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articles. Either as a consequence, or in anticipation of these findings,[55] English law has been changed in a number of significant respects.[56] For example, the law of contempt of court was amended following the *Sunday Times* case[57]; the law relating to the correspondence of persons in prisons has been radically altered[58]; the law in Northern Ireland concerning homosexual acts has been brought into line with the rest of the United Kingdom[59]; Isle of Man courts have been advised that birching is contrary to the European Convention[60]; and phonetapping has been regulated by statute.[61] The Convention has also had some influence in statutory interpretation,[62] although judges have emphasised on a number of occasions that it is not part of English law.[63]

[55] There are also some changes that can be traced to friendly settlements or Commission decisions.

[56] See P. J. Duffy, (1980) 29 I.C.L.Q. 585–618; A. Drzemczewski, *European Human Rights Convention in Domestic Law* (1983), pp. 314–322; M. P. Furmston, *et al.*, (eds.), *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights* (1983); F. J. Hampson, "The United Kingdom Before the European Court of Human Rights" (1989) 9 Y.E.L. 121.

[57] See *Sunday Times Case*, Series A No. 30, Judgment of April 26, 1979: violation of Art. 10. Contempt of Court Act 1981; S.H. Bailey, (1982) 45 M.L.R. 301. It is not certain that the Act went far enough.

[58] See the *Golder Case*, Series A No. 18, Judgment of February 21, 1975; *Case of Silver and Others*: Series A No. 61, Judgment of March 25, 1983: violations of Arts. 6 §1 and 8; *Case of Campbell and Fell*, Series A No. 80, Judgment of June 28, 1984; *Case of Boyle and Rice*, Series A No. 131, Judgment of April 27, 1988; S. H. Bailey, D. J. Harris and B. Jones, *Civil Liberties: Cases and Materials* (2nd ed., 1985), pp. 535–551; G. J. Zellick, [1981] P.L. 435–438, [1983] P.L. 167–169.

[59] *Dudgeon Case*, Series A No. 45 Judgment of October 22, 1981: violation of Art. 8; Homosexual Offences (Northern Ireland) Order 1982.

[60] *Tyrer Case*, Series A No. 26, Judgment of April 25, 1978; G. J. Zellick, [1982] P.L. 4–5. The United Kingdom does not now accept the rights of individual petition in respect of the Isle of Man.

[61] *Malone Case*, Series A No. 82, Judgment of August 2, 1984; Bailey, Harris and Jones (1985), pp. 381–392; Interception of Communications Act 1985 (see annotations in *Current Law Statutes 1985* by D. Foulkes). The Convention has also influenced the law affecting mental patients, children in secure accommodation, immigration, and the right of parents to forbid the imposition by a school of corporal punishment on their children.

[62] See below, p. 349; A. Drzemczewski, *European Human Rights Convention in Domestic Law* (1983), pp. 166–187.

[63] *Ibid.* pp. 314–322. See, *e.g. Malone* v. *Metropolitan Police Commissioner* [1979] Ch. 344; *Att.-Gen.* v. *B.B.C.* [1981] A.C. 303 (Lord Scarman); *R.* v. *Secretary of State for the Home Department, ex p. Brind* [1991] 2 W.L.R. 702.

CHAPTER 3

LAWYERS

A. INTRODUCTION: THE "LEGAL PROFESSION"

The title "lawyer" is reserved for those who have achieved the special status of membership of the "legal profession." It is not a straightforward job description: many non-lawyers perform legal tasks, some of them full-time. For example, accountants may specialise in revenue law, trade union officials may appear regularly before industrial tribunals on behalf of their members,[2] and solicitors may delegate work to legal executives.[3] Conversely, many of the tasks performed by lawyers are not strictly "legal."[4] Membership of the legal profession in England and Wales involves qualification as either a solicitor or a barrister; it is usual to speak of two branches of the profession although historically it would be more accurate to refer to two professions.[5]

It is significant that lawyers are accepted to be members of a "profession." Much has been written about the supposedly distinctive attributes of professions, and how and why occupational groups seek professional status.[6] Medicine and law have been regarded as classic models, although important differences between them have been perceived.[7] The self-conception of the legal profession was articulated by the Law Society in evidence to the Monopolies Commission in 1968[8]:

> "When a profession is fully developed it may be described as a body of men and women (a) identifiable by reference to some register or

"Barrack-room" lawyers don't count. Law lecturers commonly refer to themselves as "academic lawyers" even if they are not qualified. See M. Partington, Academic lawyers and "legal practice" in Britain: a preliminary reappraisal (1988) 15 J.L.S. 374.

[2] See below, p. 737.

[3] See below, p. 175.

[4] See below, p. 115.

[5] M. Birks, *Gentlemen of the Law* (1960), p. 3. See further, below pp. 107–113.

[6] See T. J. Johnson, *Professions and Power* (1972), pp. 21–38. For an argument that the concept of "profession ... obscures more than it reveals about the work people do" see M. Cain, (1979) 7 *International Journal of the Sociology of Law* 331. See generally R. Dingwall and P. Lewis (eds.), *The Sociology of the Professions* (1983), in which Cain's paper is reprinted. See also R. Dingwall and P. Fenn, "A respectable profession?" (1987) 7 Int. Rev. Law and Econ. 51; R. L. Abel, *The Legal Profession in England and Wales* (1988), Chap. 1 "Theories of the professions," and note the extensive bibliography.

[7] D. Rueschemeyer, "Lawyers and Doctors: a Comparison of Two Professions" in V. Aubert (ed.) *Sociology of Law* (1969), pp. 267–277, abridged from (1964) 1 *Canadian Review of Sociology and Anthropology*, 17–30.

[8] Quoted in the Report of the Royal Commission on Legal Services (Cmnd. 7648, 1969) Vol. 1, p. 30.

record; (b) recognised as having a special skill and learning in some field of activity in which the public needs protection against incompetence, the standards of skill and learning being prescribed by the profession itself; (c) hold themselves out as being willing to serve the public; (d) voluntarily submitting themselves to standards of ethical conduct beyond those required of the ordinary citizen by law; (e) undertaking to accept personal responsibility to those whom they serve for their actions and to their profession for maintaining public confidence."

This approach was accepted uncritically by the Royal Commission on Legal Services.[9] They emphasised five main features of a profession: (a) central organisation: a governing body with powers of control and discipline; (b) the primary function of giving advice or service in a specialised field of knowledge; (c) the restriction of admission to those with the required standard of education and training; (d) a measure of self-regulation by the profession; and (e) the paramountcy of the duty owed to the client, subject only to responsibility to the court. A rule of conduct or restriction on practice should "stand or fall on its capacity to protect the interests of, or to enhance the level of service to the public." Thus, in theory at least, "altruistic service" is offered subject to self-regulation, in return for considerable autonomy from external control.[10] The Royal Commission, having noted that these features existed, found that they promoted the public interest, subject to points of detail, and proposed no fundamental changes. There was no exploration of other features that have been associated with the "rise of professionalism." For example, Larson has described professionalisation as:

> "the process by which producers of special services sought to constitute *and control* a market for their expertise . . . a collective assertion of special social status (and) a collective process of upward social mobility."[11]

Arguments for maintaining standards tend to coincide with arguments for monopolies, restrictions on practice and high rewards.[12] There was also no proper analysis of the ways in which professionalism may impede the expansion of legal services.[13] Thus, problems may be defined in the professional's terms and alternative definitions regarded as irrelevant; outsiders, whether lay people or members of other disciplines, may be ignored on the grounds that they are not competent either to assist or to criticise; "specialised knowledge" may be guarded by such means as "the creation of special forms of jargonised discourse and the fostering of an air of impenetrable mystery"[14]; the emphasis on the individual lawyer-client relationship may inhibit

[9] R.C.L.S., Vol. 1, pp. 28, 30. Johnson has mentioned the error made by many sociologists in accepting the professions' own definitions of themselves: Johnson (1972), p. 25. The Commission did not discuss the literature on the sociology of the professions.

[10] Johnson sees professionalism as a form of occupational control rather than an expression of the inherent nature of particular occupations: Johnson (1972), p. 45.

[11] M. S. Larson, *The Rise of Professionalism* (1977), p. xvi.

[12] See below, pp. 125–140.

[13] R. Cotterell, "Legal Services and Professional Ideology" (1980) (Paper presented at the Conference on Legal Services in the Eighties, University College, Cardiff). P. Fennell, "Solicitors, their markets and their 'ignorant public': the crisis of the professional ideal" in Z. Bankowski and G. Mungham (eds.), *Essays in Law and Society* (1980), p. 1.

[14] Cotterell, *op. cit.*, p. 10.

the development of group representation and test-case strategies[15]; the proper advertisement of legal services may be prevented.

Many of these problematic features of professionalism have come under attack in recent years. The general preference of the Royal Commission to endorse the *status quo* has not prevailed. What he terms "the decline of professionalism" has been charted by Prof. R. L. Abel, who has written extensively on the English legal profession, applying in particular Weberian theories developed by writers such as Larson.[16] We return to his work at the end of the chapter.[17]

In the following sections, we deal briefly with the historical development of the legal profession, showing how it progressively acquired the indicia of professionalism and control over the market for legal services, and then with the main features of the profession today.

B. FROM "OCCUPATION" TO "PROFESSION"

1. Medieval Lawyers

In medieval times, legal life in London outside the courts was centred on the four inns of court (Lincoln's Inn, Gray's Inn, the Inner Temple and the Middle Temple) and the nine or so inns of chancery. Together they constituted a "great legal university situated in the western suburbs of London."[18] Membership of an inn was the clearest indicator of professional status, but not a sufficient one as most of the members attended only for general social and educational purposes and took no part in the legal learning exercises. Each inn had a chapel and a library, and a hall which was used both for meals and for moots, readings and debates. A moot was a form of mock trial consisting of the submission of legal argument relating to a given set of facts. The hypothetical pleadings were recited by "inner barristers" and the arguments conducted by "utter barristers," so called because they spoke from outside the bar of the inn. The moots were judged by senior members of the inn, the "benchers." The inns of chancery were lower in status than the inns of court; a man might spend a couple of years in an inn of chancery before moving to an inn of court, or he might remain a member of an inn of chancery all his life.

Baker[19] has distinguished six classes of common lawyer in late medieval times. Of the legal practitioners other than judges and court clerks, the most senior were the *serjeants-at-law*. The serjeants were appointed by the judges of the Court of Common Pleas, the main common-law court in London. They had the exclusive right of audience in that court, and the exclusive right to be appointed judges of the Common Pleas and King's Bench. On appointment, a serjeant would move from his inn of court to one of the two

[15] See below, pp. 422–423.

[16] R.L. Abel, "The decline of professionalism?" (1986) 49 M.L.R.1, *The Legal Profession in England and Wales* (1988), and "Between market and state: the legal profession in turmoil" (1989) 52 M.L.R. 285; R. L. Abel and P. S. C. Lewis (eds.), *Lawyers in Society: The Common Law World* (1988).

[17] Below, pp. 177–179.

[18] J. H. Baker, "The English Legal Profession, 1450–1550" in W. Prest, *Lawyers in Early Modern Europe and America* (1981), p. 17.

[19] Ibid. See also J. H. Baker, *Introduction to Legal History* (3rd ed., 1990), Chap. 10; Birks (1960); H. Kirk, *Portrait of a Profession* (1976), Chap. 1.

serjeant's inns, joining his fellow serjeants and the judges. *Apprentices-at-law* were, notwithstanding the name, "fully-fledged advocates below the degree of serjeant,"[20] who appeared in the King's Bench and other courts. They were senior members of the inns of court. The *utter barristers* did not at this stage appear as advocates in the superior courts. The largest group were the *attorneys*. Litigants were originally required to act personally in the course of litigation, meeting their adversaries face to face. This rule was progressively relaxed.[21] A litigant could then appoint an attorney to act in his name for specific or general purposes. He could appoint a friend, a relation or a stranger as he wished; court clerks and sheriff's officers were often selected. The appointments were supervised by the judges, and the names of the attorneys entitled to practise in a particular court would be endorsed in that court's records. By the fifteenth century a number of people earned a living as "common attorneys" prepared to act for any client wishing to employ them. Most were members of inns of chancery; the more affluent and those intending to become barristers joined one of the inns of court. Attorneys also came to be permitted in local courts, although they would not necessarily be members of an inn.[22] They took formal steps in litigation which bound their clients, and "also acted as general practitioners, retaining counsel and giving it."[23] *Solicitors* performed a variety of miscellaneous clerical tasks for employers such as land owners and attorneys. Their name was derived from their function of "soliciting" or prosecuting actions in courts of which they were not officers or attorneys. Thus the nomenclature of early common lawyers was confusing. Some titles indicated a public position or status (*e.g.* serjeants); others a position within one of the inns which might not be of significance outside (*e.g.* utter barrister, bencher); yet others were descriptive of a type of legal work (*e.g.* attorney, solicitor). Strict lines of demarcation were few. For example, serjeants, apprentices and attorneys might all give legal advice and an apprentice or utter barrister might act as an attorney.

A separate set of lawyers practised in the ecclesiastical courts, the Admiralty and the Court of Chivalry. The *doctors of law* acted as advocates, the *proctors* as attorneys.[24] Other quasi-legal functionaries included *scriveners*, who drew up legal and other documents and enjoyed a monopoly over the drawing of deeds in London and York, and *notaries*, who authenticated documents to be used abroad.[25]

2. Specialisation and Demarcation

A dramatic increase of legal business in the late sixteenth and early seventeenth centuries was accompanied by a rise in the number of barristers and attorneys in the common law courts and a reduction in the number of attorneys attached to local courts.[26] Much more work came to be available in

[20] Baker (1981), p. 27.
[21] Birks (1960), Chap. 1; Kirk (1976), pp. 1–4.
[22] C. W. Brooks, "The Common Lawyers in England, c.1558–1642" in Prest (1981), pp. 46–50.
[23] Baker (1981), p. 24.
[24] Baker (1990), pp. 193–194; G. D. Squibb, *Doctors' Commons* (1977); B. P. Levack, "The English Civilians, 1500–1750" in Prest (1981), p. 108.
[25] Birks (1960), Chap. 4; Baker (1981), p. 27.
[26] Brooks (1981), pp. 51–54 and *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England* (1986); W. R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590–1640* (1986).

the King's Bench and this came to be done by utter barristers as well as apprentices. The slow decline of the order of serjeants which set in was closely related to the decline in the importance of the Common Pleas compared to the other superior courts, and to the fact that holders of the new office of "King's Counsel" which became established in the seventeenth century took precedence. By 1600, practice at the Bar was limited by royal proclamation and judicial decision to utter barristers of the inns of court and their seniors.[27] Barristers concentrated more on advocacy and less on counselling. At the same time, the judges began to object to men acting as "solicitors." Intermeddling in another person's law suit constituted "maintenance," which was both a crime and a tort.[28] Serjeants and barristers obviously had a good defence, as did an attorney acting in his own court. A servant could act as solicitor for his master. However, "common solicitors" prepared to act for any client were regarded by many judges as "maintainers." They were described by Lord Keeper Egerton as "caterpillars of the commonweal" and by one Hudson as:

> "a new sort of people . . . who, like grasshoppers of Egypt, devour the whole land . . .; these are the retainers of causes, and devourers of men's estates by contention, and prolonging suits to make them without end."[29]

Some judges thought that solicitors' work should be done by young barristers rather than "ignorant and vagrant" solicitors. Nevertheless, the attempt to abolish solicitors failed. A statute of 1605[30] instead subjected both attorneys and solicitors to a measure of control to prevent overcharging and to cut their numbers; only "skilful" and "honest" men were to be allowed to practise. Solicitors became particularly associated with the Court of Chancery where there was a rule that only court clerks could be appointed as attorneys; there was, however, too much work for the clerks to handle.

At the same time, the judges and benchers began the process of excluding attorneys from the inns of court and prohibiting such persons from being called to the bar while in practice, thereby asserting the bar's intellectual and social superiority.[31] The Judges' Order of 1614 described attorneys and solicitors as "but ministerial persons *and* of an inferior nature. . . ." In the seventeenth century, the superior status of barristers was further consolidated by their growing unwillingness to accept instructions directly from a lay client without the intervention of an attorney or solicitor,[32] by rules which prohibited social contact between barristers and solicitors, and by the development of the presumption that fees paid to barristers were *honoraria* which if unpaid could not be recovered by an action.[33] In the long term, attorneys and solicitors benefited financially from the Bar's pursuit of a separate elite status and continued reluctance to perform "mechanic" legal

[27] See J. H. Baker, "Solicitors and the Law of Maintenance 1590–1640" [1973] C.L.J. 56, 59–66.
[28] *Ibid.* pp. 66–80.
[29] *Ibid.* pp. 72, 73–4.
[30] 3 Jac. 1, c. 7.
[31] J. H. Baker, "Counsellors and Barristers" [1969] C.L.J. 205, 222–224; H.H.L. Bellot, "The Exclusion of Attorneys from the Inns of Court" (1910) 26 L.Q.R. 137.
[32] This was a clear rule of etiquette by the second half of the eighteenth century: it was not, however, a rule of law: *Doe d. Bennett* v. *Hale* (1850) 15 Q.B. 171.
[33] Baker [1969] C.L.J. at pp. 222–229. Fees were then usually paid in advance and so the *honorarium* concept reinforced the barrister's status without seriously affecting his pocket.

work even when it fell on harder times. Moreover, barristers came to be dependent upon the patronage of attorneys and solicitors.

By the eighteenth century[34] the judges and the government had ceased to attempt to exercise any control over the Bar. The government of the inns of court had long since passed from the membership as a whole into the hands of the benchers.[35] The inns' educational functions disappeared, the only requirements for call to the Bar were enrolment as a student for a number of years and the eating of dinners for twelve terms in one of the inns. The lines of demarcation between barristers and solicitors were strengthened during the century. Common practice became firm rules of etiquette. The expulsion of attorneys from the inns was completed.[36]

3. The Rise of the Solicitors' Profession

The eighteenth century saw the establishment of a professional organisation for attorneys and solicitors,[37] the development of statutory controls and subsequently the expansion of work associated with the Industrial Revolution. The inns of chancery were dominated by the attorneys and their links with the bar were severed. However, the inns did not develop as a professional organisation as they had no control over admission to practice or discipline. Attorneys were still admitted to the rolls by the judges,[38] and albeit only in serious cases of a misbehaviour, struck off by them.[39] Solicitors were not subject to any formal control until the 1728 Act "for the better regulation of Attornies and Solicitors."[40] A roll of solicitors was then established in the Court of Chancery.[41] An applicant for admission as an attorney or solicitor had to have been articled to a practitioner and the judges had to be satisfied of his fitness. This Act established the mechanisms of control but the judges did not examine applicants for admission and some of its provisions were easily evaded.

In the early 1730s some London lawyers formed the Society of Gentlemen Practisers in the Courts of Law and Equity, for the purpose of "supporting the honour and independence of the profession, promoting fair and liberal practice, and preventing unnecessary expense and delay to suitors."[42] It did not claim to be representative of the profession, or even of London practitioners, but it did attempt, with limited success, to ensure compliance with the legislation and to promote the profession's interests. In 1831[43] a new society received its Royal Charter: "The Society of Attorneys Solicitors Proctors and others not being barristers practising in the Courts of Law and Equity in the United Kingdom." Its original object had been the establishment of a central "Law Institution" where lawyers could meet. The idea was popular, and a Hall was erected in Chancery Lane. The society's objects widened. It never actually amalgamated with the Society of Gentlemen Practisers but began to undertake disciplinary proceedings in the courts against attorneys and solicitors and to lobby on behalf of the profession's interests. In 1833 it decided to use the name "The Incorporated Law Society of the United Kingdom."[44] The Solicitors Act 1843 provided that it was to be the Registrar of Attorneys and Solicitors.

Another nineteenth century preoccupation of attorneys and solicitors[45] was the improvement of their status in society. Improvements in the general educational standards of entrants and in their subsequent legal education were regarded as prerequisites.[46] In 1836 the common law judges were persuaded to revive a rule of 1654 enabling them to appoint persons to examine those wishing to be admitted as attorneys. The examiners nominated included 12 members of the Council of The Incorporated Law Society. Similar steps were taken by the Court of Chancery and examinations were duly held.[47] Nevertheless, a Select Committee of the House of Commons reported in 1846 that the state of legal education was still extremely unsatisfactory.[48] For solicitors and attorneys they recommended the introduction of a preliminary examination to ensure a sound general education, the provision of lectures for articled clerks, higher standards in the final examination, and, eventually, a college of law. These recommendations were progressively adopted. In 1860, a preliminary and an intermediate examination were introduced, the latter intended to be taken midway through articles. In 1877 The Incorporated Law Society acquired control of the education and qualifying arrangements for admission. Tuition by private coaches such as Messrs. Gibson and Weldon proved more attractive than Law Society lectures, although the Society did establish a law school in 1903.[49] Failure rates in the final examination increased, particularly at times when there was concern that there were too many solicitors.[50]

University legal education also developed from slender origins in the second half of the century.[51] Graduates were exempted from the preliminary examination in 1877 and law graduates from the intermediate as late as 1922. It has indeed been a notable feature of legal education in this country that the universities and polytechnics have played a much more minor role in the education of intending practitioners than in other systems, including, for example, those in Scotland and the United States. The profession has fought hard to retain ultimate control.[52]

[34] See D. Duman, "The English Bar in the Georgian Era" in Prest (1981), pp. 86–107.
[35] A. W. B. Simpson, "The Early Constitution of the Inns of Court" [1970] C.L.J. 241; "The Early Constitution of Gray's Inn" [1975] C.L.J. 131.
[36] Duman (1981), pp. 100–104.
[37] Kirk (1976), Chap. 2.
[38] By the late eighteenth century this was a formality: Birks (1960), pp. 171–172.
[39] An attorney struck off was physically pitched over the bar, presumably not by the judges personally.
[40] 2 Geo. 2, c.23. The Act was renewed in 1739 and 1749, made perpetual in 1757, and amended on these and other occasions.
[41] "Accordingly they became entitled to call themselves 'gentlemen'. This is the origin of the jibe that solicitors are gentlemen by Act of Parliament": Birks (1960), p. 136.
[42] Kirk (1976), Chap. 2.
[43] Its inaugural meeting was in 1825.
[44] By a charter of 1903 it became "The Law Society."
[45] By now solicitors were regarded as more respectable than attorneys. Most practitioners were qualified as both. The offices of attorney and proctor were abolished in 1875 as one of the consequences of the reorganisation of the superior courts. See above, p. 32.
[46] See Kirk (1976), Chap. 3.
[47] Birks (1960), pp. 176–180. All the entrants passed the first attorneys' examination.
[48] *Report from the Select Committee on Legal Education*, August 25, 1846, H.C. 686.
[49] The Society's school and Gibson and Weldon's were amalgamated to form the College of Law in 1961, perhaps on the "if you can't beat 'em join 'em" principle.
[50] Cf. S. Hughes, *Legal Action*, July 1984, p. 10.
[51] *Report of the Committee on Legal Education* (1971, Cmnd. 4595), pp. 5–9; J. H. Baker, "University College and Legal Education 1826–1976" (1977) 30 C.L.P.1. Until the eighteenth century the universities taught only Roman-based Civil law.
[52] See further, pp. 171–175 below.

Parliament confirmed the authority of the Law Society in 1888 and 1919 when disciplinary functions in respect of all solicitors, including those not members of the Society, were transferred from the courts to a disciplinary committee appointed by the Master of the Rolls from past and present members of the Council of the Law Society.[53] According to Abel-Smith and Stevens:

> "it is almost certain that it was in the fifty years after 1860 that the solicitors' branch of the profession built its financial prosperity and social respectability."[54]

The nineteenth century development of an active professional organisation with educational and disciplinary responsibilities was no doubt associated with this transformation. Two factors of particular significance were the right of solicitors to appear as advocates in the new county courts created in 1846 and an increase in income from conveyancing following the introduction of scale fees in 1883.[55]

In the twentieth century, further steps were taken to deal with dishonest solicitors, and those who indulged in the supposedly objectionable practices of touting and of undercutting on conveyancing. The Solicitors Act 1933 enabled the Council of the Law Society to make rules about the keeping of clients' accounts and for regulating any other matter of professional practice. Solicitors' Account Rules came into effect in 1935, and Practice Rules in 1936. The Solicitors Act 1941 established a compensation fund to which all practising solicitors had to contribute, and required that solicitors' accounts be audited each year. Solicitors also lost their struggle to resist the entry of women to the profession.[56]

4. The Bar in the Nineteenth and Twentieth Centuries

The main concerns of the Bar in the mid-nineteenth century were the problems created by a lack of work[57] and the improvement of legal education in response to sustained public criticism.[58] The 1846 Select Committee reported that the inns of court provided no legal education worthy of the name, and recommended the introduction of lectures and examinations and the establishment of a college of law. A Council of Legal Education was set up by the inns in 1852. Lectures were organised, but not compulsory examinations. A Royal Commission recommended in 1855 that there should be an entrance examination for non-graduates, compulsory lectures and pupillage and a final examination before call to the bar.[59] These proposals were

[53] Solicitors Acts 1888 and 1919. Between these dates the committee could investigate and dismiss complaints but only the High Court could punish offenders.

[54] *Lawyers and the Courts* (1967), p. 187.

[55] A. Offer, *Property and Politics 1870–1914* (1981), pp. 39–40. Part I of this work considers the relationship of solicitors to the land market and to land law reform.

[56] Sex Disqualification (Removal) Act 1919. In *Bebb v. Law Society* [1914] 1 Ch. 286 the Court of Appeal had held that women were not "persons" within the meaning of the Solicitors Act 1843, one of many similar cases in various fields: A. Sachs and J. H. Wilson, *Sexism and the Law* (1978), Chap. 1.

[57] Abel-Smith and Stevens (1967), pp. 53–57.

[58] *Ibid.* pp. 63–74; A. H. Manchester, *Modern Legal History* (1980), pp. 54–63. See generally, on the bar in the nineteenth century, D. Duman, *The English and Colonial Bars in the Nineteenth Century* (1983) and R. Cocks, *Foundations of the Modern Bar* (1983).

[59] *Report of the Commissioners appointed to inquire into arrangements in the Inns of Court and Inns of Chancery for promoting the study of Law and Jurisprudence*, 1855.

vetoed by Lincoln's Inn and Gray's Inn.[60] Attempts in the second half of the nineteenth century to establish a "Law University" based on the inns were also successfully resisted, at the "cost" of the introduction of compulsory examinations in 1872.

Further problems were caused by the need of the Bar to adjust to the reforms introduced by the Supreme Court of Judicature Acts 1873–75.[61] A Bar Committee was formed in 1883 to protest against new Rules of the Supreme Court which were thought likely to deprive younger barristers of work. It was felt that the benchers, who were mostly judges[62] and Q.C.s, could not adequately protect the interests of barristers. The Committee, and its replacement, the Bar Council, began to make representations on other matters and to make rulings on matters of etiquette.[63] Disciplinary powers remained with the inns, subject to an appeal to the judges.[64]

Significant improvements in the education and training of barristers did not take place until the 1960s when the Inns of Court School of Law was established with a full-time Dean, new premises, remodelled syllabuses and improved teaching. Pupillage became compulsory.[65] Further structural changes did not take place until 1966 when a "Senate of the Four Inns of Court" was established. In 1974 this was replaced by the "Senate of the Inns of Court and the Bar."[66] This was in theory the governing body of the barristers' branch of the profession although the inns retained significant financial autonomy, and the Bar Council also retained its separate identity.[63]

Much more momentous was the decision by the Bar in 1986 to take control into its own hands. A committee chaired by Lord Rawlinson recommended the replacement of the (unrepresentative) Senate by the General Council of the Bar of England and Wales, which would be strengthened and made more representative of the Bar, and on which the judges would not be represented.[67] This received overwhelming support and the new constitution took effect on January 1, 1987.

C. THE LEGAL PROFESSION TODAY

1. Organisation

The governing body of the Bar is now the General Council of the Bar of England and Wales.[65]

[60] After the abolition of the order of serjeants in 1875 and the closure of Serjeants' Inn, the judges remained as benchers of the inns of court and began to take part in their management.

[61] The Judicature Act reforms, in conjunction with the development of the railways, significantly weakened the role of circuit messes (clubs formed by barristers travelling on circuit) as mechanisms for influencing or controlling the conduct of barristers: see Cocks (1983) and Duman (1983), Chap. 2.

[62] Abel-Smith and Stevens (1967), pp. 214–220.

[63] The Royal Commission recommended that the Senate should assume the central responsibility for all matters affecting barristers: R.C.L.S., Vol. 1, pp. 425–443.

[64] See P. Walker, *Counsel*, Easter Term 1986, pp. 36–37.

[65] It has 97 members: 3 officers; 13 ex-officio (the Attorney-General, the Solicitor-General, leaders of the 6 circuits, chairmen of 5 specialist associations); 12 representatives of the Inns; 12 circuit representatives; 5 association representatives; 39 practising barristers; 12 employed and non-practising barristers; 4 co-opted: (1986) 83 L.S.Gaz. 3828.

> "It fulfils the function of what might be called a 'trade union', pursuing the interests of the Bar and expanding the market for the Bar's services and is also a watchdog regulating its practices and activities."[66]

It co-operates with the Inns of Court through the Council of the Inns of Court, which comprises representatives of the four Inns, the Bar Council and the Council of Legal Education. The independence of the Inns has been reduced under the new arrangements; where the Council of the Inns and the Bar Council disagree, the latter's policy is to be implemented provided that it has the support of two-thirds of the profession.

The powers and duties of the Law Society are derived from the Solicitors Act 1974. Membership of the Society is not compulsory, although it is the governing body for the profession as a whole. Thus the Master of the Rolls may only admit as a solicitor a person certified by the Society to have complied with its training regulations and to be suitable for admission.[67] The Society also issues the "practising certificate" which each solicitor wishing to practise must obtain.[68] Many of its statutory functions relate to the maintenance of standards for the protection of the public. However, it is also the main professional association for solicitors. The inconsistency in these roles has led to concern that neither is performed satisfactorily. The Society was able to point to its success in defending solicitors' interests during the deliberations of the Royal Commission. There have, however, been a number of matters on which the Society has fallen out with sections of the rank-and-file[69] and its success in defending the solicitors' "conveyancing monopoly" proved short lived. The composition of the Council of the Law Society has long been criticised as unrepresentative, with very few members under 35, very few women, few from outside private practice and a disproportionate number from large firms.[70]

The Courts and Legal Services Act 1990 introduced a new statutory committee with responsibilities in the regulation of lawyers. This is the Lord Chancellor's Advisory Committee on Legal Education and Conduct and comprises a chairman and 16 other members appointed by the Lord Chancellor.[71] The chairman is to be a Lord of Appeal or judge of the Supreme Court[72]; of the members, one must be a judge who is or has been a Circuit judge; 2 practising barristers appointed after consultation with the General Council of the Bar; 2 practising solicitors appointed after consultation with the Law Society; 2 law teachers appointed after consultation with such institutions concerned with the teaching of law and such persons representing law teachers as the Lord Chancellor considers appropriate; and 9 lay members. The government was determined to ensure a lay majority.[73] The Committee is under a "general duty of assisting in the maintenance and development of standards in the education, training and conduct of those offering legal services,"[74] and has specific functions in relation to these matters, including giving advice to the General Council of the Bar, the Law Society and other authorised bodies on all aspects of their qualification regulations and rules of conduct, and on specialisation schemes.[75] It has a particular role in advising on the extension of rights of audience and rights to conduct litigation.[76] It is intended to be "operationally fully independent of Government," funded by a grant-in-aid from the Lord Chancellor's Department, and able to appoint its own staff, who will not be civil servants.[77] Given that members are appointed by the Lord Chancellor, and that the Committee is funded by his department, it is doubtful how far it will be truly independent.

[66] General Council of the Bar, *A Career at the Bar* (1988), p. 7.
[67] Solicitors Act 1974, s.3.
[68] *Ibid.* ss.1, 9–18.
[69] *e.g.* education and training, the problems of sole practitioners, advertising, compulsory insurance: D. Podmore, "Bucher and Strauss Revisited—the Case of the Solicitors' Profession" (1980) 7 B.J.L.S. 1, 4–11.
[70] R. L. Abel, *The Legal Profession in England and Wales* (1988), pp. 242–245; see also below, p. 178.
[71] Courts and Legal Services Act 1990, s.19 and Sched. 1. It replaced the previous non-statutory Lord Chancellor's Advisory Committee on Legal Education.
[72] The first is Lord Griffiths.

2. Lawyers and their Work

(a) Introduction

In their study of the legal profession in the United States and England, Johnstone and Hopson identified nineteen different "work tasks" performed by lawyers in the United States: giving advice, both legal and non legal; negotiations; drafting letters and legal documents; litigation, including the preparation of cases and advocacy; investigation of facts; legal research and analysis; lobbying legislators and administrators; acting as broker; public relations; filing submissions to government and other organisations; adjudication; financing; property management; referral of clients to other sources of assistance; supervision of others; emotional support to clients; immoral and unpleasant tasks (taking care of disagreeable matters for clients which the clients could do themselves but prefer to have someone else do); acting as scapegoat; and getting business.[78] Any one lawyer might never perform all these tasks, and some, such as advising and negotiation, were generally more significant than others. The variety of combinations in which these tasks were performed by individual lawyers was "almost endless".[79] Laymen could be found performing any of them. English lawyers may be less likely than their American counterparts to act in some of these areas, but it is difficult to think of any of them that no English lawyer would touch. It has been noted that the expertise of many lawyers may be founded not so much on their mastery of legal technique as on their possession of "worldly knowledge" in "giving economic advice or providing organisational 'know-how' and in their interpersonal skills."[80]

[73] White Paper (Cm. 740, 1989), Chap. 7: "That balance aims to ensure that the Committee primarily represents the views and interests of the user of legal services, but contains wide representation from those who have experience of providing them" (*ibid.* p. 27). This has been described as a "needless affront to the legal profession": M. Zander (1989) 139 N.L.J. 300–303.
[74] Courts and Legal Services Act 1990, s.20.
[75] *Ibid.* Sched. 2.
[76] Below, pp. 132–133.
[77] White Paper, p. 27.
[78] Q. Johnstone and D. Hopson, *Lawyers and their Work* (1967), Chap. 3.
[79] *Ibid.* p. 77.
[80] Rueschemeyer, *op cit.*, p. 105, n. 7, at p. 271.

(b) Fusion[81]

The English pattern of work is complicated by the division of the legal profession into barristers and solicitors. It is not possible for anyone to be qualified in both branches at the same time. Traditionally, barristers have had an exclusive right of audience in the superior courts, and have not normally been instructed by a lay client direct without the intervention of a solicitor. There is not, however, any *kind* of work done by barristers which is not also done by solicitors. In the lower courts the advocacy work has been shared between the two branches; in tribunals it also has been shared with non-lawyers. Both barristers and solicitors do drafting work. Both may give legal advice, the solicitor direct to the client, the barrister only if he or she is approached for his oral or written opinion by a solicitor. This would be done where the solicitor lacks the time or resources to do the work personally, to satisfy a "difficult" client or simply because "counsel's opinion" is often regarded as especially authoritative.

The different emphases in the functions of solicitors and barristers have led to marked differences in their geographical distribution: solicitors' offices may be found throughout the country[82]; over 70 per cent. of barristers' work from chambers in central London, where the superior courts sit, the rest being spread through over 30 provincial centres.[83] A further difference which affects the way that practices are organised is that each barrister must act on his or her own account, whereas solicitors may form partnerships.[84] Many solicitors' firms have several partners and a large employed staff, including fee-earners. Barristers are generally grouped in chambers, which provide administrative support, but a barrister may not share fees or employ fee-earners.

Over the years, there have been many advocates of fusion of the two branches: The profession was not always divided as it is today.[85] The legal professions of other countries are not normally divided. It was argued in submissions to the Royal Commission that the necessity of employing a solicitor as well as a barrister, where the latter's services are required, causes inefficiency (failures in communication, delay and the return of briefs by barristers who are doubled-booked), harms the confidence of clients (barristers being regarded by some clients as too remote or insufficiently prepared) and is more expensive for clients obliged to pay for two lawyers rather than one. Most of the professional bodies who gave evidence, including the Senate and the Law Society, opposed fusion. It was feared that fusion would lead to a serious fall in the quality of advocacy. The leading barristers might join the larger firms of solicitors and so be less accessible. Smaller practices might generate insufficient business to justify partnership with a barrister and find it increasingly difficult to brief a barrister of equal standing to the one retained by an opponent. The drift from smaller to larger firms might

[81] R.C.L.S., Vol. 1, pp. 187–202; G. Gardiner, "Two Lawyers or One" (1970) 23 C.L.P.I.M.; Zander, *Lawyers and the Public Interest* (1968), pp. 271–332, (1976) 73 L.S.Gaz. 882, *Legal Services for the Community* (1978), pp. 170–174; F. A. Mann, "Fusion of the Legal Professions?" (1977) 93 L.Q.R. 367; P. Reeves, *Are Two Legal Professions Necessary?* (1986).
[82] See below, p. 122.
[83] See below, p. 140.
[84] See below, pp. 121–122.
[85] See above, pp. 146–147.

increase, with a corresponding reduction in the number of offices in smaller towns and rural areas. Smaller firms might be reluctant to refer a client to a large firm for fear of losing him permanently. A reduction in the number of specialist advocates might also contribute to the lowering of standards, and make it more difficult for the Lord Chancellor to make "suitable" appointments to the bench: the numbers for consideration would be increased but the candidates would not be as well known to the Lord Chancellor and his senior advisers.

Other arguments against fusion have centred on the English form of court procedure.[86] First, there is heavy reliance on the oral rather than written presentation of evidence and argument. Secondly, hearings are single and continuous, this being designed to make best use of judicial time at the cost of inconvenience to practitioners and clients. Barristers are more easily and more economically organised to meet such inconvenience than solicitors could be. Thirdly, there is the "principle of judicial unpreparedness." The judge relies upon the parties to present the case; he or she has no research or investigative staff, and limited time to do his or her own research. The requirement that the judges have confidence in the advocates appearing before them is particularly acute under such a system.[87]

It was not surprising that the Royal Commission unanimously recommended against fusion, notwithstanding the speculative nature of some of the arguments. They saw that the existing system had its advantages; fusion might lead to some saving, but only in small cases and in larger cases the expense might be greater. Employing two lawyers did not necessarily mean that work was duplicated. Some of the adverse criticisms of the present system could be met by other changes.

(c) The 1990 Reforms

As we shall see later in this chapter, as well as opposing fusion, the Royal Commission did not favour substantial changes to the various monopolies and restrictive practices enshrined in part in law and in part in professional rules. This position has not been maintained. In 1989, the government turned its attention to the legal profession, and indicated its determination to introduce significant reforms designed to open up the market for legal services. It was not its stated aim to secure fusion; the main theme was that of dismantling the various monopolies and restrictive practices operated by the two branches of the profession. The main targets were the restrictions preventing unqualified persons undertaking conveyancing, probate or litigation work for reward (especially the so-called "conveyancing monopoly" enjoyed by solicitors); the prohibition on solicitors entering multi-disciplinary partnerships; and the Bar's exclusive rights of audience in higher courts. How did this radical change come about?

In December 1983, a second reading was given to a Private Member's Bill, the House Buyer's Bill, sponsored by Austin Mitchell M.P., which proposed the introduction of a system whereby licensed conveyancers would be permitted to undertake the conveyancing of "houses" with registered title. In response, the government indicated its intention to promote legislation to

[86] See Mann, *op. cit.* n. 66.
[87] The advocate's "duty to the court" rests on rules of professional conduct: see below, pp. 150–161.

establish a system of licensed conveyancers and, moreover, to enable solicitors employed by building societies, banks and other organisations to undertake conveyancing for their employers' clients, whether or not the land was registered. This decision was reached by the cabinet over the objections of the then Lord Chancellor, Lord Hailsham, and was apparently motivated by a desire to see increased competition and lower charges.[88] In the event, a system of licensed conveyancers was established by Part II of the Administration of Justice Act 1985, but the government ultimately decided that banks and building societies should only be permitted to offer conveyancing services where they were not the lending institution. On the latter point it accepted the Law Society's argument that the provision of conveyancing services in conjunction with a mortgage loan would lead to an undesirable conflict of interest.[89]

Concern at the threat to conveyancing incomes led to the wholesale relaxation of the professional rules restricting advertising by solicitors, and the revival of arguments by the Law Society that the Bar's monopoly of rights of advocacy in the higher courts should be removed. The latter led to an acrimonious dispute between the two branches of the profession,[90] which was temporarily put into abeyance by the appointment by them of a Committee under the chairmanship of Lady Marre. The Marre Committee, comprised (apart from the chairman), six barristers, six solicitors and six independent members, and was asked to report to the Bar Council and the Law Society on the extent to which the services offered by the legal profession met the needs and demands of the public for legal services; how the services of the profession could be made readily available to meet such needs and demands; and those areas where changes in the present education of the legal profession, and in the structure and practices of the profession, might be in the public interest. It reported in July 1988,[91] and, like the Royal Commission, tended to endorse the *status quo*. Its main recommendation affecting the structure of the profession was that solicitors recommended by a Rights of Audience Board and licensed by the Law Society should have extended rights of audience for all purposes in the Crown Court, and that professions other than solicitors should be permitted direct access to barristers.

Although there were moves to relax certain specific professional rules in each branch of the profession, the likelihood of fundamental changes seemed remote. The Marre Committee had not proposed anything that could be said to be radical. Lord Hailsham in particular was opposed to changes that might weaken the independent Bar. His immediate successor, Lord Havers, took a similar line during his brief period in office. However, the advent of Lord Mackay of Clashfern as Lord Chancellor, the first whose professional life had been at the Scottish and not the English Bar, made it easier for what may be termed a Thatcherite approach to reform to prevail.

[88] M. Zander, *A Matter of Justice* (Revised edn., 1989), pp. 9–10.

[89] *Ibid.* pp. 15–16. The Building Societies Act 1986, s.21 and Sched. 21 established a structure whereby banks, building societies and other financial institutions would be authorised to undertake conveyancing, subject to restrictions in regulations. These provisions were never brought into force and have been superseded by broader arrangements in the Courts and Legal Services Act 1990, below pp. 127–129.

[90] *Ibid.* pp. 24–31.

[91] *A Time for Change*: *Report of the Committee on the Future of the Legal Profession (Chairman: Lady Marre C.B.E.)* (General Council of the Bar, The Law Society, 1988).

On January 25, 1989, the Lord Chancellor published three Green Papers: *The Work and Organisation of the Legal Profession; Contingency Fees;* and *Conveyancing by Authorised Practitioners*.[92] The Papers were not founded on any form of research exercise, and took a line sharply different from those taken by the Royal Commission and the Marre Committee which, to an extent at least, had been based on research. Four months only were to be allowed for consultation. After consultation, the Lord Chancellor produced a White Paper, *Legal Services: A Framework for the Future*,[93] which took up proposals arising from the Civil Justice Review[93a], as well as the Green Papers. The tone of the White Paper differed from that in the Green Papers. The main Green Paper, on *The Work and Organisation of the Legal Profession*,[94] was prefaced by the statement that it was the government's overall objective "to see that the public has the best possible access to legal services and that those services are of the right quality for the particular needs of the client" and that the government believed that this would be "best achieved by ensuring that:—

"(a) a market providing legal services operates freely and efficiently so as to give clients the widest possible choice of cost effective services; and

(b) the public can be certain that those services are being supplied by people who have the necessary expertise to provide a service in the area in question."[95]

The resolve of the responsible section of the Lord Chancellor's Department had apparently been stiffened by the transfer of officials of the Department of Trade and Industry, and the result was a Green Paper "whose style and content paid little concession to the sensitivities of lawyers used to articulating, rightly or wrongly, their restrictive practices in terms of 'the interests of justice'."[96] The White Paper was more moderate in tone, with more frequent reference to the need to secure the proper and efficient administration of justice.[97] There were some modifications in the content of the proposals to meet objections from professional bodies, but the fundamentals were for the most part little changed.[98]

The White Paper formed the basis of the Courts and Legal Services Act 1990, which was introduced in November 1989 and received Royal Assent a year later. The main features of Parts II to IV of the Act are

[92] Cm. 570, 571 and 572, 1989. See (1989) 139 N.L.J. 140–149; F. Cowper, *ibid.* p. 382; Responses *ibid.* pp. 601–604; R. Smith, *ibid.* p. 897; (1989) 86 L.S.Gaz., February 1, pp. 2–7; M. Zander, *ibid.* March 1, pp. 14–15, 21; R. Abel, *ibid.* March 22, pp. 14, 18; I. R. Scott (1989) 8 C.J.Q. 202; B. Walsh (1989) P.N. 59.

[93] Cm. 740, 1989. See N. Stewart, (1989) 139 N.L.J. 1035; W. Merricks, *ibid.* p. 1036; I. R. Scott, (1990) 9 C.J.Q. 6; J. P. O'Brien, (1989) 133 S.J. 1046.

[93a] See above, p. 70.

[94] Cm. 570, 1989.

[95] *Ibid.* para. 1.1.

[96] R. Smith, "The Courts and Legal Services Bill: A View at Half-Time" (1990) 17 J.L.S. 242, 243.

[97] Cm. 740, para. 2.3, in respect of the need to maintain "the standards in the conduct of advocacy and ... litigation which are required in the interests of the proper and efficient administration of justice," and the intention to remove restrictions on practice "which are not necessary in the interests of justice."

[98] See generally R. Smith, *op. cit.*, and F. Cownie, "The reform of the legal profession or the end of civilization as we know it" in F. Patfield and R. White (eds.), *The Changing Law* (1990).

— the establishment, on a statutory basis, of the Lord Chancellor's Advisory Committee on Education and Conduct;
— the establishment of a Legal Services Ombudsman;
— the extension of rights of audience in all courts and rights to conduct litigation and undertake probate work to suitably qualified persons, whether or not barristers or solicitors;
— the removal of the restriction preventing banks and building societies offering conveyancing services to borrowers, subject to safeguards, including a Conveyancing Ombudsman Scheme.
— provision for new regulations and codes setting qualification standards and practice requirements for advocacy and the conduct of litigation, subject to the approval of the Lord Chancellor, assisted by his Advisory Committee;
— the ending of legal restrictions on multi-disciplinary and multi-national partnerships;
— changes to rule of eligibility for judicial appointments to reflect enjoyment of advocacy rights rather than status as a barrister or solicitor;
— the strengthening of the powers of the Law Society to deal with poor service by solicitors.

In addition, the professional bodies' rules and practices will be subject to review under the proposed restrictive practices legislation and, unless approved by the Lord Chancellor, open to prohibition.[99]

We consider these matters at the appropriate stages in the following sections.

(c) Solicitors' practices and their work

(i) *Numbers*

As at July 31, 1990, there were 54,736 solicitors with practising certificates; 46,652 were in private practice, on their own account (3,528) or as a partner (23,450), consultant (2,098) or assistant solicitor (13,365). The main categories outside private practice were local government (2,234), commerce or industry (2,177) and the Crown Prosecution Service (1,100). The numbers have consistently increased, apart from periods of decline in the 1840s and between the wars, and have risen dramatically in the last twenty years.[2] The number per head of the population declined to the point that there was a period of acute shortage after the second world war; this trend was reversed in the late 1960s and 1970s. Thus in 1967 there were 22,233 solicitors (1 : 2164 of the population) and in 1977 32,812 (1 : 1497).[3] At one stage, fears were expressed that there were too many in and seeking entry to the solicitors' branch.[4] The number of law graduates doubled between 1967

[99] See the White Paper, *Opening Markets—New Policy on Restrictive Trade Practices* (Cm. 727, 1989).
[1] *Law Society Annual Statistical Report 1990*, pp. 8, 9.
[2] Podmore (1980), pp. 13–19; R. L. Abel, *The Legal Profession in England and Wales* (1988), 164–168, 406–413, Table 2.14: Changes in the size of the profession 1730–1985.
[3] *Ibid.*
[4] *e.g.* P. A. Leach, (1980) 77 L.S.Gaz. 29; J. Clarke (President of the Law Society), (1980) 77 L.S.Gaz. 981–982.

and 1977.[5] More recently, however, there has been a considerable increase in demand for recruits to the solicitors' profession, and by 1988, what has been seen as a recruitment crisis.[6] The position was easier by 1990, as the economy moved nearer recession.[7] Other trends in recent years have been a steady increase in the proportion of employed assistant solicitors in private practice, a decline in the proportion of sole practitioners,[8] and a slight increase in the proportion of solicitors outside private practice.

(ii) *Solicitors firms: private practice*

There are many kinds of solicitors' practice, ranging from large, highly specialised firms in the City of London to small provincial practices specialising in legal aid work.[9] At July 31, 1990, there were 10,272 private practice firms located in 15,551 separate offices.[10] According to the Law Society in 1978 the "typical firm" had three principals, five other fee earners (one assistant solicitor, two legal executives, one articled clerk, one junior clerk) ten other full time and three part-time staff (accounts clerks, an outdoor clerk, secretaries, a telephonist and a receptionist).[11] In 1989, 95 per cent. of firms had no more than ten principals[12] and 81 per cent. no more than four. 395 firms had eleven or more principals.[13] The overall ratio of partners to assistant solicitors was about 2 : 1; in the smallest firms it was 3 : 1 and in firms of 11 or more principals, about 1 : 1.[14] Large London firms employ a disproportionately large number of assistant solicitors.[15] There has been a distinct trend for the number and size of practices to increase.[16] Expansion has been particularly notable in the City, with lawyers taking an increasing proportion of office space.[17] A particular feature in recent years has been the number of firms growing through merger,[18] and the establishment, short of

[5] R.C.L.S., Vol. 2, p. 47.
[6] *The Recruitment Crisis: A Report by the Training Committee of the Law Society* (May 1988). J. Adams, "Evidence mounts of jobs crisis" (1990) 87 L.S.Gaz., October 10, pp. 8–9; M. Yuille, "Lay-offs hit City property lawyers," *The Lawyer*, September 18, 1990, p. 1.
[7] D. Podmore, (1979) 129 N.L.J. 356–357; Podmore (1980), pp. 21–22. This trend was reversed in 1984–86.
[8] Podmore suggests a classification of 14 groups, based on Abel-Smith and Stevens (1967), pp. 144–148; Podmore (1980), pp. 22–24.
[9] *Law Society Annual Statistical Report 1990*, pp. 11, 12.
[10] Memorandum No. 5 to the Royal Commission; (1978) 75 L.S.Gaz. 422, 426. 66 per cent. of all firms were of this size or smaller.
[11] I.e. solicitors entitled to a share of profits and not remunerated by salary only.
[12] *Law Society Annual Statistical Report 1990*, p. 15, Table 3.9. The figures excluded firms earning less than £15,000 p.a.
[13] *Ibid.* p. 16, Table 4.3.
[14] *Law Society Annual Statistical Report 1987*, pp. 19–20; and *1990*, p. 17.
[15] See R. L. Abel, *The Legal Profession in England and Wales* (1988), pp. 199–207, 419–423 (Tables 2.20–2.24); *Law Society Annual Statistical Reports*.
[16] (1990) 87 L.S.Gaz., March 7, p. 5; *The Lawyer*, July 10, 1990, pp. 12–13. Statistics of the growth of the top 20 City firms are given in P. Stewart, (1990) I.F.L. Rev., June, Law Firms Supplement.
[17] Particularly spectacular was the merger in 1987 of Clifford Turner and Coward Chance to form Clifford Chance, which by 1990 had over 200 partners: see P. Brown, (1987) 137 N.L.J. 377.

merger, of groups of firms with common central services covering such matters as recruitment, training and marketing.[19]

Geographically, the spread is uneven.[20] Foster's survey based on the 1971 Law List showed an irregular dispersal within towns, between urban and rural areas, and nationally. A majority of solicitors practised in the centre of urban areas, near each other, the courts and commercial and financial institutions. Solicitors' offices were, however, more widely dispersed than solicitors. For example, in Greater London 77 per cent. of solicitors were found to work in central London, but only 44 per cent. of solicitors' offices were found there. Nearly two-thirds of all solicitors practised in towns with over 100,000 people. The proportion of offices to population varied between 1 : 1896 (Guildford) and 1 : 66,629 (Huyton). A further survey was published in 1986, prepared as part of Exeter University's *Access to justice in rural Britain* project.[21] This found that, at the regional level, the southeast dominated, with almost half the total and the lowest regional value for the number of persons per solicitor; there was a broad band of relatively well-provided counties from the southwest to East Anglia and a core of poorly-provided counties covering the north and east Midlands. At the district level, there was an overwhelming concentration of solicitors in Central London, solicitors were disproportionately well represented in rural areas, and the districts where provision was worst were generally those with rapidly expanding suburban populations on the fringes of the major centres of population. Possible explanations for the relatively good provision in rural areas included high status within a small town community, easier or earlier acquisition of equity partnership and the quality of life in the countryside.

The Royal Commission on Legal Services thought the most likely reason for the lack of solicitors in areas of social deprivation to be the low level of remuneration for legally-aided contentious work rather than simply the "preference" of solicitors to practise elsewhere. Unless "mass production" methods were employed, legal aid work had to be subsidised by other more profitable work of a kind not generally available in the areas in question. They recommended that legal aid should be adequately remunerated, that law centres should be supported and that private solicitors should be encouraged to open in areas of need by the provision of interest-free loans.[22] These recommendations were not acted upon.

(iii) *Solicitors' work*

A remuneration survey commissioned by the Law Society showed that in

[19] *e.g.* the Norton Rose M5 Group, comprising firms in Manchester, Plymouth, Leeds, Bristol, Norwich and Birmingham, and, from 1990 the London firm Norton Rose: see C. Christian, (1987) S.J. 1056; J. Carr, (1990) I.F.L. Rev., May, pp. 11–13. Other examples include the Eversheds group, the Legal Resource Group and Law Net: (1990) 87 L.S.Gaz., October 10, pp. 26, 30.

[20] Podmore (1980), pp. 27–29; K. Foster, "The Location of Solicitors" (1973) 36 M.L.R. 153; C. Bridges *et al.*, *Legal Services in Birmingham* (1975), C. Watkins, *et al.*, The distribution of solicitors in England and Wales, AJRBP Working Paper 8, 1986, and (1988) 13 *Transactions of the Institute of British Geographers* 39–56.

[21] *Supra*; summarised by K. Economides and M. Blacksell, "Access to Justice in Rural Britain: Final Report" (1987) 16 Anglo-Am. L.R. 353, 356–359.

[22] R.C.L.S., Vol. 1, pp. 46–48, 181–182.

1985, 68 per cent. of the gross fees of solicitors in private practice came from non-contentious, and 32 per cent. from contentious work. The breakdown according to the category of work was: domestic conveyancing 29 per cent., company and commercial 25 per cent., probate and wills 9 per cent., other non contentious 5 per cent., matrimonial 7 per cent., crime 5 per cent. and other contentious 20 per cent.[23] The Survey found that there had overall been a serious decline in profitability between 1976–77 and 1984–85.[24]

Solicitors are generally much less dependent than barristers on legal aid.[25] There has been increasing pressure on firms with significant legal aid practices, given the declining profitability of legal aid work.[26] The trend seems to be more and more for such work to become the preserve of specialised firms able to handle high volumes of work efficiently, but even firms in this category have expressed concern at low increases in remuneration.[27] Solicitors have been forced to become less dependent on domestic conveyancing.[28]

Overall, the Royal Commission concluded that the earnings of private practice solicitors were not out of line with comparable occupations: middle management in industry and the legal and administrative class of the civil service.[29] However, no useful information was obtained for accountants, engineers, surveyors and members of other professions, and the general quality of the research was adversely criticised.[30] The Peat Marwick Survey in 1985 concluded that the average earnings of both principals and employed

[23] Peat Marwick Survey of the Structure and Finances of the Profession in Private Practice, January 6, 1986, cited in N.C.C., *Ordinary Justice* (H.M.S.O., 1989), p. 60. For earlier surveys see R.C.L.S., Vol. 2, pp. 486–489 (1975–76) and the Report of the Prices and Income Board, *Remuneration of Solicitors* (Cmnd. 3529, 1968). For a comprehensive survey of casework time devoted to different categories of work see G. Chambers and S. Harwood, *Solicitors in England and Wales: Practice, Organisation and Perceptions; First Report: Practice, Organisation and Perceptions* (1990), Chap. 6; Figure 6.1 (p. 26) shows the categories to be business affairs 20.6 per cent.; commercial property 18 per cent.; residential conveyancing 18.5 per cent.; family 10.6 per cent.; probate, wills etc. 7.2 per cent.; personal injury 7.1 per cent.; crime 6.7 per cent.; and other 11.3 per cent. The survey also contains much useful information on, *e.g.* work patterns over a career, the different work done by men and women. See further, below, p. 169.

[24] The Royal Commission had the "overall impression" that conveyancing was more profitable than the other classes of work apart from company and commercial (Vol. 2, p. 496); in 1968, the Prices and Incomes Board estimated that conveyancing accounted for 55.6 per cent. of solicitors' income, 40.8 per cent. of expenses and 41.4 per cent. of productive time (Cmnd. 3529, Tables 14 and 15).

[25] R.C.L.S., Vol. 2, p. 491. 65.7 per cent. of firms earned less than 10 per cent. from this source, and a further 20.9 per cent. less than 20 per cent.

[26] A survey conducted by the Law Society in 1988 showed that 40 per cent. of offices had since 1983 either given up or were seriously considering giving up criminal legal aid work, and 27 per cent. matrimonial legal aid work; of these over 80 per cent. gave inadequate remuneration as the reason: Law Society, *Survey of Legal Aid Provision* (April 1988). A survey by Touche Ross in 1989 found that only a small minority of firms in the provinces were making a profit on legal aid work: (1989) 86 L.S.Gaz., March 15, p. 21.

[27] See *The Lawyer*, October 9, 1990, pp. 13 (profiling four firms who have made legal aid pay); (1990) 87 L.S.Gaz., March 21, p. 2: a partner in one of these four spoke despondently about the future of legal aid practice; H. Hodge, "A legal aid practice—ten years on," *Legal Action*, September 1987, pp. 6–7, 24.

[28] See R. Bowles, (1987) 137 N.L.J. 401 and (1990) 140 N.L.J. 1340; M. Moffatt, (1990) 87 L.S.Gaz., May 23, pp. 16–17.

[29] See generally R.C.L.S., Vol. 1, pp. 507–542; Vol. 2, pp. 447–578 (earnings surveys) and 627–698 (comparisons).

[30] L. Glasser, *L.A.G. Bull.*, September 1979, p. 201.

solicitors were lower than those of most comparable professions and occupations.[31]

(iv) *Specialisation*

There has been an increasing tendency for solicitors to specialise. Larger firms will normally have, for example, separate litigation, company and property departments and further more specialised sections. Each solicitor will develop his or her career in a particular area. It has become common for league tables to be published comparing the reputation and workload of the leading firms in different areas of practice.[32] Until 1990, however, it was only in limited circumstances that firms could advertise their specialisms.[33] The Law Society established panels covering Mental Health Review Tribunals, child care and insolvency in 1984 and 1985. It also vets solicitors wishing to join duty solicitor schemes. The first two were set up to help clients identify solicitors with a particular competence in the relevant area. Those wishing to join must attend a course and an interview panel. The insolvency panel was established in consequence of sections 388 to 398 of the Insolvency Act 1986, which limited insolvency practice to practitioners licensed by the Law Society. The Council of the Law Society has also approved the establishment of a scheme for planning law. In 1989 it set up a Specialisation Committee to consider the whole question. In April 1990, the Committee proposed[34] the setting up of panels in seven areas: advocacy in the higher courts, personal injuries, medical negligence, employment law, pensions, revenue law and criminal law. Selection criteria would cover knowledge of relevant law and procedures, understanding of relevant ethical issues, and possession of relevant professional skills and experience. While the profession was being consulted on these proposals, however, the Council decided that in future the only restriction on a claim that a solicitor is a specialist or an expert should be that "such a claim can be justified."[35] As a result, it was predicted that the development of panels would be "stillborn"; there would be little point in spending money and taking an examination to join a panel if the solicitor could anyway claim to be a specialist in the relevant area.[36] The decision was attacked by the National Consumer Council and the Legal Action Group, who favoured the introduction of formal specialisation schemes.[37] The N.C.C.'s position was that, in the light of American experience, well run schemes are in the interest of consumers because they

[31] The Law Society Special Committee on Remuneration, *Survey of the Structure and Finances of the Solicitors' Branch of the Legal Profession in Private Practice*, January 16, 1986, 3 vols; see (1986) 83 L.S.Gaz. 316. Average salaries increased by 22 per cent. in 1988: (1989) 86 L.S.Gaz., May 31, p. 6. In 1990, estimated average earnings of solicitors 4–5 years qualified ranged from £42,000 in the City to £23,000 in the South West: *Chambers & Partners' Directory of the Legal Profession 1990*, p. 18; the earnings of equity partners were "kept a close secret": *ibid.*

[32] See, *e.g.* Chambers & Partners', *The Legal Profession 1990*; J. Pritchard, *The Legal Five Hundred* (1989).

[33] See below, p. 139.

[34] *Specialisation: The Way Forward. A Consultation Document* (April 1990). See (1990) 87 L.S.Gaz., March 7, p. 7; May 2, pp. 36, 39, 40.

[35] Solicitors' Publicity Code 1990, para. 2(*b*).

[36] See (1990) 87 L.S.Gaz., July 18, pp. 4–5. Personal injury and medical negligence panels may still be set up: M. McKeone, (1991) 88 L.S. Gaz., March 6, p. 4.

[37] (1990) 87 L.S.Gaz., August 22, p. 5; R. Smith, *ibid.*, October 3, p. 2; but *cf.* J. James, *ibid.*, October 10, p. 2. It has also been criticised by Lord Mackay: (1991) 88 L.S.Gaz., January 30, p. 7.

improve access and raise standards.[38] The need for such a development is, indeed, illustrated by research which demonstrates how accident victims may be at a serious disadvantage in pursuing claims for damages if they are advised by non-specialists.[39]

(v) *Employed solicitors*

A substantial number of solicitors are employed outside private practice, mainly in central[40] and local government, industry and commerce.[41] Their work is obviously geared to the needs of their employers, lawyers in industry being particularly concerned with employment law, property and commercial work,[42] lawyers in local government with prosecutions, property, rating and so on.[43] The rules on the kind of work that may be undertaken by employed solicitors were relaxed by the 1990 Solicitors' Practice Rules. Rule 4 now provides that solicitors who are employees of non-solicitors shall not as part of their employment do solicitors' work for any person other than their employers except as permitted by the Employed Solicitors Code, promulgated by the Law Society with the concurrence of the Master of the Rolls. Under the Code, employed solicitors may act for their fellow employees in any matter relating to their employment, excluding personal injuries; formerly, they were restricted to acting in conveyancing transactions where the employee was compulsorily moved. Solicitors employed by associations (now defined more widely[44]) may act for a member in both contentious and non-contentious matters; formerly, in non-contentious matters they could only advise. An employed solicitor may now act for a trade association of which the employer is a member. In each case, the employed solicitor must be satisfied that the person in question does not wish to instruct some other solicitor, and there must be no charge.

(vi) *"Monopolies"*

Solicitors have long enjoyed certain statutory monopolies.[45] Section 20 of the Solicitors Act 1974 makes it an offence for an unqualified person to act as a solicitor and as such commence or conduct litigation on behalf of another. An unqualified person may not pretend to be a solicitor.[46] It is also an offence for an unqualified person[47] to prepare (directly or indirectly) any instrument "relating to real or personal estate, or any legal

[38] *Ordinary Justice* (H.M.S.O., 1989), pp. 144–153. See also A. A. Paterson, "Specialisation and the Legal Profession" (1986) 136 N.L.J. 697, 721.

[39] H. Genn, *Hard Bargaining* (1987).

[40] G. Drewry, "Lawyers in the UK Civil Service" (1981) 59 *Public Administration* 15; Sir Robert Andrew, *Review of Government Legal Services* (H.M.S.O., 1989): above, pp. 20–21.

[41] See above p. 120.

[42] See K. Mackie, *Lawyers in Business* (1989); *The Lawyer*, August 7, 1990, pp. 6–7.

[43] See *The Lawyer*, August 14, 1990, pp. 4–5, noting a variety of arrangements for the conduct of legal work for local councils.

[44] Membership of the associations must be limited to persons concerned in a particular trade, occupation or activity *or otherwise having a community of interest*. The words in italics were added in the 1990 Code to include, for example, groups based on sex, ethnic origin, nationality, religion or political affiliation: see (1990) 87 L.S.Gaz., August 22, p. 25.

[45] A non-lawyer may always act in person in matters affecting him- or herself. Some of the "monopolies" were shared with other relatively small groups.

[46] Solicitors Act 1974, s.21. See, *e.g. Carter* v. *Butcher* [1966] 1 Q.B. 526.

[47] Here the term covers a person who is not a solicitor, barrister or notary public, and there are some other exclusions: *ibid.* ss.22(2), 23(2).

proceedings,[48] to take instructions for a grant of probate or letters of administration, or to prepare papers on which to found or oppose such a grant,[49] unless he or she proves that this was not done for or in expectation of any fee, gain or reward. An offence is committed even where the unqualified person does not personally receive the fee.[50] No person may bring proceedings to recover costs in respect of anything done by an unqualified person acting as a solicitor.[51] The Royal Commission on Legal Services found these restrictions to be in the public interest.[52] In litigation heavy reliance was placed on the knowledge and integrity of solicitors, acting as they did as officers of the court. Solicitors had the responsibility of disclosing documents even where it would be contrary to the client's interests. A person "not subject to the same direct duty to the court and to professional disciplines"[53] could not be expected to exercise such responsibility. The Commission proposed a relaxation of the probate restrictions in non-contentious cases in favour of trust corporations, and resisted Law Society suggestions for new restrictions on unqualified persons preparing for reward wills or powers of attorney.

Conveyancing

The economic dependence of many solicitors upon conveyancing, when put alongside criticisms of the low quality of service provided[54] and the level of charges, naturally made the "conveyancing monopoly" one of the most controversial areas before the Royal Commission.[55] This monopoly had been sought by the Society of Gentlemen Practisers in the eighteenth century, and was finally granted by William Pitt in 1804 as a *quid pro quo* for an increase in the tax on practising certificates and articles.[56] The restriction was possibly designed to facilitate the collection of revenue rather than to protect the public interest. A majority[57] of the Commission accepted the Law Society's case that the restrictions were in the public interest in view of the complexity of the law relating to the ownership of land, the complexity of the conveyancing process and the need to protect clients from dishonesty, incompetence and overcharging. The Commission were unanimous that a "free-for-all" would not be in the public interest. By a majority they rejected proposals for a system of licensed conveyancers. Indeed they suggested that the restrictions should be extended to cover the preparation of the contract of sale as well as the final document and that the maximum penalty should be raised for the first time since 1894 from £50 to £500. They did not find that charges were excessive. In order to reintroduce more certainty to charging,

[48] *Ibid.* s.22. "Instrument" does not include a will, an agreement not under seal, a letter of power of attorney, or a "transfer of stock containing no trust or limitation thereof": 1.22(3). Thus a contract for the sale of land is not within the restriction whereas the deed which effects the conveyance is.

[49] *Ibid.* s.23(1).

[50] *Reynolds* v. *Hoyle* [1976] 1 W.L.R. 207; *cf. Green* v. *Hoyle* [1976] 1 W.L.R. 575.

[51] 1974 Act, s.25.

[52] R.C.L.S., Vol. 1, pp. 225–231.

[53] *Ibid.* p. 227.

[54] M. Joseph, *The Conveyancing Fraud* (2nd edn., 1989): a book by a practising solicitor.

[55] R.C.L.S., Vol. 1, pp. 243–282. The Commission preferred the expression "closed shop".

[56] Stamp Act 1804. See Abel-Smith and Stevens (1967), pp. 22–23, Kirk (1976), Chap. 7, Lewis moved from fiscal legislation to a Solicitors Act in 1932.

[57] A third of the members were unconvinced.

they suggested there would be a scale of "standard" charges covering the general run of domestic conveyancing.

As we have seen, however, matters have not rested there. Part II of the Administration of Justice Act 1985,[58] founded on the First Report of the Conveyancing Committee, introduced a system of licensed conveyancers. The Act created a new body, The Council for Licensed Conveyancers,[59] with the responsibility of controlling the discipline, admission, training and professional standards of the new profession of "licensed conveyancer." The Council was required, *inter alia*, to make training rules, rules for regulating professional practice conduct and discipline, rules requiring compulsory indemnity insurance against civil liability and for setting up a compensation fund for the benefit of the victims of negligence, fraud or other dishonesty on the part of licensed conveyancers and rules for keeping accounts. The structure is similar to that applicable to the solicitors' profession as regulated by the Law Society, with some differences of detail.[60] The first licences were granted on May 1, 1987, and solicitors have been directed to proceed in their dealings with licensed conveyancers on the same basis as with solicitors, in recognition of their status as members of a regulated profession.[61]

The numbers of licensed conveyancers are as yet too small to have had much direct impact on the work of solicitors.[62] Their existence, coupled with the threat of institutional conveyancing, has, however, played a part in encouraging greater competitiveness among solicitors, with substantial reductions in charges for domestic conveyancing; the widespread use of advertising once the rules restricting it had been relaxed; decisions by solicitors' firms to undertake estate agency as well as conveyancing work, commonly establishing "solicitors' property centres"[63]; the introduction of TransAction, a new National Conveyancing Protocol designed to make the procedure for house transfer speedier and more efficient[64]; and the establishment by the Law Society of the Solicitors' Financial and Property Services Company, as a source of information and market support for firms wishing to offer clients a fully integrated package of financial services.[65]

By 1989, the government had reverted to the view that competition in the provision of conveyancing services could properly be extended, subject to safeguards. The White Paper,[66] which differed only on points of detail from

[58] See annotations by P. Kenny in *Current Law Statutes Annotated 1985*; A. Kenny, (1986) 277 E.G. 262, 394.

[59] (Chairman: Prof. J. T. Farrand) *Non-Solicitor Conveyancers—Competence and Consumer Protection* (H.M.S.O., 1984). See [1984] Conv. 393; R. C. A. White, (1985) P.N. 80.

[60] For commentaries on the Rules promulgated by Council of Licensed Conveyancers, see [1987] Conv. 396; P. Kenny, (1987) 131 S.J. 958.

[61] (1987) 84 L.S.Gaz., 1202.

[62] By 1990, there were more than 250 licensed conveyancers actively practising in the market and a further 500 or so in employment, accounting for only a small fraction of the conveyancing market: R. Bowles, (1990) 140 N.L.J. 1340, 1343.

[63] See (1989) 86 L.S.Gaz., February 22, pp. 4–5, noting the establishment by two firms of a chain of "property shops" in the London area, and the development of Crawley Solicitors Property Centre, set up by six firms.

[64] See (1990) 87 L.S.Gaz., March 21, p. 3 and March 28, p. 4 on TransAction's launch: the Law Society predicted a 90 per cent. take up; adoption of the Protocol is voluntary but preferred practice; see also L. A. Palmer, (1990) 87 L.S.Gaz., April 4, pp. 24–25.

[65] See K. Aldred, (1989) 86 L.S.Gaz., October 25, pp. 36–37.

the Green Paper, proposed that the provision of conveyancing services should be open to any "authorised practitioner." The relevant provisions are to be found in the Courts and Legal Services Act 1990, ss.34–52, and Scheds. 5–7. The Act establishes the Authorised Conveyancing Practitioners Board,[67] comprising a chairman and between 4 and 8 other members appointed by the Lord Chancellor, who must have regard to the desirability of appointing people who have experience in or knowledge of the provision of conveyancing services, associated financial arrangements and consumer or commercial affairs, and securing a balance between the interests of authorised practitioners and those who use their services. The Board must, *inter alia*, seek to develop competition in the provision of conveyancing services, supervise the activities of authorised practitioners, and consider and report on matters referred by the Lord Chancellor. It has power to obtain information from authorised practitioners and those who act on their behalf, and to investigate and intervene in the affairs of an authorised practitioner.[68]

The restrictions in section 22 of the Solicitors Act 1974 will not apply where conveyancing services are provided by an authorised practitioner (*e.g.* an individual or corporate body authorised by the Board.[69] The Board must grant authorisation if it is satisfied that the applicant is "fit and proper," and is of the opinion that the applicant will comply with applicable rules and regulations, will be able to meet claims made in connection with the provision of conveyancing services, will maintain satisfactory complaints procedures and satisfactory arrangements to protect clients in the event of ceasing to operate, and will be a member of the Conveyancing Ombudsman Scheme set up by the Act.[70] An authorisation may be refused, or may be granted subject to conditions, and may be revoked or suspended in accordance with rules to be made by the Board. Appeals lie to a Conveyancing Appeals Tribunal, and from the Tribunal, on a point of law, to the High Court.

The Lord Chancellor may make regulations to secure that authorised practitioners maintain satisfactory standards of competence and conduct, that in providing conveyancing services (and in particular in fixing their charges) they act in a manner which is consistent with the maintenance of fair competition between authorised practitioners and others providing conveyancing services, and that the interests of clients are satisfactorily protected. The regulations may include provisions designed to promote efficiency and to avoid unnecessary delay and conflicts of interest, a requirement that, so far as is reasonably practicable, each transaction is under the overall control of one individual, and provisions as to the supervision of specified classes of work by qualified staff, terms and conditions of service, the information to be given to potential clients, the handling of clients' money and the disclosure of an accounting for commissions.[72] The Act also

[67] Courts and Legal Services Act 1990, ss.34, 35 and Sched. 5. These provisions and s.40 were the only sections in force at the time of writing.

[68] *Ibid.* ss.47–52.

[69] *Ibid.* s.36.

[70] *Ibid.* s.37. For the Conveyancing Ombudsman scheme see s.43, and the rules made there under and Sched. 7.

[71] *Ibid.* ss.38, 39, 41, 42.

[72] *Ibid.* s.40. Further details were set out in the *White Paper*, Cm. 740, paras. 5.12–5.14, including a requirement for a personal interview, safeguards against conflict of interest and [illegible] at less than their [illegible] cost.

prohibits "tying-in arrangements": a loan for the purchase of residential property may not be made subject to a condition requiring the borrower to use other services (*e.g.* conveyancing services) provided or specified by the lender, and vice versa.[73] These provisions take account of the concern expressed by the Law Society that competition in the conveyancing market be placed on an equal footing.[74]

The obvious intended beneficiaries of the new arrangements are banks and building societies, but other professions may also become involved. The actual work will have to be carried out or supervised by qualified staff (*i.e.* solicitors, licensed conveyancers, and (subject to appropriate qualification) barristers and notaries.[75]

Rights of audience

An analogous area is that of rights of audience.[76] Prior to the Courts and Legal Services Act 1990, these were limited by the practice of the courts and tribunals concerned rather than by rules of law. Litigants in person had a right of audience throughout the legal system.[77] Barristers enjoyed a virtual monopoly of advocacy before the House of Lords, Court of Appeal and High Court.[78] They also had exclusive rights of audience in all Crown Court cases, except that a solicitor might appear (a) in appeals to the Crown Court from a magistrates' court in civil or criminal proceedings or on committal for sentence, if the solicitor or anyone in his or her firm appeared in the court below[79]; and (b) in a wider class of cases in certain remote areas.[80] Barristers and solicitors had rights of audience in the county courts and magistrates' courts; lay persons might be permitted to appear. For example, by custom magistrates allowed police officers, local government officials and civil servants employed by the D.P.P. to appear. In most tribunals there were no restrictions. Any person might attend a trial as a friend of a party to take notes and give advice but he or she would not be accorded a right of audience.[81]

The Royal Commission considered the question of rights of audience and came down resoundingly in favour of the *status quo*. They rejected suggestions that the rights of audience of lay persons should be extended, stressing, particularly for the higher courts, the importance of proceedings for the

[73] *Ibid.* ss.104–107.

[74] *E.g.* the Law Society, *Striking the Balance* (1989), pp. 5–8 and Annex A; *White Paper*, para. 5.14.

[75] Cm. 740, para. 5.9.

[76] R.C.L.S., Vol. 1, pp. 203–221. For a summary, see *ibid.* p. 221.

[77] Prosecutions in the Crown Court must be conducted by a barrister.

[78] Solicitors could appear before the single judge of the Court of Appeal (Criminal Division) sitting in chambers, in certain High Court bankruptcy applications and in any High Court proceedings heard in chambers (before a judge, official referee, master or registrar). Rights of audience before the Judicial Committee of the Privy Council were limited to English and Northern Ireland barristers, Scottish advocates and all advocates duly qualified in countries from which appeals lie to the Privy Council.

[79] *Practice Direction* [1972] 1 W.L.R. 307.

[80] *Practice Direction* [1972] 1 W.L.R. 5. The areas are Caernarvon, Barnstaple, Bodmin, Doncaster and Lincoln.

[81] *McKenzie* v. *McKenzie* [1971] P. 33; *Merry* v. *Persons Unknown* [1974] C.L.Y. 3003. There is, however, no right to a McKenzie Adviser: see below, p. 444. A superior court may exceptionally hear persons who technically have no right of audience: *Engineers' and [illegible] Association* v. *A.C.A.S.* [1979] 1 W.L.R. 113 (trade union official).

individual concerned, the "special skill and expertise" called for, and their other proposals for the extension of financial support for legal services. The existing position of litigants in person and lay persons should not, however, be restricted. In the case of the former this was not because the Commission thought they were any good at advocacy, but because their right of audience was "long-established" and no-one had actually proposed its removal. In evidence, there had been some jockeying for position among lawyers. The Bar and the judges resisted solicitors' claims[82] for wider rights of audience, particularly in the Crown Court; the Law Society resisted the claims of legal executives.[83] By and large, the resisters won, apart from proposed minor changes to enable a solicitor to appear in any court to deal with formal or unopposed matters.[84] The Commission thought that any significant changes would lead to a lowering of standards. Crown Court advocacy required different skills (*e.g.* addressing a jury) or greater expertise (*e.g.* knowledge of the laws of evidence and experience in cross-examination) than advocacy in the magistrates' courts. The Commission's enthusiasm for solicitor-advocates was markedly lukewarm:

> "Many solicitors make competent advocates in magistrates' courts and some are very good. Some could achieve the same standard in the Crown Court if they could so arrange their professional lives as to enable them to concentrate on the work there."[85]

They thought it unlikely that many solicitors, except in large firms, would be able to have the constant practice in Crown Court advocacy which competence and progressive improvement required. However, they feared that enough solicitors would move into this area to have a "serious and disproportionate impact on the income and capacity of barristers to continue in practice."[86] The fear of fusion was thus in the background.

Again, as we have seen, matters have not stood still. The Law Society again raised the question of rights of audience in 1984,[87] and in 1985 widespread publicity surrounded the attempt by Cyril Smith M.P. to have the terms of the settlement of a libel action brought against him and Radio Trent by 25 other M.P.s read to the High Court by his solicitor. This act did not require the skills of an advocate, and Mr. Smith's solicitor took the view that it would be unnecessarily expensive to brief counsel for the task. Leonard J. held that he had no authority to allow a solicitor to appear before him, save in an emergency, and this was affirmed by the Court of Appeal,[88] on the ground that the public interest required that the High Court's general practices and procedures be known and not changed or departed from in

[82] The solicitors were refighting a battle lost when the criminal courts were reorganised in 1971: see the *Royal Commission on Assizes and Quarter Sessions* 1966–69, Cmnd. 4153, Written Evidence Nos. 32 and 47.

[83] See R.C.L.S., Vol. 1, pp. 413–415.

[84] Seven members of the Commission favoured some extension of the right of audience of solicitors in the Crown Court, particularly to make pleas in mitigation: Vol. 1, pp. 807, 816–823, 828–829.

[85] R.C.L.S., Vol. 1, p. 212. The competence of barristers was not discussed in the chapter on rights of audience. Their increasing prolixity was discussed in Vol. 1, pp. 307–308.

[86] R.C.L.S., Vol. 1, p. 216.

[87] Annual Statement, 1983–84, pp. 48–49; (1984) 81 L.S.Gaz. 1507.

[88] *Abse* v. *Smith* [1986] Q.B. 536.

piecemeal fashion by individual judges. However, it was acknowledged that the rule might be changed by the judges of the Supreme Court acting as a collegiate body. Accordingly, on May 9, a Practice Direction was issued on behalf of the judges of the High Court and Court of Appeal permitting solicitors to appear in the Supreme Court in formal or unopposed proceedings, and when judgment is delivered in open court following a hearing in Chambers at which that solicitor conducts the case for his or her client.[89] The Marre Committee subsequently supported, by a majority, the extension of rights of audience in the Crown Court to solicitors approved by a Rights of Audience Advisory Board.[90]

The government's proposals were more radical still.[91] The Courts and Legal Services Act 1990,[92] puts rights of audience in courts and in certain tribunals and inquiries[93] on a statutory footing. A person has a right of audience before a court

(a) where he or she has a right of audience granted by the appropriate authorised body,[94] and that body's qualification regulations and rules of conduct have been approved;
(b) where (a) does not apply but he or she has a statutory right of audience;
(c) where (a) does not apply but he or she has a right of audience granted by the court in question;
(d) where he or she is a party to the proceedings and would have had a right of audience as a party if the Act had not been passed;
(e) where he or she is a solicitor's clerk, or corresponding employee of a recognised body, and the proceedings are being heard in chambers in the High Court.

A right of audience can, however, be denied to a person for reasons which apply to him or her as an individual. Sections 20 and 25 of the Solicitors Act 1974 do not apply in relation to any act done in exercise of a right of audience duly granted under the Act.

Similar rules are to apply to rights to conduct litigation, except that the General Council of the Bar is not specified as an "authorised body."[95]

On the coming into force of section 27 of the 1990 Act,[95a] the rights of audience enjoyed by barristers and solicitors, and the right to conduct litigation enjoyed by solicitors, immediately before December 7, 1989, were deemed to have been granted, respectively, by the General Council of the Bar and the Law Society, and the relevant qualification regulations and rules

[89] *Practice Direction* (*Solicitors: Rights of Audience*) [1986] 1 W.L.R. 545. The Royal Commission's recommendation in favour of such a change (Vol. 1, p. 219) had previously been accepted in principle by the government (Government Response, Cmnd. 9077, 1983, p. 19) and the Senate of the Inns of Court and the Bar.

[90] Report of the Marre Committee, pp. 149–157. See J. Hodgson, (1988) 138 N.L.J. 615.

[91] *Green Paper*, Chap. 5, *White Paper*, Chap. 3.

[92] s.27.

[93] The term "court" includes (a) any tribunal under the jurisdiction of the Council on Tribunals (b) any court-martial and (c) a statutory inquiry within the meaning of the Tribunals and Inquiries Act 1971, s.19(1): 1990 Act, s.119.

[94] i.e. the General Council of the Bar, the Law Society, and a professional body designated by Order in Council (which may include the Council for Licensed Conveyancers: s.53). The procedures for securing and revoking designation are set out in ss.29 and 30 and Sched. 4.

[95] Courts and Legal Services Act 1990, s.28.

[95a] On January 1, 1991: see S.I. 1990 No. 2484.

Probate

Section 54 of the 1990 Act will extend the right to perform probate work for reward to banks, building societies, insurance companies and their subsidiaries, provided that they operate a complaints scheme which complies with requirements prescribed by regulations, and to other bodies approved under section 55 and Schedule 9.[6] Possible candidates for inclusion include legal executives, licensed conveyancers,[7] authorised conveyancing practitioners and accountants.

(v) *Restrictions on practice*

Multi-disciplinary practices

A solicitor may employ, but may not form a partnership with a member of another profession.[8] This has prevented the development of "group practices" of lawyers and members of other professions. The Royal Commission was not in favour of any change. Some of the candidates for partnership, such as doctors, engineers, architects, patent agents and actuaries would most often be needed to give expert evidence in litigation; it would be inappropriate for them to be in partnership with the lawyers who were preparing the case for trial. If partnerships with estate agents were allowed, there was a danger that sole practitioners and small firms would be absorbed into large estate agents' firms, to the detriment of general practice in small towns and rural areas. The Commission thought that in general it was in the client's interest to be able to choose his or her adviser without restriction; with multi-disciplinary partnerships there would be a tendency to keep a client within the firm. There would also be difficulties in drawing up common codes of conduct. The Commission did, however, accept that solicitors' firms should be allowed to incorporate, with unlimited liability only, under the Companies Acts.[9] Provision for incorporated practices was made by section 9 of the Administration of Justice Act 1985, although this is not in force at the time of writing. The Law Society has made special rules for such practices.[10] They will have to be owned, managed and controlled by solicitors, and recognised by the Council of the Law Society as being a suitable body to undertake the provision of solicitors' services. Incorporation with limited liability will be permitted provided there is additional insurance cover.[11]

The debate over the issue of multi-disciplinary partnerships has nevertheless continued. Pressure for change has come from the Director General of

[6] See, the *Green Paper: The Work and Organisation of the Legal Profession* (Cm. 570), Chap. 14, and the *White Paper* (Cm. 740), Chap. 6.
[7] 1990 Act, s.53.
[8] Solicitors' Practice Rules 1990, r. 7(6).
[9] R.C.L.S., Vol. 1, pp. 401–404.
[10] Solicitors' Incorporated Practice Rules 1988, as amended.
[11] See (1988) 85 L.S.Gaz., February 3, p. 13: report of the January meeting of the Council of the Law Society, on the justification for permitting limited liability. See also (1985) 82 L.S.Gaz. 2253, discussing the pros and cons of incorporation.

Fair Trading, Sir Gordon Borrie. A report by him in 1986[12] supported the view that mixed practices should be encouraged, with suitable safeguards for the maintenance of professional standards and adequate consumer protection; the statutory impediments against their development[13] should be removed, paving the way for suitable alterations to the practice rules.

Support for the development of multi-disciplinary practices also came from the National Consumer Council.[14] They considered that there were a number of ways in which consumers could benefit, including the convenience of "one-stop" house transfer (covering a mortgage, a survey, help with selling and conveyancing services), the reduction in duplication, delay and extra cost in fields such as tax planning that could come with mixed practices of solicitors and accountants and the greater facility for bringing management expertise into the organisation of solicitors' practices. It has also been argued that such practices would have advantages for commercial clients.[15]

The Law Society has been more cautious. It issued a consultation paper in 1987, setting out both sides of the debate.[16] It emphasised the need to preserve "the solicitor's traditional role as an independent and impartial adviser of integrity enjoying a unique position as an officer of the court who is readily available to the public." Independence would be weakened if a solicitor were employed by a non-solicitor, or the practice was owned wholly or partly by a non-solicitor. Mixed practices might lead to confusion as members of the same firm would be subject to different sets of professional practice rules. The development of large practices might be at the expense of smaller ones and so reduce the number of solicitors' firms available to the public. On the other hand, mixed practices could enable solicitors to respond to a more competitive environment, by offering a broader range of services; overheads could be shared; it would be easier to run intensive training programmes; there could be economies of scale. Since then the Law Society has been engaged in discussions with other professions. The Marre Committee took the view that any action should await the outcome of these discussions.[17]

The Green Paper[18] proposed, in line with Sir Gordon Borrie's recommendation in 1986, that the statutory inhibitions on multi-disciplinary practices should be removed. In response, the Law Society's attitude hardened.[19] It

[12] *Restrictions on the kind of organisation through which members of professions may offer their services: A Report by the Director General of Fair Trading* (O.F.T., August 1986): see (1986) 136 N.L.J. 833. He repeated this call in an address to the Macfarlanes Seminar held at the University of Nottingham on November 18, 1987: see (1987) 34 L.S.Gaz. 3385 and (1988) 85 L.S.Gaz., February 3, p. 8.
[13] Solicitors Act 1974, ss.39 (preventing a solicitor from acting as an agent for an unqualified person in contentious matters) and 22 (preventing a solicitor sharing conveyancing fees with an unqualified person).
[14] *Ordinary Justice* (H.M.S.O., 1989), pp. 237–245.
[15] P. Couse (President of the Institute of Chartered Accountants in England and Wales), (1990) 87 L.S.Gaz. April 11, p. 2.
[16] *Multi-disciplinary partnerships and allied topics* (April 1987). For responses, see (1987) 84 L.S.Gaz. 2495, J. Harris, (1987) 131 S.J. 644.
[17] *A Time for Change* (1988), pp. 173–177.
[18] *The Work and Organisation of the Legal Profession* (Cm. 570), pp. 43–47.
[19] *Striking the Balance: The Final Response of the Council of the Law Society on the Green Papers* (1989), pp. 23–28.

including a requirement for a personal interview, suggest[illegible]
the prevention of conveyancing services being offered at less than their true cost.

prepare or participate in a package of services together with other businesses or professional practices.[50] The Solicitors' Introduction and Referral Code 1990[51] applies to introductions and referrals other than between solicitors, between solicitors and barristers or between solicitors and lawyers of other jurisdictions. It states that solicitors should not allow themselves to become so reliant on a limited number of sources of referrals that the interests of the introducers affect the advice given by the solicitor to clients; each firm should conduct six-monthly reviews; where more than 20 per cent. of the firm's income arises from a single source of introduction, the firm should consider whether steps should be taken to reduce the proportion.

(d) Barristers and their work

(i) *Numbers*

In October 1990 there were 6,645 barristers (including 682 Q.C.s) practising in 374 sets of chambers. 4,638 were in 232 sets in central London, and the rest were spread through 30 provincial centres.[52] As was the case with solicitors, the numbers of practising barristers increased significantly in the late 1960s and 1970s following a period of shortage. They more than doubled between 1963 and 1979, and increased by almost a half between 1979 and 1989.[53] The net annual increase declined between 1975 and 1979, with increasing numbers ceasing practice.[54] The proportion of the profession of 10 years' call and under has also shown a marked increase: in 1966 there were 769 (34 per cent. of the practising Bar) and in 1983, 2,367 (47 per cent.).[55] The average size of sets of chambers has steadily increased.[56]

(ii) *Work*

A barrister may have a general or specialist common law practice (contract, crime, tort—especially personal injury cases, landlord and tenant, family matters), or may specialise in Chancery work (trusts, land law, conveyancing, wills, company law, revenue matters) or in one of a number of narrower fields (tax, patents, commercial matters, planning, admiralty, libel, public law). Most of the recent increase in the size of this branch of the profession has been in the generalist common law area. In London, common law chambers are concentrated in the Temple; Chancery barristers are concentrated in Lincoln's Inn. There is no rule requiring chambers to be in one of the inns of court. Concentration there has been preferred because the inns until recently have charged barristers only a proportion of the market rent, for the convenience of access to the courts and because of long tradition.[57]

A "rough guide" to the specialist work done by barristers was given in the Bar's Response to the Green Papers[58]:

Analysis of Barristers' Practices

	0% — 10%	10% — 20%	20% — 30%	30% — 40%	40% — 50%	50% — 60%	60% — 70%	70% — 80%	80% — 90%	90% — 100%	Total
Admiralty	71	3	1	18	6	2	15	0	0	0	116
Commercial	544	204	124	72	89	38	45	45	42	62	1265
Criminal	512	275	268	324	344	268	310	408	431	1026	4166
Defamation	144	15	3	5	4	2	3	5	4	9	194
Employment	880	121	30	16	13	8	4	2	3	2	1079
European	73	9	6	5	2	1	0	3	6	10	115
Family	1131	524	367	212	152	79	58	66	47	65	2701
Immigration	188	24	15	5	5	3	1	7	2	2	252
Insolvency	429	63	22	10	11	4	1	2	2	2	546
International	85	19	13	8	8	2	0	0	1	12	148
Official Referees	541	97	50	31	42	16	10	9	1	2	799
Parliamentary	274	53	19	21	12	12	10	14	17	59	491
Patents	192	15	11	3	3	2	3	6	10	31	276
Restrictive Practices and Monopolies	28	4	7	3	1	3	0	1	1	0	48
Revenue	127	21	13	5	10	1	4	4	7	45	237
Chancery	649	136	73	48	43	43	36	67	57	86	1238
Common Law	1349	810	554	435	288	138	122	102	75	84	3957
Other	258	54	40	26	29	12	13	10	13	109	564

[50] *e.g.* a solicitor may give an estate agent a price list to hand to the client or may work as part of an inclusive deal in which the agent charges the seller a fixed price and pays a fixed or hourly rate for the conveyancing service: *Ordinary Justice*, pp. 134–136. The N.C.C. thought the Code was difficult to interpret and enforce and suggested that the development of advertising was likely to reduce the importance of introductions by local businesses.

[51] See, "Arrangements: estate agents and solicitors" (1988) 85 L.S.Gaz., August 31, p. 11.

[52] Annual Report of the Bar Council 1990, pp. 20–21. Barristers in London may also join their provincial colleagues on one of the six Circuits: Northern, North Eastern, Midland and Oxford, Western, South Eastern and Wales and Chester. The circuits now are important as the units of regional court administration. Each Circuit elects a Leader and Committee. See *Counsel*, March 1990.

[53] R.C.L.S., Vol. 2, p. 54; Annual Report of the Bar Council 1990, pp. 20–21. The growth of the Bar is documented in R. L. Abel, *The Legal Profession in England and Wales* (1988), pp. 65–72, and see pp. 342–343, Table 1.16 (general figures for 1947–85) and pp. 358–359, Table 1.26 (growth of the provincial Bar).

[54] Annual Statement, 1983–84, p. 68. The figure since then has fluctuated, settling down between 1981 and 1985 to about 170, but becoming more variable thereafter.

[55] *Ibid.* p. 19. In 1988, about half of barristers in independent practice were 12 years or less since call: *Quality of Justice* (1989), p. 53.

[56] Abel (1988), pp. 360–361, Table 1.27.

[57] R.C.L.S., Vol. 1, pp. 449–450. There is a set in Wellington St., Covent Garden, and other sets have opened outside the Inns.

[58] *Quality of Justice: The Bar's Response* (1989), pp. 43 and 44, Fig. 5.2.

The percentages of gross earnings by area of law for barristers were crime 30 per cent., general civil (common law) 17 per cent., commercial general 13 per cent., family 7 per cent., chancery 8 per cent., commercial specialist 9 per cent., tax 3 per cent., and 12 per cent., other specialisations.[59]

In the 1970s there were concerns that the recommendations of the Royal Commission on Civil Liability and Compensation and Legal Services might prove a threat to the work of barristers. In the event even the modest, piecemeal, proposals of the former were not implemented, apart from some changes to the law of damages.[60] As we have seen, the Bar's rights of audience were upheld by the latter,[61] and members of the Crown Prosecution Service established by the Prosecution of Offences Act 1985 were not given rights of audience in the Crown Court and above.[62] It seemed that prospects were not as bleak as had been feared. However, the Royal Commission on Legal Services confirmed that barristers were increasingly dependent on public funds,[63] and, since then, the low rates of increase in fees for legal aid work has caused increasing dissatisfaction. The renewed challenge of the Law Society on rights of audience and then the government's proposals for radical reform once again put the Bar on the defensive.[64] As we have seen, its case for preserving its monopoly of rights of audience in the higher courts has not prevailed. It remains to be seen how far the designated judges will be able to fight a rearguard action, and what use will in practice be made by solicitors and other professions of extended rights of audience.

As to remuneration, the Royal Commission concluded that the earnings of barristers were not out of line with those in comparable occupations, except that the earnings of barristers in the early years of practice were low.[65] A report by Coopers & Lybrand in 1985 of the remuneration levels of junior council carrying out publicly funded criminal defence work claimed that fees fell well below what was required to meet the principle of "fair and reasonable reward for work reasonably done," and that an increase of 30–40 per cent. was necessary to improve the position.[66] The Lord Chancellor rejected a claim for such an increase, casting doubt on some of the assumptions relied on in the Coopers & Lybrand report, and raised fees by 5 per cent. The Bar challenged the decision in court, proceedings being settled on the agreement

[59] *Ibid.* p. 45, Fig. 5.3.

[60] Royal Commission on Civil Liability and Compensation (Cmnd. 7054, 1979); Administration of Justice Act 1982. The Royal Commission did not even recommend the introduction of a comprehensive state scheme for compensating accident victims.

[61] Above, pp. 129–130.

[62] Below, pp. 623–624.

[63] In 1976–77, £23m out of £48m total gross fees were from public funds: R.C.L.S., Vol. 2, pp. 595–597.

[64] Illustrated by the substantial report, *Quality of Justice*, produced quickly in response to the Green Paper in 1989.

[65] See R.C.L.S., Vol. 1, pp. 507–542 and Vol. 2, pp. 579–626 (surveys of barristers' earnings). Figures for senior barristers are given in the Reports of the Top Salaries Review Board. Income Data Services Ltd. prepared estimates of barristers' earnings as at April 1988 for the Andrew Review of Government Legal Services (H.M.S.O., 1989), Annex to Chap. VIII (pp. 66–69). The median figure for those with between 15 and 35 years experience was £105,954 (Q.C.s) and £39,415 (juniors). The figures were substantially lower for those concentrating on criminal cases. In 1990 Chambers & Partners estimated that likely gross earnings for reasonably successful barristers ranged from £18,000 (early years) to £100,000+ (Q.C.s) in criminal work and £20–£40,000 (earlier years) to £300–600,000+ (Q.C.s) in commercial work: *Chambers & Partners' Directory of The Legal Profession 1990*, p. 19.

[66] Annual Statement of the Senate 1985–86, p. 76; (1985) 82 L.S.Gaz. 2636.

of the Lord Chancellor to a binding time-table for negotiations for an increase in fees.[67] The Lord Chancellor eventually awarded an additional 3 per cent., plus another 2 per cent. if the Bar would change its working practices.[68] The complaints have not gone away. The result has been an increasing polarisation of the Bar between specialists who can command enormous fees[69] and the large number of barristers who rely on public funds. The late payment of fees by solicitors has been a serious cause for complaint among barristers. The Law Society and the Senate responded by tightening up the procedures for enforcing payments, and the Bar clarified the terms of work on which barristers are prepared to act. These developments did not satisfy all the critics.[70] In 1987, the Bar Council announced that, as from March 2, the Bar would withdraw credit facilities from solicitors who had failed to pay barristers' fees for over a year after reminders.[71] A revised code for barristers' terms of work was published in 1988.[72] The Law Society unsuccessfully sought changes, and advised solicitors to make it clear that, unless they thought it appropriate, they would not comply with the Bar's requirement that fees be paid within 3 months of delivery of the fee note, whether or not the solicitor had been placed in funds by the client and whether or not the case was still continuing.[73]

There are at least as many barristers employed in commerce, industry and central and local government as there are in private practice.[74] Their work compares much more closely with that done by employed solicitors in the same fields than with that done by barristers in private practice. Indeed, in 1976 the Chairman of the Solicitors' Commerce and Industry Group said that:

> "Fusion is a word that we in commerce and industry never use in practice, because it is an accomplished fact with us. Barristers and solicitors are almost completely interchangeable. . . ."[75]

The Law Society has expressed the view that people who wish to practise as a solicitor should become a solicitor. It has also been suggested that one reason why such barristers do not change is snobbery.[76] However, the Bar Association for Commerce, Finance and Industry persuaded the Royal Commission that the rules preventing employed barristers from undertaking conveyancing and briefing other barristers in non-contentious matters

[67] *R. v. Lord Chancellor, ex p. Alexander, The Times*, March 21, 22, 24 and 27, 1986; *Counsel*, Easter Term 1986, pp. 24–25. For the background correspondence see the Annual Statement 1985–86, pp. 27–31, and for the proceedings of an angry extraordinary general meeting of the Bar, which authorised the proceedings, see *ibid.* pp. 32–41.

[68] (1986) 83 L.S.Gaz. 2282–7.

[69] M. Zander, *A Matter of Justice* (Revised edn., 1989), pp. 34–35.

[70] Annual Statement, 1982–83, pp. 23–41; J. Ferris, (1982) 132 N.L.J. 745; S. Best, (1982) 132 N.L.J. 803.

[71] (1987) 84 L.S.Gaz., 573; *Counsel*, Spring 1987, pp. 27, 28.

[72] (1988) 85 L.S.Gaz., September 28, pp. 40–41.

[73] *Ibid.*

[74] R. L. Abel, *The Legal Profession in England and Wales* (1988), pp. 111–113.

[75] (1976) 73 L.S.Gaz. 369.

[76] R.C.L.S., Vol. 1, p. 237; "Enobarbus" (1980) 77 L.S.Gaz. 766.

compulsory insurance, but because of the Society's insistence on a single centrally controlled scheme[55] and the high premiums charged.[56]

Even assuming the client has perceived that the lawyer has done his or her work incompetently, which is itself problematic, there are a number of problems facing those who wish to sue lawyers. First, legal assistance is advisable, but someone whose dealings with a lawyer have been unsatisfactory and probably protracted and a source of frustration and annoyance, is unlikely to relish the prospect of involvement with yet more lawyers. Moreover there may be difficulties in finding solicitors prepared to bring negligence proceedings against fellow practitioners. In order to alleviate this problem, the Law Society, with the co-operation of local law societies, established a panel of solicitors prepared to act in such cases (the "Negligence Panel").[57]

Secondly, there is a special immunity from an action for negligence which attaches in respect of acts or omissions in the conduct of litigation. The authorities have concerned barristers, but the immunity was regarded as extending to a solicitor acting as advocate.[58] The matter is put beyond doubt by section 62 of the Courts and Legal Services Act 1990, which states that anyone who is not a barrister but lawfully provides any legal services in relation to any proceedings has the same immunity as a barrister.[59]

The House of Lords in *Rondel* v. *Worsley*[60] held that a barrister was immune from action in respect of his or her conduct at trial. The immunity was justified by public policy:

> "mainly upon the ground that a barrister owes a duty to the court as well as to his client and should not be inhibited through fear of an action by his client, from performing it; partly on the undesirability of relitigation as between barrister and client of what was litigated between the client and his opponent."[61]

In *Saif Ali* v. *Sydney Mitchell & Co.*[62] the House of Lords held that the immunity extended only to pre-trial work which was:

> "so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing."[63]

[55] D. Podmore, (1980) 7 B.J.L.S. 1 at 5–6. The Law Society is not liable to account to solicitors for the commission received from the insurance brokers: *Swain* v. *The Law Society* [1983] A.C. 598, H.L.

[56] The premium is assessed by reference to the average gross fee income per principal, with reduced rates, *e.g.* for small practices, practices in small areas, practices undertaking low risk work: Solicitors Indemnity Rules 1990, rr. 16, 17, Table 1.

[57] See above, p. 153.

[58] *Saif Ali* v. *Sydney Mitchell & Co.* [1980] A.C. 198, 215, 224, 227.

[59] If the advocate is immune from an action in negligence, there can be no liability for breach of any contract: Courts and Legal Services Act 1990, s.62(2).

[60] [1969] 1 A.C. 191. Until *Hedley Byrne* and *Rondel* v. *Worsley* were decided it was thought that a barrister could not be sued as he or she could not enter a contractual relationship with either the instructing solicitor or the lay client. This old rule of law has now been abolished, although it may be replaced by rules of conduct, see n. 44 above.

[61] *per* Lord Wilberforce in *Saif Ali* v. *Sydney Mitchell & Co.* [1980] A.C. 198 at 212.

[62] [1980] A.C. 198.

[63] *per* McCarthy P. in *Rees* v. *Sinclair* [1974] 1 N.Z.L.R. 180 at 187, endorsed by Lords Wilberforce, Diplock and Salmon. Lord Russell and Lord Keith favoured a wider test under which immunity would be extended to all work in connection with litigation.

It was alleged that a barrister negligently gave advice which led to the wrong person being joined as defendant. The House of Lords held that he was not immune as the alleged negligence had prevented the plaintiff's cause coming to court. The exact extent of the immunity is difficult to define, but it does appear to extend, *e.g.* to advice as to plea in a criminal case.[64]

The arguments in favour of the immunity are (1) that the barrister owes a duty to the court which transcends the duty to the client and that the necessary confidence between Bar and Bench would be undetermined by barristers' fear of suits, (2) that there should be a general immunity from suit for all participants in a trial again because of the adverse effects upon the administration of justice if the situation were otherwise, (3) that the "cab-rank rule" would be difficult to enforce if barristers had to take on clients who could then pursue actions against them, (4) that relitigation of cases is undesirable and the correct method of challenge is via an appeal.[65] These arguments can be challenged on two bases: the first that they are inherently unsound and the second that they are based on "dubious, empirical assertions about the legal process."[66] Zander has indicated that the first basis of challenge includes the arguments that it is not probable that barristers would be influenced to do their work much differently by the thought that they might be sued for negligence, that re-opening a case is not necessarily bad if, *e.g.* someone has gone to prison because of the negligence of the barrister, that there is little prospect of considerable litigation in view of the many barriers facing a potential litigant, and that no barrister is likely to know enough about a client for the prospect of litigation to have any effect upon accepting a brief or instruction.[67] Veljanowski and Whelan deal with the second basis of challenge, pointing out the lack of an empirical basis for the immunity, since there is no evidence to support the suggestion that a rash of suits would follow if there was no immunity, there is no evidence that "defensive" practices by barristers would abound, rather there is evidence that good practice might be encouraged, and, while the prospect of re-litigation appears to be the strongest argument, it may be that it has outlived its validity since "the very existence of an appellate framework suggests that the value of finality in judicial decisions is not absolute" and "it is hard to accept the proposition that an instrument capable of reducing negligence will bring the administration of justice into disrepute." Further, a barrister can only be liable for negligence and not for mere errors of judgment.[68] It is hard to avoid Miller's conclusion that the "immunity is an anachronism maintained by lawyers for lawyers."[69] Nevertheless, in 1979, the Royal Commission on Legal Services did not favour any change in this area[70] and the Government was convinced of the arguments in favour of the immunity

[64] *Somasundaram* v. *M. Julius Melchior & Co.* [1989] 1 All E.R. 129, C.A. See, further, Jackson and Powell (1987), pp. 273–280; Dugdale and Stanton (1989), pp. 158–162; Winfield (1989), pp. 103–104; Jones (1989), pp. 45–46.

[65] See C. G. Veljanowski and C. J. Whelan, "Professional Negligence and the Quality of Legal Services—An Economic Perspective" (1983) 46 M.L.R. 700, 711–712.

[66] Veljanowski and Whelan (1983), p. 712.

[67] M. Zander, *Legal Services for the Community* (1978), pp. 134–136.

[68] Veljanowski and Whelan (1983), pp. 712–717.

[69] D. L. Carey Miller, "The Advocate's Duty to Justice: Where Does It Belong" (1981) 97 L.Q.R. 127, 138. The Court of Appeal's support for the immunity in *Rondel* v. *Worsley* was met with scorn by the press, see Zander (1978), p. 136.

[70] R.C.L.S., Vol. 1, pp. 332–333.

not only to preserve it for barristers but to make it clear in the Courts and Legal Services Act 1990 that it extended to all advocates.[71]

Thirdly, it must be remembered that liability in negligence does not attach simply because a lawyer turns out to be wrong or makes an error of judgment. A lawyer is only liable if the error is "such as no reasonable well informed and competent member of that profession could have made."[72]

Fourthly, a solicitor who has done work for a client and remains unpaid has the right to retain the papers concerning the client's affairs and other personal property, that is a "retaining or general lien," and also a "lien on property recovered or preserved," that is a right to seek the court to direct that property, except real property, obtained under a court's judgment should be available to the solicitor to cover the client's costs in relation to that work.[73] This may cause both difficulty and resentment. If the solicitor declines to act further, the client or the new solicitor may obtain a court order for delivery of the papers on an undertaking to hold them without prejudice to the lien and to return them on completion of the matter.[74] If the client justifiably discharges the solicitor, the Law Society may gain possession of the documents.[75]

4. Social Background, Entry and Training

(a) Social Background

Lawyers predominantly come from middle class homes.[76] The same is true of law students. The College of Law reported to the Royal Commission on Legal Services that the parental occupation of 60.9 per cent. of its solicitor students and 67.3 per cent. of its bar students were professional or managerial, compared with 8 per cent. that were manual (whether skilled, semi-skilled or unskilled).[77] The system of admissions to law degrees appears to perpetuate the class structure of the legal profession.[78] Most

[71] S.62. See, *Legal Services: Framework for the Future* (Cm. 740, 1989), para. 10.10.

[72] *per* Lord Diplock in *Saif Ali* v. *Sydney Mitchell & Co.* [1980] A.C. 198, 220. For an example of a "reasonable mistake" see *Jones* v. *Jones* [1970] Q.B. 576.

[73] *Cordery on Solicitors* (1988), Chap. 8 and *Supreme Court Practice 1991*, Vol. 2 Part II, section D.3.

[74] The Royal Commission recommended that this should be normal practice without a court order where a solicitor is replaced for any reason. No such reform has been introduced, see *Cordery on Solicitors* (1988), pp. 245–247.

[75] Solicitors Act 1974, s.35, Sched. 1. This power is rarely exercised. The Royal Commission recommendation that it should be exercised whether the client would otherwise suffer has not been implemented.

[76] See R. L. Abel, *The Legal Profession in England and Wales* (1988), pp. 74–76 and 170–172 and Table 1.21; R.C.L.S., Vol. 2, pp. 57–61; D. Podmore, (1977) 74 L.S.Gaz. 611; Podmore (1980), pp. 30–32, 90–93.

[77] M. Zander, *The State of Knowledge about the English Legal Profession* (1980), pp. 22–23. The accuracy of this information is emphasised by two further studies: P. McDonald, "The Class of '81: A Glance at the Social Class Composition of Recruits to the Legal Profession" (1982) 9 J.L.S. 267 and M. King, M. Israel and S. Goulbourne, *Ethnic Minorities and Recruitment to the Solicitor's Profession* (1990), pp. 32–34.

[78] See R. L. Abel, *The Legal Profession in England and Wales* (1988), Chap. 18, esp. pp. 271–275 and King, Israel and Goulbourne (1990), pp. 32–34 and 37–52. See also P. McDonald (1982); R. G. Lee, "Survey of law school admissions" (1984) 18 L.T. 165.

lawyers are graduates[79] and so the social imbalance seen at the academic stage of qualification maintains the social imbalance at the professional stage. The burden is upon the educational institutions to redress the social imbalance in the numbers of those reaching the required standard of admission to a university or profession.[80] Educational institutions have recognised this problem and are aiming to widen the backgrounds of people who come forward for tertiary education.[81] It remains to be seen whether any change occurs in student admission. Further, it remains to be seen whether the structure of the profession will be affected, since there are financial and other hurdles to be overcome.

The passage of the Sex Disqualification (Removal) Act 1919 meant that it was possible for women to be solicitors and that the theoretical possibility of women being barristers became a reality. However, women have not come into the professions in significant numbers until the last twenty years. Women are poorly represented in the legal profession as a whole,[82] and are particularly poorly represented at the upper echelons of both branches.[83]

[79] See R. L. Abel, *The Legal Profession in England and Wales* (1988), pp. 46–49 and 143–145. In 1989–90, 3,729 solicitors were admitted, of whom 67.3 per cent. were law graduates and 14.7 per cent. were non-law graduates; the remaining 18 per cent. consists not only of non-graduates, but also members of ILEX and of other legal professions, many of whom are graduates: *Law Society Annual Statistical Report 1990*, Table 9.1. Although effectively both branches of the profession are graduate entry, it is not formally required that all entrants be graduates, see below, p. 171–173.

[80] The Royal Commission on Legal Services made this clear in Vol. 1 at p. 629. The same point is made by the authors of the recent report on ethnic minorities and recruitment to the solicitors' profession: King, Israel and Goulbourne (1990) and see below, p. 170.

[81] *e.g.* through the "Access" scheme designed to enable people without the traditional "A" level qualifications to gain admission, see, *e.g.* N. Duncan, "Testing the Third Route: testing the effectiveness of Access courses in law" (1990) 24 L.T. 29. See also King, Israel and Goulbourne (1990), pp. 44–52; R. G. Lee (1984); R. Stone, "Prediction, Prize or Profile: Three Models of Admissions Policy" (1988) 22 L.T. 28.

[82] See *Women in the Professions*, a report compiled by the United Kingdom Inter-Professional Group Working Party on Women's Issues (1990). In 1989–90, 23 per cent. of the 54,734 solicitors with practising certificates were women: *Law Society Annual Statistical Report 1990*, pp. 6–7. See also the Law Society, *Equal in the Law* (1988), p. 10. At October 1, 1990, 18 per cent. of the 6,645 practising barristers in England and Wales were women: The General Council of The Bar, *Annual Report 1990*, p. 20.

[83] *Women in the Professions* shows that 11 of the 97 members of the ruling Bar Council were women and 3 of the 70 members of the ruling Council of the Law Society were women. In a survey of solicitors' careers (with 293 respondents) it was shown in relation to people working full-time or part-time in private practice that 91 per cent. of the men admitted to the Roll in 1977 and 61 per cent. of the men admitted in 1982 were sole practitioners or partners (13 per cent. and 23 per cent. respectively being salaried partners). The comparable figures for women were 60 per cent. (8 per cent. salaried) in 1977 and 36 per cent. (14 per cent. salaried) in 1982: P. Marks, *Solicitors' Career Structure Survey* (1988), see also the Law Society, *Equal in the Law* (1988), p. 11. Of the solicitors holding practising certificates at July 31, 1990, 41.5 per cent. of those who had been admitted within 9 years were women, 34.0 per cent. of those admitted within 10–19 years and a steadily reducing percentage to 1.2 per cent. of those who had been admitted for more than 50 years: *Law Society Annual Statistical Report 1990*, Table 2.3. At October 1, 1990, 4 per cent. of the 682 Queen's Counsel were women: The General Council of The Bar, *Annual Report 1990*, p. 21. The picture is replicated in the judiciary, where there is only one woman Court of Appeal judge, and in academic law, where women are noticeably under-represented at any of the promoted stages, but particularly as professors. See also G. Chambers and S. Harwood, *Solicitors in England and Wales: Practice, Organisation and Perceptions* (1990).

Women seem to be over-represented at certain lower levels of the profession, *e.g.* there appear to be proportionately more women working as assistant solicitors for longer before obtaining a partnership than men.[84] Needless to say this picture is changing. The proportion of women who hold practising certificates as solicitors is consistently increasing[85] and women have increasingly formed a large part of the entry to the profession.[86] No doubt the picture will continue to change.

It is not only in terms of recruitment and promotion that women have faced significant problems. Work practices and ethics adopted by the professions have added to the problems. It is now the case that in the solicitors' profession considerable attention is being paid to the need to change work practices so as to encourage women to stay in it[87] and to avoid the problem of requiring women to choose between family and career. Consequently, a Working Party of the Law Society has encouraged part-time work for men and women.[88] It also encouraged career-breaks for women so as to enable time to be taken out of a career, for example to have a family, and then to

[84] Of the 293 solicitors who responded in the Solicitors' Careers Survey, 40 per cent. of the women admitted to the Roll in 1977 and 64 per cent. of the women admitted in 1982 were Assistant Solicitors, whereas the figures for men were, respectively, 8 per cent. and 39 per cent. Marks (1988), p. 9. *Law Society Annual Statistical Report 1990*, Table 2.8 reports a similar marked difference.

[85] *e.g.* the proportion of solicitor practising certificate holders who are women is increasing consistently: in 1985–86 it was 15 per cent., 1986–87 18 per cent., 1987–88 20 per cent., 1988–89 21 per cent., and 1989–90 23 per cent.: *Law Society Annual Statistical Report 1990*, Table 2.2.

[86] The number of new members admitted to the Solicitors' Roll:

	Men	Women	
1900	593	0	0%
1920	606	0	0%
1940	309	14	4%
1960	671	40	6%
1965	947	62	6%
1970	1,712	165	16%
1975	1,871	332	15%
1980	2,515	1,023	29%
1985	1,563	1,123	43%
1988	1,746	1,499	46%

Source: *Women in the Professions*, p. 57. The proportion of women admitted to the Roll had increased to 47 per cent. in 1989: M. Chambers (ed.), *The Legal Profession 1990*, p. 20. In 1989 38 per cent. of those called to the Bar were women and 42 per cent. of those obtaining tenancies were women: C. Newman, "Women and the Bar" (1990) 87 L.S.Gaz., June 27, p. 39. In 1989–90, 40 per cent. of the 846 people called to the Bar were women: The General Council of the Bar, *Annual Report 1990*, p. 20.

[87] Significantly more women than men have left the professions, *e.g.* of the men solicitors admitted to the Roll in 1977 and 1982, 99 per cent. were working full-time and 1 per cent. part-time. On the other hand, of the women solicitors admitted in 1977, 56 per cent. were working full-time and 26 per cent. part-time and, of those admitted in 1982, 74 per cent. were working full-time and 11 per cent. part-time. Thus, the only people not working at the time of the survey (1987) were women. 18 per cent. of the women admitted in 1977 were not working at all and 15 per cent. of the women admitted in 1982 were not working at all: Marks (1988), p. 1. The Law Society views this picture with alarm: document reproduced in *Women in the Professions*, p. 65.

[88] *Equal in the Law* (1988), pp. 20–21.

make return relatively easy.[89] Consequently, it encouraged a retainer system and emphasised the importance of courses, at present organised by the Association of Women Solicitors, to provide up-dates on the law and skills and, in particular, to overcome any possible loss of confidence.[90] Since barristers are self-employed, the problems that arise are different. For example, attempts to be supportive of women with children by establishing child-care facilities have foundered for poor reasons.[91]

It is also the case, at least with regard to the solicitors' profession, that women earn less and that the work they do is different. For example, on average male assistant solicitors earn 9 per cent. more than their female counterparts, although there are significant regional variations.[92] Women are more likely to specialise in matrimonial law, probate, wills and trusts, and domestic conveyancing than men, who are more likely to specialise in company and commercial work.[93]

Although there have been few complaints about sex discrimination,[94] there has been an acceptance by some that it is a problem. Consequently, the Law Society has established a Code of Practice[95] to avoid sexual discrimination and the Code of Conduct for the Bar of England and Wales contains provisions designed to prevent sex discrimination by a practising barrister both generally and in particular in relation to pupillage.[96] Further, the Sex Discrimination Act 1975 now applies not only to the solicitors' profession but also to the offer of pupillage and tenancies at the Bar.[97] A Working Party of the Law Society has recommended that sex discrimination be a disciplinary offence, that interviewing styles should be amended to take account of the requirements of the legislation and that the implications of the legislation should be publicised generally throughout the profession.[98]

As regards racial discrimination, the Royal Commission on Legal Services concluded that the situation was not satisfactory and that the trends were unfavourable.[99] Historically speaking there has always been a significant number of people from ethnic minorities at the Bar, but they have usually been overseas residents. In a survey report of 1989 it was shown that 5 per

[89] *Ibid.*, pp. 22–23.

[90] *Ibid.*, p. 15.

[91] C. Newman (1990) 87 L.S.Gaz. June 27, p. 39.

[92] See M. Chambers (ed.), *The Legal Profession 1990*, p. 21.

[93] See Marks (1988), p. 18 and Chambers (1990), pp. 20–21.

[94] It may be the case that women are afraid of making a complaint: C. Newman, *op. cit.*

[95] See, *e.g.* the Law Society's document entitled "The Treatment of Sexual Discrimination" reproduced in *Women in the Professions* at p. 18; see also R. L. Abel, *The Legal Profession in England and Wales* (1988), pp. 81–85 and 175–176, which also reports denial by some members of the professions of the existence of discrimination.

[96] See *The Guide to the Professional Conduct of Solicitors* (1990), pp. 10–11 and *The Code of Conduct of the Bar of England and Wales* (1990), Annex C and para. 210.

[97] See the amendments to both the Sex Discrimination Act 1975 and the Race Relations Act 1976 introduced by s.64 of the Courts and Legal Services Act 1990. These provisions are also extended to advocates: *ibid.* s.65.

[98] *Equal in the Law* (1988), pp. 8–9, 17 and 23. The other recommendations made by the Working Party are that the Law Society should press for legislation enabling it to set different levels of practising certificate fees to enable women to retain a certificate whilst looking after children; change its procedures on the granting of practising certificates after a lapse of time, so as to make it easier for women to return after having had children; and adopt a policy to request tax relief for child care expenses for women solicitors who return to work: *ibid.* pp. 8, 14–15, 16.

[99] R.C.L.S., Vol. 1, pp. 501–504, see the Senate's Annual Statement, 1983–84, pp. 32–36.

cent. of all lawyers were ethnic minorities barristers, which the Bar believes to be a better proportion than in most other professions.[1] The problem of racial discrimination has been acknowledged. The Code of Conduct prohibits racial discrimination and the Bar Council and its Race Relations Committee have taken steps to combat racial discrimination and disadvantage at the Bar. However, the option of dealing with discrimination by affirmative action for the benefit of people from ethnic minorities was rejected.[2] Nevertheless, it is recognised that greater efforts need to be made, since ethnic minorities students appear to have greater difficulty obtaining pupillage and tenancies and many ethnic minorities barristers work in what have been called "ghetto" chambers, which are relatively isolated from the rest of the Bar.[3] Further, ethnic minorities barristers are clearly underrepresented in the upper echelons of the profession since the 1989 survey showed that they numbered only 1 per cent. of Q.C.s.[4] It may be the case that the extension of the statutory provisions relating to racial discrimination to the barristers' profession will have an effect, but it is doubted whether discrimination will be eliminated.[5]

There are few ethnic minorities solicitors.[6] Part of the problem has been that of racial discrimination, which the Law Society's Race Relations Committee constantly has under review.[7] Further, the Law Society has adopted a code of practice for the avoidance of racial discrimination.[8] Although steps have been taken to combat racial discrimination, there are still many problems. A recent report concerned with ethnic minorities and recruitment to the solicitors' profession[9] did not make the usual assumption that there is equality of opportunity, but examined the validity of that assumption. It examined the tests set at each stage of professional qualification and considered their effects upon people from disadvantaged backgrounds so as to determine what the barriers are and how they might be overcome both by

[1] General Council of the Bar, *Quality of Justice: The Bar's Response* (1989), pp. 267–268.
[2] R. L. Abel, *The Legal Profession in England and Wales* (1988), p. 78, and see *Quality of Justice* (1989), p. 267.
[3] Abel (1988), pp. 78–79; J. Morton, "Racial discrimination in the legal profession" (1990) 140 N.L.J. 1104–1107 (The Bar), 1146–1148 (the solicitors' profession), 1184–1185 (conclusion).
[4] *Quality of Justice* (1989), p. 267.
[5] J. Morton (1990), p. 1185.
[6] Abel (1988), p. 172. The *Law Society Annual Statistical Report 1990* reveals the following figures in Table 2.11:

Ethnic origin	Number	Per cent
White/European	37,403	68.3%
Afro-Caribbean	74	0.1%
Asian	477	0.9%
Chinese	98	0.2%
African	20	0.0%
Other ethnic origin	40	0.1%
Unanswered/refused	4,969	9.1%
Unknown	11,653	21.3%
Total	54,734	100.0%

81.2 per cent. of the students enrolling with the Law Society 1989–90 were white European: *ibid.*, Table 10.5.
[7] See, *e.g.* its publication entitled, *The Race Report* 1989.
[8] See, *The Guide to the Professional Conduct of Solicitors* (1990), pp. 10–11.
[9] King, Israel and Goulbourne, (1990).

the individual and the "gatekeepers."[10] There are barriers which are particularly difficult for ethnic minorities to overcome at all stages of qualification: the academic stage, the professional stage and seeking employment. One barrier is that created by class and race prejudice, *e.g.* prejudice in favour of Oxbridge applicants for articles. Further barriers are created by the tests used at various stages, *e.g.* for admission to Universities and Polytechnics, which are of such a nature that people who have experienced educational disadvantages, but who are talented, have significant problems in satisfying them; or for passing the L.S.F. course, which is wholly reliant upon assessment by examination and thus produces similar problems to those of admission to tertiary educational institutions. Finally, the candidate faces the barrier created by the method of informal, unstructured interviews for articles, which are not the best way to assess a candidate's ability. Numerous recommendations are made, including less reliance on A-level scores and greater reliance on a "Profile Model" for University and Polytechnic admission, less reliance on unseen written examinations in the L.S.F. examination and greater concentration on skills acquisition, and the introduction of a Code of Practice or a Model Interview Guide to minimise the influence of racial prejudice upon employment selection decisions.[11]

Further, one way to deal with discrimination may be highly disadvantageous to the legal system as a whole. Goulbourne pointed to this issue when she said, "the segregation of the profession which the Royal Commission warned against in 1979 continues not only because of historical forces but because many black solicitors and barristers believe that all black firms and chambers are the only way in which black lawyers can make progress within the profession."[12]

(b) Entry and training

Entry to the Bar has since 1975 been restricted to graduates and mature students.[13] An entrant must join one of the inns of court and complete two educational stages. The "academic stage" is satisfied by obtaining either a "qualifying law degree" recognised by the Council of Legal Education[14] or

[10] *Ibid.*, pp. 23–24. The method of assessing the barriers is to use the model established by Twining which requires the asking of four questions: (1) What are the barriers to progress beyond a particular stage? Do the barriers operate against members of disadvantaged groups? (2) Who controls entry and exit at this stage? (3) From the point of view of the individual, by what means might each barrier be surmounted? (4) From the point of view of the gatekeepers and of those concerned with general strategy, what are acceptable and feasible means of eliminating or circumnavigating the barriers or easing the passage of individual members of disadvantaged groups in the interests of improved access?: *ibid.* p. 24, adopting the Twining model: W. Twining, "Access to Legal Education and the Legal Profession: A Commonwealth Perspective" (1987) 7 *Windsor Yearbook of Access of Justice* 157.
[11] King, Israel and Goulbourne (1990), pp. 1–7 and 23–109.
[12] S. Goulbourne, "The Recent History of Black Ethnic Minorities in the Solicitors' Profession" in King, Israel and Goulbourne (1990). See also Abel (1988), p. 79.
[13] See the Consolidated Regulations of the Inns of Court published by the Council of Legal Education; R.C.L.S., Vol. 1, pp. 619–621; B. Hogan, *A Career in Law* (1981); E. Usher, *Careers in the Law in England and Wales* (1982).
[14] A law degree must include the six "core" subjects Contract, Tort, Criminal Law, Land Law, Constitutional and Administrative Law, Equity and Trusts, passed to a satisfactory standard. Partial exemption may be given on a subject by subject basis. From October 1981, at least 2(2) Honours standard has been required.

the Diploma in Law taught and examined by the City University and the Polytechnic of Central London.[15] The "vocational stage" comprises courses at the Inns of Court School of Law.[16] The new course is skills based in addition to providing and assessing basic information. In consequence the timetable for the course has been split into three parts:

(1) the knowledge which the students must acquire,[17]
(2) the skills the students must learn,[18]
(3) the practical exercises in which the students can deploy both knowledge and skills.[19]

Students wishing to practise must attend all elements as well as passing the examinations. Students who complete the two stages, and who have dined in the hall of their inn three times a term for eight terms,[20] are then "called to the Bar." They are not, however, entitled to practise unless they complete twelve months pupillage in the chambers of a barrister of at least five years' standing, and may not accept instructions until the second six months of pupillage.[21] There are special provisions for barristers from Ireland, Scottish advocates, Commonwealth lawyers and former solicitors.[22] The costs of entry are high, including not only tuition fees and maintenance, but also dining fees and special clothes and barristers may not earn enough to live on for some years. Discretionary grants may be available from local education authorities. In addition, the Council of Legal Education and the Inns of Court award a number of studentships, the Inns of Court make a variety of additional awards each year and the Bar Council has a Trusts Funds Committee which makes grants to assist students and pupils. Further, it is the policy of the Bar Council to encourage chambers to move towards a scheme of funded pupillages so that pupils receive a minimum of £3,000 per six months.

Entry to the solicitor's branch of the profession consists also of an academic stage followed by a vocational stage. The academic stage for about

[15] This is the method by which the person who is not a law graduate obtains the necessary "Certificate of Eligibility." The course for non-law graduates lasts one year; for mature students, two years. Students may be permitted to prepare by private study or by attendance at certain provincial polytechnics.

[16] The change towards a vocational course has meant a limitation on places available at the Inns of Court School of Law to only those people intending to practise in any member state of the E.C. In particular this excludes most overseas students. Courses not involving the skills training and simply leading to entry to the Bar examination are provided at a number of institutions, primarily the private Holborn Law Tutors.

[17] The knowledge is almost all confined to evidence, procedure and professional conduct. There is a multiple choice examination in civil and criminal procedure just before Christmas: Hoffmann J., "Change of Course at the CLE" (1989) *Counsel*, November, pp. 13–14.

[18] The skills concentrated on are legal research, information management and problem solving, opinion writing, interviewing, negotiating, drafting and advocacy: Hoffmann (1989), p. 14.

[19] Students are required to act as counsel in simulated cases, bringing together the various skills which they have been taught: Hoffmann (1989), p. 14.

[20] See the Consolidated Regulations, regs. 10–13. There are four "dining terms" of 23 days duration in each year. A pupil may keep up to four terms by dining in a Circuit Mess at least three times per term. The dining requirements have long been a matter of contention. The Royal Commission recommended their abolition unless improvement to ensure that benchers and barristers mix with the students are made and found to work satisfactorily: R.C.L.S. Vol. 1, pp. 641–642.

[21] Consolidated Regulations, regs. 39, 40.

[22] *Ibid.*, 34–48.

three-quarters of new solicitors is satisfied by them having obtained a law degree. A significant number take the "Common Professional Examination" after having obtained a non-law degree. Whilst 82 per cent. of people take a degree, some qualify by other routes. These other routes are available to people who, whilst they may be graduates, rely upon their qualifications as fellows of the Institute of Legal Executives[23] or as members of another legal profession.[24]

After the academic stage, all candidates must attend the first part of the professional stage, which is a vocational course leading to the taking of the Law Society's Final (L.S.F.) Examination. The L.S.F. course may be taken at one of the branches of the College of Law in London, Guildford, Chester or York, or one of the nine polytechnics offering the course, that is Birmingham, Bristol, Leeds, Leicester, City of London, Manchester, Newcastle, Nottingham and Wolverhampton.[25] The course is expressly designed not only to provide students with the requisite legal and procedural knowledge, but also with the vital skills necessary to fit someone to undertake practice as a solicitor. The courses taken are an attempt to reflect this essential mix and to reflect the basic areas of work that are the main work of a solicitor.[26] As with qualifying as a barrister, one of the main hurdles at the vocational stage is the financial one, since grants from an L.E.A. are discretionary and policy varies from area to area and from year to year. In consequence, the cost of tuition fees and maintenance must be either met from the student's own resources via, *e.g.* a loan, or by financial support from a future employer. Many solicitors' firms, in particular large London firms, offer assistance with funding the L.S.F. course. After the academic and vocational stages have been passed, a person enters articles for two years.[27] The formal educational requirements of a solicitor do not end with the successful completion of articles, since continuing education is a requirement for new solicitors, which it is expected will eventually extend to all solicitors admitted on or after August 1, 1965.

[23] It is still possible for school leavers and mature students (people over 25 with no degree) to qualify. School leavers must take and pass the "Solicitors' First Examination" as well as the Final Examination and then undertake five year articles. Mature students must pass an eight subject C.P.E. which takes two years, pass the Final Examination and do two years articles. The number of people entering the profession by this route is insignificant (one by each method in 1989–90). The Solicitors' First Examination is to be abolished: *Law Society Annual Statistical Report 1990*, para. 8.3. It is also possible for a justices' clerk to qualify through their Diploma.

[24] People transfer from being overseas solicitors, barristers and Scots and N. Ireland solicitors. Although relatively few take this route, there was a significant increase from 1988 to 1990: *Law Society Annual Statistical Report 1990*, para. 8.4. The manner in which transfer is facilitated is to be simplified.

[25] Fees at the College of Law are usually the most expensive, and fees at the polytechnics vary. Admissions are now undertaken through a centralised system, although the criteria for the College and polytechnics vary, *e.g.* the latter desire a reference in relation to the applicant. More information is available through the Association of Graduate Careers Advisory Services.

[26] The courses taken are: accounts; business organisations and insolvency; consumer protection and individual employment law; conveyancing; wills, probate and administration; family law and litigation. In addition, professional conduct and revenue law can be tested in any of these papers.

[27] A Fellow of the Institute of Legal Executives may serve two years' articles instead of attending the L.S.F. course, but must pass the examination; if they attend the course, in certain circumstances they need not serve in articles.

The issue of legal education is a matter of public importance in view of the nature of the work performed by barristers and solicitors. In consequence, a publicly accountable committee, the Lord Chancellor's Advisory Committee on Legal Education and Conduct, is charged, amongst other things, with the general duty to assist "in the maintenance and development of standards in education [and] training ... of those offering legal services."[28] More specifically, the Advisory Committee is required to "keep under review the education and training of those who provide legal services," to "consider the need for continuing education and training for such persons and the form it should take," and to "consider the steps which professional and other bodies should take to ensure that their members benefit from such continuing education and training."[29]

The objectives of legal education in general have been considered on a number of occasions in the recent past. In particular, two reports have been published, one in 1971, by a committee chaired by Ormrod J.,[30] and one in 1988, by the Marre Committee.[31] Both committees were concerned with the financial burden of qualification. It may well be a significant additional factor in the skewed social background of the profession. The problem is slowly being tackled, at a time of great demand for lawyers, but only by the two branches of the profession. Government does not appear to recognise the obstacle which financial difficulties present to many potential lawyers.

Much of the recent discussion about legal education is concerned with the provision of essential legal skills.[32] This is already the avowed aim of the current vocational courses. Indeed, since the major changes to the vocational course at the Bar, the Law Society has undertaken a thoroughgoing examination of the L.S.F. course which is aimed to ensure that the education and training should "provide a supply of well trained solicitors sufficient to meet the needs of the profession and the consumer (both individual and corporate)."[33] In part this aim is to be achieved by more skills-based training. A further aspect of the future of legal education may be to encourage specialisation at the training stage, as well as the qualified stage.[34]

The Marre Committee commented not only on the need for the vocational stages to provide skills, but also the academic stage. It was pointed out, in particular, that many students arrive at the vocational stage exhibiting certain characteristics: "(1) insufficient ability to present clear and concise written arguments; (2) insufficient comprehensive knowledge of the core subjects; (3) inability to undertake independent legal research; (4) lack of ability in oral expression."[35] Many institutions already aim in their courses to provide students with the necessary skills, and the comments of the Marre

[28] Courts and Legal Services Act 1990, s.18(1). The precursor of this committee was established after the report of the Ormrod committee and the new committee partly responds to the recommendations for change made in *A Time for Change*, paras. 17.3–17.11.

[29] Courts and Legal Services Act 1990, Sched. 2, para. 1(1).

[30] Report of the Committee on Legal Education (Cmnd. 4595, 1971), see P. A. Thomas and G. Mungham (1972) 7 *Valparaiso Law Review* 87 and discussion reported at (1972) 12 J.S.P.T.L. (N.S.) 39.

[31] See above, p. 118.

[32] *A Time for Change*, at para. 12.21, provides a summary of the necessary legal skills, whilst recognising that at a time of rapid technological and social change it is not possible to provide a definitive list.

[33] The Law Society Training Committee, *Training Tomorrow's Solicitors* (1990), p. 9.

[34] *Legal Services: A Framework for the Future* (Cm. 740, 1989), paras. 9.7–9.11.

[35] *A Time for Change*, para. 13.5.

Committee inform debate about possible future developments. However, an inherent tension has to be recognised in considering what is the objective of a law degree. It has been suggested that it is a matter of concern that nearly one-half of law graduates do not go on to become lawyers.[36] However, a law degree is not simply one part of the process of qualifying as a lawyer. Law at a tertiary institution is an academic subject in its own right, taught for its own sake. It provides an insight into legal reasoning skills. Such reasoning skills are useful in many careers, not just the law. In consequence, there is often a tension between the perceived professional needs, *e.g.* reflected in the content and number of core subjects, as against the academic needs, *e.g.* to teach that which is of academic, intellectual and pedagogic significance.[37]

5. Unadmitted Personnel

Most solicitors' firms employ "legal executives," formerly known as "managing clerks," who are not admitted as solicitors but who do undertake professional work under their employers' supervision. The Institute of Legal Executives in evidence to the Royal Commission estimated their numbers at over 20,000, although the numbers of solicitors, particularly assistant solicitors, have been expanding more rapidly.[38] There are no requirements as to their qualification and training, although they may voluntarily take examinations in order to qualify as Associates or Fellows of the Institute of Legal Executives (ILEX). They tend to specialise in a particular class of work, and the amount of supervision exercised over an experienced executive may in practice be minimal. The Institute made various proposals to the Royal Commission for improving the professional status of legal executives. Having resisted suggestions that the two branches of the legal profession be fused, the Commission was unwilling to contemplate a third branch. The Institute's proposals for profit-sharing, enhanced pay for executives with ILEX qualifications or compulsory qualifications, compulsory arrangements for day release and payment for courses and extended right of audience all fell on stony ground, if not an impenetrable slab of concrete.[39] Legal executives have been among those who have qualified as licensed conveyancers.

Barristers' clerks have the rather different role in chambers of acting as office administrator and accountant for chambers as a whole, and as business manager and agent for each individual member. The employment of a clerk has until recently been a requirement of practice.[40] The Royal Commission recommended that this rule should be relaxed, provided a practice is administered efficiently, but recognised that a clerk would almost invariably be employed.[41] This was only finally implemented in 1990.[42]

[36] Reportedly the view of one member of the Marre Committee: *A Time for Change*, para. 13.3.

[37] See e.g. M. Zander, *A Matter of Justice* (1989), pp. 82–83.

[38] R.C.L.S., Vol. 1, p. 408.

[39] R.C.L.S., Vol. 1, pp. 406–417. See also R. L. Abel, *The Legal Profession in England and Wales* (1988), pp. 207–210.

[40] See above, p. 148. On barristers' clerks generally see R. Hazell, *The Bar on Trial* (1978) Chap. 5; J. Flood, "Barristers' Clerks," Warwick Law Working Paper No. 2, July 1977, and *Barristers' Clerks* (1983); M. Oldham, *Legal Executive Journal*, October 1990, pp. 2–3.

[41] R.C.L.S., Vol. 1, p. 484.

[42] See the General Council of the Bar, *Quality of Justice* (1989), p. 217; above, p. 148.

The clerk manipulates the flow of work in chambers by virtue of the functions of negotiating fees and arranging each barrister's timetable and his or her relationships, built up over many years, with solicitors' firms. A minority are employed under a formal contract, although the Senate suggested that this should become the normal practice.[43] Many senior clerks are paid a percentage of gross fees, and their earnings are significantly higher than those of junior barristers.[44] The Royal Commission did not regard this disparity as justified by any difference in the nature and intensity of the work done. They suggested that clerks should be paid a fair remuneration for the work done, with a bonus of not more than one per cent. of gross fees to reward a high pressure of work (the present arrangements provide for a minimum of 5 per cent.[45]). The present system has the advantage for the barrister that the clerk has a "direct incentive to promote [his or her] practice,"[46] although the distinction between promoting the practice and simply "promoting" the level of fees is a fine one.[47] The Commission "deplored" cases where the clerk exercised too much authority, although all they could suggest was that barristers should not allow it to happen and that the head of chambers should exercise control in cases where a clerk restricted the flow of work to a particular barrister on grounds of supposed incompetence or inexperience, or simply personal dislike. The possibility of barristers arranging their own timetable and negotiating fees, leaving other administrative tasks to clerks, which system is operated by advocates in Ireland, Australia and South Africa,[48] was not seriously explored.

In recent years there have been some changes, with increasing number of senior clerk's appointments being advertised, and going to outsiders, the move away from remuneration based on a percentage of fees, the recruitment of graduates as junior clerks and the organisation of further education courses for junior clerks.[49] Overall, however, the cumulative effect of these changes seems limited.[50]

6. Lawyers and the European Community

A lawyer from another Community country may provide any service in connection with legal proceedings in the United Kingdom, provided that he or she acts in conjunction with a British lawyer entitled to provide that

[43] Chambers guidelines (1977); R.C.L.S., Vol. 1, p. 477. Forms of contracts have been recommended: Annual Statement, 1982–83, pp. 69–74; Counsels Guide to Chamber Administration (1988), pp. 11–15.

[44] R.C.L.S., Vol. 1, p. 487; see also Vol. 2, pp. 395–433.

[45] Annual Statement, 1969–70, pp. 33–36. The Bar responded to the effect that payment by commission is not wrong in principle, although steps should be taken to stop excessive earnings: *Comments of the Senate* on R.C.L.S. (November 1983), pp. 9–13.

[46] "Lincoln," (1980) 77 L.S.Gaz. 1275.

[47] "Lincoln" argues that it is the responsibility of the solicitor to protect *his or her* client when negotiating the fee.

[48] Hazell (1978), pp. 122–123.

[49] M. Findlay, "The discreet fixers behind the briefs" *The Law Magazine*, October 16, 1987; P. Shrubsall, *Counsel*, July/August 1988, pp. 9–10; J. Loyd Q.C., *ibid.* p. 11.

[50] Findlay, *op. cit.* noting that the success rate of outsiders was estimated by the Barristers' Clerks Association at 50 per cent.

service.[51] The restrictions on conveyancing and probate work are not affected. In 1988, the Council adopted a Directive which established a system for the mutual recognition of higher education diplomas within the E.C.[52] This Recognition Directive was published on January 4, 1989, and is due to come into force on January 4, 1991 (as part of the Commission's 1992 programme). It applies generally to persons who have obtained a diploma as a necessary prerequisite for taking up a regulated profession in a member state, and who wish to have the diploma recognised in another member state where they wish to establish and take up the profession in question. The host member state may, however, require the applicant to complete an adaptation period not exceeding three years, or take an aptitude test, where the matters covered by the education and training in the original member state differ substantially from those covered by the diploma required in the host member state. The step of requiring an aptitude test has been taken, *inter alia*, by the U.K. and Germany.[53]

In October 1988, the Council of Bars and Law Societies of Europe agreed a Code of Professional Conduct to be applied to all cross-border activities by and between lawyers.[54] It has also been seeking agreement on the terms of a draft Directive to regulate the establishment of legal practices in other member states: some have argued that foreign lawyers should become full members of the local legal profession; others that they should have the option of relying on their original qualification and remaining subject to the exclusive disciplinary control of the home profession; yet others favour a compromise between those positions.[55]

It has been suggested, however, that the arrangements permitted by these developments will prove less efficient than the establishment of multinational partnerships of lawyers from different jurisdictions.[56]

7. Conclusion

The various threads in the developments outlined in this chapter have been drawn together by Abel in his writings on the legal profession in England and Wales.[57] He notes that both branches have lost much of their control over the production *of* producers to academic legal education; financial barriers to entry to the profession have largely disappeared and all barristers

[51] Council Directive 77/249/EEC of March 22, 1977 (the Legal Services Directive); D. B. Walters (1978) 3 Eur.L.R. 265; European Communities (Services of Lawyers) Order 1978. (S.I. 1978, No. 1901). See also above, p. 136. The 1977 Directive did not provide for any right of establishment or mutual recognition of diplomas. In Case 427/85, *Re Lawyers' Services: E.C. Commission* v. *Germany* [1989] 2 C.M.L.R. 677, the Court of Justice held that the German Act implementing this directive was too restrictive in so far as it required a visiting lawyer to work in conjunction with a host lawyer even in cases where representation by a lawyer was not mandatory under German law: see H. Eidenmüller, (1990) 53 M.L.R. 604. See also D. Lasok and J. W. Bridge, *An Introduction to the Law and Institutions of the European Communities* (4th ed., 1987), pp. 79–83 and D. Edward, "The Legal Profession in the Community" in St. J. Bates, *et al.*, (eds.) *In Memoriam J.D.B. Mitchell* (1983).

[52] Council Directive 89/48/EEC of December 21, 1988.

[53] J. Toulmin Q.C., (1989) I.F.L. Rev. August, pp. 19–21 and (1990) 140 N.L.J. 1309; (1990) 87 L.S.Gaz., August 29, p. 41 and October 10, p. 7; H. Eidenmüller, (1990) 53 M.L.R. 604.

[54] J. Toulmin Q.C., *Counsel*, July/August 1989, p. 8.

[55] (1989) 86 L.S.Gaz., April 19, pp. 6–7; J. Toulmin Q.C., (1990) 140 N.L.J. 1309; P. Stewart, (1990) I.F.L. Rev., May, pp. 13–14.

[56] H. Eidenmüller, (1990) 53 M.L.R. 604, 607–608.

[57] Above, p. 107, fn. 16.

and most solicitors are now graduates. This development has facilitated a dramatic increase in the proportion of women entrants to the profession, although not of entrants from ethnic minorities and without a significant effect on the class composition of the profession. The monopolies and restrictive practices that enable profession to control production by producers have also come under serious scrutiny and challenge. Given the increasing difficulties in controlling their market by limiting supply, lawyers "have turned to the alternative strategy of creating demand" but "have done so slowly, reluctantly and ineffectively."[58] The expansion of demand for legal services fuelled by legal aid and the country's growing economic prosperity did not itself result from the activities of the profession (and is obviously vulnerable to, respectively, the government's wishes to curb legal aid expenditure, and economic recession).

These developments have led to heightened competition, and, in turn, an increase in the proportion of lawyers who are employed (in private practice[59] or by government, commerce or industry), the growth in the size of sets of chambers and solicitors' firms, and a decline in the authority of the profession's governing bodies, which "have lost significant power over their members, to both the state and the ever-larger and more bureaucratic units of production, such as public and private employers, barristers' chambers, and solicitors' firms."

Writing in 1986, Abel predicted the continuing growth in overall numbers and in the numbers employed by government, commerce and industry; the intensification of competition in private practice; the loss of solicitors' business to lay competitors; that the Bar would find it difficult to resist solicitors' claims to enhanced rights of audience given the similarity of academic education and professional training in the two branches; and the supplanting of collective self regulation "by both direct State control and bureaucratic controls within the units of production."[60] His conclusion is worth quoting in full:

> "Professionalism, in the sense in which both champions and critics have used that concept during the last two centuries, will not disappear. It will persist as both a nostalgic ideal and a source of legitimation for increasingly anachronistic practices, although it will lose much of its power to convince. And it still will reflect the experience of a dwindling elite—some profit-sharing partners in solicitors' firms and the handful of more successful barristers—who will remain largely impervious to State control and continue to dominate their markets and govern their professional associations. But for the mass of lawyers, occupational life will mean either employment by a large bureaucracy, dependence on a public paymaster, or competition within an increasingly free market. Whichever they choose, these lawyers no longer will enjoy the distinctive privileges of professionals: control over the market for their services and high social status. The age of professionalism is ending."[61]

[58] (1986) 49 M.L.R. 1, 21.
[59] The "more intensive and extensive exploitation of subordinated labour undoubtedly is part of the reason for the higher incomes enjoyed by principals in the larger firms." *Ibid.* p. 28.
[60] *Ibid.* p. 41.
[61] *Ibid.* See also R. L. Abel, *The Legal Profession in England and Wales* (1988), Chap. 19.

Recent developments have reinforced these predictions,[62] although the extent of government regulation in the Green Papers[63] was somewhat reduced in the White Paper and Courts and Legal Services Act 1990.[64]

There is every likelihood that the future will see growing divisions in legal practice. Private practice, with ever-larger firms increasingly devoted to delivering legal services to commercial clients, will move further away from the public sector, which will increasingly turn to the use of employed lawyers to deliver legal services to the poor. Public sector lawyers will enjoy inferior working conditions, lower salaries and higher caseloads than their counterparts in private practice. There is an obvious risk that only the less able or the altruistic will be attracted.[65]

[62] R.L. Abel, "Between Market and State: the Legal Profession in Turmoil" (1989) 52 M.L.R. 285; A. Sherr, (1990) 53 M.L.R. 406 (review of Abel (1988)).
[63] Criticised, *e.g.* by Abel in "Contradictions in the green papers" (1989) 86 L.S.Gaz., March 22, p. 14.
[64] See F. Cownie, in F. Patfield and R. White (eds.), *The Changing Law* (1990), Chap. 12.
[65] See A. Sherr, (1990) 53 M.L.R. 406.