judges in the colony to make their own procedural rules.[45] One of the first rules made with this new power gave legal force to the English custom that only barristers should have right of appearance in the superior courts. The proposed rule was opposed by the solicitors and attorneys. It was remitted to London for authorisation, which was given over two years later, and on 1 November 1834 it came into force in the colony amid some controversy.[46] In 1840 the court further ruled that only barristers had right of appearance in the lower court of Quarter Sessions.[47] By statute solicitors were later given the right of appearance on behalf of their clients in the superior courts in New South Wales.[48] It seems that the etiquette of the early barristers took its colour from the rough background of the colony because, in 1848, two barristers were committed to gaol for violent conduct against each other in court.[49]

IV QUEENSLAND SEPARATION IN 1859

Until the erection of Queensland as a separate colony from that of New South Wales in 1859, the Moreton Bay Settlement had little need for legal practitioners. The penal colony was established in 1824 in the Moreton Bay area — first at Redcliffe and later at the site of Brisbane. Private lawyers had no role in the administration of a military and convict settlement. After the Brisbane area was thrown open to free settlement in 1842,[50] more and more free settlers in Brisbane, Ipswich and the Darling Downs required the legal services necessary for a free community. The attorney Robert Little was the first to practise in the district and the profession grew steadily from that small beginning.[51]

---

[44] Bennett, above n 30, 35–36. The motion had been resisted by the six solicitors and attorneys then practising in Sydney, including the Solicitor-General, Stephen.

[45] Initially 9 Geo IV, c 83, which was amended from time to time and made permanent by Act 5 & 6 Vic, c 76, s 53.

[46] Bennett, above n 30, 47.

[47] Ibid 60.

[48] *Legal Practitioners Act of 1892* (NSW) ss 2–3.

[49] John Bayley Darvall, later Solicitor-General for New South Wales, 'illustrated the sturdy truculence of the Bar when he struck his opposing counsel, Richard Windeyer, who had charged him with unfair conduct and had called him a liar. For this 'contempt and outrage' Darvall had been committed to gaol for 14 days, while Windeyer received 20 days': Keith Mason, 'The Office of Solicitor General for New South Wales' (1988) *New South Wales Bar News* 22 citing *Australian Dictionary of Biography 1851–1890*, vol 4, 23.

[50] Before 1842 settlement closer than 50 miles to the penal establishment at Brisbane was prohibited.

[51] For details of the legal profession in Queensland, see Helen Gregory, *The Queensland Law Society Inc 1928–1988: A History* (1991) Chapter 1; Ross Johnston, *History of the Queensland Bar* (1978) Chapter 1; Justice Bruce McPherson, *Supreme Court of Queensland 1859–1960* (1989) Chapters 1–2; John Forbes, *The Divided Legal Profession in Australia: History, Rationalisation and Rationale* (1979).

Admission to practise was under the powers of the Supreme Court of New South Wales until separation in 1859,[52] after which admission to practise in the Colony of Queensland was governed by legislation of the Queensland Parliament with the Supreme Court of Queensland having the powers over admission and discipline.

V ADMISSION

As Queensland derived the structure of its legal profession from New South Wales, barristers and solicitors were admitted to separate branches of the profession.[53] There was a bar to women being admitted and this was removed in Queensland by the provisions of the *Legal Practitioners Act 1905* (Qld).[54] A practitioner had the choice of being admitted either as a barrister or as a solicitor but not as both,[55] though either could change to the other roll on satisfying certain requirements.

The *Supreme Court Act 1867* (Qld) applied the laws of England in the administration of justice in the courts of Queensland and transferred jurisdiction by giving the newly empowered Supreme Court judges the 'authorities powers and jurisdiction' of the judges of New South Wales.[56] It made provision for admission of any 'attorney solicitor or proctor of good repute', upon satisfying various conditions, to change rolls to that of barristers and also for certificates for qualified persons to practise as a 'conveyancer'.[57] The Court had power to make rules for regulating the admission of barristers and 'attorneys, solicitors and proctors'.[58] This it did from time to time and, up until the *Legal Profession Act 2004* (Qld) ('the 2004 Act') came into force, it was the Court's rules that governed the admission of barristers. Boards were established by the rules for this purpose. The regulation of solicitors later came under statutory authority.

The membership of the boards was comprised of suitable members of the profession. A certificate of compliance as to the requirements for admission to practise from a board was not binding on the Court, as it had power to act independently of it,[59] but the Court generally acted on such a certificate without further inquiry. Apart from a general discretion to decide for itself whether there

---

[52] 'Letters Patent erecting Moreton Bay into a colony under the name of 'Queensland' and appointing Sir George Ferguson Bowen, KCMG. to be Captain-General and Governor-in-Chief of the same', read by Governor Bowen in Brisbane on 10th December 1859. The Order in Council had been signed by Queen Victoria on 6 June 1859.

[53] Section 42 of the *Supreme Court Act 1867* (Qld) originally provided for a third branch of the profession by allowing a person to be admitted as a conveyancer. It remained possible to seek admission as a conveyancer in Queensland up until the enactment of section 2 of the *Legal Practitioners Act Amendment Act 1938* (Qld).

[54] Section 2 of the *Legal Practitioners Act 1905* (Qld) provided that 'a woman shall be entitled to admission as a barrister, solicitor, or conveyancer' in like manner and subject to the same conditions as in the case of a man.

[55] *Ex parte Atthow* [1923] St R Qd 95.

[56] *Supreme Court Act 1867* (Qld) ss 20, 34.

[57] *Supreme Court Act 1867* (Qld) ss 40, 42.

[58] *Supreme Court Act1867* (Qld) s 54.

[59] *Re Sweeney* [1976] Qd R 296; but note that this case was overturned on another point in *Street v Queensland Bar Association* (1989) 168 CLR 461.

had been compliance with the requirements for admission, the Supreme Court of Queensland also had the discretion to admit a person in 'special circumstances' where the applicant did not otherwise comply with all of the rules for admission.[60]

As the requirements for admission differed for barristers and solicitors, it is appropriate to address them under separate headings.

A *Barristers*

The first control over admission to practise as a barrister in Moreton Bay, later part of the Colony of Queensland, was under the *Barristers Act 1848* (NSW). The Act established a Board to approve persons seeking admission as barristers of the Supreme Court of New South Wales, both with respect to education and character. No candidate was to be admitted unless the board was satisfied that the candidate was a 'person of good fame and character' and was a 'fit and proper person'.[61]

After separation in 1859 the *Supreme Court Constitution Amendment Act 1861* (Qld) made provision for the Supreme Court to make rules relating to the admission of barristers to practise, and the first rules made were those of 1866.[62] In 1896 the jurisdiction for the control under the board became vested in the *Rules Relating to Admission of Barristers 1896*, published in the Queensland Law Almanac.[63] The jurisdiction of the board and its power to regulate admissions was later founded on the *Supreme Court Act 1921* (Qld), which provided power for the Governor-in-Council with the concurrence of two or more judges to make rules of court for, amongst other areas, 'the admission of barristers, solicitors and conveyancers on such terms and conditions as may be prescribed and prescribing any qualifications or condition precedent notwithstanding the provisions of any Act, rule or practice.'[64]

Before the 2004 Act the control of admission as a barrister in Queensland, for persons not already admitted elsewhere in Australia, was governed by the *Barristers Admission Rules 1975* (Qld).[65] They established the Barristers' Board and its membership, which is constituted of the Attorney-General, the Solicitor-General, Her Majesty's Counsel learned in the law (ie QCs) resident and practising in Queensland and five barristers of at least five years standing, one of whom was to be appointed by the judges of the Supreme Court and the other

---

[60] See *Re McMillan* [1968] Qd R 247 and *Re Hogan* [1987] 2 Qd R 688.

[61] *Barristers Act of 1848* (NSW) ss 2–3. The Act is to be found in the Queensland 'White' Statutes, *The Public Acts of Queensland 1828–1936*, vol 9, 394–395.

[62] *Supreme Court Constitution Amendment Act 1861* (Qld) s 67. A discussion relating to the right to practise without being resident in the State is contained in *Re Sweeney* [1976] Qd R 296, 303–312 (WB Campbell J).

[63] See the Queensland 'White' Statutes, *The Public Acts of Queensland 1828–1936*, vol 9, 394, n 2.

[64] *Supreme Court Act 1921* (Qld) s 11(1)(v), (2)(v).

[65] The 'Rules Relating to the Admission of Barristers of the Supreme Court of Queensland', made pursuant to the rule making power of the Court under *The Supreme Court Act of 1921* (Qld) and the *Supreme Court Act 1995* (Qld); see also the *Barristers Act 1848* (NSW).

four being elected by the barristers.[66] The *Barristers Admission Rules 1975* (Qld) set out the qualifications for admission as a barrister. Basically, they were that the applicant be of 'good fame', possess certain educational qualifications (a recognised Law degree or a pass in the examinations set by the Board itself), meet certain professional requirements for a barrister (Part 3 of the *Barristers Admission Rules 1975* (Qld) required attending and reporting certain types of cases argued in court and also completing the Bar Practice Course of training)[67] or be admitted as a barrister in a recognised jurisdiction (mainly another Australian State or Territory, New Zealand or be a solicitor of the Supreme Court having been 'five years in actual practice').[68]

The applicant became a 'student-at-law'. If the applicant had a law degree from a recognised law school then he or she was exempt from the board examinations (Stage 1) but still had to complete the other requirements. Those without a law degree had to undertake the examinations set by the board. From time to time there had been appeals to the court from board decisions relating to non-compliance, usually on the ground that there had been 'special circumstances'.[69] There was also a power to exempt an applicant from compliance with the requirement to serve a certain period of time as a student-at-law where suitable grounds had been established.[70]

The question of the admission to practise in Queensland of barristers who are admitted overseas or interstate had been a vexed one. After the Colony of Queensland was established those barristers who had not earlier been admitted in New South Wales were not given rights of audience in Queensland. This applied the policy, which was widely accepted in the common law jurisdictions, that barristers should normally be resident in the jurisdiction in which they practised. Admission of barristers resident elsewhere was opposed in 1865 by some barristers as being 'against all precedent and unfair to the Queensland Bar', and the Supreme Court agreed, with Lutwyche J saying: 'An affidavit of residence or intention to practise is necessary ...'.[71]

---

[66] See Part II of the *Barristers Admission Rules 1975* (Qld).

[67] The Bar Practice Course is conducted under a joint arrangement between the Queensland Bar Association and the Queensland University of Technology Law School (QUT), with its premises at QUT. Barristers from the Queensland Bar Association give many of the lectures and the Board is chaired by a member of the Association.

[68] Part III of the *Barristers Admission Rules 1975* (QLD). When introducing the *Legal Practitioners Bill* in 1872 the Secretary for Public Lands mentioned that the Bill allowed an attorney of five years standing to apply to become a barrister. It was noted that this requirement for admission to practise as a barrister gave a 'certain guarantee of his experience and respectability': Queensland, *Parliamentary Debtates*, Legislative Assembly, 18 April 1872, 46–47 (John Thompson, Secretary for Public Lands and Member for Ipswich).

[69] *Re Barbi* [1968] QWN 17; *Re Ganis* [1972] QWN 55; *Re Grealy* [1975] Qd R 192; *Re Everingham* [1973] Qd R 148.

[70] *Re Drummond* [1965] QWN 1 is a case in point. (The report does not deal with the substance, merely recording that the application was adjourned. One needs to see the court file for the substance of the matter); *Re Haxton* [1966] QWN 37.

[71] *Re Owen* [1865] 1 QSCR 139, 140.

There have been numerous cases on the residency requirement, although the board had certain powers to grant exemptions[72] and WB Campbell J, as he then was, fully traced this in his judgment in *Re Sweeney*.[73] However, the issue was put to rest in *Street v Queensland Bar Association*[74] when the High Court held that the residency requirement and the requirement of an intention to practise principally in Queensland offended against section 117 of the Australian *Constitution*[75] and was inoperative.

A more recent provision for the right to appear for interstate practitioners was provided for the *Mutual Recognition (Queensland) Act 1992* (Qld). The provisions of this Act need not be fully addressed here. For interstate barristers who were briefed to appear in a Queensland court hearing a matter under State jurisdiction, it was a provision frequently used. For those appearing in a court, State or federal, exercising federal jurisdiction there is a right of 'audience' under the *Judiciary Act 1903* (Cth).[76] There had been a problem in relation to persons who were 'barristers and solicitors' in other States seeking to be admitted in Queensland purely as barristers, without the appropriate experience and without attending the professional requirements and training for barristers under the *Barristers Admission Rules 1975* (Qld).[77] Interstate practice is now addressed under the 'travelling' provisions of the 2004 Act.[78]

B *Solicitors*

Admission of solicitors to practise prior to the 1859 separation of Queensland was covered by rules made by the Supreme Court of New South Wales.[79] After separation the first Queensland legislation touching on admission was the *Supreme Court Constitution Amendment Act 1861* (Qld) which preserved the right to practise of those solicitors and barristers in the new colony who had been admitted in New South Wales[80] while also providing the newly established Supreme Court of Queensland with the power to make rules regulating future admissions within the colony.[81] This power was carried over into the *Supreme Court Act 1867* (Qld) which provided for the judges to make rules for the admission of 'attorneys, solicitors and proctors' with the additional requirement

---

[72] *Re Pratt* [1972] QWN 31; *Re Baston* [1984] 2 Qd R 300; *Re Quinn* [1986] Qd R 278; *Re Lyne* [1967] QWN 8.

[73] *Re Sweeney* [1976] Qd R 297, 301–312 (WB Campbell J). In *Henry v Boehm* (1973) 128 CLR 482, the High Court upheld similar South Australian rules on residency requirements as not offending s 117 of the *Constitution*.

[74] (1989) 168 CLR 461.

[75] 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'.

[76] *Judiciary Act 1903* (Cth) s 55B.

[77] *Re Lavery and the Registrar of the Supreme Court of Queensland (No 2)* (1996) 43 ALD 13; see also the decision of the Queensland Supreme Court *Queensland Law Society v Sande (No 2)* [1998] 1 Qd R 273.

[78] *Legal Profession Act 2004* (Qld) ss 74–78, 230–242.

[79] Section 16 of the *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83 gave the Supreme Court of New South Wales the power to make rules for the admission of solicitors and barristers.

[80] *Supreme Court Constitution Amendment Act of 1861* (Qld) s 13.

[81] *Supreme Court Constitution Amendment Act of 1861* (Qld) s 67.

that any such rules be laid before the Queensland Parliament.[82] These rules were printed in the annual Queensland Law Almanac.[83] A comprehensive set of new admission rules promulgated in 1866 required persons seeking admission as a solicitor to have spent five years in articles or as a judge's associate, resided for one year in the colony and successfully pass a number of prescribed examinations.[84] An overhaul of the rules in 1898 retained this basic requirement but allowed reciprocal admission to solicitors from the United Kingdom, the other Australian colonies and New Zealand.[85]

The basic structure for the admission of solicitors in Queensland that was in place by the end of the nineteenth century was to persist virtually unchanged until the 1960s but there were other important developments that took place in the intervening period. The *Legal Practitioners Act 1905* (Qld) gave women the right to be admitted as solicitors on the same basis as men[86] and also provided that a practicing solicitor could employ a woman as an articled clerk.[87] The *Supreme Court Act 1921* (Qld) gave the Governor-in-Council, with the concurrence of two or more judges of the Supreme Court, the power to make rules for the admission of 'barristers, solicitors and conveyancers'.[88] The requirement that any new rules be laid before the Queensland Parliament was retained.[89]

Special arrangements were made for members of the State public service. Legislation passed in 1938 provided that time spent as a clerk in the offices of a State legal officer[90] could be deemed to satisfy either all or part of the articles of clerkship requirement and could also entitle a person to sit for the intermediate and final examinations leading to admission as a solicitor.[91] In 1968 this requirement was altered so that admission could be obtained after ten years service and passing the examinations administered by the Solicitor's Board or after five years if the candidate had obtained a university degree in law.[92]

The last major changes to the admission rules that were in place prior to the 2004 Act were contained in the *Solicitors Admission Rules 1968* (Qld) (the '1968 Rules'). It is worth discussing the workings of these rules in some detail so that the system put in place by the 2004 Act can be contrasted with its immediate predecessor. The 1968 Rules were administered by the Solicitors' Board. This comprised the Supreme Court Registrar, an officer of the Department of Justice, and five solicitors of at least five years standing, of

[82] *Supreme Court Act of 1867* (Qld) s 54.
[83] Queensland 'White' Statutes, *The Public Acts of Queensland 1828–1936*, vol 9, 283.
[84] McPherson, above n 51, 82.
[85] Ibid 231.
[86] *Legal Practitioners Act of 1905* (Qld) s 2.
[87] *Legal Practitioners Act of 1905* (Qld) s 5.
[88] *Supreme Court Act of 1921* (Qld) s 11(2)(v).
[89] *Supreme Court Act of 1921* (Qld) s 11(4).
[90] Such as the Solicitor-General, the Crown Solicitor, a Registrar of the Supreme Court or the Public Curator.
[91] *Legal Practitioners Act Amendment Act of 1938* (Qld) s 9.
[92] *Legal Practitioners Acts Amendment Act 1968* (Qld) s 7.

whom three were appointed by the judges of the Supreme Court and two by the Law Society.[93]

Practical training requirements could be satisfied either by completing service under articles of clerkship with a suitably qualified solicitor, or partly under articles and partly as a law clerk or managing clerk, or by service with a Judge as an Associate,[94] or by completing a course of practical training.[95] The separate systems could not normally be combined into an amalgam to avoid compliance with the *Solicitors Admission Rules 1968* (Qld).[96] Before a clerk obtained consent from the board to enter into articles of clerkship the board had to be satisfied that the applicant was of good character and fit and suitable to serve under articles.[97]

At the completion of the period of articles or the practical training course the applicant could seek admission as a solicitor. Provided that the board was satisfied that the applicant was fit to be admitted to practise, it issued a certificate setting out compliance with the *Solicitors Admission Rules 1968* (Qld).[98] At admission sittings the court usually relied on this certificate to admit the applicant, although it had an independent discretion to look behind the certificate. The time requirements were often tested and the board and the court were often called on to consider applications for an abridgement of time, as the board had no power to abridge time by more than 14 days.[99]

An applicant was required to demonstrate that he or she was of 'good fame' and 'as regards character, a fit and proper person'.[100] The circumstances relating to conduct which would not demonstrate these qualities were unlimited. Mainly they related to the personal integrity, reliability and honourable conduct of the applicant. Persons who had been convicted of a serious criminal offence, or who had been shown to be dishonest, concealed matters they should have revealed or been untruthful in the affidavit for admission generally, were not so regarded.[101] The conduct may have related to matters not connected with the profession; an

---

[93] *Solicitors Admission Rules 1968* (Qld) r 5.
[94] *Solicitors Admission Rules 1968* (Qld) r 17(2).
[95] *Solicitors Admission Rules 1968* (Qld) r 17(2)(d). The Solicitors Board had previously held courses and examinations but in February 1978 the Solicitors Board resolved that its courses and examinations be discontinued and the last examinations were held in November 1989. All solicitors after that needed to have a law degree. The Queensland Barristers Board, however, continued with its courses and examinations until the advent of the 2004 Act.
[96] *Re Rapp* [1973] Qd R 151.
[97] *Solicitors Admission Rules 1968* (Qld) r 29(2)(a).
[98] *Solicitors Admission Rules 1968* (Qld) r 69.
[99] *Solicitors Admission Rules 1968* (Qld) r 94(1); and see for example *Re Wishart* [1994] 1 Qd R 108, about time away for maternity leave; also *Re Hickey* [1970] QWN 21; *Re Barry* [1973] Qd R 155; *Re Ahern* [1981] Qd R 532, relating to a period served as a judge's associate counting towards articles of clerkship for admission as a solicitor; *Re Bauer* [1979] Qd R 60; *Re Sapuppo* [1974] Qd R 168; *Re Hogan* [1987] 2 Qd R 688; *Re Taylor* [1970] QWN 41; *Re Whibley* [1958] QWN 8; *Re Dwyer* [1960] QWN 42; *Re Ryan* [1971] QWN 45.
[100] *Solicitors Admission Rules 1968* (Qld) rr 16, 70.
[101] See for example *Re B* (1981) 2 NSWLR 372; *Wentworth v NSW Bar Association* (Unreported, Supreme Court of New South Wales, Court of Appeal, McLelland AJA, Carruthers AJA and Studdert AJA, 14 February, 1994); *In the matter of an Application for Admission as a Practitioner* (1997) 195 LSJS 482.

example of which is *Re Walton*,[102] where the applicant, who had been in breach of his fiduciary duty in respect of investment monies in a trading company and had failed to refer a person for independent advice, was held not to have discharged the onus of showing his fitness to be re-admitted as a solicitor.[103] Another is *Re Hampton*[104] where the court refused the application for admission for failing to disclose discreditable conduct in relation to a previous occupation, in this case that of a registered nurse.

An appeal lay from the board to the Court of Appeal (previously it was to the Full Court). The court would only interfere with the discretion of the board when it was clear that the board had exercised its discretion unreasonably or if its decision was clearly wrong.[105]

The *Solicitors Admission Rules 1968* (Qld) made provision for conditional admission.[106] The condition imposed was usually that for one year a solicitor practise under the supervision of another solicitor and could then apply for the admission to be made absolute. The court had held, in *Lynes Case*,[107] that the time for deciding whether the solicitor was resident in Queensland was at the time when absolute admission was sought, except if the intention to comply with the rule was exposed as a sham on the part of the admittee in that the admittee had no intention of ever seeking normal absolute admission. In this case the time for testing the intention was the time of seeking conditional admission.[108] The requirements of the *Queensland Law Society Act 1952* (Qld) contained the provision that admission could not be made absolute until the solicitor had been employed by a practising solicitor for one year. There were cases on whether that requirement had been fulfilled.[109] For conditional admission the onus still lay on the applicant to demonstrate that the applicant was a fit and proper person and where that person had been censured for certain conduct as a solicitor in

---

[102] [1964] QWN 10; see also *Re Morrison* [1961] Qd R 343, 348–9 (Mansfield CJ, Matthews and Hanger JJ) and *Re Thomas* [1984] 2 Qd R 460.

[103] Other cases of misconduct other than in practice are *Re Weare; A Solicitor* (1893) 2 QB 439 (solicitor who was landlord of premises used by tenant illegally as brothel); *In re Crick* (1907) 7 SR (NSW) 576 (solicitor, when Minister of the Crown, accepted bribes); *In re A Solicitor* (1933) VLR 103 (solicitor defaulting on gambling debts); *In re Davis* (1947) 75 CLR 409 (barrister convicted of breaking, entering and stealing before admission but who concealed the conviction when applying to be admitted); *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 (barrister convicted of manslaughter arising out of a motor vehicle accident); *In re H, a Barrister* (1981) 1 WLR 1257 (barrister importuning for immoral purposes in a public lavatory); *In the Matter of a Practitioner & Report by Legal Practice Disciplinary Tribunal* (Unreported, Supreme Court of Western Australia, Malcolm CJ, Kennedy and Pidgeon JJ, 19 September 1997) (breach of Companies Code); *Walsh v Law Society of New South Wales* (1999) 198 CLR 73. For a thorough consideration of this aspect and the cases, see Reid Mortensen, 'Ethical Blindness' (2002) 22 *Queensland Lawyer* 166.

[104] *Re Hampton* [2002] QCA 129, (Unreported, de Jersey CJ, Moynihan and White JJ, 5 April 2002).

[105] *Re Stobie* [1990] 2 Qd R 456; applying *Re Fitzgerald* [1944] QWN 32, *Re Hickey* [1970] QWN 21 and *Re Moroney* [1972] QWN 26.

[106] Part 7 of the *Solicitors Admission Rules 1968* (Qld).

[107] *Re Lyne* [1967] QWN 8.

[108] See *Re Lyne* [1967] QWN 8, 18 (Mack CJ, Stable and Gibbs JJ agreeing).

[109] *Macklin v Queensland Law Society Inc* [1982] Qd R 433, where the court held that employment with the Legal Aid Commission was not employment with a practising solicitor; *Re Nicholson* [1980] Qd R 343, where 'special circumstances' were that the New South Wales solicitor from Tweed Heads was employed by Queensland solicitors in the New South Wales office and so had experience of Queensland laws and practice.

another jurisdiction the onus still had to be discharged, but it was not as heavy as the onus on a person who had actually been struck off.[110]

As in the case of barristers there was a residential requirement under the rules that solicitors reside in Queensland. However, following the High Court decision in *Street v Queensland Bar Association*,[111] the Supreme Court held that the principle also applied to solicitors and so the rule requiring residence in Queensland was struck down.[112]

There was provision for admission by a single Supreme Court judge in Rockhampton and Townsville but only when the applicant had complied with all the rules, had the certificate of the board and where no objection to the admission had been lodged with the board.[113] Where the applicant did not secure the certificate of the board, or there was an objection to admission, or a failure to comply with the rules, the applicant could still proceed with the application for admission before the court but had to satisfy the court that admission should be granted despite the irregularity. Of course, an applicant always carried the onus to satisfy the court of fitness for admission but, as a matter of practice, once the board's certificate was obtained, admission usually followed as a matter of course. Under the *Solicitors Admission Rules 1968* (Qld) a single judge of the Supreme Court had no power to exempt an applicant from full compliance. This power lay only with the Court of Appeal[114] and was said to be 'substantially, if not entirely, unfettered.'[115]

Once admitted, a solicitor was not entitled to practise either as a principal or as employee until a practising certificate had been obtained from the Law Society.[116] To practise as a solicitor without a practising certificate was a contempt of court but this only so if the conduct complained of occurred within Queensland.[117] Barristers in Queensland did not have a system of practising certificates before the 2004 Act came into force.[118]

---

[110] *Re Thomas* [1984] 2 Qd R 460.
[111] (1989) 168 CLR 461.
[112] *Re Pudig* [1990] 2 Qd R 551.
[113] *Solicitors Admission Rules 1968* (Qld) r 67.
[114] *Re Hope* [1996] 2 Qd R 25.
[115] *Gregory v Queensland Law Society Inc* [2002] 2 Qd R 583, 588 (Thomas JA).
[116] This requirement was first introduced by Part III of the *Queensland Law Society Act Amendment Act 1930* (Qld) which made it mandatory for a solicitor to reapply annually for a certificate to the effect that the solicitor was on the roll of solicitors administered by the Supreme Court and entitled to practise. This requirement was carried over into section 39(1) of the *Queensland Law Society Act 1952* (Qld). See *Queensland Law Society v Sande (No 2)* [1998] 1 Qd R 273.
[117] *Queensland Law Society Act 1952* (Qld) s 39(1). See *Re D* [1962] QWN 16; *Re Sande & Queensland Law Society Incorporated* (1994) 20 AAR 107.
[118] It was necessary however during the time when the legal profession was fused in Queensland for a barrister to hold a practising certificate if that barrister wished to practise as a solicitor. See *Queensland Law Society Act Amendment Act 1930* (Qld) s 26(1). This requirement became superfluous when barristers were banned from practising as solicitors by section 5 of the *Legal Practitioners Act Amendment Act 1938* (Qld).

VI CHANGES FROM BARRISTER TO SOLICITOR AND VICE VERSA

The division between barristers and solicitors was from an early period strongly felt by many in Queensland to be based on the then usually superior education of barristers, the long English tradition in favour of separation and the belief that the work of an advocate was distinct from the work of an attorney.[119] On the other hand many others considered it was based more on barristers protecting their practices.[120]

A *The 1860s and 1870s*

The regulation of the change of rolls from barrister to solicitor and vice versa came under the *Supreme Court Act 1867* (Qld), which relevantly provided for an 'attorney solicitor or proctor of good repute' to change rolls to that of a barrister upon passing certain educational examinations and having three years in actual practice.[121] The applicant's name was then ordered to be 'struck off' the roll of solicitors as a practitioner could only be on either one roll or the other.

As mentioned above, only barristers had right of audience before the superior courts, which had derived from the English practice that had been adopted in the colony. This gave rise to some hardship as clients who needed representation before the superior courts in the country areas when the judges were on circuit[122] could not always have ready access to barristers, who all resided in the large towns.[123] The scarcity of barristers and the belief that the leading solicitors of the colony were often the equal, if not the superior, of the barristers then in practice led to agitation for reform.[124] The Parliament passed, therefore, the *Supreme Court Act 1874* (Qld) ('the 1874 Act') which provided that every attorney, solicitor and proctor should 'be entitled to audience before any circuit Court or Assize Court' held before a single judge of the Supreme Court.[125] This measure was not seen to be conclusive. It was not long before questions were being asked in Parliament as to whether there was any 'consistency, rationality, justice or necessity' in an arrangement whereby a solicitor was presumed competent to

[119] See Queensland, *Parliamentary Debates*, Legislative Council, 25 July 1877, 149–150 (Charles Mein, Postmaster-General and Representative of the Government in the Legislative Council) for a concise summary of these beliefs. It is not the case now, as the 2004 Act seeks to equalise entry standards into the profession.

[120] The pros and cons of separation into two branches of the profession in Queensland has been addressed in Forbes, above n 51, 135–175. The author differs in some respects with Dr Forbes about the utility of the divided profession, as to which see Part VII of this article.

[121] *The Supreme Court Act of 1867* (Qld) s 40.

[122] The authority for circuits by the Supreme Court was contained in section 30 of the *Supreme Court Act of 1867* (Qld).

[123] The difficulty in gaining access to the small number of barristers resident in Queensland during this time led to some adopting the extreme position that 'it was best to throw open the profession to anybody, so that litigants themselves might be their own judges as to whom they should employ — whether a solicitor, barrister or even someone outside of the profession altogether': Queensland, *Parliamentary Debates*, Legislative Assembly, 21 June 1877, 336 (George Thorn, Secretary for Public Works and Member for Northern Downs).

[124] The genesis of the moves to amalgamate the two branches of the profession are discussed by Henry Simpson in Queensland, *Parliamentary Debates*, Legislative Council, 25 July 1877, 145–146.

[125] *Supreme Court Act of 1874* (Qld) s 22. The Act also provided that the maximum limit of residency in Queensland that the Rules could require before presenting for examination for admission should be one year. See *Supreme Court Act of 1874* (Qld) s 23.

present a case before one judge but could not be trusted to present a case before two or more judges.[126]

B *The Fusion of 1881*

The 1874 Act was followed by the *Legal Practitioners Act 1881* (Qld) ('the 1881 Act') which had a long and chequered passage through Parliament,[127] before it was finally passed. Its short title stated that it was an Act 'to relieve and otherwise benefit Suitors by Abolishing the Division of Practice between Barristers and Solicitors' and the preamble stated 'the division of the profession of the law is unsuited to the circumstances of the Colony'. The Act then provided that 'every person now practising or who hereafter be admitted to practise as a barrister in the Supreme Court may also practise as a solicitor and every solicitor heretofore admitted or who shall hereafter be duly admitted may practise also as a barrister'.[128] For the parliamentary proponents of the 1881 Act it was seen as the culmination of a crusade that had begun almost ten years earlier. The fundamental reason given for the advancement of the legislation was that it would make the law 'cheap, quick and good.'[129]

It might be thought that the provision also implied that the differences between the two branches of the legal profession were abolished and that there need only be the one roll, which would be of barristers and solicitors. However, the actual effect of the Act was to create a new category of lawyer, a 'legal practitioner'. A legal practitioner could practise as both a barrister and a solicitor but was neither one nor the other. There was vigorous opposition to the lessening of the division between barristers and solicitors, which was maintained by the bar, some judges and some solicitors.[130] The 1881 Act had also provided that 'any solicitor of five years' standing was eligible to be appointed' either a Supreme or District Court judge.[131] This gave rise to considerable concern that solicitors not fitted by

---

[126] See eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 7 June 1877, 193 (William Henry Walsh, Member for Warrego).

[127] Forbes, above n 51. Efforts to amalgamate the two branches of the profession had been strongly resisted by some of the most eminent lawyers in the colony. The main arguments advanced against amalgamation were that, based on the experience of New Zealand, South Australia and other southern States, there was no guarantee that legal services would become any cheaper and there was the risk that the high standards of the profession could be compromised. These and other arguments are summed up in the speech of Sir Samuel Griffith (then Attorney-General and Member for Oxley) in Queensland, *Parliamentary Debates*, Legislative Assembly, 7 June 1877, 197–199. When introducing the 1881 Bill for its second reading in the Legislative Assembly the member for Gregory, Charles Lumley Hill, remarked that he knew 'the opposition he should have to encounter from leading barristers in that House, who were also at the head of their profession outside': Queensland, *Parliamentary Debates*, Legislative Assembly, 11 August 1881, 306.

[128] *Legal Practitioners Act 1881* (Qld) s 1. Sections 22 and 23 of the *Supreme Court Act 1874* (Qld) were repealed pursuant to section 3 of the 1881 Act. Section 22 had made provision for solicitors and proctors to appear in the court on circuits and section 23 provided that for barristers and maximum period of residency before admission in Queensland was one year.

[129] Queensland, *Parliamentary Debates,* Legislative Assembly, 11 August 1881, 309 (Charles Lumley Hill, Member for Gregory).

[130] One example of the continuing difference was the decision in *Re Walker* [1897] 8 QLJ 61 where Griffith CJ, Cooper and Power JJ held unanimously that service by a clerk under articles with a barrister practising as a solicitor was not good service under the rules for admission purposes.

[131] *The Legal Practitioners Act of 1881* (Qld) s 2.

education or experience would be appointed to the bench, which had added opposition to the general tenor of the Act.[132]

The 1881 changes were also of concern to other Australian colonies that had moved to recognise the qualifications of Queensland barristers. Chief Justice Lilley felt it necessary to write to the President of the Legislative Council in Victoria to assure him that the 1881 Act did not lower the high standards that had to be met to be called to the bar in Queensland.[133] In the result most of the bar and many solicitors maintained their practices without change. In 1890 it was estimated that there were, at most, only eight persons practising as 'legal practitioners' out of 153 solicitors and barristers then practising in Queensland.[134] McPherson has noted that '[b]ecause it interfered with the rights of each branch of the profession, it was unpopular with both.'[135]

C *The 1920s*

The basic structure established in 1881 remained the position for some 40 years. Then the *Supreme Court Act 1921* (Qld) ('the 1921 Act') made further provision for a barrister to change to the roll of solicitors and for a solicitor to change to the roll of barristers[136] without repealing the 1867 or the 1881 Acts. It contained a section which provided that a person admitted for five years as a solicitor of the Supreme Court of Queensland in actual practice could be admitted as a barrister by a motion in open court without having to pass any additional examinations.[137] As McPherson records, this provision was strongly supported in the Parliament by prominent Brisbane solicitor, and member of the Government at the time, FT Brennan.[138] The Opposition labelled the provision 'the Brennan clause' and claimed that the main reason for its introduction was Brennan's inability to pass the examinations necessary to be called to the bar.[139]

The amendment to the admission requirements made by the 1921 Act did not appear to alter the proviso that a solicitor must be struck from the rolls if admitted as a barrister and this was confirmed in a case heard in 1923, *Ex Parte Atthow*.[140] The Full Court held that Mr Atthow could not be enrolled as a barrister without his name being removed from the roll of solicitors. The Court

---

[132] On realising that the 1881 Bill was going to become law Charles Mein, a staunch opponent of the Bill in the Legislative Council, commented that 'a law was now initiated which would bring the legal profession in Queensland into more contempt than was the case in any other colony': Queensland, *Parliamentary Debates*, Legislative Council, 28 September 1881, 99. In 1885 Mein became the first solicitor to be elevated to the Supreme Court Bench. See Gregory, above n 51, 33.

[133] Ross Johnston, *History of the Queensland Bar* (1978), 14–15.

[134] Gregory, above n 51, 36.

[135] McPherson, above n 51, 228.

[136] *Supreme Court Act of 1921* (Qld) ss 10, 10A.

[137] *Supreme Court Act of 1921* (Qld) s 10.

[138] McPherson, above n 51, 328. McPherson's book deals in detail with Brennan's controversial appointment to the bench and his turbulent judicial career.

[139] Ibid 328–329; see also Queensland, *Parliamentary Debates*, Legislative Assembly, 21 September 1921, 824 (Mr JHC Roberts).

[140] [1923] St R Qd 95. The court gave effect to s 40 of the previous Act, *The Supreme Court Act of 1867* (Qld), which had expressly provided that the practitioner 'shall be struck off the roll' in such circumstances.

held that the body of legislation, read as a whole, did not dispense with the requirement that there be two rolls and a practitioner could only be on one roll at any one time.

The *Queensland Law Society Act* was enacted in 1927. As its preamble stated, it was to 'provide for incorporation of the Queensland Law Society, and to make Further Provision for Regulating the Legal Profession ...' The previously unincorporated Queensland Law Association was incorporated and the membership and property transferred to the new Society.[141] The Statutory Committee was established with powers to summon persons before it, hear complaints and strike off or suspend members of the Society, and its orders became 'enforceable in the same manner as a judgment of the court'.[142]

It is noted that no change was made for barristers, as they preferred to continue with self-regulation. In every case the Queensland Full Court had jurisdiction over admission and discipline of all lawyers on the rolls of barristers and of solicitors.

D *Developments since the 1930s*

In 1930 a new policy for an amalgamated profession was given effect in the *Legal Practitioners Act 1930* (Qld) which provided for a fused legal profession. A barrister who wished also to practise as a solicitor had to register and obtain a practising certificate as a solicitor from the Law Society (mainly for the purposes of the administration of the Legal Practitioners' Fidelity Guarantee Fund).[143] This amalgamation of the profession was not successful, in part because ill-equipped barristers were doing solicitor's work. The experiment was ended by the *Legal Practitioners Act Amendment Act 1938* (Qld) ('the 1938 Act'), which provided that 'a barrister shall not be entitled to practise as a solicitor and a solicitor shall not be entitled to practise as a barrister', with an exception made for the lawyers employed by the Commonwealth or State Governments.[144] In a marked change from the acrimony that had permeated debate over the 1881 Act, the 1938 Act passed with the support of both sides of the Parliament.[145] Section 1 of the 1881 Act was repealed.[146] Provision was also made for suitably qualified barristers and solicitors to change from one roll to the other. The circumstances surrounding the 1938 Act and the reasons for its introduction were addressed by Hoare J as follows:

> I recall clearly enough the circumstances surrounding the enactment of *The Legal Practioners' Amendment Act* of 1938. At that time the traditional mode of entry to the ranks of solicitors in Queensland was by service under articles of clerkship for five years. Apparently under the provisions of s 1 of *The Legal*

[141] *Queensland Law Society Act 1927* (Qld) s 3.
[142] *Queensland Law Society Act 1927* (Qld) s 5.
[143] See *Queensland Law Society Amendment Act 1930* (Qld) s 26(1).
[144] *Legal Practitioners Amendment Act 1938* (Qld) s 5.
[145] McPherson, above n 51, 348–349.
[146] *Legal Practitioners Amendment Act 1938* (Qld) s 4.

> *Practitioners Act* of 1881, a number of persons who had been admitted as barristers in fact practised as solicitors. Such persons were not for all purposes regarded as solicitors (*Re Walker* (1897) 8 QLJ 61). In most cases the persons concerned — usually by service as a clerk in a solicitor's office for some time — had learned sufficient of the actual practice of a solicitor to properly conduct a solicitor's practice. However there had been some instances where a person had qualified as a barrister — at that time under the Barristers' Board examinations — and without any practical experience whatever had commenced practice as a solicitor. Responsible members of the legal profession were seized of the undesirability of such a course ... It was also thought that with the opening of the law school at the University of Queensland there might well be a considerable increase in the number of persons qualifying as barristers and then without any practical experience whatever, setting up practice as solicitors.[147]

Forbes disputes how much impact the opening of the law courses at the University of Queensland might really have had, given it produced only 'a trickle of graduates'[148] and suggests that the leaders of the profession had simply decided that 'the time had come when the despised Act of 1881 could be removed ... without fuss or publicity'.[149] It has also been suggested that another reason for the repeal of the 1881 Act was the advent of swifter means of communication which meant provincial towns not large enough to support a permanent full-time bar could rely on barristers from larger cities being able to appear.[150] The restriction on solicitors appearing in the Supreme Court continued until the *Supreme Court Act Amendment Act 1973* (Qld),[151] which provided that in all matters in the Supreme Court a party may appear in person 'or by barrister or solicitor or by any person by special leave of the judge'.[152]

The position before the introduction of the 2004 Act about changing from one roll to the other was that, under the *Barristers Admission Rules 1975* (Qld), a solicitor could apply to be admitted to practise as a barrister after five years in 'actual' practice.[153] Actual practice had been held to be 'an independent practice and undertaking the general duties and responsibilities of a solicitor'.[154] In effect it meant that a solicitor had to discharge the responsibilities commonly placed upon a partner in a solicitors firm. In relation to changing from a barrister to a

---

[147] *Ex Parte Solicitors' Board of Queensland* [1979] Qd R 133, 135–136.

[148] Before 1936 students from Queensland either went to the Law School at Sydney University, or completed an Arts degree at the University of Queensland and then completed the courses under the Solicitors' or the Barristers' Boards. The University of Queensland's Law School's first LLB graduates were in 1938.

[149] Forbes, above n 51, 171.

[150] McPherson, above n 51, 229.

[151] An example of a solicitor being prevented from appearing before the Supreme Court as a consequence of the 1938 amendments is *Selecky v Selecky* [1955] QWN 12. It has been suggested that this situation came about as an 'unwitting error' in the drafting of the 1938 Act. See McPherson, above n 51, 397.

[152] *Supreme Court Amendment Act 1973* (Qld) s 2. This is the same standard as applies in the lower courts. See *District Court of Queensland Act 1967* (Qld) s 52; *Magistrates Courts Act 1921* (Qld) s 18; *Justices Act 1886* (Qld) s 72.

[153] *Barrister Admission Rules 1975* (Qld) r 15(6).

[154] *In re McMillan* [1968] Qd R 247, approved *In re C* (1927) Gaz LR (NZ) 212 and applied *Re A S Lilley, a Solicitor* (1894) 6 QLJ 87, it was held that service as an employed solicitor with the Crown did not meet these requirements.

solicitor similar provisions applied, although only three years in practice was required.[155]

VII CONCLUSION

The structure of the legal profession was always one that divided many of the functions of legal practice. Over the centuries each of the categories of persons mentioned near the beginning of this article had a different role — scriveners, conveyancers, proctors, attorneys, solicitors, counsellors-at-law, professors of the law, lawyers, apprentices-at-law, barristers, serjeants-at-law, King's Counsel and advocates. These roles steadily simplified into what we now call solicitors and barristers and there is no doubt that during the period of development of the nineteenth and twentieth centuries a part of the division related to the English class structure. In the English hierarchy the upper social classes tended to the bar and those of the more modest social pretensions tended to be solicitors, proctors, attorneys and conveyancers. When this structure migrated to Australia, so to speak, some aspects of this social hierarchy accompanied it although this was complicated by the early barristers tending to have a better legal education. In the struggles for the legal work there was certainly some protection of practices. The barristers sought to protect court appearances and preferment for elevation to the bench, and the solicitors sought to protect the lucrative commercial aspects of legal practise.

In Australia, and probably in England as well, there was also merit mixed in with the other social aspects of the divided profession. For instance, then and now, a judge needed to know the law, the practice and the general conduct of a court. The barristers were the persons who were best equipped, therefore, to be the persons from whom judges were selected. Further, until the 1950s and 1960s, educational standards played a part. Until then it was barristers who tended to be graduates of universities rather than solicitors. On the other hand until the 2004 Act the Queensland bar retained the Bar Examination system, which was an inferior system of legal education to a university degree, long after that system had been abandoned by the solicitors. Further, in recent years there has developed a trend whereby the top law graduates become solicitors and do not consider going to the bar until later in their careers, if at all.

The division of the profession between barristers and solicitors also enhanced the benefits of specialisation. Barristers specialise in appearances in court so are more familiar with those aspects of the law that are regularly litigated, rules of evidence and court conduct and the ethics and etiquette of litigation. On the other hand, solicitors specialise in many others areas of legal practice. They have skills in corporate law, conveyancing, wills and probate, due diligence and take-

[155] *Legal Practitioners Act 1995* (Qld) s 42(b). This rule was first set down in s 10A of the *Supreme Court Act 1921* (Qld) where it was stated that a barrister must serve three years under articles, as a law clerk or as a judge's associate prior to seeking admission as a solicitor. This section was inserted into the 1921 Act by s 7 of the *Legal Practitioners Act Amendment Act 1938* (Qld).

overs and such matters in which barristers are only peripherally involved (unless it gets to court).

A complex matrix of policy, tradition, interest and status therefore informed the battles between 1859 and the 1970s over whether the legal profession in Queensland should be divided. Mixed with passions about social divisions, better education and protection of lucrative areas of practice were merit and public benefit. That the virtues were evenly divided is reflected in the legislation, which tends one way and then back again. It was also complicated by divisions about admitting legal practitioners from other States and overseas. On the other hand the Australian States that had amalgamated legal professions moved to a divided profession and every Australian State, the Northern Territory and Australian Capital Territory had a thriving independent bar because this is what the merits and the market required. It is piquant, therefore, to see in the past decade that the two 'divided' States, Queensland and New South Wales, have moved to a general 'amalgam' form of admission.

Forbes has argued that the merits tend to lie with fusion of the two branches of the profession. The author begs to differ on this point. It is suggested that an independent bar has provided a better service to the public than fusion could have done. Representation in court by specialists has many advantages for the public. This is not to deny that some barristers are poor advocates. They are the exception and, standing alone, not a reason for abandoning an independent bar.

In conclusion, the key issue is what arrangement of roles within the legal profession best suits the needs of the Queensland community. It is suggested that the changes of the law and practice have fairly reflected the needs of the community since 1859 and that, in the dynamics that have always characterised the structure of the legal profession, the provisions of the 2004 Act are just one more step in a long and continuing path.