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A REPORT BY JUSTICE

Lawyers and the Legal System

A critique of legal services in England and Wales

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A critique of legal services in England and Wales

Based on evidence presented to the Royal Commission on Legal Services

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INTRODUCTION

1 The Royal Commission on Legal Services was announced in February and appointed in June 1976. Not long afterwards, it issued a first circular, and then a second one. These circulars listed the subjects on which the Commission invited evidence. Many organisations concerned with the law responded.

2 The Council of Justice felt that we too should prepare a Memorandum of Evidence for the Royal Commission. Many of the questions raised in the Commission's circulars related to matters on which we had already come to conclusions, and published reports. Some others were questions to which we had not before had the opportunity of applying our collective mind.

3 Three special Working Parties, and our Criminal Justice Committee, were therefore asked to draft material for such a Memorandum. A Steering Committee was asked to put it together and edit it. All these included barristers, solicitors and teachers of law. The final Memorandum was approved at three successive meetings of the Council, and submitted to the Royal Commission in April 1977.

4 To enable our evidence to be debated in a wider forum, the Council has since decided to publish it as a *Justice* report. The shape of this report is broadly, but not precisely, governed by the order of the questions in the Royal Commission's Circular No.2. Some of those questions were left unanswered, because we did not feel competent to deal with them. In particular, we have no facilities for assembling statistics, even though our practitioner members and our Secretariat have between them a wide-ranging experience of the functioning of the laws of England and Wales, and of the legal profession.

5 We have therefore confined ourselves largely to matters which fall within the special concern of JUSTICE. However, we believe that we are unique as an organisation which combines practitioners of both branches of the profession, as well as teachers of law, holding a wide range of political and other opinions, having an unusually wide range of experience, and having no partisan or professional interests to represent or defend. Accordingly, we included in our submission some matters which do not fall obviously within JUSTICE's special sphere of interest, where the views of those who prepared the submission and those who endorsed it coincided, in the hope that these might be helpful to the Royal Commission.

6 JUSTICE looks at the provision of legal services in general, and the legal profession in particular, as they are seen from the viewpoint of the ordinary man concerned for his rights, whether in relation to his immediate neighbour, or to government (central or local), or to other organisations exercising power over him. We have no dogmas to pronounce or crusades to follow. But we see ordinary people nowadays enmeshed in

a system of law and procedure which they seldom understand and often cannot utilize; a system so arcane that proceedings for enforcing and defending their rights seem to them more and more to be an esoteric mystery outside the reality of everyday life. We believe that the law and the legal system must be, and be seen to be, the servant of the citizen and not his master. The casework which JUSTICE, no doubt because of its title and its reputation, is called upon to do, regularly throws up the very real grievances of those who have failed to find redress through the legal system for injustices which, both in their view and in ours, that system ought to have been able to remedy.

7 Provided that the ordinary citizen is enabled to enforce or defend his rights as simply, quickly and cheaply as is consistent with a just result, we are not wedded to any particular structure or organisation of the legal profession. At the same time, it has been our experience that reforms which build on existing institutions are more likely to be successful than those which begin by destroying what is already there.

8 One other general comment may be useful here. In the legal history of England – and, we believe, in that of some other countries too – the rules of procedure in both civil and criminal matters have more than once been radically reformed. The natural formalism and traditionalism of lawyers (including judges, particularly in a Common Law system which operates by precedent) tends to produce a gradual process of ossification, until the reformed system has once again become so complex that its high formality and cost, and its low speed, again arouse public concern. At that point, a further reform has to be carried out, usually following the report of a Royal Commission or its equivalent. It is noteworthy that the last such occasion in our history was almost exactly 100 years ago. We are satisfied that the time is more than ripe for another.

PART I

NEED AND PROVISION FOR LEGAL SERVICES

The General Problem

9 The general problem falls into three parts:–

(a) Many people who have a legal problem do not even know that the law could help them;

(b) Of those who do, many have difficulty in finding a suitable lawyer to advise and act for them;

(c) Of those who find one, many are today too well-off to be entitled to legal aid, but few are rich enough to be able to afford to litigate without it.

We discuss the last of these points later in this report. Here, we confine ourselves to the first two.

A glance at the Law List is enough to confirm that solicitors do not concentrate their offices where people live. In London alone, there are five pages of entries for EC2 (part of the City), half a column for E15 (Stratford), and none at all in neighbouring E14 (Poplar) or E16 (Canning Town). The explanation often put forward is that lawyers can make a good living out of the legal problems of industry, commerce and banking, but not out of those of the urban (or rural) poor. This is of course true so far as it goes, but it is by no means the only reason for the concentration of solicitors' offices in certain places. Solicitors, like others, prefer to see their clients in their offices during office hours, when their staff are on duty, their reference books are available, and the man they need to speak to on the telephone is there – rather than at home in the evenings, or at weekends, when none of those facilities are available. For most clients, too, it is more convenient to see their solicitors during the working day, provided they can get time off from work. It is therefore not too surprising that solicitors tend to concentrate their offices in areas where people *work*, rather than in areas where they *live* – even though the rents in the former are generally much higher than in the latter.

10 In London, in country towns, and in the suburbs of our larger cities, solicitors tend to be found near the courts, rather as auctioneers tend still to be found near the old cattle market, and meat wholesalers congregate near Smithfield. That type of concentration too has advantages not only for the solicitors, but also for many of their clients.

11 The concentration of solicitors' offices in commercial, rather than residential, areas is further encouraged by planning policy, and especially the rigid adherence by local authorities to zoning restrictions. So long as it remains their policy to segregate residential areas not only from industrial ones, but also from offices (even those for which residents may have a need near their homes), solicitors are prevented from having their practices where people live, even if they were attracted by more business or lower rents.

12 In the 1920s and 1930s, many solicitors would put up brass plates at their private houses operating a supplementary 'private' practice in addition to that operated in their offices in the business quarter of the town; the 'private' practice would be available in the evenings and at week-ends to local residents. Today the one-man practice is seldom viable, and the establishment of an office at a private residence is usually contrary to planning control.

13 While it cannot be denied that legal services are unequally distributed within the population, we do not therefore believe that the inequality is primarily geographical. The problem is rather one of social – and personal – categories. The intelligent, well-informed, articulate, literate and self-possessed citizen (provided he is not in prison) has no difficulty in finding a suitable solicitor, marshalling the facts, assembling the papers, explaining the problems, and understanding and following the advice he is given – even if he lives in a deprived area and earns low wages from unskilled work. But if he lacks these attributes – as many, through no fault of their own, still do – he will not even know how to begin.

14 More important still, he will very seldom even realise that his problem is a legal one – i.e. that it is a problem which the services of a lawyer could help to resolve, or at least to mitigate. Lawyers tend to assume rather too readily that the man in the street, even though he will not know what the answers are, will at least be able to frame the right questions. In fact, this is not so. The great majority of the population, even today, is ignorant not only of what the law is, but of how it works, what is its scope, what it can do and what it cannot. To most, The Law connotes only the police and the criminal courts, and lawyers are remote and expensive people to be avoided unless one is in serious trouble on a criminal charge. We doubt whether more than a small proportion of any random sample of people in this country would have even the vaguest concept of 'civil law', let alone of the difference between that and criminal law.

Possible General Solutions

15 We do not therefore believe that the problem of making 'the law' – and lawyers – more accessible to 'the people' can be solved by any simple expedient. There is everything to be said for creating greater incentives for lawyers to set up offices in socially under-privileged areas – and indeed in all areas where there is a need or demand for them, whether under-privileged or not. But that by itself cannot have the desired effect until a far greater proportion of our population knows enough about the law to be able to make at least a reasonable attempt at classifying their own problems, so that they are able to identify those where it may be worth the effort to find and consult a lawyer.

16 In short, we believe that far the greater part of the present unmet need for legal services is invisible, even to those who have it. In the long run, it is to that problem that a solution must be found. We know of only one, and that is education – not only through the usual media of publicity for adults, but above all at school. With the recent raising of the

secondary school leaving age, there is ample room for the inclusion of a course on the elements of our legal system in the curriculum for the additional year. We strongly urge that this possibility should not be lost sight of during the current national debate on secondary education. Such a course should not of course be purely theoretical, or a mere extension of the present 'civics'. We feel sure that local police authorities, the courts, and solicitors throughout the country would be only too happy to give schoolchildren a practical insight into their work, and how they try to resolve the problems with which it presents them. If it were possible to transmit a basic understanding of our legal system to even just one generation by these means, the diffusion of that knowledge to their parents – and eventually to their children – could do more to meet the unmet needs for legal services than any other means we can imagine.

17 But that can only be for the long run. Meanwhile, there is an acute problem to be solved. Here we believe that much could (and should) be done by a consistent policy of expanding the facilities provided by Citizens' Advice Bureaux ('CABx') and building on the experiments which have recently begun with law centres. There is a powerful case for saying that there should be at least one such centre in every area of special need throughout the country, particularly in our decaying inner cities. We do not consider that such centres should be wholly or even mainly staffed by lawyers. Indeed, one of their main functions should be to disentangle the social problems from the legal ones and to refer clients, where appropriate, to the right social welfare agencies. However, such centres need lawyers working for them full-time. We make the rough estimate that an effective centre would cost about £100,000 a year to be fully operational. We would hope that when existing public expenditure constraints can be relaxed, it will become possible to create a national network of perhaps fifty such centres, sharing some common services and co-ordinated by a small national steering council. We do not think that an annual expenditure of about £5 million would be disproportionate in view of the problems of individual injustice and social disadvantage to whose alleviation it would be devoted. We welcome the efforts which have been made towards this objective by the present Lord Chancellor, and hope that the Royal Commission will recommend that the problem of tackling these unmet needs for legal services, especially in areas of great deprivation, should be given higher priority in terms of public expenditure.

18 We would emphasise that there are two distinct parts to this proposal, though for some years to come they will need to be combined. The first is the extension, throughout the country and particularly to areas of special need, of advisory and referral centres to which every citizen can have ready access, and which will help him with the identification and preliminary analysis of his problem (or, more likely, cluster of problems) and tell him where to go for their solutions, and what to do and say when he gets there. That service is one which should not be placarded as a 'Law Centre', 'Housing Action Centre', 'Claimants' Union Office', 'Consumer Bureau' or 'Marriage Guidance Council', since such titles presuppose that the client has already correctly classified his problems. That is why we

favour the CABx as the nuclei for this service, without in any way wishing to belittle the excellent work that is done by many other agencies. But CABx have become well-known over the years as places which will give advice on all kinds of problem, and their title carries precisely the right connotation.

19 Once a CAB has identified a client as needing legal services, the second problem arises: namely whether such services will be readily available to him. In the long run, we hope that the creation of the necessary incentives – especially by the extension of legal aid and advice schemes – will make the right legal services available wherever they are needed, and will make it worthwhile for their practitioners to acquire the necessary skills, such as expertise in welfare law, public housing law and so forth. But until that happens, positive discrimination in the form of law centres, provided at public expense, will be necessary in deprived areas. Wherever possible, these should be housed in or near the premises of the CABx which will be the primary referral agency – as should any other voluntary agencies to whom the client is likely to be referred. Where there are public libraries or other community centres, the CAB, the law centre and the other agencies should if at all possible be in the same building, or at least close by. We are anxious to avoid a perpetuation of the present dilemma, where there is a proliferation of agencies of every kind, and far too many people have no means of telling to which of them they should address themselves.

20 If and when we have enough lawyers with enough incentives throughout all parts of the country to satisfy all the needs for legal services, the law centres as such may cease to be as acutely necessary as they are now. But we believe that the need for an advisory and referral service – centered, as we suggest, on the CABx – will persist for much longer, and probably permanently. Our society is highly complex, and shows no signs of becoming much simpler in the foreseeable future. We do not anticipate a substantial reduction in the number of social agencies, of which "the law" is only one – even though it is ultimately the law that determines which agency is appropriate for any given problem. Even if we achieve – as we believe we should try to do – a greatly enhanced consciousness throughout our society of the role (and limitations) of the law, the need for help with the classification of problems, and referral to the appropriate agency, will therefore almost certainly continue for much longer than the need for positive discrimination in the provision of legal services in deprived areas.

A National Legal Service?

21 A proposal which has recently gained some vogue is the creation of a National Legal Service. In its shortest form, the justification runs: 'We have a National Health Service: why not have a National Legal Service?'

22 We believe that the advice and referral service which we have recommended above, and perhaps also the curriculum development for the course in elementary law at secondary schools, could gain from being organised at national level and by a centralised service. But if what is meant by the proposal is a national service of state-employed lawyers dispensing full legal services to the community at public expense, we would oppose it on several grounds.

23 First, a legal profession that is, and is seen and believed to be, independent of State control and influence is a cornerstone of the Rule of Law and the preservation of human rights, as the experience of many countries – including this one – has amply demonstrated. Unless, therefore, we wish to imperil all our liberties by removing that cornerstone entirely, a National Legal Service could at best only be an adjunct to the private practice of the law. Yet were we to have a National Legal Service which dispensed legal advice and assistance only to those who could not afford a private lawyer, we would be compounding the very mischief which we are seeking to mitigate. Instead of one law for the rich and another for the poor, we would have expensive private lawyers for the rich and cheap State-paid ones for the poor. It is the poor who most need protection from the State in all its protean aspects, and in such a system they would be least likely to get it. Inevitably, therefore, great pressure would soon build up for the abolition of private law, as pressure is already building up for the abolition of private medicine. And were that aim to be ultimately achieved, neither rich nor poor would be able to trust lawyers to defend them against the State.

24 Secondly, the analogy with the National Health Service is false in a number of respects. In the maintenance of his health and the alleviation or cure of his illnesses, the citizen (apart from competing for scarce resources on equal terms with all others) is not pitted against adverse interests, let alone those of the State or of other organised power groups: in the enforcement or defence of his legal rights, he is. In the latter case, therefore, his lawyer must not only be 'on his side' (as his doctor will always be), but must on no account be paid, or be subject to any control, direction or even influence, by 'the other side' (as his doctor can never be, since there is not one). Also, modern medicine requires a monumental expenditure, especially in the capital equipment of hospitals, operating theatres and sophisticated apparatus, which in Great Britain today can only be afforded by the State at an annual expenditure of some thousands of millions of pounds: by comparison, the cost of legal services, high though it may seem to the client, pales into insignificance. (Currently the annual cost of Legal Aid is less than 1% of the annual cost of the NHS). Again, everyone needs health services at birth and at least once, if not many times, again before death. It therefore makes sense for all to contribute to a service which all will sooner or later need. But by no means everyone needs legal services: a majority of the population probably never needs them throughout their lives. There is therefore no obvious reason why the majority should contribute to the needs – often perceived as self-inflicted – of the minority.

25 The tacit premise which underlies almost the whole of our legal system is that individuals should have rights, and that they should be able to defend or enforce those rights against others by legal process. If our present system is imperfect, that is certainly not due to any serious lack

of the necessary rights, or indeed of the necessary legal processes for defending or enforcing them, but rather because the system not only presupposes easy and equal access to the processes, but above all general knowledge of the rights and remedies. It must, we think, follow that any improvements to the working of the system must be in the direction of making the rights much better known, and the remedies much more easily usable. The only logical alternative would be to say that the system has totally failed and should be dismantled, putting in its place a fundamentally different system in which the rights of individuals were defended and enforced not by the individuals themselves, but by paternalistic agencies on their behalf, staffed by people with the necessary expertise to carry out their task. We would most strongly oppose such a trend, which we would regard as running wholly contrary to the Rule of Law. We believe that the theory on which our system is based, centred as it is on the rights and duties of the individual, is perfectly sound. What is needed are improvements in the mechanics whereby those rights are known, perceived and understood, together with readier and more equitable access to the means for defending and enforcing them.

Particular Problems and Solutions

26 In our experience, there is a particular gap in the provision of legal services which results partly from the absence of qualified lawyers, and partly (and more significantly) from inadequacies in the services provided. This gap shows itself in what we call 'casualties of the law' – people who have suffered injustice or other hardship for which the law theoretically provides a remedy but who, for one reason or another, have not been able to avail themselves of that remedy. JUSTICE is able to testify to this by reason of the large number of cases, mostly criminal but also some civil, which find their way to its office and with which – although this is not strictly their function – the secretariat of JUSTICE find themselves unavoidably endeavouring to help.

27 There are two areas which are particularly obvious:–

(a) Cases where the citizen has simply not been able to find a suitable lawyer with adequate professional experience.

(b) Cases where the citizen has exhausted a wide range of legal services and yet remains, justifiably or not, with an acute sense that he has been denied justice. These cases range from the disgruntled client who has exhausted the patience of several firms of solicitors, and counsel, to those who have not encountered legal practitioners sufficiently skilled, not so much to diagnose the real cause of their complaint, but to know how to set about curing it in the most effective legal manner. Some of these have real grievances against the legal system and the quality of the advice they have received, but there are others whose grievances are imaginary and fanciful, or are grievances against society or fate for which no lawyer can provide a remedy. Nonetheless, we cannot fail to be aware of the need to devise a service for such cases.

28 We have already dealt with the first of these problems in paragraphs 15-20 above. For the second, we would advocate, as a partial solution, a 'rescue service' on the following lines:–

(a) It would consist of a central bureau under the auspices, we suggest, of the Law Society.

(b) It would employ a team of salaried lawyers with the necessary supporting services, and be very similar to a firm of solicitors save that it would not engage in certain branches of a normal solicitor's practice such as conveyancing, trust or probate work.

(c) It would have access to the Bar, just as does a normal firm of solicitors, and in addition to specialist firms of solicitors when needed for cases involving non-routine subjects, e.g. patent law or rating.

(d) It would be entitled to charge fees to clients who could afford to pay (although in the nature of things these would be the exceptions), and to use the legal aid scheme wherever appropriate. Clearly, however, some additional financial support would be needed; both the field of work and the clientele would be of the kind usually regarded as unremunerative (the 'lame duck' sector of a solicitor's practice). We think that this burden should be shared between the Solicitors' profession, the Bar and the State in roughly equal proportions, reflecting the fact that shortcomings of members of both branches of the profession, as well as defects in the law itself, contribute to the need for such a service.

(e) Inevitably, such a service would attract unmeritorious as well as deserving cases and the question arises whether there should be some filter through which applicants should pass before being accepted as clients. We think that such a filter would tend to defeat the object, but we do recommend that the service should not accept a client unless satisfied that he or she has made a serious but unsuccessful effort to obtain redress through normal legal channels.

(f) Initially the JUSTICE experience suggests that one bureau would suffice for England and Wales; Northern Ireland would presumably require a separate one, as would Scotland.

29 Finally, we welcome the Law Society's recent initiative in producing lists indicating the kinds of work which solicitors are willing to handle and suggest that these lists should be available in Post Offices, Police Stations, Public Libraries, Town Halls, and of course CABx.

Legal Aid

30 We believe that legal aid should be available in all contentious matters, whether civil, criminal or administrative. Its absence places the poorer (and nowadays even the tolerably well-off) citizen at such a disadvantage that he cannot obtain justice.

31 Theoretically, it would be desirable for all legal aid to be administered by a single body including representatives of the general public as well as of the legal profession. It is in many ways anomalous that civil legal aid is administered by the Law Society with ultimate responsibility resting with the Lord Chancellor, when criminal legal aid is administered by the courts with ultimate financial responsibility resting with the Home Secretary. We have, however, always taken the view that because of the need for immediate decisions, very often in the precincts of the court, it would be wholly impractical for criminal legal aid to be administered by the Law Society. We did, however, in our memorandum of evidence to the Widgery Committee, suggest that there should be some provision for an appeal to the Law Society Area Secretary against a refusal of criminal legal aid. Although the rate of refusals is now very much less than it was at the time we submitted this evidence, we still think this recommendation was right because it would help to focus attention on those magistrates' courts with an undesirably high rate of refusals. In relation to the problem as a whole, we now propose as a minimum reform that the Lord Chancellor's present Advisory Committee on Legal Aid should be replaced by a committee set up by both Ministers to advise on, and to supervise, criminal as well as civil legal aid.

32 The present limits of eligibility for legal aid in civil matters are far too low, and should be raised as soon as possible, especially in respect of capital. That would solve a large part of the problem, especially if it were accompanied by a substantial extension of small claims courts, which we have more than once recommended.

33 However, even a substantial uplift would leave the financing of a complicated action beyond the means of all but the wealthy few. For example, the costs of an unsuccessful action for professional negligence might easily reach £20,000 and be beyond the range of even a modestly successful business man earning, say, £10,000 a year before tax. It is wrong that the financial result of losing such an action should be so catastrophic as to deter a plaintiff who is advised that he has, say, an 80% chance of success. This is a negation of justice; it encourages a powerful (and especially an insured) defendant to be intransigent in any negotiations for a settlement. One method of meeting this problem would be the creation of a Contingency Legal Aid Fund, which we recommend later in this Report. Another is the Suitors' Fund, which we proposed as long ago as 1969.

34 Another major injustice of the present procedure is that an applicant cannot obtain legal aid to appeal to an Area Committee against the refusal of a Local Committee to grant or extend a Civil Aid Certificate. If a solicitor or counsel is required to argue the case, and the applicant cannot pay for such representation personally, it must be given free; there is not even power to reimburse travelling expenses. Since the result of such an appeal will in most cases decide whether the applicant can pursue his legal remedy, it is as important to him as the case itself, and it must be wrong that he should be barred by lack of means for prosecuting it.

35 We also recommend that the present informal practice of some judges of recommending in open court that legal aid be granted should be given statutory status; the presiding judge, if he thinks fit, should be able to provide a certificate addressed to the Local or Area Committee stating his opinion that a party should be granted legal aid for representation in the relevant proceedings. While the final decision would remain that of the Committee, legal aid would normally be granted on the judge's certificate, save for good reason.

36 As an alternative to our proposals for a Suitor's Fund, we would agree with the Evershed Committee's recommendation in 1953 (*Report on Supreme Court Practice and Procedure*, Cmd. 8878) that public funds should be made available to enable points of law of exceptional public importance to be determined at no expense to the litigants. However, since such cases may sometimes be brought against the Crown, we do not agree with the Evershed Committee's recommendation that such public expenditure should be authorised by the Attorney-General. Instead, we propose that the High Court should be empowered to certify such cases as appropriate for the expenditure of public funds.

37 We can see no justification for excluding actions for defamation from the ambit of legal aid. Trivial libels or slanders could be excluded by the *de minimis* discretion of the local certifying committee, but in substantial cases – especially where the plaintiff's livelihood depends on his reputation – the need for a remedy may be just as great, and its denial through lack of means as inexcusable, as in any other class of tort. We are glad that this view has the support of the Faulks Committee.

38 We believe that a person appearing before a tribunal requires legal advice and representation in a wide range of cases. In a memorandum on Legal Aid in Tribunals submitted to the Lord Chancellor's Office (at their invitation) in October 1973, these cases were categorised as those involving any one or more of the following factors:–

(a) A point of law, save for the most trivial.
(b) The means of livelihood of the applicant.
(c) The liberty of the subject.
(d) Rights analogous to rights *in rem*, e.g. pension rights.
(e) Security of tenure in the applicant's home.
(f) The professional reputation of the applicant.
(g) A question involving the applicant's level of subsistence.
(h) Where the party opposing the applicant is legally represented.

This list is still valid, though it is not exhaustive; for example item (h) could well include the case where the opponent is a public authority and is represented by an officer who, although not qualified as a lawyer, is highly skilled in the particular aspect of the law with which the tribunal deals. For a case in point we would quote that of appeals to the National Insurance Commissioner which usually involve questions of law, frequently difficult ones in relation to which an appellant appearing in person cannot assist the Commissioner; an appellant in such a case, however, can usually only obtain representation if he is a member of a trade union. And a constable who is cited before a disciplinary tribunal on a serious

charge may not even be allowed representation, let alone legal aid: see *Maynard v. Osmond* [1977]1 All E.R.64. In the memorandum we advocated legal aid for representation before tribunals, mainly by expanding the 'green form' scheme up to a maximum charge, for tribunal cases, of £50 (this, to be effective, would now have to be increased to, say, £75), coupled with an increase in the limits of financial eligibility under the scheme.

39 The Lord Chancellor's Advisory Committee endorsed these principles, but with the substitution of £40 for £50 for the 'green form' scheme. The Committee recommended that legal aid should be available for appearances before all statutory tribunals within the supervision of the Council on Tribunals in which representation is permitted. We would accept that limitation, although we consider that any tribunal dealing with cases within the eight categories listed above ought in any case to be under the supervision of the Council of Tribunals, and ought not to prohibit representation.

40 In the 1973 Memorandum we said:

> The skill of the advocate in identifying the relevant issues, marshalling evidence, examining and cross-examining witnesses and considering the law and any relevant policy is as necessary in proceedings before tribunals as it is before courts.

During the three years which have elapsed since then the work of the tribunals has been enlarged both in range and importance, and the need for legal representation has correspondingly increased. We strongly urge that the recommendations of the Lord Chancellor's Advisory Committee should now be implemented, with appropriate raising of the permitted charges and limits of eligibility under the green form scheme.

41 We also recommend that chairmen of tribunals should have the same power of adjourning hearings in order that an applicant or objector can be legally aided, as we have advocated in relation to the courts.

Sponsorship

42 We see no need for any redistribution of the responsibilities for legal services as between government, the courts and the profession itself. But we see considerable disadvantages in the way in which government's responsibilities are presently divided between the Home Office and the Lord Chancellor's Office. The division has historical origins, and has been subject to a process of accretion which makes it today a good deal less than rational. By itself, that might not matter too much were it not for the practical consequences of irrationality in this case. Of these, the most important is that law reform in England is (despite the creation of the Law Commission) still a largely hit-and-miss affair, and some important areas for reform fall between two stools – or three, if one includes the Commission. We would cite as just one example the case of privacy, where all but two of the Younger Committee's recommendations (those relating to credit reporting and to computers) still await government decisions more than five years after they were made, despite the overwhelming

case for reform to which so many organisations, including our own, have repeatedly drawn attention. Another consequence is that, where the responsibilities of the two Departments overlap, any disagreement between them will tend to produce inaction, since there is no single Minister who can decide the issue.

43 Accordingly, we believe that there would be substantial advantages in rationalising all government responsibilities for the state of the law, the administration of justice, and legal services in one single Department, to be known as the Department of Justice. This form of concentration of responsibilities is now commonplace not only in the USA, but throughout the Commonwealth, and has been shown to work very well. Given the historical role in Great Britain of the Lord Chancellor, we would recommend that the new department should be his responsibility, since he will be subject to fewer direct political pressures than his colleagues in the House of Commons. The Attorney-General could answer for the Department in the House of Commons. The Solicitor-General would function as one of the Ministers of State of the Department, though we believe that there will be need for more than one.

44 A further advantage of this proposal is that government spending on the administration of justice would also be concentrated in a single department, competing with the votes of other Departments, but not with that for other parts of the same Department. At the present time, the Lord Chancellor's Office's budget is (comparatively) very small, and its negotiating power as against the Treasury for, for example, money for legal aid is correspondingly slender. In the Home Office, money for the administration of justice has to compete with money for other departmental activities, both before and after the total Home Office vote is negotiated with the Treasury. We believe that a single Department, headed by the Lord Chancellor, with sole responsibility for spending for all aspects of the administration of justice, would carry far more weight in ensuring that sufficient funds were allocated to this essential function of any free nation. The Lord Chancellor should also be answerable for maladministration in the Courts, at least so long as the Ombudsman has no power to consider judicial maladministration.

45 However, we would add one important warning. Combining functions which are now divided between two Departments into one would give the Minister at the head of that Department a degree of power which, in the wrong hands, could be very dangerous if they were ever open to abuse. Accordingly, if our proposal in this section were to be adopted, it would be essential to ensure that this could not happen. Among the necessary safeguards would be these:–

(a) So long as the office of Lord Chancellor exists, it must be its holder, and not a Minister sitting in the House of Commons, who heads any Department of Justice.

(b) The Minister answerable for the Department in the Commons must always be someone who is legally qualified and has personal experience of legal practice, and must not be a Home Office Minister.

(c) If the office of Lord Chancellor were ever to be abolished, for whatever reason, all judicial appointments must cease to be the responsibility of the Department of Justice, and must be made by a Commission wholly independent of the government of the day, and immune from all political pressures (see our report, *The Judiciary*).

(d) The police must remain the responsibility of the Home Office, and not of the Department of Justice.

(e) If and when the recommendations we have made in our report, *The Prosecution Process*, are adopted, all prosecutors should be appointed by, and responsible to, the Lord Chancellor or (if he ever ceases to exist) the Judicial Commission.

PART II

STRUCTURE AND ORGANISATION OF THE LEGAL PROFESSION

46 If society requires an effective legal system, and one which will maintain and advance the Rule of Law, it will also require an effective legal profession to inform citizens of their rights and duties under law, and to act, where necessary, as those citizens' representatives and advocates to assert and defend their rights in any appropriate forum. Decisions which affect the citizen are taken by an ever wider variety of bodies with varying degrees of accountability, and the calls for a profession skilled at representation in the widest variety of circumstances will therefore increase. It is essential that the legal profession should maintain into the twenty-first century a degree of flexibility and responsiveness which will ensure that, as various demands are made on it, it makes the changes necessary to meet them.

47 But any changes in the legal profession will serve no useful purpose unless the rest of society also changes its attitudes to the profession. The profession, for instance, should not be entirely blamed for its failure to engage in welfare law problems when there has been such a strong current against the formalism which lawyers are thought to import into the proceedings. Similarly, in view of the distrust of lawyers widely shown in the trade union movement in connexion with matters of employment, the blame for their alleged lack of concern for such matters cannot rest entirely on them, but must be shared by those who might have referred cases to them on such subjects, or at least to have used their advice.

48 Any improvements in the structure and organisation of the profession should be governed by two main considerations: the paramount importance of the independence and integrity of the legal profession, and the need for responsiveness to its actual and potential clients.

49 The sense of corporate identity given by the existing structures of the profession is too great an organisational asset supporting independence to be lightly thrown away. We do not, however, think that the organisation of the two branches has been sufficient to ensure that the responsiveness we regard as important is properly maintained. We believe that the profession should continue to take on public functions but, in undertaking them, it should be as outward-looking as possible. To encourage this, we propose a 'Legal Profession Advisory Council' later in this report.

50 We believe that teachers of law should be regarded either as a third branch of the profession, or as equal members of the existing two branches (as employed barristers and solicitors are). The first solution has the advantage that the profession would be structured by functions, the second that individual law teachers who are solicitors or barristers could play a full part as teachers in their own organisations. We prefer a combination of the solutions, with law teachers and researchers recognised both as a separate branch of the profession, and as members of the

other branch to which they belong.

51 An element of lay representation could reduce the danger of lawyers becoming prisoners of their own preconceptions and habitual methods of going about their business: the presence of non-lawyers can encourage these preconceptions and methods to be continually reassessed. But lay representation can also provide a voice for specific interests. We do not think that this would be desirable unless *all* relevant interests could be represented. That might be possible for the management committee of a law centre: it is unlikely to be possible nationally.

52 We believe that there is a case for the appointment of a minority of lay people to the Council of the Law Society, the Bar Council and the Executive Committee of the Senate. We do not recommend that these appointed members should have a vote, but their presence would help the lawyer members in their discussions and decisions. However, it is important to ensure that such appointments are not influenced by political considerations. In its general statements on the Rule of Law, the International Commission of Jurists has pressed for a legal profession either totally in control of its own affairs or subject to direction only from the courts. The records of the International Commission of Jurists are full of situations in which governments seek to attack their citizens' right to independent legal representation, and in which demands for lay representation on the legal profession's governing bodies are clearly aimed at watering down professional independence and the Rule of Law. While this is not a present danger in Great Britain, the possibility of future abuse must be guarded against.

53 Finally, we suggest a Legal Profession Advisory Committee to advise the Senate, the Law Society and the Lord Chancellor on matters concerning the legal profession; it should not, however, have any powers of decision. We are influenced in this recommendation by the success of the Lord Chancellor's Advisory Committee, which should become a sub-committee of the new Committee. It has in its twenty-five years of existence moved from a watchdog position, mainly reviewing the Law Society's exercise of statutory functions and to some extent supporting the Law Society's administration of the Legal Aid Scheme against hostile criticism, to being a body to which the Lord Chancellor's Office has entrusted powers to undertake research and encourage innovation. It has been able to step into difficult situations and make constructive suggestions: for instance, its Standing Conference on the provision of legal services has been a meeting place for a number of bodies with overlapping concerns. The new body should have a sufficient number of lawyers to be helpful, and otherwise a range of lay expertise. It should not be slanted, for instance, only towards concern for the deprived, an area which can best be dealt with by the sub-committee which would be the successor to the present Advisory Committee.

Fusion

54 Our concern here is with what we may conveniently call 'total fusion', that is to say the abolition of all distinctions – legal, practical, conventional and ethical – between the existing branches of the legal

profession, so that every one of its members could do everything that is now done either by barristers or by solicitors.

55 This subject has been much debated in recent years, and the debate has engendered strong feelings on all sides. JUSTICE has no corporate views on the subject: we have members who strongly favour it, and others who strongly oppose it. (That ambivalence is reflected in the history of fusion in Australia and New Zealand, with which the Royal Commission will be familiar). But it may be helpful to draw attention to some considerations which are not always fully brought out when a debate becomes too polarised between entrenched opposing views: –

(a) The provision of legal services requires many different kinds of skill, and it is impossible for any one practitioner to master them all. They include knowledge of the substantive law and the rules of procedure (including those of evidence); negotiating ability; the selection, marshalling and analysis of relevant facts; advocacy in all its aspects; personal relationships with one's clients, one's opponents, and the courts; office management; finance; and probably several others.

(b) Inevitably, therefore, there will be specialisation within the legal profession, not only in different branches of the law, but also in different functions.

(c) To obtain the best possible advice and representation, therefore, a client may often (but not always) need the specialised services of more than one lawyer.

(d) It follows that any form of organisation of the legal profession which makes it difficult for a client to obtain the services of all the specialists whom the case requires will, to that extent, render the public a less than optimum service.

(e) However, it is also true that an optimum service will always be more expensive than one of lower quality. The first choice which any nation must therefore make is to decide the *maximum* quality of legal services which it can collectively afford.

(f) Once the choice has been made, it becomes important to ensure that no one will be prejudiced by having access only to a lower quality of service than his opponent, and that the services which are available (at whatever level of quality has been decided) are rendered as cost-effective as possible.

(g) Traditionally, Great Britain has always opted for a system intended to give a very high level of quality, with the inevitable penalties in speed and cost which this choice brings in its train. (We accept, of course, that in an imperfect world that high quality will not in practice be achieved in all cases.)

(h) Those who oppose total fusion believe that the traditional separation between the two branches of the legal profession in all parts of the U.K. makes the *maximum* quality of legal services available higher than it would be if that separation did not exist, much as the separation between general practitioners and specialists in medicine produces a similar result, even though the analogy between the two professions is not

complete in a number of other respects. The principal reasons they give for this are that the generalist and the specialist practise independently from – and are therefore not tied to – each other, that the generalist disposes of the expertise necessary to assess and choose the right specialist, and that the forces of competition tend to operate in both branches in the direction of increasing the quality of the services provided.

(j) If that is right, then total fusion would inevitably entail a reduction in the *maximum* quality of service available to some clients in some cases. On the whole, that is not a consequence which we would find easy to accept.

(k) Supporters of total fusion challenge the premises of that argument: they say that most barristers are not true specialists, whereas many solicitors are, and instruct each other as such (e.g. in commercial work, Admiralty, matters with a foreign element, etc.) without generally losing their clients to each other; that the relationship between the two branches is anyway too formal for the solicitor to find the right specialist easily, and to instruct him satisfactorily; and that the existing divisions enable each branch to blame the other for failures in the service given. They draw the conclusion that total fusion would give the client a more efficient service at no cost in quality.

56 Clearly, total fusion cannot be imposed on the profession against its will. However, we believe that much could be done, amounting to less than total fusion, to make the maximum quality available to more people in more cases, more quickly and at a lower cost. In this connexion, we would draw attention to our recommendations – set out elsewhere in this submission – for:

(a) the simplification of civil procedure in accordance with our proposals in our report, *Going to Law;*

(b) legal aid;

(c) easier access to counsel in some cases;

(d) easier transfer from one branch of the profession to the other;

(e) partnerships at the Bar;

(f) making the specialities of all lawyers better known to each other, and to the public;

(g) the creation of a Suitors' Fund and a Contingency Legal Aid Fund;

(h) the creation of a Department of Justice.

57 Some of us who believe that the maintenance of a separate and independent Bar is in the public interest take the view that its continued existence does not in fact depend on the 'demarcation rules' which formally distinguish the functions of solicitors and barristers, and in particular the rule which excludes solicitors from rights of audience in the High Court and (subject to limited exceptions) in the crown court. Those who take this view point out that much of the work now done by the Bar is already within the formal competence of solicitors: for example, a high

proportion of the work of the Chancery Bar and the Tax Bar is advisory or drafting work not involving litigation, and many contested cases in the county courts and magistrates' courts are still conducted by barristers. This suggests that much work comes to the Bar not because solicitors *have* to send it there, but because they *want* to do so. Consequently, it is argued, it should not be assumed that fusion would be a necessary or even a likely consequence of the abolition of the demarcation rules, and the Royal Commission ought to be more concerned with the merits or demerits of the demarcation rules than with the merits or demerits of fusion. If, however, the abolition of the demarcation rules did lead to the ultimate disappearance of the Bar, this would simply show that those who believed that a divided profession was in the public interest were wrong, and that the public had shown its preference for fusion.

58 Those of us who favour this approach would therefore go further than the proposals summarised in paragraph (56) above, and suggest a programme under which, over a period of time,

(i) the right of audience of solicitors would be extended to the superior courts; and

(ii) barristers would become entitled (but not bound) to accept instructions first from other professionals, such as accountants and surveyors, and ultimately direct from lay clients.

If those steps resulted, in the course of time, in a situation where the majority of barristers and solicitors were in effect all doing the same kind of work, the supporters of this approach would then accept that the public had opted for fusion, and that barristers and solicitors should thenceforth be allowed to enter into partnership with each other, and to employ each other in their practices.

59 Those of us who oppose fusion (by whatever means it is brought about) object to this approach on the principal ground that the public interest in the maintenance of a separate and independent Bar concerns not only the interest of some members of the public as clients, but also important questions such as standards of integrity in advocacy, and the administration of justice generally. They say that such questions should therefore not be decided only by the preferences of those members of the public who happen, during a given period, to be engaged in litigation and whose short-term economic interest may not always coincide with the public interest in the wider sense. If fusion is to be accomplished, they would maintain, it should be by a deliberate policy choice made by our democratic institutions after a full consideration of all its consequences, and not by the operation of market forces exercised by individuals having no responsibility for what might be far-reaching consequences on the administration of justice.

60 Total fusion – as opposed to certain relaxations in the rigid and not entirely rational division of functions which now prevail – would have one other major consequence. As we have said elsewhere in this report, we attach a high value to the sense of corporate solidarity which both branches of the profession enjoy under their current organisation. We believe that this sense of solidarity is important for the preservation

of the independence of the profession, and we fear that it might be seriously eroded if the two branches were now to be forcibly merged. The profession has come under increasing attack in recent years: some of this has been informed and justified, but much more of it has not. The Bar has already responded with a radical overhaul of its corporate structure. But both branches have been driven on to the defensive, and a sense of general anxiety and insecurity prevails which cannot be conducive to the proper carrying out of their work. Some of us believe that there is a very real risk that the destruction of their present structures could have far-reaching effects on the public interest which would heavily outweigh any benefits that could reasonably be anticipated.

61 We would add here one word on the drawing of written pleadings in civil litigation. There is no present legal requirement for that function to be performed by counsel, and indeed in many cases in the county courts, and in routine cases like divorce and running-down actions in the High Court, they are frequently drawn by solicitors. But in anything but simple cases pleadings can still be a dangerous trap for the unwary, and it is fatally easy to lose a case on the pleadings rather than on the merits. That is the only reason why many High Court pleadings are still drawn by the Bar. We would draw attention here to the recommendations about pleadings in our report, *Going to Law*. If these were adopted in England (as they have already been in Sri Lanka), pleading would become far less technical and dangerous, and solicitors would incur fewer risks if they drew them themselves. This in turn would enable the Bar to concentrate its expertise even more on legal research, advice and advocacy, which we believe to be the principal fields in which it excels.

Transfer between the branches

62 We believe that transfer between the two branches of the profession should be as easy as possible. If the supply of legal services is to match a demand which must necessarily fluctuate, it is important that no one should be 'locked in' in either branch. The freer the flow between the two, the more quickly and sensitively can the profession adjust itself to changes in demand.

63 Much of the basic training for the two branches is the same, and we therefore welcome the idea of a common qualifying examination. The two principal skills which are not shared are advocacy (which is the speciality, and at least part of the *raison d'être*, of the Bar) and the management of client's moneys (which is reserved to solicitors). Advocacy, of course, includes much more than the ability to make persuasive speeches: it requires a highly developed instinct for the rules of evidence, the weak and strong facets of witnesses, and the attitude and habits of the judiciary. Above all it requires the ability to think quickly – and accurately – 'on one's feet'. Much of this can only be acquired through experience, either in training simulations or in actual practice. Accordingly, we would recommend that transfer from the solicitors' branch to that of the Bar should include special training in advocacy and a pupillage in chambers: beyond that, we do not see a need for any other instruction.

64 Similarly, for those who wish to transfer from the Bar to the solicitors' branch, we recommend the necessary training in solicitors' accounts (including trust accounts), together with a period of acclimatisation to the routines of a solicitor's office, the interviewing of clients and witnesses, and so on. But here again, we see no need for the acquisition of any other qualifications. Even these additional qualifications could be dispensed with in special cases.

Partnership

65 We do not consider that members of the legal profession should be permitted to practise in partnership with members of other professions. The solicitor and the barrister may duplicate each other's work on some occasions, but not generally that of the accountant or surveyor, still less that of the consulting engineer or the architect. From the point of view of the public there are two special dangers in mixed professional partnerships. First, many solicitors' firms are already in danger of being too large. To permit the legal profession to join in partnerships of the size of, for instance, some of the international firms of accountants would simply encourage a situation about which there is already widespread complaint from that profession's clients. Secondly, although lawyers have essential services to perform to the business community, they also have a unique service to perform to the wider community in safeguarding individual rights and liberties. What are necessarily the more commercial attitudes of the accountant, the estate agent and many other professions would inevitably affect, and to some extent undermine, the non-commercial function of the legal profession, if its members were to practise in partnership with others who did not share that concern in their work. There are also some practical difficulties, even in commercial matters. A company may, for instance, require advice from its solicitor about its accountant, or a builder about his architect. This becomes impossible if the solicitor is in partnership with them. And should the solicitor's partners be personally liable for the professional failures of their non-solicitor partners, whose expertise they can neither assess nor control?

66 On the other hand, we are on the whole in favour of allowing barristers to enter into partnership with each other. To the client, the principal advantage would be the corporate responsibility of the firm for his representation in court. We shall draw attention later in this report to the persistent problems in criminal cases, where only too often counsel does not see his brief until the eve of the trial, even though it has been delivered some time before, and where the client may find himself represented by counsel whom he has never seen, or by a different counsel from the one he has seen. If such briefs were to be delivered to a *firm* of barristers, the proper preparation of the case and the proper representation of the client would become the responsibility of the whole firm, with the consequence that a number of senior barristers, with substantial reputations and practices at risk, would have the incentive to ensure that the arrangements in their chambers were such that the clients' cases were properly dealt with. (In saying this, we do not underestimate the extent to which the existing chambers system helps to maintain high professional standards.)

67 Although there is no comparable problem in civil matters, we believe that partnerships between barristers in chambers which concentrate on civil work would also operate to the clients' advantage, in that the allocation of work within the firm would be more likely to match the abilities and experience of the partners than can be ensured by the (sometimes rather capricious) choice of the solicitor alone. We shall return to this point later in this report.

68 There are some further advantages which, although accruing primarily to the Bar, would also operate to the benefit of the clients. By tending to reduce the existing extreme disparity of distribution of work and income – where a small number of senior juniors is grossly overworked, while a large pool of spare capacity exists among a much larger number of young counsel – the total pool of legal ability at the Bar could be used more efficiently. Beginners would acquire their experience more quickly, and would begin to earn a living sooner. This in turn should help to recruit people of the right calibre with the necessary abilities and ambitions. At the other end of the range, the more senior people could shed at least part of their work-load to their junior partners without risking the loss of the solicitor client, and so concentrate on the heavier, and more difficult, work which they are best qualified to do.

69 A significant advantage for both the Bar and the general public would be that partnership would relieve many of the Bar's senior members of the need to apply for a judicial appointment involving, as it does under our present obscure system of recruitment for such offices, an unsettling and inhibiting period of uncertainty. If preference rather than necessity influenced the choice of career of barristers eligible for appointment to the Bench, the senior Bar would not be denuded of much of its talent and experience, and the Bench could be recruited from those who are attracted by the inherent substance of judicial work rather than by economic considerations. There are also tax advantages of practice in partnership which would make this branch of the profession more attractive to new entrants. We believe that any means which would help the Bar collectively to do its work even better, and to attract people of the right calibre to it, must ultimately enure to the benefit of the public whom it serves.

70 The principal objection to partnership between barristers is that it could, in some circumstances, reduce the client's choice of counsel. If this were so, the objection would be a serious one. But we believe that such an effect can be avoided. It arises only in a few specialities, where all the specialists are to be found in a very small number of chambers, or even only one. A feasible solution would therefore be to allow partnerships only with the licence of, say, the Bar Council, which would not grant such licences unless it was satisfied that the formation of the firm would still leave outside it enough other firms of comparable specialists, or enough such specialists practising on their own, to give an ample choice of counsel to all the parties who could be engaged in any one dispute. There is, for example, no reason why more than one partnership could not be formed in a large set of chambers. The consequence of such a scheme would probably be that many partnerships would be formed in

the areas where many barristers practise – crime, general common law, chancery, etc. – but that only a few (and those small), or even none, would obtain the necessary licence where the number practising in a particular speciality was small.

71 On balance, therefore, and subject to the safeguards of some kind of licensing control, we favour giving barristers at least the option of forming partnerships with each other. We believe that the forces of competition would then continue to operate in the public interest to achieve an appropriate balance between large, medium and small firms, and sole practitioners.

72 For similar reasons, we should like either the Law Society, or local law societies, to have and exercise power to limit the maximum number of solicitors practising in any one partnership in a particular area if and so long as there is not adequate competition between at least two comparable firms of solicitors in that area. On the other hand, we see no need for any lower limit: the requirement of experience before practising alone or unsupervised effectively serves the same purpose.

Incorporation

73 We see no merit for the public in permitting either solicitors or barristers to practise as limited liability companies. Incorporation would not materially affect efficiency, or the cost of legal services. It could however mean that where there was a large claim, the company might prove insolvent and there might be no recourse against the individual lawyer personally as at present. This would clearly be disadvantageous to the public. Whilst the cost of insurance is rising, the Law Society's new Master Policy does go a long way to protecting the public, and incorporation appears to us to be an undesirable move in the opposite direction. The only merit we can discern is that it might make it easier for lawyers to make proper pension provisions for themselves, and to dispose of their share in the practice on retirement. This does not outweigh the disadvantages, nor do we think that many lawyers would welcome incorporation. The questions of takeovers, or ownership by non-practising, and possibly non-lawyer, shareholders, would also need to be resolved.

Independence

74 Professional independence is needed wherever, in an occupation requiring expertise, a balance has to be struck between the claims of the client and the claims of the public.

75 The professional owes duties to his client to represent his interests despite the arcane nature of the subject matter (which makes it impossible for the client to police his performance), possible disadvantages to himself (because unexpected complexity or an association with an unpopular client may cost him more advantageous work), or pressure from outside sources (newspapers, police, government departments or, in less fortunate countries, state 'security' services).

76 On the other hand, the professional owes duties to the public not to put forward unlawful or dishonest demands on behalf of his clients,

not to allow the building of dangerous or illegal structures, or the putting forward of inaccurate and misleading accounts, and attention to the client's interests cannot override these duties.

77 Professional independence requires that the balance between these conflicting demands should be left to the professional and his organisation, and that there should be a code of conduct exacting the utmost integrity in the striking of this balance.

78 It is part of this concept of independence that there will be occasions when the professional or his organisation reaches a conclusion which the client or a body otherwise representing the public interest will think is wrong.

79 The legal profession is here in a particularly difficult situation. The clients whose interests it has to uphold range from government departments and prosecuting authorities to squatters and large corporations resisting government control; the public interests in the administration of the legal system are themselves controversial, since there is little unanimity on what counts as justice, and much law is widely seen either as politically motivated or the outcome of a remote and bureaucratic administrative process. Even the applicability of law and legal procedure in many areas is controversial. It is therefore vitally important that neither client control, nor control by those who represent other facets of the public interest, should interfere with the difficult task the legal profession has in holding this balance. If, as we would suggest, the legal profession takes a wider role in the advocacy of client interests, it will come into further conflict with other sectional and administrative interests, just as it already has in its defence of orderly criminal procedures in the face of plausible demands for greater efficiency in the prosecution of crime.

80 For all these reasons, we regard the continued existence of an independent legal profession as an essential condition for the maintenance of the Rule of Law and the protection of human rights. To summarise, what we mean by 'independence' in this context is the ability to represent, press and advocate a client's case without any limitations other than those set by the demands of justice and integrity, subject to no pressure or influence (or fear of it), however subtle or indirect, from any other quarter. The experience of too many other countries has shown – and continues to show in our own time – how rapidly and completely the Rule of Law can be undermined if ever the reputation, the career, or the standing (let alone the earnings) of lawyers can be adversely affected by their zeal for the case of an unpopular client. It is that independence, where the lawyer has nothing to fear, and everything to gain, from doing all that he honestly can for his client, which provides the fundamental *raison d'être* of lawyers in helping to redress the balance between the individual citizen and the different collective power groups to whom he is an inconvenience. Without it, we might just as well give up having lawyers altogether, and leave the citizen to fend for himself as best he can.

81 This independence is, we believe, better preserved in Great Britain

than in all but a very few other countries in the world. We express the hope that, whatever may be the recommendations of the Royal Commission, they will not have as their direct or indirect effect any reduction or erosion of that independence, to which not only we, but also the International Commission of Jurists, attach the most fundamental importance. Among the features of our system which help to secure it are these:–

(a) Free admission to the profession for anyone who can demonstrate the necessary degree of expert training and knowledge, and no more.

(b) The freedom to practise anywhere within the realm, and in any field of the law, without any form of 'quantity licensing'.

(c) Disciplinary control only by the courts, and by professional organisations which are not subject to the control or influence of government or any other concentration of political or economic power, and only on the grounds of professional dishonesty or incompetence, with an appeal to the courts in all cases.

(d) The position of most lawyers as independent contractors – not salaried, but paid directly (or on behalf of) the client for work done – so that their livelihood does not depend upon the whim of any one client.

(e) The 'cab-rank' rule at the Bar, whereby every barrister is bound to accept every brief which is tendered to him in any court in which he holds himself out to practise, provided only that it is marked at a fee which he normally charges in that court for that kind of case, that he is not already retained in the same case by an adverse party, or in another case elsewhere on the same day, and that he will not be embarrassed by extraneous personal knowledge of the case, or of any of the parties or witnesses.

82 We believe these features to be the minimum that are necessary, though there are several others of lesser importance. Provided that these are preserved, we do not consider that any additional ones are needed at the present time.

Barristers' clerks

83 With the rapid growth of litigation, and in the size of the practising Bar, over the last decade, the administration of a set of chambers has become increasingly complex and now requires a significant measure of managerial skill. But the organisational side has failed to keep abreast of these developments. The present-day senior clerk, like his predecessor, will never have received any structured training in office management or accounts. He will have entered chambers as a boy before becoming a senior clerk (this is an almost invariable progression and means that entry into clerking in chambers is very restricted). He will have learned his trade from accumulated experience and from absorbing the knowledge of his seniors, who will themselves have received no formal training. He will, in addition to earning a basic salary, receive a substantial part of his remuneration in the form of commission on fees earned by the members of his chambers. He will very probably run his chambers with inadequate secretarial staff – indeed this will usually consist of copy typists rather

than trained secretaries. He will negotiate counsel's fees and keep the accounts himself rather than engage a cashier or book-keeper, a functionary with whom few types of organisation handling such substantial sums during the course of a year would feel able to dispense. Finally he will have a considerable – many would say excessive – involvement in the distribution of work among members of his chambers.

84 We would accept that many senior clerks are very capable and organise their chambers effectively. Nevertheless it is our view that a more professional approach is now necessary to the efficient conduct of the business of chambers. Entry to the ranks of barristers' clerks should be more freely available and more widely advertised. Every senior clerk should be encouraged to receive, and should have made available to him by the chambers to which he is attached, a proper training in office management and accounts; and it should be his responsibility to ensure that his chambers are adequately staffed on the secretarial and book-keeping side. Though we see no objection to a small commission being paid to a barrister's clerk, it seems to us undesirable that, possessing as he does considerable control over the distribution of work (particularly among young members of chambers) he should have so substantial and direct an interest in fees, and thus (since fees vary according to seniority and other factors) in the allocation of work. Indeed we recommend elsewhere in this report that there should be less dependence on the clerk for the distribution of business within chambers. Some of us also consider that counsel should be free, if they wish, to negotiate their fees directly with their instructing solicitors.

Legal executives

85 Fellows of the Institute of Legal Executives, and others who achieve recognised qualifications, already perform many important functions of a qualified solicitor, though the final responsibility must always be that of a partner. We believe that this trend should be encouraged, and indeed there may be a case for different categories of 'para-legals' to perform different functions under appropriate supervision, provided there is always a qualified solicitor to exercise the necessary control and accept the ultimate responsibility.

Silks and juniors

86 Now that the restrictive practice known as the 'two-thirds rule' has gone and the 'two-counsel rule' is on the way out, we believe that the two-tier system offers several benefits to the public. In civil work particularly, senior juniors tend to become impossibly overworked, and cannot give their full attention to one case at a time. It must be in the interest of a client to be able to take in a 'one-case-at-a-time' man who will not be distracted by a great case-load of other people's paper work while the client's own case is being tried, particularly if his opponent already has. Again, the cadre of silks provides a known and tried reservoir for appointments to the High Court Bench, and it must be in the interests of all clients, and the public generally, for the judiciary to be of the highest possible standard. There is also the imponderable phenomenon of 'front-

row effect' which is difficult to describe to anyone who has not experienced it at first hand in court.

87 However, while we are broadly satisfied (subject to the recommendations in our report, *The Judiciary*) with the present arrangements for appointments to the Bench, we would question whether there is any need to preserve the system whereby transfer to the upper tier of the Bar lies exclusively in the gift of the Lord Chancellor. There is no obvious reason why barristers should not make the transfer for themselves if and when they are satisfied that they can give a better service to their clients (and so ensure for themselves a better living) by giving up drafting. Just as barristers can already give up practice in selected courts, we see no reason why they should not be allowed to give up the treadmill of paper work which effectively distinguishes the junior from the silk. Since the step is already a risky one, it is unlikely that anyone would take it unless he was reasonably certain that it would succeed, and market forces should therefore suffice to ensure a balance of supply and demand in the 'front row'.

88 If it is thought important to preserve an element of ceremonial, barristers taking silk could be required to announce their self-promotion by a public advertisement on Maundy Thursday, though we do not attach any particular importance to this. More difficult is the question of whether a silk should be allowed to revert to being a junior: on the whole, we see no reason in principle why he should not, but we think there should be some time limits so as to restrict too great a frequency of oscillation between the two.

89 If this suggestion were adopted, it would of course follow that those who have promoted themselves to silk should not automatically be granted the Queen's patent, and so achieve the rank of QC. They would simply become 'senior' (as opposed to 'junior') counsel, neither bound nor entitled to draft, and required (as at present) to concentrate on advocacy and advice. There is no reason why they should not continue to wear silk gowns and cutaway coats, and occupy the front bench (when there is one) in court.

90 The ancient title of 'Queen's Counsel' would then remain as an honour in the gift of the Lord Chancellor, awarded to those who have specially distinguished themselves in the law (and this should continue to include academic lawyers, and might well include solicitors), much as the title of Privy Councillor is conferred on the most distinguished of our politicians.

Regulation of the profession

91 The present rules of conduct and etiquette are disordered and confused. We believe that they would gain from being properly codified under the heads of a few general principles, followed in each case by a descending hierarchy of rules, sub-rules, and exceptions. This task should be carried out for the entire profession by a single body having a substantial lay representation, and successive drafts could usefully be submitted for comment to the profession and to the public. There are good

precedents for this in the USA and in Canada.

92 In the course of that exercise, special attention should be given to the problem of additional employments and the non-professional relationships of lawyers to the public, to all rules relating to the 'dignity' of the profession and not merely its probity and efficiency, to the formulation of a general duty to take part in the provision of legal services to the public and particular duties in relation to legal aid cases, to a reduction in the number of rules which reflect an attitude of supporting the interests of fellow-members against the outside world, and to a strengthening of the rules imposing duties of competent and efficient professional work. We also suggest a review of those rules of Bar conduct and etiquette (such as the preference for conferences in chambers) which seem to conflict with the conception of two *equal* branches.

93 As for discipline and complaints, we welcome the appointment of the Lay Observer, and agree with the observations he has made in his first report. We would draw attention to those of the recommendations in our report, *Complaints against Lawyers* which have not yet been implemented, and especially to those which concern the continuing 'grey area' between professional negligence and professional misconduct, and the introduction of a lay element at an early stage.

94 We should of course like to see the fullest protection for clients against the consequences of professional negligence by their lawyers, and we believe that by and large this protection now exists. Indeed, it is in practice a good deal easier to prove negligence against a solicitor than against other professional men, since judges are themselves experts in the law and therefore need no expert evidence to tell them what a careful man in the defendant's position would have done. The difficulty of finding such evidence in medical cases is notorious.

95 The single remaining exception is advocacy. Some of us believe that this presents special problems. One is that an action for negligent advocacy could furnish persistent litigants with an additional opportunity to re-open the issues they have lost at the original trial, and perhaps on appeal. *Rondel* v. *Worsley* [1969, 1AC, 191] was just such a case, and libel actions were used for this purpose before s.13 of the Civil Evidence Act 1972 was passed. Another is that advocacy, unlike surgery, is much more an art than it is a science. It might prove difficult, if not impossible, to decide after the event whether the advocate was negligent in not calling a witness who he believed would evoke a counter-productive reaction from judge or jury, or in asking the notorious 'one question too many' in cross-examination, when this fact brought out the truth, but lost his client the case. A third is that the fear of actions for negligence might make advocates excessively cautious, and so prolong trials (at the litigants' expense) while every possible avenue is explored.

96 But a majority of us believe that these problems are outweighed by the injustice of leaving a party without remedy where his advocate has been plainly and grossly negligent – e.g. by failing to read his brief properly – and they are content to leave the courts to develop rules which will minimise the problems referred to in the previous paragraph.

97 We believe that professional negligence insurance should be compulsory for all lawyers in private practice, and that it should if at all possible be arranged by the professional organisations under Master Policies, but without any limit of liability for individual members. In effect, the members of each branch of the profession should mutually insure each other.

Entry and training

98 Practising the law is essentially a practical occupation. It requires judgment, some knowledge of the ways of the world, some understanding of how people (including other lawyers, and judges) behave and think – and of course a wide knowledge of the law and its procedures. But that knowledge of the law does not need to be profound in every branch: what is essentially required is a deep understanding of the *principles* of the law, and of the rules of construction, procedure and evidence, and a knowledge of where the finer details can be found when they are needed.

99 Much the same considerations apply in medicine, accountancy and the other professions. To be of practical use to a client or a patient, the practitioner must first and foremost know what to *do*, rather than command a detailed knowledge of many of the more esoteric branches of the science in which he practises.

100 Many lawyers have acquired their knowledge of legal principle by attending university law schools before entering legal practice. The subjects taught in university law schools have expanded in modern times to keep pace with new developments in our society and in legal practice. Thus it is not uncommon to find courses in welfare, consumer protection and housing law, and subjects like labour law and taxation law have become well established. However, while we recognise the valuable contribution made by the academic study of law, it is not our view that a law degree should be a necessary pre-condition for admission to the legal profession. Indeed, many of us believe that a legal practitioner will in many cases be better able to render a service to his clients if his academic grounding has been in a different discipline, such as the natural sciences, political science, or modern languages. We appreciate the modern tendency to regard academic training as a necessary foundation for admission to professions, and welcome the steps which have been taken recently in the legal profession towards providing a common core of basic training, in which the university law schools play an important role for those attending their courses by enabling those students to claim exemption from the academic part of their professional training.

101 Moreover, we do not wish to suggest that we see no virtue in the discipline of academic law. On the contrary, we believe that it does a great deal to achieve and maintain coherence in our legal system, and above all in devising and testing proposals for law reform. If anything, academic legal work has been undervalued in the past, especially by the English courts which (unlike those of continental Europe) have tended to ignore academic publications in favour of judicial precedents.

102 At the same time, it is a fact that success in either branch of the law

is not necessarily dependent on earlier success in university law schools. The successful practice of law requires many skills which are not taught at universities. The more practical skills of advising a client what to do in an untidy situation, negotiating a settlement, or coping with the human surprises of a trial, can only be learnt in practice. Nonetheless, many law firms continue to seek the best honours graduates in law for articles, and many chambers have regard to the academic qualifications of applicants in deciding whom to accept as pupils.

103 We also attach much importance to variety amongst practitioners, and we believe it to be much to the public advantage that the profession should include the most diverse personalities, bringing to it a wide range of experience, interests and temperaments.

104 We therefore believe that, if anything, there should be greater emphasis on practical training as a condition for admission to the profession, more particularly in those areas – such as welfare law, employment, housing, etc. – where the profession has been charged with failing to meet the public's need. We also believe that some training in office management would not come amiss for both branches of the profession, and professional ethics should certainly be included.

PART III

QUALITY OF SERVICE

105 We believe it to be generally true to say that the levels of skill, endeavour and dedication are higher amongst professionals than amongst most others. We also believe that, by comparison with other professions, those who practise the law collectively render a service whose quality is above average.

106 However, even that service falls well short of perfection, and there is a number of respects in which it is positively unsatisfactory. Apart from the causes which we have already discussed earlier in this submission, the following may also be cited:–

(a) the ever-increasing volume of legislation;

(b) the multiplicity of regulations by statutory bodies, and of local tribunals in specialised fields;

(c) the increasing numbers of the public who look for legal advice in an affluent society;

(d) the lack of corporate organisation on the barristers' side;

(e) the undermanning and overwork on the solicitors' side, aggravated by the shift from unqualified to qualified staff;

(f) the tremendous increase in uneconomic work, which is not adequately covered either by legal aid or by voluntary organisations.

107 It is notorious that few individuals today can afford the cost of litigation in the High Court. It may be that more than half of the population are both too well off for legal aid and not well enough off to finance their own cases. This is bound to lead to injustice, and to affect the quality of legal services.

108 At the opposite end of the spectrum, the voluntary organisations like the CABx cannot give more than preliminary advice. The voluntary arbitration system in Westminster, whereby solicitors give their services free to both sides and arbitrate by consent in small cases, is in serious difficulties for lack of funds to administer the scheme. The nettle of small cases has to be grasped: either such volunteers must be properly organised with government backing, or a properly organised set of courts must be set up to deal summarily and speedily with small cases. The ever-increasing load of uneconomic small work (cases which are either never taken because of lack of funds, or taken as a matter of moral obligation or charity by practitioners of both branches, at a severe financial loss) must be shouldered by someone, if necessary at public expense. The obvious solution would be the expansion of Legal Aid, if the Treasury permitted it and if the system were streamlined so that practitioners did not have to wait for unacceptable lengths of time before being paid.

109 In most areas where an unsatisfactory quality of service exists, the fault is not that of individuals but of the system. The real causes are the

economic pressures on practitioners who cannot afford both to pay current rents and salaries and to accept cases where they will never be paid more than a small contribution to their overheads; the lack of knowledge by the public of its rights, and what lawyers can do; and the traditional slow payment of lawyers (who are treated as tailors used to be treated) of both branches, by the public and the solicitors respectively. The 'Robin Hood principle' may be laudable, but a system which relies on a sufficient volume of high-profit cases to finance loss-making deserving cases can only provide a patchy quality of service.

Civil Cases

110 Any legal remedy must be available in time to redress the client's grievance, and at a cost within his means.

111 We believe that in many civil cases today, neither of these criteria is satisfied. The aggregate time which elapses between the date when a cause of action arises and the date of an effective remedy is frequently **between two and five years**, and the costs payable by the loser following proceedings in the High Court are frequently within the range of **£1,500** to **£20,000**. A case of constitutional importance which must go to the House of Lords may involve aggregate costs of £50,000 – so that the parties could reasonably be considering an alternative remedy before the European Court at Strasbourg, where the cost would be a fraction of that sum.

112 In 1964 we published our report, *The Trial of Motor Accident Cases*. Ten years later, we followed this with our more general report called *Going to Law*. Each of these reports contains many – and in the case of the latter, some fairly radical – recommendations for increasing the speed and reducing the cost of civil litigation in England. We commend these reports to the Royal Commission, especially to those members who are not personally familiar with the procedures of litigation, and the causes of expense and delay. There is no point in our repeating their contents here, but it may be of interest for the Commission to know that the most important of our recommendations in *Going to Law* have recently been enacted in Sri Lanka – a country whose legal procedures had hitherto been based on those of the English Courts – in an excellently-drafted statute called the Administration of Justice (Amendment) Law, No.25 of 1975.

113 We are satisfied that, if the recommendations which we have hitherto made in this field – in each case after very thorough study by experienced practitioners – were to be implemented at all events in principle, substantial increases in the speed, and reductions in the cost, of civil litigation could be achieved without at the same time reducing to any appreciable extent the quality of the administration of justice.

Criminal Cases

114 In our report, *Complaints against Lawyers* (1970), we recounted and discussed at some length (in Appendix B) the special circumstances relating to legal aid in criminal cases and the nature of complaints about

the legal profession brought to the notice of JUSTICE. We do not propose to reproduce in detail the arguments and recommendations we made in that report, which is still available, as we think it more sensible to try to appraise the defects of the system as they appear to exist at present. It is, however, not always easy to decide whether the blame for any particular defect lies with individual lawyers or with the climate in which they have to work. Some degree of overlap is unavoidable.

115 The introduction of legal aid in criminal cases in 1960 transformed the workload of the legal profession. The right to be defended became a reality for a large section of the community, and the social improvement achieved by the introduction of legal aid is undeniable. It was, however, obvious at the time that the resources of the profession, particularly the Bar, were not adequate to meet the demands of a scheme the immediate effect of which was evident in criminal courts of every level. In the 17 years that have passed since then there have been substantial increases in the numbers of practising lawyers at the Bar, the figures having very nearly doubled. There is no doubt that the quality of the service at present available is incomparably better overall than it was in 1960.

116 The provisions for legal aid in criminal cases can be regarded as generous in comparison with civil cases. There is still a fairly wide variation in the readiness of magistrates' courts to grant legal aid, but they are now bound to offer it if the accused person is in danger of losing his liberty. The rate of refusals of legal assistance is in some courts as low as 5% and in the worst courts about 30%, compared with 90% a few years ago. In many courts duty solicitors are filling the gaps. A person committed for trial is invariably granted legal aid, however unmeritorious his defence may appear to be. Leading counsel are normally granted in the more serious and complicated cases.

117 Three important factors have produced certain shortcomings in the services that can be offered. First, the number of cases coming before the courts has greatly increased at every level. In 1960 there were 20,000 cases tried at the equivalent of Crown Court level. In 1975 63,129 cases were tried. This increase has stretched still further the resources available to deal with them. Second, the range of cases justifying the grant of legal aid has been very properly increased to cover pleas of guilty: indeed the law is that no-one may be sentenced to imprisonment unless he has been offered legal representation – and few refuse it. Third, trials take longer than they used to, are more carefully conducted than they were many years ago, and preparation for them is made more elaborate by reason of increased complexity and the advent of photo-copying machines. This in turn means that the lawyers tend to be engaged for longer periods of time in individual cases, thereby reducing still further their general availability.

118 Many procedural steps to save time have been taken; but these do not keep up with the other pressures, and in particular with the increased crime rate. The inherent uncertainty about the length of time a trial will take is such as to make a system of fixed dates unworkable. An aggravating factor is the long-standing tradition that what is called 'the judge's time' (but in reality means that of the whole court staff as well as

shorthand writers and jurors) should not be wasted. To avoid this the system of floating cases, which can be called on when a case goes short, is adopted but it is extravagant of the time of everyone save the judge. In our view it is of greater importance to make more economical use of the time of counsel, solicitors and witnesses, and the tradition to the contrary should be abandoned.

119 Generally speaking, we believe that the public is well served. However, the cases brought to our notice show that there are unsatisfactory features which call for attention:

(a) It quite often happens that the defendant does not have a conference before trial with his barrister. Sometimes a conference is not required, particularly if the solicitor has prepared the case well or the issue is a simple one. Sometimes the client does not wish to lose time from work to attend the meeting, perhaps because he does not wish his employer to know that he is in trouble. Nevertheless, though it would add to the costs, it would also improve confidence if conferences were arranged reasonably well in advance of the trial whenever necessary. Solicitors have a special duty in this respect to explain the importance of this matter to their client and to attend the conference.

(b) There are a few firms of solicitors specialising in criminal cases which are frequently inundated with work and have more than they can handle efficiently. They may do their best, but their best in the circumstances may be stereotyped instructions, hasty preparation, and inadequate supervision of unadmitted staff. For this there is no legitimate excuse. The only remedy for it is self-discipline in not taking on more work than the particular firm can do well. Briefs should be properly prepared and informative, and delivered in good time to a barrister of sufficient competence to deal with the case. Solicitors should enter into early consultations about the case with the barrister of their choice. It should, however, be borne in mind that some clients prefer the scanty attention of someone well recommended to the more careful service of one they have never heard of. We consider it quite wrong that a client should be deprived of the free choice of representation.

(c) In our view, once a brief has been delivered to counsel it is important that he gives advice on evidence, or asks for a conference if the merits of the case demand it. The present rules do not permit counsel to decide for himself what he should be instructed to do; and if he advises on evidence where no request was made for it, or the taxing officer, when assessing costs, does not think it was asked for or necessary, no fees will be allowed. We think the necessary implication of the delivery of a brief should be that advice on evidence is required, and that fees will be allowed for it. The work is important and often laborious.

(d) We are aware that some solicitors in the great metropolitan areas deliver briefs to a set of chambers without the name of counsel marked on them, and that quite often these are allocated only the evening before the trial by the clerk. We would discourage this practice, but when it happens it should be the duty of the clerk to see that the papers are read as soon as possible by a competent member of chambers. Some form of corporate responsibility of chambers should be developed to ensure that work is undertaken by counsel of sufficient competence, and this is discussed in another part of this report.

120 Although a substantial number of trial dates is now fixed in advance, there is no guarantee that the fixed date will be kept and that the nominated barrister will appear at the trial, even when the brief has been delivered days, weeks or months beforehand. The result is that a client who has had a conference with his counsel and gained confidence in him is abruptly confronted by a counsel of whom he knows nothing. A further undesirable consequence is that a busy barrister who is given a brief in advance has little encouragement to give much thought to it, or to offer advice on it, when he knows that he may well not take the case in the end.

121 Criminal work is often unpleasant and worrying and, if carried out conscientiously under the personal supervision of a partner, may not be financially rewarding. One particularly unsatisfactory aspect of Crown Court work is that the normal fee for attendance of a managing clerk at court is about £12 per day. And even if a senior partner goes to a local court in a serious case, it is unlikely that more than £20 will be allowed for his actual attendance. This is not economic, and it is hopelessly uneconomic if the case is conducted by firms, say in the City of London or the West End, which have particularly high overheads.

122 After we had published our report, *Complaints against Lawyers* in 1971 information began to reach our Secretary from a number of sources that in some areas and some courts unscrupulous firms of solicitors were resorting to undesirable methods of obtaining more than their fair share of legal aid work. The consequence of this, and of the inadequate remuneration referred to in the preceding paragraph, is that there exist some firms which take on far more criminal defences than they can handle efficiently and entrust it to clerks whose experience or competence is not high.

123 One of the objectives of the duty solicitor scheme, which we advocated in our report, *The Unrepresented Defendant in Magistrates' Courts* (1971), was to break up these near monopolies by bringing more solicitors into the legal aid scheme, and there are indications that where duty solicitor schemes have been introduced, they are having the desired result. Early in 1977 there were in operation about 80 schemes approved by the Law Society. It is desirable that the scheme should be extended to cover all magistrates' courts where there is sufficient work to justify it. Some problems relating to rotas and remuneration need to be ironed out. In particular the method of remuneration should be standardised and put

on a statutory basis. At present this varies from court to court, use being made either of the £25 scheme which covers advice but not an appearance in court, or of the power now vested in magistrates (unfortunately too rarely exercised) to appoint a solicitor who is in the precincts of the court and is paid the normal fee for a case. This payment by the case is less rewarding than an attendance fee, and can adversely affect the quality of representation.

124 There is at present no effective machinery for investigating complaints by legally-aided defendants that their cases have been negligently or incompetently handled, or of ensuring that the large sums of money paid out in criminal legal aid are wisely spent. Rates of remuneration allowed to solicitors and counsel vary considerably as between taxing authorities in different parts of the country. In our evidence to the Widgery Committee on Legal Aid in Criminal Cases, and in later representations to the Home Secretary, we have recommended the setting up of a Home Office Advisory Committee, which would include barristers and solicitors and have the duty to see that criminal legal aid is efficiently and fairly administered and that complaints are properly dealt with. We have already repeated this suggestion elsewhere in this Report.

125 One area where legal aid is inadequate and unsatisfactory by reason of the constraints placed upon solicitors and counsel, and of the variety of their response to these constraints, is in the area of criminal appeals. Since our report, *Criminal Appeals* was published in 1964 there has undoubtedly been a very great improvement in the extent to which solicitors and counsel give advice and assistance on appeals. Under a legal aid order the solicitor is now under a duty, when so requested, to seek the advice of counsel about possible grounds of appeal and, if any exist, to ask him to draft them. At this point, however, the legal responsibility of solicitors ceases unless they are asked to undertake further work by the Registrar, and it frequently happens that an appellant receives no further help.

126 Further provisions for assistance do, however, exist. For example, when counsel drafts grounds he may indicate to the Registrar that these are only provisional grounds and that he needs a copy of the short transcript to amplify and perfect them. A solicitor may make representations to the Registrar on the seriousness or complexities of the case and ask for a special appeal aid order so that he can do justice to the merits of the appeal. In our experience, however, the effectiveness of these provisions is very uneven, depending very much on the Deputy Registrar in charge of the file or the judge to whom the request is referred, and on the zeal of the solicitor and his relations with the Criminal Appeal Office. An appellant who feels that he was let down by his solicitor and counsel, and is advised by them that he has no grounds of appeal, will find it very difficult to have his legal aid order transferred so that another solicitor may deal with his application for leave to appeal.

127 An impecunious appellant in custody is under further disabilities. Legal aid effectively fades out of the picture if and when an application is refused by the Single Judge. It sometimes happens that a solicitor

believes that his client was wrongly convicted and would like to make further efforts on his behalf but is not put in a position to do so. Grounds of appeal which carry little weight on paper may be capable of succeeding if they are effectively argued before the Full Court. If counsel has not asked to be provided with a copy of the short transcript of the summing-up to perfect the grounds (or for transcripts of vital evidence to be ordered) then an application may be refused without anyone having had any opportunity of studying the transcript on the appellant's behalf. He is allowed to purchase a copy at a special price but may often be unable to afford it.

128 The lack of adequate legal aid for the presentation of applications for leave to appeal is a matter of major importance. In civil cases an unsuccessful litigant can appeal as of right to the Court of Appeal and, also as of right, can apply for leave to appeal to the House of Lords. In criminal cases there is no right of appeal except on a point of law. This right is, however, often illusory in that the majority of appeals are based on a mixture of fact and law, and their presentation may be greatly weakened if only the point of law is relied on. For the general run of appeals the application for leave goes first to the Single Judge. If the Single Judge refuses leave the appellant has the right to pursue his application to the Full Court, but if the Full Court refuses leave, that is the end of the road. This means that a prisoner's application may be dismissed merely on consideration by the court of written submissions made by an illiterate prisoner who may have good reason to be dissatisfied with the way his defence was conducted, and been advised that he has no grounds of appeal. JUSTICE receives many requests for advice and help, either immediately after conviction or more often after the dismissal of the application by the Single Judge. Our experience is that, although successes are comparatively few, they are enough to show that many meritorious appeals must go by default through lack of effective legal help.

129 It is plainly unsatisfactory that a prisoner's prospects of a successful appeal should depend on so many variable factors. In our view the relationship between a legally aided prisoner and his lawyers should be the same as where a solicitor is privately instructed, so that the appellant is in no way disadvantaged by his lack of funds. As we recommended in our report, *Criminal Appeals* (1964), where a convicted person's lawyers advise that he has valid grounds of appeal and his counsel is prepared to argue them before the Full Court, then the legal aid order should enable them to take whatever steps are reasonably necessary to pursue the application. We also recommended that a short transcript should be provided free of charge on the certificate of counsel.

130 It remains to consider the plight of those in prison who continue to protest their innocence after their appeals have been dismissed. If they are to have any prospect of persuading the Home Secretary to reopen their cases they need help in obtaining evidence which was not available at the trial. Potential new witnesses may have to be traced and statements taken from them. These statements, together with any new factual evidence, then have to be evaluated in the light of the evidence

given at the trial, and a fully argued petition prepared for presentation to the Home Secretary. It may then be necessary for the merits of the petition to be pressed on the Home Secretary by further submissions, or by enlisting the help of MPs or the media. We examined these problems in our report, *Home Office Reviews of Criminal Convictions* (1968).

131 Over the years JUSTICE has received innumerable requests from prisoners to take up their cases, or for assistance in tracing witnesses and obtaining statements. We have been able to respond to only a small proportion of these requests and our efforts have from time to time resulted either in cases being referred back to the Court of Appeal, or in early releases when innocence could not be fully proved. These exercises involve a great deal of time and sometimes expense. We know of a few cases in which defence solicitors and counsel have believed so strongly in their clients' innocence that they have done everything in their power to prove it without even charging their out-of-pocket expenses. But this approach is exceptional and we consider it quite wrong that the release of an innocent man should depend on his being able to obtain the help of a voluntary society, or a dedicated solicitor, or a zealous MP and the media – as in the recent Confait case.

132 Since we published our report on Home Office Reviews in 1968 the situation has been improved to some extent by the introduction of the £25 scheme. A solicitor can now visit a prison and discuss with a prisoner the new evidence he thinks might be obtained. The solicitor may then be able to persuade his local Legal Aid Secretary to extend the certificate to cover some limited enquiries, but it will not put him in sufficient funds to cover all the work that may be required, including the cost of transcripts and the drafting and presentation of a petition. We therefore take the view that there is an urgent need for some form of post-appeal legal aid certificate, to be granted by a Legal Aid Area Committee specifically for the purpose of obtaining or verifying new evidence and drafting a petition to the Home Secretary.

The Monopoly of Audience

133 The only classes of work in which the legal profession has any kind of monopoly are conveyancing (on which JUSTICE has no collective views) and audience before the courts (including the drafting of pleadings and other ancillary work).

134 The monopoly of audience is not complete, because there is one vital and fundamental exception to it – the litigant in person. We hope that no restrictions will ever be placed on the right of a litigant to argue his own case, other than those which seek to meet the chronic (but not substantial) problem of the 'vexatious litigant'. On the contrary, as more members of society become more articulate and less likely to be overawed by the mystique of the courts, it is at least possible that the number of litigants in person will increase. In many county court cases, any such development should be welcomed, given that professional representation is often uneconomic for cases involving only a few hundred pounds.

135 The problems posed by litigants in person, and the steps which

could be taken to assist them, have been discussed in the JUSTICE report, *Litigants in Person* (1971). These include the appointment of a special Master, provision for *ad hoc* advice and assistance, and power to the Court to grant legal aid where the interests of justice appear to require it. The question now is whether the gap between the litigant in person at one end of the scale and full legal representation by solicitor and (where necessary) counsel is too wide, and whether a right of audience ought to be given to persons who are neither themselves litigants nor professionally qualified advocates.

136 One possibility (dealt with in paragraph 137 below) would be to abolish all restrictions on rights of audience and to permit any person, paid or unpaid, qualified or unqualified, to act for a litigant. More limited relaxations of the rule might involve such possibilities as –

(a) conferring rights of audience on members of the family or friends of litigants, on an unpaid basis, if the litigant feels too nervous to present his own case (or suffers from some problem such as a speech defect);

(b) conferring rights of audience on members of other professions where the subject-matter of the case relates wholly to matters within the competence of that profession (for example, accountants in tax appeals, and surveyors in most cases within the jurisdiction of the Lands Tribunal);

(c) permitting officials (without professional qualifications) of trade unions to represent members in, for example, industrial injury cases, or social workers to represent clients in housing or other welfare law matters.

137 The abolition of all restrictions on the right to conduct litigation for others would, in our view, be wholly contrary to the public interest. Few would suggest that the practice of medicine should be open to those who have not acquired any professional qualifications. The length and severity of training required of a lawyer may not be quite as great as that required of a doctor, but a high standard of professional competence is still essential. In addition, there is probably no profession in which the public interest so clearly requires the enforcement of a high standard of professional ethics, and any general extension of rights of audience to unqualified persons would make that impossible. There is no reason why non-qualified 'lawyers' should be substantially cheaper than qualified lawyers; but they would certainly be substantially less competent, and would probably contain a much higher proportion of 'black sheep'. One of the outstanding features of our legal system is its integrity. We attach great importance to this, and would not wish to see it jeopardised.

138 We think, however, that there is some case for a more limited relaxation of the existing monopoly. In particular, we think that litigants or potential litigants who do not wish to instruct a lawyer but feel too nervous to conduct their own case in court should, in general, be allowed to have some member of their family or friend (within a defined category) to conduct their case for them. This is already permitted, in the discretion

of the court, in county courts (County Courts Act 1959, section 89). Representation by an unqualified person is also permitted in many tribunals, in some cases as of right. In the High Court such a discretion does not exist, or is at any rate never exercised, though it has been accepted that a litigant in person may be assisted by a friend who may sit with him and advise and prompt him: *McKenzie v. McKenzie* [1971] P.33. We think that the discretion to permit a relative or friend to conduct a case for a litigant should be exercisable in all courts. We do not think that this will lead to any lowering of standards, because under the present system the likely outcome is anyway that the case will either go by default or will be handled even less efficiently because it is conducted by a nervous litigant in person.

139 In some cases – husband and wife, parent and child – there ought in our view to be an *absolute right* to nominate the other as an 'advocate'. In other cases the court should have a *discretion* to permit some other person to speak for the litigant. This should, in our view, only be permitted where the court is satisfied that no payment (except compensation for loss of earnings) is being made to the 'advocate'. It is possible that, in exceptional cases, the discretion might be exercised in favour of a social worker (as already happens to some extent in social security cases before tribunals), but this should be fairly narrowly limited, as we do not think that social workers either should, or would wish to, undertake advocacy on a regular basis. We also think that the discretion to allow a friend or relative to conduct a case should normally be exercised only where the issues are not of substantial importance to the parties (e.g. small consumer claims) or where the litigant is not entitled to legal aid and could not reasonably afford to pay for professional representation. It is, in our experience, clear that litigants who are not professionally represented are at a serious disadvantage, and a cousin who fancies himself as an amateur lawyer is no substitute for a trained professional. It is desirable, in our view, that the discretion should be exercised or refused as early in the proceedings as possible (which, in the High Court, would probably be on the first hearing of the summons for directions).

140 The discretion would of course not need to be exercised if legal aid could, as we recommend elsewhere in this report, be granted on the recommendation of the court.

141 Companies present a special case. As a company cannot speak with its own mouth, it cannot appear in the High Court except by solicitors and counsel. In the case of one-man or small family companies, this is a frequent cause of annoyance and unnecessary expense. We therefore propose that any company ought to be entitled to appear as a 'litigant in person' acting by one of its directors.

142 We do not think that trade unions or other organisations ought to be entitled to employ non-qualified staff to represent their members or employees in court in litigation relating to their employment, or other matters of concern to the organisation. Such organisations, where appropriate, should either employ professional representation or employ their own qualified salaried lawyers to act for members, and we think that this

is the best method of dealing with such cases. Different considerations may, however, arise in relation to tribunals for which legal aid is not available. The number of cases to be handled may make it impracticable to employ qualified lawyers to represent parties before tribunals. In general, therefore, we think that organisations having a legitimate interest in the success of parties appearing before tribunals (which we do not attempt to define) ought to be entitled to provide representation by non-qualified officers or employees, in the discretion of the tribunal (or as of right where such a right already exists).

143 The question whether members of other professions should be granted rights of audience in cases within their professional competence is one which we find fairly evenly balanced. The strongest argument, we think, is for accountants to have the right to appear in tax appeals to the courts, as they already have a right of audience before the General and Special Commissioners. Accountants are, however, not trained (or normally experienced) in advocacy, and on balance we think that their present rights of audience should not be extended.

144 At first sight, it appears that there are a number of cases (such as compensation cases in the Lands Tribunal) where surveyors would be qualified to act, but in practice we think that this would usually be undesirable. In such cases, surveyors are essential expert witnesses, and it is an important principle that the same person should not act both as a witness and as an advocate. There may, perhaps, be circumstances in which it would be proper to extend rights of audience to members of other professions, but they would be few. Such extensions should only be made–

(a) where the issues in the proceedings are necessarily limited to matters within the competence of the profession;

(b) where the issues do not normally include matters in which expert professional evidence on questions of fact will be required; and

(c) where either there is adequate control of professional ethics, or ethical problems are unlikely to arise.

The Working Relationship Between the Two Branches

145 In the great majority of cases, the relationship between solicitor and counsel works excellently, and to the benefit of the client. But no system is perfect, and one of the functions of the Royal Commission is to try to improve the one we have. We therefore set out here some of the possible imperfections which could be easily remedied.

146 For a good working relationship with counsel, a solicitor must have:

(a) the ability to detect when he is out of his depth and at what point counsel ought to be brought in;

(b) the ability to choose horses for courses – that is, to select the right barrister for the job;

(c) a working knowledge of the relevant law and procedure (specialised knowledge is not essential, for where difficult issues

of law or procedure arise the solicitor is entitled to rely on suitably selected counsel);

(d) the ability to marshal documentary and other evidence and to present counsel with clear and adequate instructions summarising the relevant facts, identifying the issues for consideration and offering constructive comments that will assist counsel in his deliberations and help to ensure that no material question of fact, law or evidence is overlooked.

147 In too many actions, the standard of performance of the solicitor's duties leaves much to be desired and counsel fail to receive from their instructing solicitors the assistance they are entitled to expect. In the following paragraphs, an endeavour is made to identify some of these weaknesses and their causes and to suggest ways in which they may be remedied. As a preliminary, it should be mentioned that whilst the lack of expertise may be on the part of the solicitor handling the case, a great deal of litigation is conducted by legal executives or wholly unqualified clerks, with little or no supervision. This problem is adverted to again below.

148 (a) *Lack of discrimination in the selection of counsel*

This manifests itself in three ways:

(i) *Selection of counsel whose level of competence is unacceptable*

As in any profession, there is a small number whose general competence falls below an acceptable standard. In the case of the Bar, market forces to some extent help to limit, but not fully extinguish, this problem. The only remedy here is the exercise of greater care by solicitors in selecting counsel and a greater awareness on the part of solicitors and other staff of the level of counsel's performance. This assessment in turn requires a reasonable measure of expertise on the part of those instructing counsel.

(ii) *Selection of capable counsel for the wrong job*

It is by no means uncommon for counsel who are highly competent in a given area to be instructed in cases outside their field of expertise which they are not equipped to handle. Some solicitors and their clerks appear to assume that a competent barrister whom they regularly instruct is equally capable of dealing with all kinds of work. That this happens is only partly the fault of the solicitor. The difficulty is that there is no adequate machinery for ascertaining the fields of expertise of members of the Bar. More information needs to be more widely available.

(iii) *Excessive reliance on experienced counsel*

A distinct, though related, problem is the conservatism of solicitors in the selection of counsel. Not unnaturally they prefer to instruct counsel whom they know to be effective in a given field, with the result that a large volume of work

at the Bar tends to fall on experienced juniors, leaving the younger members with inadequate work and thus inhibiting the development of their own skills. Hence the paradox that the Bar – whose size has increased by some 40% over the last five years – is in danger of becoming overmanned, yet a solicitor can wait three months or more before getting a set of papers back from counsel. This problem has become exacerbated by the recent tendency of the Bar to become bottom-heavy. At the present time nearly 50% of the total practising Bar consists of barristers of under five years' call. The relevant factor here is no doubt excessive reliance on the Bar for judicial and other appointments, thus denuding the Bar of more experienced silks and juniors. A few firms of solicitors are farsighted enough to take positive steps to become acquainted with the younger barrister and, having formed a judgment of his abilities, to send him work and gradually build up his practice. In this way, though the work is done by less experienced counsel, it is done much more quickly and given more concentrated thought, and the lay client, who is usually more interested in speed than perfection (he is rarely able to appreciate the latter) is happier.

(b) *Inadequate knowledge of or interest in issues of law*

The ability of the solicitor to present proper instructions to counsel depends in large measure on his capacity to discern relevant issues of law and to marshal evidence which bears on these issues. It is all too easy for the litigation department of a firm to conceive its function as being essentially concerned with procedural steps, issues of law being automatically passed over to counsel, so that the solicitor becomes little more than a post office transmitting communications from client to counsel. Even the larger firms are not always immune from this weakness. The quality of service depends not so much on the firm as on the particular individual handling the case and the degree of supervision to which he is subjected. Since litigation is still relatively unremunerative, there is a tendency on the part of too many firms to rely excessively on legal executives and unqualified clerks. The experienced legal executive can be very effective, particularly in the routine case, but his knowledge of law is likely to be less broad than that of the qualified solicitor and so he may be less flexible and well-equipped to deal with cases possessing an unusual feature. Even more serious is the entrusting of substantial litigation to the relatively untested and unqualified clerk who works without adequate supervision and is often woefully ignorant not only of law but of basic procedure and rules of evidence. The result of this lack of knowledge is that instructions sent to counsel are likely to be incomplete and will need to be returned with a note requiring further information and evidence, all of which must then be sought from the client and witnesses

and transmitted back to counsel for his further consideration, with consequent delay.

(c) *Lack of system in the organisation of cases*

The poor quality of instructions is a matter of frequent lament by barristers. All too often papers sent to counsel comprise a skimpy set of instructions which omit vital facts, fail to draw attention to the material issues and are accompanied by only part of the relevant documents. In too many cases there is little evidence of any real effort by the instructing solicitor to sift the material, to apply an independent mind to the case, or even to collate the documents into some semblance of order. Whatever the reason for these shortcomings (and some reasons are suggested below) the consequences are unfortunate. Instead of being free to concentrate on the issues, counsel has to spend valuable time sorting out the papers and calling for missing facts and documents. Not only does this cause delay but in addition it increases the likelihood that the case will, at least in its inception, be imperfectly pleaded so that there is either further delay or expense in making amendments at a later stage or the case comes before the court without the pleadings being in order. An aspect of this lack of organisation is the late delivery of briefs. This is due to three major causes: pressure of work; the inadequate preparation of the case at an earlier stage, with the result that a great deal has to be done in a hurry and the time left for preparation of the brief is too short; and the fact that delivery of the brief often attracts payment of the full brief fee, so that the solicitor has every incentive, on behalf of his client, to try to defer delivery of the brief in the hope that a negotiated settlement will render its delivery unnecessary. Mention may also be made at this point of the effect of failure to establish communication at an early stage between client and counsel. A not uncommon complaint on the part of clients is that they are not introduced to counsel until an advanced stage of the proceedings, sometimes on the day of the trial itself, so that there is little opportunity to establish that measure of confidence on the part of the client which is essential to a proper working relationship. Counsel thus becomes a somewhat shadowy figure in the mind of the client who may experience anxiety and frustration at being unable to put points directly to him.

149 These shortcomings in the solicitor's role are attributable to four factors:

(a) the unremunerative nature of litigation work, coupled with the labour and expense involved (particularly in legal aid work) in having bills of costs prepared and taxed, and the long delay resulting from taxation;

(b) the absence of any structured training in civil litigation, a

knowledge of this being picked up in fragments through experience in an office;

(c) inadequate supervision of litigation staff;

(d) the insufficiently close working relationship between the Bar and solicitors, leading to a situation in which each tends to conceive of its functions in isolation from those of the other.

150 A further factor worth mentioning here is the absence of any standard system for the payment of counsel's fees. From the viewpoint of the Bar, a great source of grievance is the extreme dilatoriness of solicitors in the payment of fees. This bears particularly harshly on the younger members of the profession, who need the income; but it is unreasonable to expect any barrister to wait for months, and sometimes years, after the conclusion of a case to be paid. Inevitably the irritation engendered by late payment of fees has some impact on the enthusiasm with which counsel undertakes a piece of work and the speed at which he does it. To some extent this unhappy state of affairs is the fault of the Bar itself. Despite the substantial sums of fees earned in a year, few sets of chambers employ an accountant, some counsel's clerks are very dilatory in sending out fee notes, and the practice of deferring accounts and payment until the conclusion of an action is only very gradually giving way to a 'pay as you go' approach. This is simply an aspect of the amateur nature of administration in chambers of which further mention is made below.

151 But the inadequacy of working arrangements between solicitors and the Bar is as much the responsibility of the Bar as of the solicitors' branch of the profession. Major weaknesses on the Bar side are the following:–

(a) *Insufficiently close working relationship with the solicitor*

Some barristers still have a strong tendency to distance themselves from the solicitor and to avoid a working relationship that would savour of teamwork. The solicitor's function is considered as gathering material, delivering instructions and acting on documents settled and advice given by counsel. Solicitors are not encouraged to scrutinise counsel's pleadings; indeed the greatest tact has to be exercised in suggesting additions or amendments. The quality of the product resulting from the separate labours of counsel and solicitors would be significantly improved by a more free-flowing interchange of ideas and a greater willingness to act more closely in contact.

(b) *Lack of corporate organisation*

This leads to the next major obstacle on the Bar side to smoother working arrangements with solicitors, namely the fact that whereas solicitors practise in firms whose members act as part of a collective organisation, the basis of the barrister's business life is his sole and individual responsibility for his work. Whereas the lay client instructs a firm of solicitors, the firm instructs a particular barrister, not the chambers of which he is a member. No doubt it is inevitable that solicitors will wish to instruct individuals of their choice, but the

heavy emphasis placed on the individuality of responsibility has the unfortunate effect of militating against the proper sharing of the workload of chambers with consequent delays in paper-work through undue pressure on the experienced juniors. Their younger colleagues, where given work to do, are likely to be involved more by way of devilling for the barrister to whom the papers were sent than by acting in the case in their own right. The system is thus inherently inefficient. It has as its consequence not merely unnecessary delay and imbalance of workload, but the increased likelihood of disruption through the late return of briefs. Nothing is more calculated to shake the lay client's confidence in the legal system than to be told at the last minute that X cannot take the case and that it will have to be done by Y, who has not previously been involved and indeed may belong to a different set of chambers. More solicitors should explain to their clients the inevitability of such difficulties. Many of these difficulties stem from the absence of partnership arrangements among counsel. Whereas partners in a firm of solicitors accept collective responsibility for work done by any member of the firm, and the lay client knows that if one member of the firm is for some reason not able to undertake the particular matter it will be dealt with by another, the absence of partnership or similar arrangements among counsel in a set of chambers inhibits a similar arrangement among members of chambers. Thus instead of the chambers as a whole accepting responsibility for a case and undertaking to ensure that if a member of chambers to whom instructions are sent is over-burdened the matter will be automatically passed to another, papers are retained on the desk of the particular barrister who is instructed and if for any reason it later becomes impossible for him to deal with the case at the trial the matter has to be dealt with by some last-minute unplanned substitution. That is why, elsewhere in this report, we advocate a change in the professional rules to allow counsel to practise in partnership.

(c) *Amateurism in the administration of chambers*

It would be no exaggeration to say that the administrative arrangements for running a set of chambers are often still amateurish and antiquated. As previously mentioned, hardly any chambers have accountants, many chambers are inadequately staffed on the secretarial side and the senior clerk, upon whom the administration of chambers largely depends, has no opportunities for structured training. He is not merely expected to involve himself in the fixing of dates for the trial of actions and interlocutory applications and in the engagement of secretarial staff, but he has the responsibility for the organisation of accounts, the arrangements for accommodation (being consulted also on admission of pupils and new tenants) and the distribution of business. The last role may

give some cause for concern since the influence and control exercised by the senior clerk in the distribution of business may be said to be anomalous. Indeed it would be fair to say that the younger member of chambers is perhaps excessively dependent on the senior clerk for briefs and instructions.

152 Several things could be done to overcome these difficulties:

(a) *Remuneration*

Central to the problems discussed above is the sheer inadequacy of remuneration for the conduct of litigation. The subsidising of litigation by other branches of practice is no longer possible. The poor return (relative not only to other areas of work but also to overheads) on litigation work means that, on the solicitors' side, more and more reliance is being placed on the unsupervised, unqualified clerks whilst, at the Bar, there is less incentive to spend on a case the time it deserves. One has only to consider the derisory fee customarily allowed on taxation to counsel for settling a statement of claim – the most important document in the whole action – to realise how poorly rewarded is effort expended on litigation.

(b) *Training*

Civil litigation cannot be efficiently learned simply by the accumulation of experience in an office. It needs to be taught in a concentrated and structured fashion, in a full course embracing not only procedure and evidence but instruction on the management of litigation and the respective roles of solicitor and counsel. The Bar does give some practical training in civil litigation but this needs to be strengthened. There is no current course for solicitors in civil litigation, but the College of Law will be providing such a course for the new Final.

(c) *More collective effort by members of chambers*

We have earlier advocated partnership arrangements among members of a set of chambers. This would do much to alleviate many of the problems previously discussed. But in any event, if the workload on the Bar can be more evenly spread, the immense pressure on experienced juniors would be eased, younger members of the Bar now complaining of lack of work would be assisted and the litigation process significantly speeded up, with benefits all round. To achieve this requires a greater willingness on the part of members of chambers to see themselves as a 'firm' rather than as a collection of individuals, and active steps by the more senior members to introduce their more junior colleagues to solicitors and encourage the channelling to them of the less heavy litigation. Part and parcel of this change in approach would be more effective arrangements to provide cover against the inability

of briefed counsel to appear at the trial through the overrun of another case or some other good cause. This is not quite so easy as it may seem, since most solicitors will expect a substitute of at least equal skill and experience, but the spreading of the workload in the manner suggested above should make it easier even for the experienced and busy junior to provide cover for a colleague. To effect a change of this kind what is necessary is the assumption of greater personal responsibility by members of chambers themselves for the distribution of business within the chambers, and less dependence on the clerk for the performance of this vitally important function.

(d) *Closer working relationships between counsel and solicitors*

Much more teamwork is necessary than is at present in evidence. Each side needs to be more interested and involved in the functions of the other. This requires a raising of the level of expertise on the solicitor's side, a greater willingness by partners of firms to take an active part in the conduct of litigation and to exercise proper supervision over their staff, and a less lofty attitude by counsel towards their instructing solicitors, with greater receptiveness to constructive criticism of pleadings and opinions. In addition every effort should be made by counsel and solicitors to ensure that the lay client is brought into contact with counsel at an early stage.

Contingency Fees

153 We are persuaded by the arguments against the introduction of 'payment by results' for legal services in this country. In particular we do not believe that it would further the interests of justice if lawyers had a direct financial interest in the outcome of the cases in which they are concerned. We are aware that such a system exists in the USA, but conditions there differ in several important respects from ours, and we believe that the disadvantages of such a system in Great Britain would far outweigh the advantages.

154 The principal advantage of a contingent fee system is that it makes legal services available to a litigant who neither qualifies for legal aid nor has the means of financing the litigation from his own resources. We believe that this benefit can be achieved by a different proposal, which we first advanced in paragraphs 7 to 10 of our report, *The Trial of Motor Accident Cases.*

155 Our proposal, in essence, is for the institution of a Contingency Legal Aid fund. Such a fund should be an independent public office, initially funded by a single grant to constitute its working capital, and thereafter charged to operate at neither profit nor loss, taking one year with another. It would have discretion to grant to any applicant full legal aid for the prosecution or defence of any proceedings in which the court can award the payment of money, whether as damages or otherwise.

The applicant would be free, as under the existing civil legal aid scheme, to choose his solicitors and counsel, and the rest of the legal aid rules would also apply. However, there would be one important difference: in place of a means test, the Fund would negotiate with the applicant a percentage of any award that he recovered which would have to be paid over to the Fund, and on which the Fund would have a charge pending payment. We believe that, astutely managed, the Fund should have no difficulty in breaking even.

156 In each case, the Fund would make its own assessment of the prospects of success, perhaps with its own staff, or by obtaining counsel's opinion at its own expense. It should have a power to turn down applications altogether where there was no reasonable prospect of success, but such a power should only be exercised sparingly and in obvious cases. It should be entitled, like the existing Legal Aid Fund, to recover costs in the event of success.

157 We have not worked out all the details of this proposal. A number of variants is possible. For example, an unexpected surplus through over-conservative management might be distributed to successful litigants in proportion to the damages they have recovered, by analogy with the bonuses distributed by life assurance companies. There is a strong case for providing that, where a claim financed by the Fund fails, the successful opponent should be able to recover his costs from the Fund.

158 However, although the proposal is not complete and several options remain open, we believe that if it were adopted it could lead to a substantial improvement in the provisions of legal services in England to those who need them most and can afford them least. By enabling claims to be litigated for which there is not yet any settled line of precedents, it would also operate to improve and refine substantive law and legal remedies, as the contingency fee system in the USA has undoubtedly done and continues to do.

159 Accordingly, we commend this proposal to the Royal Commission and suggest that it be given more detailed attention than we have so far been able to give it ourselves. At the very least, we believe that an experimental scheme on these lines – say for an initial period of five years – could be most valuable in showing how well a full scheme could work, and resolving initial problems which might be found with it.

SUMMARY OF CONCLUSIONS

Legal Services

(1) The continued existence of an independent legal profession is an essential condition for the maintenance of the Rule of Law and the protection of human rights. Independence means the ability to represent, press and advocate a client's case without any limitations other than those set by the demands of justice and integrity, subject to no pressure or influence (or fear of it), however subtle or indirect, from any other quarter (80). We therefore oppose a National Legal Service, if that means a national service of State-employed lawyers dispensing legal services to the community at public expense (21-24).

(2) Our system of law, centred as it is on the rights and duties of individuals, is sound; what is needed are better means of ensuring that those rights are known, perceived and understood, and better access to the procedures for enforcing them (25). We therefore favour basic education in law at secondary school (16), the development of Citizens' Advice Bureaux as local advice and referral centres, the creation of more law centres in deprived areas (17-19), the raising of the civil legal aid limits (32), and the extension of legal aid to all contentious matters before civil courts, criminal courts, or administrative tribunals (31, 37-41). Proper provision should also be made for the disposal of small claims (107).

(3) For the intractable 'casualties of the law', we recommend a 'rescue service' operated by the Law Society, and paid for partly by the clients, partly by the profession, and partly by the State (28).

(4) There is a strong case for concentrating all Government responsibilities for the state of the law, the administration of justice, and legal services in one single Department of Justice. But the head of that Department must be the Lord Chancellor, and not a Minister sitting in the House of Commons (42-45).

(5) Judges and chairmen of tribunals should have statutory power to certify the need for legal aid for unrepresented parties (35 and 41); legal aid should be available for an appeal to an Area Committee from a refusal by a Local Committee to grant legal aid (34); and a single Advisory Committee should advise Ministers on, and supervise, both civil and criminal legal aid (31).

Organisation of the Profession

(6) We hold a variety of views on 'total fusion'. A few of us favour it: most of us oppose it. But some of us, while believing that a separate Bar confers substantial benefits on the public, see merit in a gradual 'convergence' of the functions of the two branches of the profession (54-60).

(7) We believe that transfer between the two branches of the profession should be made as easy as possible (62-64).

(8) We do not believe that solicitors should be allowed to enter into partnership with members of other professions (65), or to form themselves into limited companies (73); but we believe that barristers should be

allowed to enter into partnership with each other, subject to the licence of the Bar Council to ensure that an ample choice of counsel remains open to all the parties who could be engaged in a dispute (66-71).

(9) We think there is a case for some non-voting lay representation on the profession's governing bodies (52), and for a standing Legal Profession Advisory Committee, composed of both lawyers and laymen (53).

(10) The profession's rules of conduct and etiquette should be codified by a single body which includes laymen, in consultation with the profession and the public (91).

(11) Professional negligence insurance should be compulsory for all lawyers in private practice (97), and a majority of us believe that advocates should be liable for negligent advocacy (95 and 96).

(12) A law degree should not be a necessary condition for admission to the legal profession (98).

(13) Junior counsel should be free to promote themselves to senior counsel, leaving the title 'Queen's Counsel' as an honour in the gift of the Lord Chancellor for those who have specially distinguished themselves in the law (86-90).

(14) Barristers' clerks should have professional training, and be remunerated largely by salary (83 and 84).

Quality of Service

(15) On the whole, the levels of skill, endeavour and dedication of lawyers is high, and the service they collectively render is above average for professions in general (105).

(16) Civil litigation is far too slow and far too costly. What is needed is a thorough reform of procedure, such as we recommended in our report *Going to Law* (110-113).

(17) In criminal cases, heads of chambers and senior partners should ensure that clients see their counsel in conference, receive advice on evidence, and are not represented at the trial by counsel who has been inadequately briefed (119).

(18) Legal aid in criminal cases should cover all necessary steps to pursue an application for leave to appeal to the Full Court (125-129).

(19) Legal aid should also be available after a criminal appeal to support an application for an Home Office reference (130-132).

(20) In principle, only lawyers should be entitled to act as paid advocates (137), but lay representation by some unpaid members of the family might sometimes be allowed (139); a company director should be allowed to represent his company (141).

(21) The two branches of the profession could improve their working relationship in several respects (145-152).

(22) We do not favour contingency fees (153), but we do favour a Contingency Legal Aid Fund, and believe this proposal should be further studied (154-159).

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