WA BAR
Association

**ORIGINS OF THE WA BAR**

# The Independent Bar in Western Australia Origins and Functions of the Western Australian Bar Association

From an article written in 1996

*by the Hon Mr Justice David Malcolm AC QC, former Chief Justice of Western Australia*

Since the formal establishment of the WABA, the Association has provided the corporate structure which represents the interests of those who have elected to practise solely as barristers. As at 1 September 1995 there were 114 members who were practising barristers resident in Western Australia, and 56 interstate members. The resident members included 22 Queen's Counsel and of the interstate members 30 were Queen's Counsel from other States who had taken silk in Western Australia. The WABA also has honorary and judicial members.

The WABA was not formed for the purpose of dividing the profession into barristers and solicitors as is the case in some jurisdictions where the profession is 'divided'. The formation of the Independent Bar was a professional response to a perceived professional need. The continued growth of the Bar has provided concrete evidence of the continuation of that need.

The formation of the Independent Bar was facilitated by the flexibility built into the Legal Practitioners Act 1893. The Act then provided for persons to be admitted as 'practitioners'. A practitioner was defined as 'a person admitted and entitled to practise as a barrister, solicitor, attorney and proctor of the Supreme Court of Western Australia, or in any one or more of these capacities.' No person had in fact been admitted to practise as a solicitor alone or a barrister alone, and no specific provision existed for separate qualifications for any such admission. The invariable practice was for all persons to be admitted as barristers, solicitors and proctors of the Supreme Court of Western Australia. It is for this reason that the profession in Western Australia had been described as a 'fused' profession or as an 'amalgam'. Lawyers who practise otherwise than exclusively as barristers generally describe themselves as barristers and solicitors, whether they are sole practitioners or partners in a firm. This position is reflected in the current definition of 'practitioner' which, as amended in 1992, is 'a person admitted as a barrister and solicitor of the Supreme Court of Western Australia.'

The 1983 Report of the Inquiry into the Future Organisation of the Legal Profession ('the Clarkson Report') concluded that the development of the Independent Bar in Western Australia had been successful and that its members had served the community and the profession well. It was pointed out in the Report that the way in which the development had occurred had provided the advantages of an Independent Bar, without the disadvantages of a separate Bar.

The Clarkson Report regarded the Independent Bar as a voluntary specialty rather than a distinct branch of the profession. The Clarkson Report considered that it was undesirable for the Bar to drift into a state of separation along the lines of the Bar in New South Wales and Victoria. This would have the result that the Bar would become entirely self-regulatory and function separately. Rather, the Report said that the adoption of separation should require a conscious decision as a result of public discussion and legislative action. The Clarkson Report noted that under the existing Legal Practitioners Act it could be possible for a person to be admitted as a barrister only. It recommended that the legislation should be amended to eliminate that possibility without further specific amendment. The Report did not say that the Bar should never become separate as well as independent. It said only that legislative action should be required to make the change. The only effect of the recommended amendment was to limit the flexibility which previously existed.

The Independent Bar serves several functions. In the first place, it constitutes a service group to firms of solicitors or sole practitioners. Some firms do not hold themselves out as providing services as advocates in Court. They look to the Bar to provide these services. Others look to the Bar to provide services in fields outside their own areas of practice. Others still make use of the Bar to relieve situations of overloading within their own offices. In the second place, the organisation of the Independent Bar provides an opportunity for practitioners to develop a degree of specialisation in advocacy in Court and in consultancy out of Court. This aspect of the Independent Bar was specifically recognised by the Clarkson Report. In the third place, members of the Bar constitute a body of independent professionals. The advantages of such independence have long been recognised in terms of the objectivity and detachment which the barrister is able to bring to the matter in hand. It is the view of the WABA that the absence of a direct relationship between lay client and counsel greatly improves the capacity of counsel to perform his or her other dual function, both as an adviser and advocate for the lay client and as an officer of the Court. In the fourth place, the Bar provides a group of independent practitioners who are available to all firms, large and small, offering advice and representation of a high standard in a situation where a solicitor may feel free to instruct them without the risk of losing a client.

While the criterion for membership of the WABA is practice solely as a barrister, the Bar remains an integral part of the profession. It is, however, important for the members of the Independent Bar to have an association which can represent the views of barristers. The Constitution of the Association requires every member of the WABA to be a member of The Law Society of Western Australia. This requirement was originally included in the Constitution to demonstrate to the profession that the founders of the Independent Bar did not intend to establish a separate or an elitist branch of the profession. Membership of The Law Society of Western Australia is a qualification for membership of the Association. Ironically, this means that members of the Independent Bar are the only practitioners for whom membership of The Law Society is compulsory.

Contrary to the conclusion expressed in the Clarkson Report, the Independent Bar is not merely a voluntary specialty. Those who practise solely as barristers constitute a branch of the profession. It is, however, an independent rather than a separate branch. Its independence is a reflection of its functions. Separation would involve an alteration of status which, as far as I know, has never been contemplated. Apprehension about separation should not be allowed to obstruct recognition of the Independent Bar as a branch of the profession. Those who have adopted a particular mode of practice cannot

be equated with those who specialise in a particular field or fields. The WABA is affiliated with the Australian Bar Association ('ABA'). The WABA is recognised by the respective Bar Associations in the other States of Australia as a viable and respected association of barristers. As a constituent member of the ABA the WABA is kept informed of developments, difficulties and achievements elsewhere. The most important achievement of the ABA has been the provision of universal Professional Indemnity Insurance Cover for all barristers.

The WABA has formulated and adopted a set of Conduct Rules which govern the conduct of members and the etiquette that they are expected to observe. The WABA reserves the right to discipline its own members who are, at the same time, subject to the statutory jurisdiction of the Legal Practitioners Complaints Committee and the Legal Practitioners Disciplinary Tribunal. The professional standards and rules of conduct which those who practise solely as barristers are required to observe are supplementary to the Rules of Conduct followed by the profession generally. The WABA provides a corporate framework for the acceptance of professional standards and codes of conduct as a matter of contractual obligation.

It is important to remember that those who have elected to practise solely as barristers have no monopoly of work in the Courts, but are in healthy and friendly competition with the many competent practitioners who have elected to remain in the amalgam. This feature has had the result that those who practise solely as barristers tend, on average, to be persons of greater experience and seniority than the profession as a whole. While the indications are that this situation is likely to continue for the foreseeable future, a greater number of younger practitioners have joined the Bar in more recent years. Furthermore, opportunities have been created for graduates to spend up to six months of their articles at the Independent Bar and a system of pupillage has been introduced.

In a submission to the New South Wales Law Reform Commission in 1979 the former Chief Justice, Sir Lawrence Jackson, said that he had no doubt that the Bench and the community were better served by having an Independent Bar. As he put it:

Since 1960 there has been a marked improvement in the standards of advocacy and in forensic practice in this State and in all Courts. There have been barristers who have specialised in particular work, which has proved most helpful to solicitors as well as to the Courts. The Bar has, from the outset, realised the benefits which flow from not being closely identified with the client, and hence being able to take an objective and dispassionate view of the case. Although many 'amalgams' still do Court work, their advocacy has also improved by the influence of the barristers and the example they set.

In my opinion, since Sir Lawrence Jackson wrote in 1979 his conclusion has been continually reinforced. The current strength of the Bar reflects the level of service and the skill of its members. It is of great importance to the administration of justice and the work of the Courts in Western Australia that the Bar continues to maintain and enhance the quality of advocacy and advice provided by its members.