Modernisation: changes do not necessarily improve

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After completing their first away series win against the Springboks in 1996 and winning the Tri-Nations Trophy in 1997, the All Blacks changed their style of play in 1998 with the aim of winning the Rugby World Cup in 1999. They concentrated on defence when their traditional strength has always been eight big forwards driving over the ball and seven skilled backs running hard for the line. During the same period numerous changes have been made or proposed for the modernisation of the legal profession in New Zealand. Can we learn from their successes and failures?

Historical setup

The Law Practitioners Act 123 of 1982 (the Act) regulates the profession in New Zealand. Every person admitted to practice under the Act is admitted as a barrister *and* solicitor; no person may be admitted *"as a barrister or solicitor only"*.[1] The minimum requirements for admission are an LLB degree and completion of a practical training course prescribed by regulation.[2] A statutory body, the Council for Legal Education[3] (the CLE) has the responsibility to organise practical training, which it does through the Institute of Professional Legal Studies (the IPLS).[4] In order to be able to practise a duly admitted barrister and solicitor has to hold a current practice certificate issued by a district law society, of which there are fourteen. Membership of a district law society is therefore required if you want to practise. Membership of the New Zealand Law Society (the NZLS)[5] is automatic for every-one who holds a current practice certificate.[6] Governance of the NZLS is entirely in the hands of the practising profession. Its council consists of thirty two practising lawyers; none appointed by the government or any other agency. This enables the NZLS to *promote the interests of the legal profession and the interests of the public in relation to legal matters*[7] without interference from the government.

Every person admitted as a barrister and solicitor has the right of audience before every tribunal in the hierarchy of courts, from the district court to the Privy Council in London. In practice, however, many solicitors prefer not to undertake their own litigation. They pass matters which become litigious on to their litigation partners or brief counsel. Where they brief outside counsel, they call the process "briefing out." The larger firms prefer not to brief out; they would rather keep the fee income within the firm. In order to be able to do that, they have to employ specialist litigators. They also have litigation specialists for different types of disputes, for example, for divorce and family matters, resource management matters, labour matters, commercial and insurance cases and so on. In a big firm the litigation team could be as big as some of the smaller Bars in South Africa. If a firm does not have a specialist litigator available *"in house"* to conduct a particular trial or proceeding, they brief counsel, or, in very rare cases, they brief another firm. Smaller firms simply do not have the need for full-time litigation specialists, nor can they afford to employ the full range of specialist litigation skills their clients may need.

These factors have contributed to the development of a de facto Bar,[8] whose members are known as *barristers sole*. They practise according to the traditional English model we know and have all the powers, privileges, duties and responsibilities that barristers have in England,[9] but they are members of the same district societies and the NZLS as all other practitioners. The profession has been fused in New Zealand from the time of arrival of British settlers here. It was only after the Second World War that some lawyers started practising as barristers sole.[10] The independent Bar has never been strong in New Zealand, although it has grown considerably since the early seventies. In a way, the Bar has developed out of a fused profession and as a voluntary association of members who wished to adopt the style of practice of the barrister's profession in England, much like the Bar developed in Natal (now Kwazulu-Natal) in the nineteen thirties.

Barristers practising in the civil courts are organised in sets of chambers, for the most part, in a setup similar to what we have in South Africa, except that there is no restriction on where they may have their chambers. Criminal barristers tend to practise individually or in small sets of chambers; they do mostly legal aid criminal work. Barristers sole practise as a referral profession; in criminal cases the legal aid clerk nominally fulfils the role of instructing solicitor. Notwithstanding all of this, barristers sole are organised in their own associations, but these enjoy no statutory or official function or recognition.[11]

... While all lawyers with practising certificates are bound by the NZLS's Rules of Professional Conduct (the Rules), rule 11 applies specifically to *The Practice of Barristers* and provides for the following:

- Rule11.01: A barrister sole may not practise in partnership.
- Rule11.02: No person holding a practice certificate as barrister *and* solicitor may hold himself or herself out as practising as a barrister sole.
- Rule11.03: Subject to Rule11.04, a barrister may accept briefs only from a solicitor and not from the lay client.
- Rule11.04: There are six categories of exceptions to Rule11.03, including that briefs may be accepted from a registered patent attorney, a lawyer practising overseas, and an official Assignee or Liquidator. A barrister may also act without a solicitor when assigned to a legally aided person and when acting as duty solicitor.[12]
- Rule11.05: A barrister must be professionally independent and available to accept briefs within his or her field of practice from any client, subject to other professional obligations.
- Rule11.06: A barrister must not induce a belief that there is any relationship between him/her and any law firm.
- Rule11.07: A barrister must not have an arrangement which restricts the complete freedom of a solicitor to brief any counsel the solicitor or the client selects.
- Rule11.08: A barrister shall, when requested, state what the fee will be, or, where that is not practicable, give a carefully considered estimate.
- Rule11.09: A barrister must treat all practitioners with courtesy and fairness.
- Rule11.10: A barrister must keep his or her instructing solicitor reasonably informed of the progress of the brief and seek the consent of the solicitor before interviewing the client or witnesses.
- Rule11.11: Correspondence between the parties (to litigation) should normally be carried out between the solicitors.
- Rule11.12: A barrister should not normally file documents at court or give his or her address as the address for service, except in exceptional circumstances, such as when Rule11.04 applies.

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Proposed changes

The Law Practitioners and Conveyancers Bill (the Bill) which is currently (September 2001) under consideration by the government seeks to introduce a number of changes. The general effect of the Bill is that anyone who wishes to call himself or herself a lawyer has to submit to the regulatory regime provided by the Bill. The basic consideration of the Bill is protection of the public. The four requirements for practice will remain the same namely, an LLB degree, passing the the IPLS course, admission by the court and the issue of a practice certificate. However, the admission process and issue of practice certificates will no longer be functions of the district societies. Those functions will move to the NZLS, which continues to exist. However, compulsory membership of the district law societies and the NZLS would cease. A complaints system which is nationally applicable and administered by the NZLS is envisaged, as opposed to the current situation where each district law society has its own procedures. The demise of the district law societies is on the cards. With their demise important services to the legal profession such as the provision of library facilities at the courts in the main centres will be affected adversely, as these services are provided by the district law societies and funded by the subscriptions paid by their members.

The NZLS made strong representations in favour of the retention of the independent Bar and the right of the NZLS to issue practice certificates allowing barristers sole to practise as such. This stance of the NZLS is partly based on the need of smaller and rural firms to have access to the full range of advocacy skills available at the Bar and partly on the right of practitioners to specialise in any branch of legal practice they should choose. The smaller firms prefer to brief counsel at the independent Bar rather than their city correspondents because they fear, justifiably, that the bigger firms would entice their clients away from them. So they prefer not to expose their clients to the wiles of their competitors. From an advocate's point of view, the most significant fact seems to be that the government has indicated that the continuation of the independent Bar has been assumed although it is not specially mentioned in the Bill. But the government will not expressly acknowledge the separate existence of the Bar. The clear distinction between those lawyers who practise as a referral profession and do not handle clients' money and those who take instructions directly from clients and handle trust money will therefore be maintained.

Pupillage

After obtaining their LLB degrees, law graduates attend the prescribed course at the IPLS. They are then admitted as barristers and solicitors of the court. Once admitted, those wishing to practise as barrister *and* solicitor can only commence practise for their own account (as partner or principal of a firm) after a three year period during which they practise under some form of supervision. Those choosing to practise as barristers sole may commence practice for their own account immediately after admission. There is no Bar examination for prospective barristers sole, nor any pupillage. The IPLS course serves those purposes.[13] Nevertheless, it is not unusual for a young barrister to do work for a busy barrister sole, doing research, drafting pleadings and doing interlocutory applications in an extended form of paid devilling, as we would view it. During this stage the "*devil*" would gain some experience under the guidance of his or her employer, would benefit from being exposed to the briefing solicitors, would be entitled to nurture his or her own practice, and would enjoy a reasonably steady income while doing so. The continuing legal education programmes of the law societies include litigation and advanced litigation skills courses as well as courses on jury trials, duty solicitor training an many other litigation techniques.[14]

Barrister's immunity

The traditional rule was that a barrister may not be sued for negligence arising from the conduct of litigation. New Zealand barristers and solicitors alike are bound by the "*Cab Rank rule*"[15] and are not permitted to refuse an instruction within their field of practice without "*good cause.*" This rule has been relied upon to justify the immunity of counsel from being sued for professional negligence. It is also accepted that counsel owes a duty first and foremost to the administration of justice and subject to that primary duty, a duty to the client. This principle has also been relied upon as justification for the immunity rule. As in other jurisdictions, the scope of the immunity has always been problematic. Further, New Zealand has not always followed English law on questions of liability, a right recognised by the Privy Council in *Invercargill CC v Hamlin*[16]. The explanation is that the common law may develop differently in different countries as it is influenced by local conditions. That raises the prospect that *Rondel v Worsley*[17] and *Saif Ali v Sydney Mitchell & Co*[18] may still be applied in New Zealand, notwithstanding the judgment in *Hall v Simons*[19]. The New Zealand courts have not yet been faced with a case where a plaintiff has relied on *Hall v Simons* to overcome the traditional position. My guess is that the local courts will follow the House of Lords on this issue. There is also a considerable groundswell of opinion that all professionals should be liable for the professional negligence. As things stand at present, only medical professionals and counsel cannot be sued. In an apparent anomaly, all legal practitioners, barristers sole included, are required to have professional indemnity insurance.[20]

Complaints against barristers

Disciplinary matters are dealt with by a special tribunal for each district for which a district law society exists.[21] The tribunal has to inquire into charges made by the district law society. It may impose various penalties. An appeal lies to a higher tribunal, the New Zealand Law Practitioners Disciplinary Tribunal.[22] It has the power to order a suspension from practice or a striking off.[23] There is an appeal to the court.[24] The court may also order the striking off of a practitioner, but the procedure is that the high court hears the application but refers the matter to the Court of Appeal when it is of the view that the application should be granted or is uncertain whether it should be granted or not.[25] There is no separate procedure or tribunal for complaints against barristers. It appears to me that the enforcement of practice standards is not as strict as it could, or should, be. For example, lawyers who arrive at court late or fail to turn up altogether are seldom, if ever, disciplined. The judges do nothing, the district law societies do little and the NZLS seems to be unaware of the problem. The result is that lawyers here are rather lax about their obligation to arrive at court and to do so on time. Double bookings are accepted too; similarly no sanctions are imposed to stop this practice. The Bill proposes that the NZLS will take over the functions of the district law societies in disciplinary matters. The high court will retain its function of overseeing the ethical and professional standards of all lawyers with practising certificates, including the power to discipline lawyers and even to order that their names be struck off the roll.

Robing

Counsel generally robe only for appearances in the high court and court of appeal. Traditional counsel's robes, silk's too, are worn over suits and ties. This might look rather odd to those used to robes with wing collars and bands. Here wing collars and bands have been assigned to the recycle bin by a previous chief justice. Judges wear the same uniform as counsel. The full regalia, robe, wing collar, bands and wig, are worn

only on ceremonial occasions, such as admission ceremonies and tributes, and also for appearances in the Privy Council.

Defaulters' rule

There is no defaulter's rule in New Zealand, although it is accepted that the firm briefing counsel is liable for counsel's fees, not the lay client. Rule 6.08 is to the effect that the instructing solicitor becomes "*responsible personally for the prompt and full payment of the fee.*"[26] The instructing solicitor may not delay payment because he or she has not been paid by the lay client. The procedure followed by counsel who is not paid by the instructing solicitor is to lay a complaint with the district law society of which the solicitor is a member. That solicitor may eventually be disciplined for breaching rule 6.08, but that process does not mean that counsel will get paid.

The rank of Queen's Counsel

The current position is that Queen's Counsel are appointed from the ranks of barristers sole. A solicitor employed in a firm and aspiring to elevation to the bench has to resign from the firm and practise as a barrister sole for a sufficient time to break any links he or she may have to the firm and its clients. That person may later apply for silk and may be appointed to the bench later. The idea is that the judges appointed to the bench should have no current loyalties to any party to litigation, nor any firm or client. The independence of the bench cannot be ensured otherwise. Appointments are made by the Cabinet, acting on the advice of the Solicitor General. However, the current Minister of Justice is bent on abolishing the rank of Queen's Counsel. While the minister has invited representations on the issue, she has made various statements which make it obvious that she, at least, has decided to abolish it. Her reasons appear to be based partly on the Labour Government's desire to root out anything which might smack of a class or quality distinction. Another reason for the proposed abolishment is that litigation lawyers in the big firms have expressed the view that it is unfair that there should be a formal recognition of the seniority and skills of barristers sole in this manner when there is no similar recognition for solicitors practising in the firms nor for academic lawyers. Existing QC's will retain their rank, but no new QC's will be appointed. I expect this announcement to be made early in 2002.

Privy Council Appeals

The minister also has Privy Council appeals in her sights. Unfortunately for her, just as her campaign reached its zenith, the Privy Council handed down an important judgment in a matter where the New Zealand high court and the Court of Appeal can fairly be said to have made a complete mess of a rather simple case.[27] The trial court had awarded costs amounting to some NZ$ 65 000-00[28] *de bonis propriis* against the barrister and the firm of solicitors who had represented a vexatious litigant in an action. There never was any basis for such a ruling because the litigant had been advised fully of his lack of prospects and instructed his lawyers to continue. However, Justice Giles penalised the barrister and the solicitors for pursuing what he called "*a hopeless case*," notwithstanding that it was the litigant himself who had chosen to proceed with the action and notwithstanding the fact that his position was in accordance with a similar case undertaken by the NZLS itself. His Lordship's entire judgment on this issue was, according to the Privy Council, "*based on a series of mistaken assumptions, all of which were due to the unfair way in which he decided to broaden the scope of his inquiry.*" It gets worse. The barrister and her instructing solicitors appealed to the New Zealand Court of Appeal. Their appeal was given short shrift and the court opined that counsel and the firm had been in serious dereliction of their duty.

The Privy Council then had to remind the New Zealand Court of Appeal that: "*As a general rule, litigants have a right to have their case presented to the court and to instruct legal practitioners to present them on their behalf. Although exceptional steps may have to be taken to deal with vexatious litigants, the public interest requires that the doors of the court remain open.*" Since then the legal profession has become far more active in opposing the minister on this issue. Perhaps it is beginning to dawn on them that a lawyer can seldom determine in advance with any degree of certainty whether a client has a good or a bad case. Isn't it the very function of the court to decide that question, after hearing the evidence and argument on both sides? Perhaps it is beginning to dawn upon the profession that they may need protection from the excesses of their own courts, their own government. Since they do not have a written constitution or a strong Bill of Rights, who can protect them from their own institutions other than the Privy Council?

There is a need, demonstrated repeatedly in cases where the Privy Council overruled the Court of Appeal, for a final court of the impartiality, expertise and standing of the Privy Council. New Zealand is a member of the English common law family and it is difficult to understand why the Minister wants to cut those ties. That is, unless there is another reason for the proposed abolition.[29]

Standards of advocacy

I have mixed views about the standards of advocacy in New Zealand. At entry level young lawyers appear to receive more intensive and more focussed training than the training available to pupil advocates and candidate attorneys in South Africa. Not only do they (New Zealand graduates) have to pass the requirements of the IPLS course, which includes a six-weeks Litigation Skills module, but they have various post-admission courses available to them. These include the Duty Solicitor programme and more advanced litigation skills courses offered by the district or national law societies on a regular basis. The bigger firms also run very aggressive training schemes for their staff; many of these cover advocacy.

At a senior level, however, the standards of advocacy are, in my view, disappointing. I cannot quite work out whether it is a matter of style or substance. Compared to what I have witnessed in England, South Africa and Australia, the advocacy of experienced barristers, including some of the most senior Queen's Counsel in New Zealand, is rather unpersuasive. Performances are almost uniformly wooden, without any sign of emotion or conviction. I think three, perhaps four, factors detract from the development of impressive advocacy skills here:

Firstly, written argument has to be provided in all opposed civil matters. Although a synopsis of the argument is required, many produce what amounts to a written argument instead, leaving nothing to be added during the oral argument stage. Judges also require copies of all authorities to be relied upon; in many cases counsel have to produce a vast array of photocopies arranged in a bound bundle even when the books are on the judge's bookshelf within arm's reach. The result is that counsel almost invariably read out, word for word, the whole of the argument. Dead advocacy is the consequence; counsel stands there reading questions and submissions in a monotonous tone of voice that can put even the most recalcitrant and colicky baby to sleep.

Secondly, the skill of examination-in-chief has also been neglected, and with it, the art of cross-examination. In order to speed up trials, parties are required to exchange written briefs of evidence which contain the proposed evidence-in-chief of each witness, except that of defence witnesses in a criminal case. The witnesses then read these briefs instead of being questioned in conventional examination-in-chief. The briefs are prepared by the

lawyers for the parties, so there is a great risk that the evidence may be influenced by them. The court also does not get much of an opportunity to evaluate the power of recall or demeanour of the witnesses; it is only when they are under cross-examination that the court can see how they react to questioning.

Thirdly, because they receive these briefs well in advance of the hearing, opposing counsel have the opportunity to write out every question to be put in cross-examination, which is exactly what they seem to do. They no longer listen to the answers and they take refuge in the list of questions they have prepared in advance to produce unthinking and unpersuasive advocacy. The whole process of examining witnesses is no longer dynamic; neither is oral argument.

The *fourth* reason I put forward rather tentatively; it appears to me that here in New Zealand there is not the degree of specialisation in advocacy which we take for granted at the Bar in South Africa, England or New South Wales. Can it be that advocacy skills are best developed in an environment where there is complete objectivity in the advocate, coupled with independence, early specialisation in litigation and fierce competition? If so, this would be the best reason for retaining the Bar as a separate and independent profession.

Conclusion: a personal view

New Zealand has espoused socialist policies from the nineteen thirties and that philosophy is reflected in her laws, social and political structures, and even in the interpretation of the English common law by the courts. The current government is more overtly socialist than its predecessors and the Court of Appeal has, since the early nineteen eighties, steadily imposed heavier duties of care upon institutional defendants such as municipalities, insurers and employers. The combination of these two factors has seen a progressive reduction in the standing, authority and power of employers' associations, what is described as "*Big Business*" and professional associations such as the law society. A welfare state has been created where the overriding expectation is one of compensation, or "*compo*," as it is called here. For every person in employment there is another enjoying welfare benefits. In order to provide to the multitude of welfare claimants, the government has to take from others. The taking is made easier if those from whom the taking is to be made can be weakened first. This is done by way of legislation.

The NZLS has always been a very powerful organisation. It represents all practising lawyers in New Zealand. It has powerful alliances with overseas law societies. Under the proposed new regime membership of the district law societies and the NZLS will no longer be compulsory. Many lawyers will not join; some because of apathy, others because they do not want to pay the subscriptions, yet others because they feel adequately catered for by their Bar association or chambers. The "*mana*," authority, of the NZLS will be reduced considerably. In a related development the real power in health care has been taken away from the medical profession and placed in the hands of local health boards. There is a gradual process of wresting power away from everyone except the labour movement.

I view the Law Practitioners and Conveyancers Bill in the same light. I think the adamant refusal of the government to recognise the existence of the Bar is an extension of their socialist policies. The planned abolition of the rank of Queen's Counsel and Privy Council appeals are further examples of rampant social engineering. We have been there before in South Africa, haven't we? The first thing the South African government did in the nineteen fifties and sixties was to target the lawyers and to reduce the authority of the courts. Listed communists were not allowed to practice. And the government decided whose name went onto the list. Detainees were denied access to lawyers or the courts. Lawyers were detained, prosecuted and imprisoned. Government supporters were appointed to the Bench. The courts were saddled with unjust reverse onus provisions in political crimes and had their power to review the actions of the police and the military removed or reduced. The same desire to control the activities of non-governmental organisations is apparent here in New Zealand. It just so happens that the legal profession is in the sights this time. In a country which has seen little internal turmoil and has never faced an external enemy, the value of an independent legal profession for the protection of individual rights is not self-evident. So there is no general alarm or outcry yet.

Since the All Blacks changed their strategy in 1998 their success rate against the big three, South Africa, Australia and France has dropped to 55%. Previously it had hovered around the 70% mark. They have lost to the Wallabies seven out of the last nine times they met each other in tests! At the time of writing this article they are looking for a new coach to take them to the 2003 World Cup. No doubt they expect a new style of play. No doubt they will be disappointed. That is, unless they can find a way to harness their traditional strengths.

In my view the government's proposed changes are likely to weaken the legal profession to the detriment of the public. A strong and independent judiciary can only be built on an independent legal profession. That is the strength of the traditional English model and governance of the legal profession.

Endnotes

1 S 43(1).
2 S 44.
3 The CLE comprises two high court judges nominated by the chief justice, one district court judge nominated by the head of that court, five members of the NZLS, the deans of the law schools at Waikato, Wellington, Canterbury, Otago and Auckland universities, two members of the Law Students' Association, one member, not a practising lawyer or law student, nominated by the Minister of Justice and one member nominated by the CLE.
4 See www.ipls.org.nz for detail about the IPLS and its course.
5 For its functions and powers, go to www.nzls.org.nz.
6 S 3(2). All practice certificates have to be renewed on 1 January each year.
7 A function imposed on it by s 4(a) of the Act.
8 It is not, however, entirely independent of the solicitor's profession because they belong to the same law societies and share the same disciplinary procedures.
9 S 61.
10 It is rumoured that Lord Cooke of Thorndon was the first person in New Zealand to set up practice exclusively as a barrister accepting briefs only from solicitors.
11 Eg the Criminal Bar Association.
12 The duty solicitors scheme provides persons who have been arrested and need urgent advice and representation with a lawyer on a legal aid basis. Barristers sole are on this roster.
13 My view is that the course is too easy and too short.
14 I am tempted to attend the next seminar on DNA evidence.
15 Rule 1.0.
16 [1996] 1 NZLR 513 (PC).
17 [1967] 1 AC 19 (CA).
18 [1980] AC 198 (HL).
19 *Arthur JS Hall & Co (a firm) v Simons; Barratt v Ansell and other (trading as Woolf Seddon (a firm); Harris v Scholfield Roberts & Hill (a firm) and another* [2000] 3 All ER 673 (HL).
20 Rule 1.1.
21 S 103.
22 S107.
23 S112.
24 S118.
25 S 92-93.
26 *Atkinson v Pengelly* [1995] 3 NZLR 104.
27 *Glasgow Harley v McDonald* ,10 April 2001.
28 More than R240 000 at current exchange rates.
29 While I was editing this article the *Sunday Star Times*,7 October 2001, reported that the prime minister had announced at the New Zealand Law Conference that Privy Council appeals will be abolished. The only question is what court will replace it. The paper also reports that the vast majority of lawyers are against the abolition. The idea seems to be that a further tier of appellate court would be added above the Court of Appeal, with its judges drawn from the current Court of Appeal. Very few can see any advantage in the proposed system, especially when one considers the perceived or real shortcomings of the Court of Appeal and the fact that the impartiality and expertise of the Privy Council is available at no cost to the taxpayer. If the Court of Appeal is good enough, there is no need for a further appellate court. If it is not good enough, the Privy Council would be better than the proposed court for the reasons mentioned in the text.