The Bar in Australia

Glen Martin SC, vice chair of the Queensland Bar and member of the council of the Australian Bar Association

Origins

The common law of England and the basic structure of courts was brought to Australia in the late 18th century by those who followed the first white settlers in Australia in 1788. As so much of Australia as was subject to British rule was a penal colony, the legal structures necessarily did not stray far beyond those of military courts. In the early 19th century an increase in the number of free settlers arriving in Australia created the necessity for a true court system and a legal profession arose. However, the size of the population and the commerce which was involved meant that the legal profession was a combined profession. A separate Bar did not emerge until 1834 when, in the colony of New South Wales, appropriate rules of court were brought into force. A separate Bar later came into existence in the colonies of Victoria and Queensland and the organisation and control of the legal profession now reflect the colonial heritage of the country. The power to legislate directly with respect to the legal profession lies with the various states and territories of Australia rather than the commonwealth parliament.

Organisation

Consistent with the colonial history of Australia, there is a separate and distinct Bar in each state and territory. The admission of practitioners to practice and the disciplining of all practitioners are, in the end, the province of the supreme court of each state and territory.

In each state and territory (except Queensland) a person is admitted as a legal practitioner (or similar title) and then is free to choose the style of practice which he or she wishes to adopt. Thus, it is possible for a person to practise solely as a solicitor, solely as a barrister, and, to a much lesser extent, as a barrister and solicitor. Queensland still maintains a divided profession but it is anticipated that legislation will amalgamate the professions in the near future while providing for the same freedom to choose as exists elsewhere.

A separate Bar emerged in New South Wales, Victoria and Queensland in the 19th century but it was not until the second half of the 20th century that separate Bars developed in the less populous states.

Each state and territory has its own Bar association. This table shows the number of barristers in actual practice (it excludes interstate, associate and related categories) in those associations:

Jurisdiction	*Male*	*Female*	*Silk*	*Junior*	*Total*
Australian Capital Territory	36	6	3	39	42
New South Wales	1 600	251	244	1 607	1 851
Northern Territory	25	3	5	23	28
Queensland	506	73	73	506	579
South Australia	122	21	32	11	143
Tasmania	20	1	16	5	21
Victoria	1 175	225	180	1 250	1 430
Western Australia	127	16	24	119	143

All members of the various state and territory associations are also members of the Australian Bar Association. It is an umbrella body which liaises with commonwealth authorities and courts and deals with matters of national interest. It has also produced a set of model rules of conduct which may be adopted, with appropriate local variations, by the state Bar associations.

Court structures

The structure of courts in Australia also dictates, to some extent, the manner in which the bar is organised and the way in which barristers practice. Until 1975 the only commonwealth tribunals of substance were the High Court of Australia and the Conciliation and Arbitration Commission. In 1975 the Family Court of Australia was established with a jurisdiction covering all of Australia. This was then followed by the Federal Court of Australia (which has Australia-wide jurisdiction with respect to certain commonwealth matters). This has led to the development by some counsel of interstate practices. A recent innovation is the "travelling practising certificate". This allows counsel admitted in one state to practise in any other state. Prior to the introduction of this counsel were required to be admitted, and to maintain practising certificates, in each jurisdiction.

Each state and territory has a supreme court and one or more inferior civil and criminal courts. There is also in each jurisdiction a number of other tribunals dealing with specific areas.

The supreme court sits in the capital of each state and also engages in circuit work. This has, in some states (particularly Queensland), encouraged the growth of provincial Bars. In Queensland, for example, almost 20% of the total Bar is outside the capital city.

Style of practice

Almost all barristers, across Australia, practice in a chambers system whereby the costs of accommodation, library, secretarial and other facilities are shared to some extent. All barristers are required, by the rules of conduct, to practise as sole practitioners and so, of course, there is no sharing of income. A substantial clerking system exists in Victoria and it bears some similarities to the clerking system in England. The New South Wales Bar also has a system of clerks but it does not generally have the same degree of involvement with barristers' practices as in Victoria. The other Bars in Australia operate without any form of clerking system. Virtually all sets of chambers are located in modern commercial buildings situated close to the major court houses.

Senior counsel

Until 1992 all appointments to the Inner Bar were as Queen's Counsel. In that

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The Bar in New Zealand*

Chris Marnewick SC

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 *Aas a barrister or solicitor only*. The minimum requirements for admission are an LLB degree and completion of a practical training course prescribed by regulation. A statutory body, the Council for Legal Education (the CLE), has the responsibility to organise practical training, which it does through the Institute of Professional Legal Studies (the IPLS). 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) is automatic for everyone who holds a current practice certificate. 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* 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, 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, but they are members of the same district societies as all other practitioners, and of the NZLS. 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. 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.

While all lawyers with practising certificates are bound by the NZLS's Rules of Professional Conduct (the Rules), one of the rules applies specifically to *The Practice of Barristers*. 🕮

* *This is an extract from Marnewick "Modernisation: changes do not necessarily improve" in 2001 December* Advocate 30. *That article contains more detailed information on the Bar in New Zealand.*

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year the New South Wales government decided to remove itself completely from the process and prohibited any further appointments. In answer to that the New South Wales Bar Association instituted the appointment of senior counsel pursuant to a protocol it devised. Ten years later, and with various systems in place, all appointments (except by the commonwealth government) are now as senior counsel. The appointment system differs from jurisdiction to jurisdiction. In most case the relevant chief justice plays a prominent role. 🕮

Chris Marnewick's paper on "Assessing competency in advocacy skills," delivered at the Barristers' and Advocates' Forum of the IBA in Durban on 24 October 2002, will appear in the next issue of *Advocate*.