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LAWYERS IN NEW SOUTH WALES, 1856-1914
- THE EVOLUTION OF A COLONIAL PROFESSION

by

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A thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Australian National University

May 1979
This thesis is my own work.

S.J. Woodman
# CONTENTS

<table>
<thead>
<tr>
<th>ACKNOWLEDGEMENTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABBREVIATIONS</td>
<td>(iv)</td>
</tr>
<tr>
<td>A NOTE ON TERMS</td>
<td>(v)</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>(vi)</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>(vii)</td>
</tr>
<tr>
<td>PART I: 1787-1856: The Establishment Of The Legal Profession In New South Wales</td>
<td>1</td>
</tr>
<tr>
<td>Chapter 1 The Early Years, 1787-1856</td>
<td>2</td>
</tr>
<tr>
<td>PART II: The 1860s: The Legal Profession In Retreat</td>
<td>50</td>
</tr>
<tr>
<td>Chapter 2 The Decline Of Lawyers' Political Influence</td>
<td>51</td>
</tr>
<tr>
<td>Chapter 3 Problems At The Bar</td>
<td>92</td>
</tr>
<tr>
<td>Chapter 4 The Failure Of The Law Institute</td>
<td>128</td>
</tr>
<tr>
<td>Chapter 5 Solicitors Without Common Cause</td>
<td>155</td>
</tr>
<tr>
<td>PART III: The 1880s: The Legal Profession Finds New Strength</td>
<td>185</td>
</tr>
<tr>
<td>Chapter 6 Changes At The Bar</td>
<td>186</td>
</tr>
<tr>
<td>Chapter 7 Solicitors With A New Outlook</td>
<td>244</td>
</tr>
<tr>
<td>Chapter 8 Improved Relations Between Barristers And Solicitors</td>
<td>293</td>
</tr>
<tr>
<td>Chapter 9 The Revival Of Lawyers' Political Influence</td>
<td>325</td>
</tr>
<tr>
<td>PART IV: The 1890s and 1900s: Another Challenge For The Legal Profession</td>
<td>367</td>
</tr>
<tr>
<td>Chapter 10 A United Response By Solicitors</td>
<td>368</td>
</tr>
<tr>
<td>Chapter 11 A Formal Organisation For The Bar</td>
<td>414</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>453</td>
</tr>
<tr>
<td>APPENDICES</td>
<td>458</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>470</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.D.B.</td>
<td>Australian Dictionary of Biography.</td>
</tr>
<tr>
<td>A.O.N.S.W.</td>
<td>Archives Office of New South Wales.</td>
</tr>
<tr>
<td>H.R.A.</td>
<td>Historical Records of Australia.</td>
</tr>
<tr>
<td>H.R.N.S.W.</td>
<td>Historical Records of New South Wales.</td>
</tr>
<tr>
<td>N.S.W.P.D.</td>
<td>New South Wales Parliamentary Debates.</td>
</tr>
<tr>
<td>S.M.H.</td>
<td>Sydney Morning Herald.</td>
</tr>
</tbody>
</table>
A NOTE ON TERMS

'Barrister' - the principal duty of a barrister or counsel is to advocate the interests of a client before the courts. He also advises solicitors upon points of law and the drafting of documents. In general, a barrister undertakes no work except through the intervention of a solicitor. He does not deal directly with a client.

'Solicitor' or 'Attorney' - a solicitor or attorney is primarily concerned with the office work of the law. He confers with clients, gives advice, drafts documents, conducts negotiations, prepares cases for trial and retains barristers for advice on special matters and for advocacy before the courts. Originally in England, a solicitor's practice was restricted to the chancery courts, an attorney handled the common law business, and a proctor was responsible for ecclesiastical and admiralty matters. This distinction was, however, never applied in New South Wales and the terms 'solicitor' and 'attorney' are treated as synonymous throughout the thesis.
 Between 1856 and 1914 the character of the legal profession in New South Wales changed markedly. It evolved from being a small group of primarily British practitioners with no real foundations in the colony into an independent and cohesive colonial profession strongly conscious of the need to preserve its standards and reputation and of its responsibilities with respect to the administration of justice. Historians have, however, largely overlooked the significance of this change and its implications for the legal and political development of the colony. Although lawyers appeared to have won a secure and leading position in the social and political life of New South Wales by the 1850s, there were important weaknesses in the composition of the profession which soon undermined its standing and influence. Not only did the profession lack the numbers and the experience to cope adequately with the demands of the colony which was expanding rapidly in the wake of the gold rushes but its political authority was linked closely to the fortunes of the colony's conservative social elite whose former dominance of the government of New South Wales disintegrated rapidly after the introduction of responsible government in 1856. Neither barristers nor solicitors showed any inclination or ability to respond. They were primarily concerned with furthering their individual careers and clearly had little sense of commitment to the more general interests of the profession. In consequence, the profession's reputation deteriorated and law reform slipped into abeyance.

It was not until the 1880s that lawyers began to demonstrate new strengths. In part this change was due to the increased size and experience of the profession and the apolitical standing of its leaders, but above all
it reflected the new character of the individual lawyer. Two decades of prosperous economic development had greatly enhanced the opportunities for colonial youth to aspire to the law. They brought with them a strong awareness of the position which they had won and a determination to preserve the rights and reputation of lawyers. These sentiments, together with an increasing realisation of the profession's colonial identity, led to the upgrading of admission standards and legal education, provided the basis for effective cooperation among lawyers upon a wide variety of issues, and greatly increased both the interest of barristers and solicitors in law reform and their ability to pursue that object successfully. The united response of lawyers to the economic difficulties and political changes of the 1890s and early 1900s confirmed how far these new qualities had become fundamental elements in the character of the legal profession of New South Wales.
INTRODUCTION

Though historians and lawyers have not entirely neglected the evolution of the legal profession in New South Wales between 1856 and 1914, it is a subject which remains only imperfectly understood. The New South Wales Bar Association, when it decided in 1961 to 'ascertain and preserve' the history of the local Bar, was aware that it 'embarked on uncharted seas'.\(^1\) Since that date a number of important publications and theses have appeared upon various aspects of lawyers and the law during these years and the Bar Association has published the results of its own researches. None of these studies has, however, fully come to grips with how the legal profession evolved in the second half of the nineteenth century and why. The Bar Association's own history, though a mine of information and anecdote, has several important limitations. Not only does it evaluate the Bar in isolation and overlook the interrelationships which existed between the two branches of the profession but it also tends to focus upon leading personalities and notable events, as is inevitable in a pioneering study, without a fully developed appreciation of how far these particular foci are characteristic of the profession as a whole. It does, for instance, label the period when Sir Alfred Stephen was Chief Justice as 'The Age of Reform';\(^2\) - a generalisation which, while acknowledging Stephen's undoubted interest in law reform, overlooks the fact that the last years of his presidency on the bench from 1861 to 1873 were among the blackest for the fortunes of law reform. Without a more general appreciation of the condition of the profession as a whole at a particular period of time it is impossible to resolve such apparent contradictions.


\(^2\) Ibid., p. 83.
The other studies written about lawyers in New South Wales during these years have invariably restricted their scope to a prominent personality or specific theme and made little attempt to evaluate the character of the lawyer group at that time. Most would, however, have drawn considerable benefit from a fuller understanding of developments then taking place within the profession. Robyn Parsons, in her study of lawyers in New South Wales politics between 1870 and 1890, considered those barristers and solicitors who served in the Legislative Assembly primarily as a body of private members of parliament and not as representatives of the profession in general. As a result, Parsons analysed only the actual performance of these lawyers within the system of faction politics and did not investigate how this was affected by overall changes in the character of the profession. Similarly John Forbes, in his comparative study of attempts to fuse the legal profession in the different Australian states, focused upon the actual moves to amalgamate the two branches and provided little information as to whether and for what reasons the significance of this question might have changed for barristers and solicitors. The biographers of prominent legal personalities have, in like fashion, sidestepped the need to identify and explain their subjects in terms of the values and character of the profession to which they belonged. To John Molony, John Hubert Plunkett was a conservative, a Catholic and a public servant before he was a lawyer and his interpretation of Plunkett's career hinges upon that allotment of priorities.

Grainger's portrait of James Martin⁶ and John Ryan's examination of Bernhard Ringrose Wise⁷ both emphasise the political side of those men's lives and show little appreciation of the legal environment in which they spent the majority of their time and earned their incomes. Only John Bennett in his thesis on Frederick Matthew Darley has placed the legal before the political and social aspects of his subject's life but even he has failed to take more than a cursory glance at the general character of the profession to which Darley belonged as barrister and judge for almost fifty years.⁸

This thesis is not an attempt to rewrite or criticise those studies which have already been written. Its aim is rather to complement them by developing an understanding of how the legal profession as a whole evolved in New South Wales between 1856 and 1914 and the effect which its changing character had upon the profession's public performance. To that end, the thesis seeks to go beyond those lawyers who occupied prominent legal, political or social positions and to analyse the role and the attitudes of the majority of barristers and solicitors whose fame seldom stretched beyond their brass door plaque or the pages of the annual Law Almanac.

Few of these lawyers have, however, left either personal or official papers that are readily accessible to the historian. To overcome this deficiency, I have undertaken an exhaustive examination of the admission papers of some 2,961 barristers and solicitors who either trained for the law or sought admission in New South Wales prior to 1914. This research, when

used in combination with the more formal records of their future careers provided by the *Law Almanacs* and the personal reminiscences and papers that do exist, has enabled me to construct a picture not only of their character and attitudes at the time they entered the profession but also an explanation of their responses to particular events later in their careers. From this basis, the thesis offers both a comprehensive interpretation of the evolution of the legal profession in New South Wales in these years and a new perspective upon the relative importance of people and events which have previously been considered in isolation from the professional context of which they were a part.
PART I

1787-1856: THE ESTABLISHMENT OF THE LEGAL PROFESSION

IN NEW SOUTH WALES

Although initial arrangements were made for the administration of justice in New South Wales in 1787, it was not until sixty years later that it was possible for both barristers and solicitors to be trained and admitted in the colony. Chapter One traces the evolution of the legal system of New South Wales between 1787 and 1856. It shows how the lawyers who practised there gradually overcame early weaknesses, developed local admission rules to preserve their standards and reputation, and assumed a leading position in colonial society.
CHAPTER 1

THE EARLY YEARS, 1787-1856

By the 1850s the legal profession of New South Wales appeared to enjoy a satisfactory reputation in practice and to have won an influential position in colonial society and politics. In his *Reminiscences* published in 1863, Mr Justice Therry recalled that the Sydney Bar was modelled 'as nearly as circumstances will admit' on the English Bar. Many of its members had received the benefits of English training; English law reports were quite speedily available in the colony; and the general standard gave no scope to ill-qualified British practitioners who might decide to 'try their hand' in the colony. Therry estimated the average income of leading barristers at £3,000 per annum, sometimes higher. Colonial attorneys, it would appear, similarly were not inferior to their counterparts in England. In politics the influence of lawyers was amply demonstrated by their prominence in the constitutional debate over responsible government in the early 1850s. Not only were W.C. Wentworth, W.M. Manning, J.H. Plunkett and J. Martin among the most active and forceful framers of the constitution bill, but the constitution committee which sought to negate the strong conservatism and social elitism of those framers was also led by lawyers, including J.B. Darvall, G.K. Holden, R. Johnson and J. Norton.

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The profession's authority far exceeded its representation of twelve in a Council, part nominated and part elected, of fifty-four members. Even that numerical level, second only to pastoral interests, was itself impressive.  

The standing of the legal profession was by no means restricted, however, to issues with which it had an exceptional affinity. Lawyers enjoyed considerable influence in a wide variety of political, social and cultural activities. Three of the most influential figures in colonial politics during the 1840s - William Charles Wentworth, Richard Windeyer and Robert Lowe - were all members of the Bar. Though Wentworth, now the possessor of large estates, no longer commanded that popularity which he had won a decade earlier as resister of the autocratic government of Darling, as defender of emancipists' rights and as leader of the Australian Patriotic Association, he continued to take a prominent role due to the strength of his own personality and the support of pastoralists within the Council. He led the squatters in their demand for new land regulations and the transfer of imperial control over crown lands to the colony. Together with Lowe, Wentworth was active in promoting a system of state primary education and in founding the University of Sydney in 1850. Richard Windeyer lacked Wentworth's strong 'class' interests but contributed to many legal, educational and social improvements after his elevation to the Council in 1843. He sponsored important measures relating to trial by jury and libel; took an active part in educational...
institutions such as the Sydney Mechanics' School of Arts; argued strongly for the promotion of trade in Australian agricultural products with Britain and other colonies; and promoted many social causes including the welfare and protection of aborigines, and the Temperance and Benevolent Societies.  

Robert Lowe, though resident in the colony only from 1842 until 1850 and frequently in direct opposition to Wentworth, also exercised considerable influence. He was responsible for the original report on state-supported non-denominational schools and pressed hard for their introduction. He campaigned vigorously both in the Council and as editor of the Atlas for the granting of responsible government and local control over colonial wastelands, but not in the hands of the squatters. Lowe also led the popular agitation against the renewal of transportation in 1849.

Leading Sydney solicitors were similarly in the forefront of colonial life. George Nichols, the attorney whose success as an advocate before the Quarter Sessions was to concern the Bar in 1841, successfully passed twenty-three bills in the Council between 1848 and 1851 besides serving on numerous select committees. His activities in the Patriotic Association and as editor of the Australian, where he advocated self-government and denounced transportation, earned Nichols a reputation as a radical reformer. He was also a leading Freemason and a member of several other organisations. George Allen was more conservative but no


less active. Outside his lucrative legal practice he was deeply involved in educational, benevolent and religious bodies. These included Sydney College, the Benevolent, Temperance and Agricultural and Horticultural Societies, the Wesleyan Missionary Society and several bible groups. Allen served on the Sydney Municipal Council from 1842, was elected mayor in 1844, and nominated to the Legislative Council in 1845. James Norton and Randolph John Want enjoyed similar reputations, as did George Kenyon Holden who gave much time to the promotion of colonial education, campaigned against the resumption of transportation, was secretary to the 1849 Law Commission and led a moderate group in the New South Wales constitution committee. One of the leading figures in colonial literary circles was an attorney Nicol Drysdale Stenhouse. He personally accumulated one of the best private literary collections in the colony, the treasures of which he made widely available, and his Balmain residence became a centre for many writers and intellectuals including Rowe, Fowler, Harpur, Kendall, Dalley and Deniehy. Deniehy, who had served articles with Stenhouse, was noted for the lectures on poetry and literature which he delivered to the Mechanics' School of Arts from 1851 to 1853. He supported the radical Australian League and the liberal constitution committee and gained wide repute as an orator for his ridiculing of

Wentworth's proposals for a 'bunyip aristocracy'.

The true significance of the profession's standing can only be appreciated, however, in the context of its earlier history, tainted as it was with convictism, personal inadequacies and a generally low reputation. The original arrangements made for the administration of justice in New South Wales in 1787 had reflected the colony's penal character. The criminal court, which consisted of a Judge-Advocate and six naval or military officers appointed by the governor, closely resembled a court martial. Guilt or innocence was decided by a majority vote, with the Judge-Advocate himself voting on both verdict and sentence, which might extend to death or corporal punishment. The Judge-Advocate assisted by two residents appointed by the governor handled civil matters.

Though these forms worked satisfactorily at first due largely to the efforts of Judge-Advocate David Collins, an officer of the marines with no formal legal training, they soon proved inappropriate to the needs of the increasing number of free settlers in the colony. The problem was exacerbated by the conduct of Collins' successors, Richard Dore and Richard Atkins, who proved quite unsuited to the task. Dore was a qualified attorney but he gained little respect because of his inconsistent attitudes and the mistakes he made in judgments. He ran into conflict with Governor Hunter and clashed with colonial profiteers, including the


officers with whom he shared authority in the court. The resulting charges of prejudice by both sides damaged the administration of justice even further. The final straw was the appointment of Atkins upon Dore's death in 1800. As Judge-Advocate, Governor Bligh pointed out, Atkins 'has been the ridicule of the community: sentences of death have been pronounced in moments of intoxication; his determination is weak, his opinion floating and infirm; his knowledge of the law is insufficient and subservient to private inclination; and confidential cases of the Crown he is not to be entrusted with'. Governors King and Bligh pleaded with the Colonial Office for the appointment of a professional man of rectitude and resolution, suitably remunerated, to replace Atkins.

The need to obtain sound legal advisers within the colony was given even greater urgency by the appearance before the court of several emancipist attorneys. George Crossley and Michael Robinson in particular had capitalised upon the inadequacies of character and legal knowledge of both Dore and Atkins. Besides frequently giving advice to the judges, they acted as agents for suitors in the civil court, conducted other legal business and encouraged litigation. Their methods were speculative.

They took no payment in advance but claimed a percentage of the amount of any judgment recovered by them. 20 Even though Crossley and Robinson had been transported for perjury and forgery respectively, they were reputed to hold most of the colony's legal business. Neither Dore nor Atkins was a match for 'their artful chicanery'. 21 The appointment of a capable Judge-Advocate, Ellis Bent, in 1809 following the Rum Rebellion reduced the influence of these emancipist attorneys upon the executive but had little immediate effect upon their general practices. 22 There were few incentives to attract qualified legal practitioners to the colony.

Both Bent and the new governor, Macquarie, were determined, however, that this unsatisfactory state of affairs should not persist. They proposed a complete reform of the criminal court and its incorporation into a single Supreme Court with trials before a jury of twelve. Bent also insisted that the services of several competent practising lawyers must be obtained to overcome the need for parties either to conduct their cases personally or to have recourse to the emancipist attorneys. 23 As a result of these recommendations, new arrangements were introduced for the administration of justice in 1814. The criminal court remained unchanged because Lord Bathurst still believed that there were many

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advantages in 'the continuation of a judicial officer who bore a commission exclusively military'.

Civil matters were to be handled in future either summarily by the Governor's Court where they did not exceed fifty pounds or by a Supreme Court consisting of a Judge and two magistrates appointed by the governor when larger sums were in dispute. The Colonial Office appointed Jeffrey Hart Bent, the Judge-Advocate's brother, to this new position and arranged for two attorneys, Moore and Garling, to begin practice in the colony.

The improvement promised by these changes was not felt immediately. J.H. Bent proved to be vain and quarrelsome. He clashed with Macquarie about the suitability of court accommodation and, despite the inconvenience to suitors, delayed the opening of the court for nine months in the hope that Garling, the second attorney, might arrive in time. When the court did sit finally, there was still only one attorney in the colony and emancipist attorneys Crossley and Edward Eagar applied to the court for permission to practise. They pointed out that they had important business pending for respectable clients and their claims to admission were supported by Macquarie and the two magistrates whom he appointed to the Supreme Court. Bent, however, viewed the matter differently. He

29 A full account of these incidents may be found in Governor Macquarie to Earl Bathurst, 22.6.1815, H.R.A., Series I, Vol. VIII, pp. 479-542.
criticised the governor for interfering with the affairs of the court and adjourned its sitting indefinitely when unable to convince the two magistrates of his viewpoint. A conflict between Ellis Bent and Macquarie over the respective standing of the judiciary and the governor heightened the controversy and emancipists were also excluded from practice in the Governor's Court before the Judge-Advocate. Finally the Colonial Office was forced to terminate the Bents' appointments. Macquarie was strongly advised that emancipists should not be allowed to practice except when there were not two free lawyers in the colony.

The new judges, John Wylde and Barron Field, were far more satisfactory, although not completely above criticism. Wylde, according to Commissioner Bigge several years later, had 'such an habitual and studied obscurity of phrase and meaning' that he tended to confuse rather than clarify issues before the criminal court, but in general his conduct was fair-minded and independent. Field, on the other hand, was not on good terms with either Wylde or the executive. His judgments were elaborate and technical rather than wise and he introduced complex forms of procedure and pleading from England. Field's most notable action, for the purposes of this study, was the striking of solicitor T.S. Amos from the roll in August 1819 for his partnership with George Crossley.

Amos had engaged Crossley as his principal clerk in 1817 and contracted to pay him half the profits of his business less £400 a year. Field, who gave Amos no opportunity to defend himself, considered such conduct improper for an attorney although the real reason for his action appears to have been Amos' slowness to repay certain moneys he had recovered on the judge's behalf. Field subsequently was prepared to allow Crossley a limited right of practice in matters arising out of unfinished business in Amos' office. Whatever Field's motives, his action emphasised the continuing unsatisfactory state of the legal profession and the administration of justice in the colony.

By 1819, however, the Colonial Office could no longer ignore the transformation which was taking place within New South Wales. The military style of administration and law which had sufficed in the original penal settlement was quite inadequate for the complex social and economic relationships developing among a population increasingly dominated by emancipists and free settlers. In consequence, John Thomas Bigge, formerly Chief Justice of Trinidad, was appointed to undertake a wide-ranging investigation into the state of the colony and its dependencies. One of Bigge's three reports was devoted solely to the judicial establishments of New South Wales and Van Diemen's Land. In that report, Bigge suggested the establishment of a Supreme Court of New South Wales, invested with both


civil and criminal jurisdiction and presided over by a single Chief Justice. This judge, he proposed, should no longer combine the duties of a committing magistrate, prosecutor, juryman and judge, but should be assisted by an Attorney General, have no connection whatsoever with the jury, and be independent of the executive. Bigge made many other suggestions to promote greater uniformity with English procedure but, influenced by the 'exclusives' who considered any association with emancipists to be degrading, he supported the retention of a military-style jury of seven officers in criminal cases, a conclusion quite out of character with the remainder of the report. Upon the basis of this report, the Colonial Office undertook a complete review of the colony's legal system.

The first steps towards putting the profession and the administration of justice on a proper footing were taken in 1823 by the British statute 4 Geo. IV, c. 96 and the Letters Patent issued thereunder. These measures created a Supreme Court of New South Wales. It was to be held before a Judge or Chief Justice appointed by the Crown, to be a court of record, and to have 'cognizance of all pleas, civil, criminal and mixed, and jurisdiction in all cases whatsoever, as fully and amply in New South Wales ... as his Majesty's courts of King's Bench, Common Pleas and Exchequer at Westminster'. In addition, the Supreme Court was to exercise the same equitable jurisdiction as held by the Lord Chancellor.

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38 4 Geo. IV, c. 96, s. 2; for details on the drafting of this statute, see C.H. Currey, Sir Francis Forbes, Sydney, 1968, pp. 20 ff.
in England, and power in probate and insolvency matters, but not in matrimonial causes. The Chief Justice had to be an English or Irish barrister of at least five years' standing. His precedence and salary were regulated and he was precluded from holding 'any other office or place of profit and emolument'. It was the responsibility of the judge to make rules for the efficient running of the court and to admit qualified persons 'to act as well in the character of barristers and advocates as of proctors, attorneys and solicitors'. Membership of this fused profession was restricted to advocates of Great Britain and Ireland, attorneys of England and Ireland and Scottish Writers to the Signet. Only if there were insufficient practitioners available under this formula could the court make rules and set standards for the local admission of such fit and proper persons as were necessary. The Letters Patent specifically denied the admission of emancipist attorneys.

Though these new provisions sought to overcome several of the problems which had plagued the functioning of the legal profession, they quickly ran into difficulties. Immediately after their admission as barristers in September 1824, Robert Wardell and William Charles Wentworth moved that 'the gentlemen at present practising as solicitors and acting as barristers be compelled to retire from the Bar - confining themselves to their own province in the profession as attorneys etc.; and yielding to the barristers the twofold privilege of exercising their functions as

39 Ibid., ss. 9, 10, 22, 23.
40 Charter of Justice, clauses 2, 3, 5, 6, 7.
41 4 Geo. IV, c. 96, s. 17.
42 Charter of Justice, clause 10.
43 Ibid.
barristers and practising as attorneys solicitors etc. They based their claim upon their construction of s. 10 of the 1823 Letters Patent and were granted a rule by the court calling upon the attorneys to show cause why they should not forthwith retire from the Bar. Six leading attorneys appeared in court to rebut this challenge to their rights. Though some professed little personal interest in appearing before the courts, they based their defence upon the principle involved and were most indignant that their accepted rights should be questioned in this way. Chief Justice Forbes upheld the attorneys' viewpoint despite a counter-attack from Wentworth who 'occupied nearly two hours in wading through Acts of Parliament, Commissioner Bigge's Report, and the Charter; in the course of which considerable ardour and abundant talent were pressed into service'. However, the question was by no means closed as Forbes expressed the hope that a division of the profession might be achieved in the near future.

The possibility of the profession being divided was enhanced in 1828 when the Supreme Court judges received statutory authority to make rules for, among other things, the admission of attorneys, solicitors and barristers. In the following March the judges proposed that the functions of barristers and solicitors be separated, making it legally impossible to practise in both capacities. They considered that the four senior solicitors should be given a choice as to the branch in which

45 Bennett, A History of the New South Wales Bar, pp. 35-36.
47 Ibid.
48 9 Geo. IV, c. 83, s. 16.
they would prefer to continue, but otherwise only those admitted as barristers in England or Ireland should have rights of audience before the Supreme Court. The proposed rule was criticised vigorously by both solicitors and the press but supported unanimously by the Bar. The judges, unconvinced by the arguments for retaining the status quo, announced in September 1829 their decision that the division of the legal profession would be in the interests of the public and of the lawyers as well as helping to expedite the business of the court. They were, however, more liberal in their attitude towards the rights of colonial attorneys. The rule, they announced, was not to take effect until his Majesty's pleasure was known, at which time it was to have the force of law. In the meantime those already on the roll of the court would be able to elect in which branch they would practise in the future. Otherwise the court would hear only barristers admitted in Great Britain and Ireland. Attorneys would have to be admitted as such in England, Ireland or Scotland, or to serve five years as clerks either solely in New South Wales, or partly in the colony and the rest in Britain or Ireland.

When the division of the profession finally came into force in November 1834 there was considerable uproar. Some attorneys who had failed to make their choice were only permitted to complete the current

49 Sydney Gazette, 28.3.1829, p. 2; 2.4.1829, p. 2.
50 K.G. Allars, 'The Development of the Legal Profession in New South Wales Until 1850', pp. 179 ff. The proposal was debated before the Full Court on 1 June 1829, the first day of the ensuing term, Sydney Gazette, 4.6.1829, p. 2.
51 Bennett, op. cit., pp. 44-45. The concession to attorneys at present practising in the colony was only made reluctantly by the judges, see Governor Bourke to E.G. Stanley, 2.6.1834, H.R.A., Series I, Vol. XVII, pp. 259-261.
business which they held as advocates. The court rejected an appeal from five of these solicitors that the new provision should not apply to those already admitted under the Letters Patent of 1823. Press opinion was also largely hostile except for the Sydney Morning Herald. The attack was led by the Sydney Gazette, the Australian and the Monitor. They argued that the change would only increase legal expenses, present the Bar with a monopoly, and exclude all but the most affluent colonials - who could afford the requisite voyage to and study in England - from the Bar. Their arguments were to no avail and several years later attorneys also lost their right of audience before the Quarter Sessions. The Bar had raised the question of whether attorneys were allowed to appear before inferior tribunals in the light of the successful practice being enjoyed

53 Bennett, op. cit., pp. 48-49.
54 S.M.H., 4.11.1834, p. 2; 6.11.1834, p. 2; 11.11.1834, p. 2.
55 Cf. Australian, 4.11.1834, p. 2; 7.11.1834, p. 2; 11.11.1834, p. 2; 18.11.1834, p. 2; Allars, op. cit., pp. 188-90.
56 The Bar held a meeting at the Attorney General's office on 13 November and there resolved that professional business would only be done upon the instruction of an attorney; that fees must be paid to the barrister's clerk when a brief was delivered, otherwise the clerk should not receive it; and that no barrister was to influence the choice of an attorney, Australian, 14.11.1834, p. 2. The Australian was so vigorous in its criticism of the decision to divide the profession that its editors, solicitors Robert Nichols and Francis Stephen were brought before the court for contempt (see R v. Stephen and Nichols (1835) 1 N.S.W.L.R. 244). As a result, Nichols was discharged but Stephen was fined £50 and required to provide sureties for good behaviour, Bennett, op. cit., pp. 49-51.
there by George Robert Nichols. While neither the judges nor the governor would interfere, the latter suggested that it was the responsibility of the magistrates to decide who should appear before them. As a result a special court of Sydney magistrates ruled that only barristers had the right to practise before them. The magistrates made an exception in Nichols' case, due to his past services, and allowed him to elect in which capacity he would prefer to appear before them. Thus by 1841 the legal profession was fully divided while tensions existed between barristers and solicitors that would take many years to heal.

A second problem to emerge from the 1823 provisions was that while they excluded emancipists from the profession they did not include any satisfactory scheme for regulating the standards of those who were admitted. Most solicitors arrived unchecked from England and Ireland and those articled clerks trained in New South Wales received an essentially practical education which was totally dependent upon the individual master solicitor. Judge Therry, upon his arrival in the colony in 1829, observed that 'though several members of both branches of the profession were men of talents and respectability, the profession generally was not in high estimation'. Some solicitors were 'of high character; but there were also a few adventurers of damaged reputation from England, Canada and other colonies'. This questionable reputation stayed with solicitors during

57 In 1839 Nichols had by proceedings in the Supreme Court established his right as an attorney to appear for an accused in Petty Sessions, Ex parte Nichols (1839) 1 Legge 123. J.K. McLaughlin, 'The Magistracy in New South Wales, 1788-1850', LLH. thesis, Sydney University, 1973, pp. 483-87 shows that particularly in country areas there was considerable controversy as to whether solicitors could or should appear before the Quarter Sessions.

58 Bennett, op. cit., pp. 60-61.

59 Therry, op. cit., p. 347.

60 Ibid.
the 1830s: James Mudie in a very bigoted attack contended that they were 'of such a stamp that they would be briefless in England'. There was, he pointed out, 'little or no restraint upon the spirit of litigation' as 'actions of the most frivolous description were ... got up for the mere purpose of making business'. Many lawyers were merely pawns in the hands of 'imported legal scoundrels' who had come to the colony as convicts.

Despite the extreme prejudice behind Mudie's outburst, there was clearly some truth in his accusations. In 1838 the Supreme Court found it its duty to cancel a contract between an attorney and John Williams, the holder of a ticket-of-leave, for the performance of legal services. Williams, who had been a solicitor prior to his transportation for forgery, had proved his competence in the colony as chief clerk to Nicol Allen, an attorney. When Allen died, as many as seven colonial attorneys had approached Williams with proposals that amounted to legal partnerships. As a result Williams had accepted the offer of an attorney named Roberts for a guaranteed income of £450 per year and other advantages and it was this contract which the court held to be improper. The case led to the introduction of new provisions to prevent the recurrence of such practices. The judges passed a rule of court which forbade any colonial attorney to employ as an assistant, clerk or writer, any person transported to the colony or convicted of any felony, or wilful and corrupt perjury or common barratry. Secondly, the statute 3 Vic. No. 8 sought to prevent

62 Ibid., p. 248.
63 Ibid., pp. 248-250.
64 *In re Roberts and Williams* (1838) 1 Legge 89.
65 Ibid., p. 90.
convicts from acting as conveyancers. It laid down that any transport, or person under the sentence of a criminal court of New South Wales, who drew or prepared an instrument relating to realty or personalty or to any proceedings at law or in equity should be liable, upon summary conviction before two justices, to be worked in irons on the roads for a period not exceeding twelve months. 66 Williams' case could not have been an isolated instance for the court to be led to adopt such a drastic solution.

The press welcomed this decision as a step towards ensuring the respectability of attorneys' offices but the Sydney Gazette in particular felt that much more was needed. 67 That paper considered that the root of the evil lay in the admission of improper characters to act as attorneys. It took up a suggestion of Mr Justice Burton that admission should be refused to those not morally and legally qualified and urged the judges to appoint a committee of the most respectable lawyers 'to inquire into the legal qualifications and characters of those persons who present themselves for admission'. 68 The Gazette also proposed that a purge be made upon the same grounds of those lawyers already on the roll. It asked 'whether the gambler, the drunkard, the adulterer or the man who sets public decency at defiance' was suitable to be an attorney and announced its intention to show in the near future that all these terms could be applied to some colonial solicitors. 69 Leading solicitor George Allen confirmed this view that local solicitors were not of a high standard in

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66 3 Vic. No. 8, s. 2.
68 Ibid.
69 Ibid.
February 1837 when he recorded the death of a newly arrived solicitor E.F. Pogson in his diary. Allen regretted Pogson's passing because he understood that he was doing very well and particularly because 'he was one of the few respectable practitioners in the colony'.

The condition of the Bar was also not above reproach. The first Attorney General, Saxe Bannister, caused frequent difficulties for Governor Darling and engaged in a bitter personal feud with fellow barrister Wardell which came to a climax in a duel with pistols at Pyrmont on the day before Bannister's departure from the colony. Neither of his successors was a notable improvement. A.M. Baxter, besides lacking both legal knowledge and experience, was 'extravagant, a spendthrift, a drunkard, and guilty of scandalous ill-treatment of his wife'. John Holland also proved quite unsuited as he was trained as an attorney, not a barrister, and appears to have been somewhat eccentric. The Governor protested to the Colonial Office against the assumption that the colony 'affords an excellent Asylum for Fools and Madmen, as well as Rogues and Vagabonds'. The problem was not, however, restricted to those in official positions. Early in 1828 John Mackaness, who had begun his career in the colony as Sheriff and only recently had been admitted to the Bar, was convicted of assaulting the acting Solicitor General William Foster after a dinner of the magistrates at the Liverpool Quarter Sessions in

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72  Ibid., p. 40.
73  Ibid.
75  Governor Darling to Viscount Goderich, 30.1.1828, ibid., pp. 743-44.
professional terms the most serious case of misconduct was that of barrister R.J. Kinsman who was struck from the roll in 1835 for perjury by false allegations in an answer in Chancery filed in 1833. 76 It was not a conduct record of which the Bar could be proud.

In fairness to the profession, it must be admitted that the context within which lawyers had to work was not conducive to stability and high standards of practice. The rules of court which Chief Justice Forbes had drawn up in 1826 were quite different from those which regulated proceedings at Westminster. Forbes's aim had been to promote speed, economy and easiness of litigation. He simplified proceedings, dispensed with undue formality and gave the court authority to adapt procedure to the requirements of the individual case. 77 Though these rules appear to have satisfied the ends of justice adequately, they meant that practitioners were unfamiliar with the rules and they were strongly opposed by Mr Justice Burton who was appointed to the bench in 1832. 78 Burton, a capable and ambitious lawyer but with a ready temper, worked strenuously to expunge Forbes' innovations and to promote a far greater emphasis upon English custom in the administration of justice. 79 The issue was not fully resolved until after Alfred Stephen was appointed to the bench in 1839. Stephen considered that Forbes's rules represented no system at all and with the approval of the other judges gradually brought the rules of court into

76 Allars, op. cit., pp. 204-07.
78 Therry, op. cit., p. 335. The Australian, 8.4.1841, p. 2, recorded Burton's view that 'the more that English customs were introduced into this Colony in the administration of justice, the better it would be for its inhabitants'.
line with the English system introduced by the 1832 Uniformity of Process Act and the 1833 Civil Procedure Act. These changes met with strong opposition from established colonial practitioners but were greatly appreciated by British lawyers who came to the colony during the 1840s. Such open differences of opinion on the bench must have created considerable uncertainty in the administration of justice and would have added little to the stature and authority of the court. This situation was not improved after 1837 by the volatile, stubborn and obstructionist behaviour of Mr Justice Willis which finally led even the diligent and conciliatory Chief Justice Dowling to an altercation in their robing room.

Several other examples serve to show how the administration of justice remained unsettled and often unsatisfactory before the 1840s. John Kinchela, Attorney General from 1831 until 1836 and sometime acting judge of the Supreme Court, was virtually deaf and consequently unable to perform his duties adequately before the Supreme Court. Many of his responsibilities fell to John Hubert Plunkett, the conscientious Solicitor General. Similarly inefficient were the court's administrative offices which remained poorly organised and mere sinecures for Colonial Office patronage until the passage of the Administration of Justice Act in 1840. Those appointed were generally quite unsuited to their tasks and were frequently overwhelmed by the liabilities of their office.

80 Bennett, op. cit., pp. 64-65.
81 Ibid.
ability of the Supreme Court to handle the demands of the expanding colony was also limited in many directions. It could not service the hinterland because the Colonial Office refused before 1840 to sanction the expense of the court going on circuit. These difficulties were largely overcome in that year by the creation of the Resident Judgeship at Port Phillip and the granting of authority to the colonial legislature to establish circuit courts. The appointment of Willis to the new judgeship restored harmony to the Sydney bench. In addition, it was during the 1830s that a comprehensive procedure for appeals evolved after the abolition of the Governor's appellate jurisdiction in 1828. Not only did points of law and new trials become referable from a single judge to all three sitting en banc, but the Supreme Court was able through the use of prerogative writs to review the decisions of justices of the peace both as to facts and law. Trial by jury was similarly slow to find a secure place in the administration of justice. Though the court was able to order trial by a jury of twelve in civil suits from the early 1830s, it was not until 1839 that the provision for criminal cases to be tried before a jury of seven commissioned officers was finally abolished. The optional civil procedure of trial by a judge and assessors remained until 1844. In total the conditions which surrounded the work of the legal profession before the 1840s did little to offset the lawyers' own instability.

85 Ibid., pp. 75-78.
86 Ibid., pp. 77-78.
87 Dowling, who considered Willis 'a fidgetty, restless, conceited, self-opinionated fellow, hoped that 'he may stick (at Port Phillip) and that I may never see his face again', ibid., p. 36; Currey, op. cit., p. 187.
88 Bennett, op. cit., pp. 166-183; Castles, op. cit., pp. 80-81.
89 Bennett, op. cit., pp. 80-88.
or to encourage settled practice and procedure.

By the late 1830s and early 1840s both the judges and solicitors themselves were taking steps to improve the standing of the profession. Spurred on by the increasing number of solicitors seeking admission in the colony 90 and by the recent English decision to introduce a system of examinations for articled clerks, 91 the Supreme Court drew up a series of rules in 1838 to regulate the training of articled clerks and the admission of solicitors. They provided that before a clerk could enter into articles he was to be presented to the judges. He might also be required to produce character references, proof of educational attainments and evidence of having reached the age of seventeen years. During articles a clerk was not to engage in any other form of business and, at the conclusion of his articles, he was to be examined upon his legal knowledge by the Master in Equity, one barrister and two solicitors. If this panel refused to admit the clerk to practice, he could appeal to the court in chambers before at least two judges. No attorney was permitted to train more than three articled clerks at the same time. The rules required that persons applying for admission should give notice, made provision for the readmission of persons previously admitted, and decreed that attorneys not practising for upwards of twelve months should be struck from the roll. In addition, attorneys from overseas who sought admission in New South Wales faced tighter controls. They had to provide evidence of their previous admission by affidavit, give the names of several referees and explain their movements prior to seeking entry to the colonial profession.

90 The number of new solicitors admitted in New South Wales was 1834 (4), 1835 (5), 1836 (10), 1837 (12), 1838 (5), 1839 (13), 1840 (21), 1841 (17), 1842 (11), N.S.W. Rolls of Barristers and Solicitors, 1824-1876, v25, A.O.N.S.W.

Their initial admissions were conditional, to be confirmed at the end of twelve months if their conduct proved satisfactory, and until 1846 they were subject to a five guineas admission fee. Such sums, the court intended, would help to establish a law library. Though these rules could not guarantee the conduct of an attorney after his admission, they were a significant step towards preventing the initial admission of unsuitable persons to the law.

Solicitors demonstrated their concern to raise the standards of both admission and practice by their endeavours to establish an effective professional organisation. Their moves in this direction must have received additional impetus from the recent exclusion of solicitors from advocacy before the Quarter Sessions, an event which made only too plain the inability of colonial solicitors to defend their own interests. In August 1842 they set up the Sydney Law Library. A president, secretary, treasurer and a committee of five proprietors, elected annually, were to conduct the business of the library. Membership as proprietors was open to solicitors, attorneys and proctors of the Supreme Court who paid an admission fee of £50 and an annual subscription of £3. Ordinary members had to pay £10 each year and articled clerks the reduced rate of £3.

Members of the Law Library did not, however, find these arrangements

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92 Allars, 'The Development of the Legal Profession in New South Wales Until 1850', pp. 236 ff. In September 1846 Lowe moved in the Legislative Council to have the admission fees refunded as the law library which they were to have established had not been progressed with. The government also questioned the legality of the fees, S.M.H., 30.9.1846, p. 2. Lowe's motion was carried, S.M.H., 17.10.1846, p. 2.

particularly satisfactory as they felt the need for greater influence and a wider range of activities. They resolved at their general meeting in February 1843 to form a Law Society, whose aims were:

- to promote good feeling and fair and honourable practice amongst members of the profession so as best to preserve the interests and retain the confidence of the public, in conjunction with their own just rights and privileges;
- to aid all such measures as shall best promote a cultivated understanding and propriety of conduct in Articled Clerks during the period of clerkship;
- to attend to all applications for admission, so as to guard the Court, the public, and themselves from persons disqualified by conduct or education from being admitted to the profession, and to offer to the proper authorities, from time to time, such efficient new Rules of Practice as may appear useful and necessary for the conduct and dispatch of business, with due regard to the saving of expense to suitors.94

The Society was to have a hall, a comprehensive library, rooms for private conciliations and professional meetings, and an office of Registry. The latter would register transactions in property and monetary loans and handle professional matters such as applications for partnerships, for articles, and for managing and other clerks.95 The affairs of the Law Society were to be conducted by a president, secretary and committee of five members. Membership was open to attorneys who paid an entrance fee of £25, an annual subscription of £3, and were approved by two-thirds of the membership at a ballot. Such members acquired an inalienable life interest in the Society. Alternatively, a solicitor could subscribe to the library at the rate of £5 a year for the use of those facilities, provided that he was accepted at a similar ballot. For articled clerks,

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94 *Rules of the New South Wales Law Society*, established 1842, Sydney, 1843, p. 3.
the Society made its library available at £3 each year. 96

The fragmentary evidence which remains about the Law Society of 1843 suggests that for several years at least the association did strive to upgrade the standards and protect the interests of colonial solicitors. The Society's executive consisted of the leading Sydney attorneys, presided over by James Norton and including solicitors of the calibre of George Allen, George Kenyon Holden, Brent Clements Rodd and Randolph John Want. 97 In March 1843 they wrote to the judges informing them of the Society's formation and objects and offering its services to the court. In particular they referred to the association's intention of communicating with the Law Society of England in order to gain information upon those applying for admission in the colony. 98 The Law Society also presented each Supreme Court judge with an admission card to its library which was expecting a large shipment of the latest textbooks and reports within a few months. Thereafter, the Society's intention was to expand and update the library continually. 99 With this progressive spirit and a membership of seventeen, the association was ready to undertake wider initiatives. 100 These included a protest to the Attorney General about the injurious effects to the public of the Bar retainer rules drawn up in June 1842 as a result of which the Bar reverted to the use of the

96 Ibid.
99 Ibid.
100 Ibid., p. 247.
English rules. The Law Society, together with the Bar, also opposed the application of barrister Edward Brewster in August 1846 to be struck off the roll and admitted as a solicitor. The court refused Brewster's request because he did not have the necessary qualifications under the admission rules. In the following year the Law Society took up the cause of a member who had been charged as an accomplice to fraud when previously practising in London. Its actions secured both vindication of and compensation for the member.

The Law Society continued to operate into the 1850s but by that time appears to have lost much of its initial impetus. This may have been due to a failure to gain more widespread support among solicitors but was most probably the result of the very sharp decline in legal business during the 1840s. According to James Norton, the number of actions commenced in the Supreme Court fell from 9,700 in 1841 to a mere 1,500 in 1846. The depressed circumstances had for a time swelled insolvency business but even that had now halted, Norton claimed, because of the extreme caution of all parties in entering into engagements; and if credit be given, they rather bear with grievances than have recourse

102 S.M.H., 6.8.1846, pp. 2-3.
103 Napier and Dely, op. cit., p. 1; Allars, op. cit., pp. 250-51.
104 The last record I have discovered of activities by the Law Society was a meeting in 1854 when it decided that solicitors' offices should close at one o'clock on Saturdays, S.M.H., 1.12.1856, p. 5. The Law Society, however, was not directly represented at any of the important enquiries into the administration of justice in the later 1850s.
105 As a result less than one quarter of the amount was being spent on legal proceedings that had been expended several years earlier. These circumstances were not conducive to the success of an association whose subscriptions were high and whose objects required considerable finances.

The reduced effectiveness of the Law Society did not, however, hinder further improvements in the lot of the colonial solicitor. Solicitors gained or regained rights of audience in the Courts of Requests in 1842, 106 the Quarter Sessions in 1849, 107 and in the newly established District Courts in 1858. 108 The District Courts Act also made provision for the appointment of a solicitor of seven years' standing, if selected, to the position of judge. 109 Such a step would have been inconceivable two decades earlier. In another area, colonial attorneys profited considerably from the statute 11 Vic. No. 33, assented to in 1847, which regulated both the taxation of attorneys' bills of costs and the practice of conveyancing. That act provided 'an expeditious and summary method ... by which the charges in an attorney's bill of costs were legally sanctioned, without the necessity of bringing an action; and when the amount was ascertained, judgment could be entered up for it,

105 V. & P. (L.C., N.S.W.), 1847, Vol. 2, pp. 478-79. Sir James Dowling wrote to his son in 1841: 'The depression is frightful ... the lawyers are the only people who get anything and they are thriving on the miseries of their neighbours ...', Currey, op. cit., p. 27. See also T. Callaghan, Diary, 1838-1845, Mitchell Library, MSS.Set 2112, Item 1, entries for 2.10.1841, Vol. 1; 19.11.1843, Vol. 2.

106 6 Vic. No. 15, s. 46.

107 13 Vic. No. 7, s. 7.

108 22 Vic. No. 18, s. 62.

109 Ibid., s. 27.
The taxing officer was required 'to consider the skill and labor properly employed, and the expense and responsibility incurred in the preparation thereof'. Though the act made it difficult to swell bills of costs artificially and made conveyancing transactions taxable, it did ensure that attorneys received proper remuneration for the professional skill, time and energy involved. Further, the act protected the interests of the profession against unauthorised competition by providing that only barristers, attorneys or certificated conveyancers 'shall for or in expectation of any fee, gain, or reward, directly or indirectly draw or prepare any conveyance, or other deed or instrument in writing, relating to any real estate, or any proceeding in Law or Equity'. To limit the preparation of legal documents solely to attorneys would have been unrealistic when so few were practising in the country areas, but henceforth anyone who desired to act as a conveyancer had to be examined before the Master in Equity 'touching his ... skill and knowledge in conveyancing, as well as his character for integrity'. By the 1850s, therefore, colonial attorneys had come a long way from the days when they had been tainted with convictism and scandal.

The Bar also appeared to have overcome its major weaknesses by the 1850s. An English barrister who witnessed proceedings in the Supreme Court had 'fancied himself transported to England'. He considered that 'the Sydney Bar is highly respectable in character and is certainly the

111 11 Vic. No. 33, s. 5.
112 Ibid., s. 13.
113 Ibid., s. 14; see also Supreme Court Rule, 30.12.1847.
most numerous and perhaps, taken as a whole, the best Bar out of England'.

This improvement was not due directly to colonial initiatives. Until 1848 admission to the Bar remained restricted to barristers of Great Britain and Ireland. They were admitted as a matter of course on the motion of a barrister, usually the Attorney or Solicitor General. No advertisement was necessary and occasionally the court even dispensed with the need to produce a certificate of call or admission. In these circumstances the primary reason for the Bar's better standing lay in the personal qualities of several of the growing number of barristers seeking admission in New South Wales from the late 1830s. They included Richard Windeyer, William Montagu Manning, Edward Broadhurst, John Bayley Darvell and Robert Lowe, all of whom were to make significant contributions to the legal and political development of the colony. Both the introduction of the controversial Bar retainers rules in 1842 and several references to Bar meetings and dinners suggest that this small group of colonial barristers had some sense of esprit de corps and an appreciation of their status which would have helped to promote higher standards. Thomas Callaghan observed in May 1840 after a Bar dinner at Petty's that 'it was, so far as speaking went, a very foolish affair: altho I think that the custom is not a bad one: it generates social feeling and good

114 Allars, op. cit., p. 219.

115 A. Stephen, Introduction to the Practice of the Supreme Court of New South Wales, Sydney, 1843, pp. 71-72.

116 Between 1837 and 1841, 24 new barristers were admitted in New South Wales, see N.S.W. Rolls of Barristers and Solicitors, 1824-1876, A.O.N.S.W., X 25.

fellowship'. At another meeting held in the office of acting Attorney General Therry, Windeyer criticised W.A. Purefoy for dining with attorneys during a recent circuit. There had been only one dining room but Windeyer, who equated attorneys with convicts, thought Purefoy 'would have better preserved his honour if he had eaten bread and cheese in his bedroom'.

This assumed superiority, however, was not always carried through into the Bar's behaviour, especially while litigation was depressed in the 1840s. In December 1846 the court sentenced Darvall and Windeyer to prison for fourteen and twenty days respectively and ordered them to enter into a bond to keep the peace towards each other for two years for their conduct following an unimportant action for debt. Darvall, accused by Windeyer of conducting the case unfairly, had struck the latter with his brief whereupon Windeyer prepared to assault Darvall. The Sydney Morning Herald welcomed this decision by the court in the light of public dissatisfaction with the conduct of the Bar. Another incident to reflect little credit upon the Bar was the clash between fellow barristers Lowe and Broadhurst after the former had publicly denounced the virtues of one of Broadhurst's sisters in 1844. Upon rumours of a duel they were both bound over to keep the peace for twelve months but at the end of that period Broadhurst, who still expected an apology, denounced Lowe as a coward and the court was again forced to intervene. Chief Justice Stephen, delivering the sentence of the court, regretted that a man known as one

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118 Callaghan, _op. cit._, Vol. 1, entry for 31.5.1840.
120 Allars, _op. cit._, pp. 207-10.
121 _S.M.H._, 25.12.1846, p. 2; see also Callaghan, _op. cit._, Vol. 1, entry for 13.3.1841 and Vol. 2, entry for 11.4.1842 for similar incidents.
'of strong mind - education and intellect' should have been unable to rise above the 'prejudices and absurd usages of society'. He sentenced Broadhurst to pay a fine of £100, enter into a bond of £200, and furnish sureties of £100 to keep the peace for two years. Such incidents were, however, uncommon and with barristers of the calibre of Plunkett and Manning filling the Crown Law Offices the Bar appeared far more stable and reputable than it had a decade earlier.

Indeed, the stability and repute of both the judges and the crown law officers by the 1850s contributed greatly to the standing not only of the Bar but of the profession and the administration of justice as a whole. The Chief Justice, Sir Alfred Stephen, had been appointed to the Supreme Court in 1839 after an active career as Attorney General in Van Diemen's Land. His influence was soon apparent with the introduction of Westminster style procedures into the court and he was largely responsible for the drafting of the 1840 Administration of Justice Act. Stephen succeeded James Dowling as Chief Justice in 1844, was knighted two years later, and worked strenuously to ensure the dignity of the court and respect for the administration of justice. Apart from his judicial duties, he was chairman of the 1848 Law Commission, a prominent Anglican and a member of many literary and benevolent associations. Stephen remained on the bench until 1873.

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122 A.D.B., Vol. 3, pp. 234-36; Bennett, A History of the New South Wales Bar, pp. 55-56. To avoid arrest on one occasion, either Broadhurst or Lowe apparently escaped from the police in Clarence Street on a sidesaddle horse, S.M.H., 8.4.1844, p. 2.

123 In 1847 Chief Justice Stephen admitted that 'until of late years' the colonial Bar had a low reputation, V. & P. (L.C., N.S.W.), 1847, Vol. 2, p. 419.

New South Wales in 1844 after twelve years' practice as a special pleader and barrister in England. Despite his lack of experience in equity, he soon established a reputation as a practical, efficient judge, noted for his independent disposition and close reliance upon English precedent. Dickinson retired in 1860 after acting as Chief Justice for a year during Stephen's absence overseas.125 The third judge, Roger Therry, was an Irish barrister who had come to the colony in 1829 as Commissioner of the Court of Requests. He was widely respected for his good conduct and legal knowledge and served for some time as Attorney General before his appointment as Resident Judge at Port Phillip in 1844. Two years later Therry transferred to the Supreme Court in Sydney and took over the duties of the Primary Judge in Equity. Like Attorney General Plunkett, Therry was distrusted in some circles for his Catholicism and his interest in promoting more equitable treatment for his co-religionists, but this did not damage his standing as a judge.126

Attorney-General Plunkett and Solicitor General Manning had established similarly long records of public service in the colony by the 1850s. Plunkett had arrived in Sydney in 1832 to fill the post of Solicitor General but his early duties had been greatly increased by the deafness of Attorney General Kinchela, whom he succeeded four years later. In addition to his legal duties, Plunkett served as one of the twelve government nominees in the Legislative Council between 1843 and 1851, was the first chairman of the National Education Board, was active in the establishment of Sydney University and published the Australian Magistrate,

126 J.M. Bennett, 'Introduction' to Therry, op. cit., pp. 11-49.
an essential guide for justices of the peace. Despite his humanitarian approach to law reform and his reputation for impartiality, his career was not without controversy. He was passed over for the Chief Justiceship in 1844 even though he enjoyed the support of Governor Gipps, was criticised by his church for his attitude to education, and managed to antagonise both squatter and anti-squatter interests by his attitudes to transportation and the land law. The efforts of ministries to retain Plunkett's services as Attorney General after the granting of responsible government in 1856 showed, however, that his ability as a crown law officer continued to be highly prized.127 William Manning, the Solicitor General between 1844 and 1856, had arrived in the colony in 1837 and had served as a chairman of Quarter Sessions and Commissioner of Courts of Requests before his appointment as Solicitor General. In 1848 and 1849 he acted as a judge of the Supreme Court where he relieved Chief Justice Stephen of the equity work, and in 1851 he was nominated to the Council by Governor Fitzroy. Manning was also involved in many commercial ventures. Like Plunkett, his public standing was confirmed in 1856 with his election to the first Legislative Assembly.128 With leadership of this order, the lawyers of New South Wales and especially the Bar had a sound basis for consolidating their reputation and their influence.

The position of the Bar was further reinforced by the rejection in the late 1840s of a proposal to re-amalgamate the profession. The issue had continued to be of considerable importance because the division imposed

127 For the career of J.H. Plunkett, see Molony, An Architect of Freedom.

in 1834 had excluded colonial youths from practising at the Bar unless they had the opportunity to study in England. In 1840 attorney George Nichols had petitioned the Legislative Council to make provision for the local admission and examination of barristers in its bill to promote the more effectual administration of justice, but the Council had not granted his plea.\(^{129}\) The sharp decline in legal business during the 1840s raised the additional question, even among the supporters of division, of whether the colony could sustain an independent Bar. Under these circumstances, the Bar was far from comfortable in 1846 when Edward Brewster, after an unsuccessful attempt to be disbarred and admitted as an attorney,\(^{130}\) introduced a bill into the Council to end the division of the profession. Brewster argued that amalgamation would cheapen and expedite legal proceedings, allow the native born to practise at the Bar without the necessity to study overseas, and remove a system which was 'unsuited to the circumstances of the colony and prejudicial to the interests of the community at large'.\(^{131}\) His proposal won the support of several prominent members of the Council, including Dr Bland and Robert Lowe, but was strongly opposed by Wentworth and the other barristers who denied that any reduction in costs would occur.\(^{132}\) As a result of the Bar's opposition, the Council finally referred Brewster's bill to a select committee which was to enquire into the best means of reducing legal expenses and, if this proved not to be amalgamation, to draw up a scheme

\(^{129}\) Currey, op. cit., pp. 234-35.

\(^{130}\) Forbes, op. cit., pp. 114-16.

\(^{131}\) S.M.H., 16.9.1846, pp. 2-3. The text of Brewster's Bill was reprinted by the S.M.H., 21.9.1846, p. 2.

\(^{132}\) S.M.H., 16.9.1846, p. 3.
for the admission of colonial youths to the Bar.\textsuperscript{133}

The Bar, in a petition to the Council, set out clearly its reasons for opposing the measure. While it felt that native youths ought to enjoy better access to practice before the courts, it considered that only law reform would reduce legal costs and that amalgamation would lessen the professional standing and not the incomes of barristers.\textsuperscript{134}

Those barristers who appeared before the select committee took these issues further. S.F. Milford, the Master in Equity, argued that such a change would not make proceedings less expensive but would only produce confusion and fresh litigation because of an increasing number of mistakes by professional advisers.\textsuperscript{135} A barrister had duties to the public, he insisted, 'beyond those for which he is merely paid'. Such checks against fraudulent actions, ignorance or favouritism would be lost if legal proceedings became 'matters of trade'. Milford believed that liberal education, eligibility 'to move in a superior grade of society', and the sense of barristers being 'something beyond mere workers for gain' rendered the Bar above attorneys 'in the same manner as a Knight or a Peer is above a Commoner' and contributed substantially to the better administration of justice.\textsuperscript{136} Chief Justice Stephen agreed that it was 'of vast public importance to have a learned, efficient, dignified and able Bar'.\textsuperscript{137} Amalgamation, he felt, would not only destroy the junior

\begin{itemize}
\item \textsuperscript{133} \textit{S.M.H.}, 25.9.1846, pp. 2-3.
\item \textsuperscript{134} \textit{V. \& P. (L.C., N.S.W.)}, 1846, 2nd Session, pp. 384-85. Other petitions against re-amalgamation were received from both barristers and solicitors at Port Phillip. Petitions in favour came from certain residents of Sydney and Parramatta, \textit{S.M.H.}, 24.9.1846, p. 2.
\item \textsuperscript{135} \textit{V. \& P. (L.C., N.S.W.)}, 1846, 2nd Session, pp. 399-400.
\item \textsuperscript{136} \textit{Ibid.}, pp. 401-06.
\item \textsuperscript{137} \textit{V. \& P. (L.C., N.S.W.)}, 1847, Vol. 2, p. 419.
\end{itemize}
Bar but would provide a livelihood for the 'man of very inferior capacity and stamp of character'. A'Beckett, the Resident Judge at Port Phillip, wrote that while he was confident that respectable attorneys would discuss legal problems with ability and dignity, he was apprehensive of 'the pettifoggers, the tricksters, the flaw hunters and sharp shooters, the bloodsuckers of costs, the fruits of their own chicanery and the errors of others, the pert and pragmatical charlatans who would waste the time and lower the dignity of the court'. The only barrister not to support this view was Archibald Michie who believed that the Bar was not large enough to permit either specialisation or healthy competition while attorneys, excluded from the 'intellectual duties' of the profession, were forced to charge professional fees for purely 'mechanical duties'.

By contrast, even those colonial attorneys who supported division in principle were not convinced that the present arrangements were appropriate to colonial circumstances. Randolph John Want favoured division because it tended to promote specialisation and because he felt that it was not possible to conduct properly the work of both branches simultaneously. At the same time he believed that the monopoly of so small a Bar was prejudicial to the interests of the community, particularly in country areas. Not only were the powers of the court over the Bar very restricted but the number of barristers was not sufficient to permit

138 Ibid., pp. 468-69.
139 Ibid., p. 424.
140 Ibid., pp. 485-87. Michie considered that costs under amalgamation might be reduced by as much as 50%, although this was contradicted by John Gurner, former Chief Clerk of the Supreme Court (pp. 481 ff.).
141 V. & P. (L.C., N.S.W.), 1846, 2nd Session, p. 408.
the kind of self-disciplining which operated within the English Bar.\textsuperscript{142} James Norton, another leading solicitor who shared Want's views upon the virtues of division, did not feel that practice was at present adequate to sustain a learned and intelligent Bar.\textsuperscript{143} He suggested the introduction of a less artificial system of pleadings and rules until a divided profession was again practicable.\textsuperscript{144} On the other hand, James Martin and Robert Johnson saw amalgamation as highly desirable. Martin insisted that, far from promoting speculative actions and lawyer-client bargains, it would reduce the expense of litigation and make the Bar competitive, independent of the judiciary and less servile in its quest for government appointments.\textsuperscript{145} He considered that it was of the utmost importance for the educated youth of the colony to be able to aspire to the Bar 'for it is upon this body, in the Colonies especially, that the maintenance of public liberty chiefly depends, and it is to them that the people must look for its leaders in every great political struggle which may arise.'\textsuperscript{146} Johnson argued that division only promoted incompetence, Bar irresponsibility, expense and a multiplication of labour.\textsuperscript{147}

Faced with these conflicting opinions, the select committee\textsuperscript{148}

\textsuperscript{142} Ibid., pp. 407, 411-12.
\textsuperscript{143} V. & P. (L.C., N.S.W.), 1847, Vol. 2, p. 478.
\textsuperscript{144} Ibid., pp. 478-79.
\textsuperscript{145} Ibid., pp. 442-46, 451-53.
\textsuperscript{146} Ibid., p. 442.
\textsuperscript{147} Ibid., pp. 457-59.
\textsuperscript{148} The members of the Committee were W.C. Wentworth, R. Windeyer, R. Lowe, J.B. Darvall, J.H. Plunkett (Attorney General), all of whom were barristers, as well as J. Lamb, C. Cowper, J. Robinson, T.A. Murray and E. Deas-Thomson (Colonial Secretary).
produced a compromise report which sought to overcome the present difficulties while avoiding fundamental changes in the structure of the profession and the administration of justice. It recommended that the legal profession remain divided but that attorneys be permitted to act as counsel in the Quarter Sessions and before the Supreme Court on circuit due to the scarcity of barristers in country areas. Further, it proposed that young men, born or educated in the colony and of competent character and attainments, ought to be able to aspire to the Bar. In return, it suggested that all practising barristers should have the option of being disbarred and becoming attorneys. The report concluded with the advice that only a complete revision of the rules and procedures of the Supreme Court would reduce expenses and improve efficiency in the administration of justice. Subsequently Wentworth, the committee's chairman, introduced a bill based upon these recommendations to allow attorneys to act as advocates in criminal cases at Quarter Sessions and on circuit, to facilitate transfers between the branches of the profession, and to provide for local tests by which colonial youths might qualify for the Bar. Wentworth himself made clear that he was personally opposed to all except the final clause and in the face of adverse criticism from the Bar, led by Attorney General Plunkett, who believed that it went

150 Ibid., p. 420.
151 Ibid.
152 Ibid., p. 421.
153 S.M.R., 26.4.1848, p. 3. Wentworth's Bill restricted attorneys to advocacy in criminal cases at Quarter Sessions and on circuit, but the committee as a whole does not appear to have made such a distinction between civil and criminal cases.
154 Ibid.
too far, and from others who thought it should have gone further, he withdrew the bill and amended it. The revised bill, which became the Barristers' Admission Act of 1848, simply provided for the admission of colonial youths to the Bar. It did not include any other of the select committee's recommendations. This conclusion, though it did not satisfy the advocates of amalgamation, removed one of their most powerful arguments against division. Together with the revival of legal business in the 1850s, it took the heat from the issue and left the Bar in a much stronger position to resist challenges to its independence.

The Barristers' Admission Act of 1848 established the Barristers' Admission Board. It was to consist of the Supreme Court judges, the Attorney General and two practising barristers elected annually by their brethren and empowered to examine candidates for the Bar with respect to both legal knowledge and personal character. The act laid down that these candidates were to be examined 'in the Ancient Classics both Greek and Latin in Mathematics in Law and in such other branches of knowledge' as the Board determined. Otherwise, it vested complete authority in the Board to make rules for the examination of candidates for the Bar. In consequence, the Board promulgated its initial rules in September 1848. These made detailed provisions for both the tests of legal knowledge, which the Board itself was to conduct, and those in the classics, mathematics and history, for which two independent examiners were to be appointed. Candidates were to be examined on the second Thursday of each

155 S.M.H., 26.4.1848, p. 3; 1.5.1848 (supplement), p. 3; Currey, op. cit., p. 237.
156 11 Vic. No. 57, s. 1.
157 Ibid.
term by questions in writing given to them and answered in the presence of at least two members of the Board or its examiners. No paper was to exceed two hours and the fee payable by a candidate to each examiner was set at ten guineas. The Board required a candidate to give notice fourteen clear days before the commencement of term, together with two character references, to the Master and Prothonotary as well as itself. The rules also prescribed the texts for study which appear to have been neither numerous nor particularly demanding. Apart from this, candidates for the Bar did not have to fulfil any formal course of training.

The Barristers' Admission Board was not, however, prepared to rest content until it perfected these rules in the light of early experience. In January 1850 it required that students for the Bar should henceforth pass the literary examination before being admitted to the law examination, but much to the chagrin of at least one candidate it continued to consider the tests as a single unit and success in one part only did not exempt the examinee from that section on a subsequent occasion. This situation remained unaltered until 1855 when the Board, as well as updating the prescribed textbooks, ruled that the law examination could be taken

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160 Petition of Singleton Rochfort re Admission of Barristers, ibid., p. 583. Apparently Rochfort had paid his fees of £21 and passed the literary but not the law examination. He applied to sit for the law examination again, but the Board insisted that he must pass the literary test again also and pay full fees. The judges refused to intervene as they did not have authority over the Board. Rochfort then turned to the Legislative Council to gain redress, but that house also refused to overrule the Board.
at any time within two years of passing the literary test. Three years later the Board appointed barristers Alexander Gordon and Isidore John Blake to undertake a comprehensive review of its examination requirements. Despite some disagreements between members of the Board, their recommendations became binding in the rules of July 1861 which considerably extended the scope of the law examination. In future it was to consist of five sections - real property, personal property, pleading and evidence, equity and a general paper - each based on specific texts. Each paper would contain between twelve and eighteen questions and was to be answered in two hours, although an additional hour might be allowed at the discretion of the examiners. The rules gave some flexibility to candidates depending upon their preference for equity or common law and required that the law examination be passed within three years of the literary test unless an extension was granted by the Board. They also tightened up the provisions relating to character references. Henceforth, one of the two character references had to be from either a barrister or a graduate of a university within the meaning of 20 Vic. No. 14 and 22 Vic. No. 23. Both referees had to be resident in Sydney and to have known the candidate for upwards of twelve months. In accordance with the provisions of those two statutes, the 1861 rules exempted candidates for the Bar, who were graduates within the terms of the acts, from the literary examination. As a whole, these new rules sought to

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161 Rules for the Admission of Barristers, 5.2.1855, N.S.W. Government Gazette, 1855, Vol. 1, p. 647.

162 Meetings of 7.7.1858, 14.4.1860, 13.6.60, Barristers' Admission Board, Minutes - 27.8.1858 to 21.11.1888, pp. 64, 65, 88-89.

163 Meetings of 5.7.1861, 19.7.1861, ibid., pp. 102-03; Rules for the Admission of Barristers, 19.7.1861, N.S.W. Government Gazette, 1861, Vol. 2, pp. 1580-81.
assure that no candidate unsuited by character or legal knowledge would be admitted to the colonial Bar.

Besides helping to preserve the standards of the Bar, this tightening up of colonial admission requirements was linked closely to plans to make barristers admitted in the colony eligible for judicial office. In November 1855 an act was passed to provide for the appointment of an additional Supreme Court judge whose primary responsibility was to service the settlement at Moreton Bay. The act restricted the appointment to barristers of England or Ireland 'or of this colony' of not less than five years' standing. Attorney General William Manning then sought to extend the principle further and introduced into the Legislative Assembly a bill entitled the Judicial Officers and Barristers' Admission Bill. It aimed to make barristers admitted in the colony eligible for judicial office and also to dispense with the examination in Greek classics for Bar candidates. Manning, however, announced his intention to withdraw this second clause in committee as a result of consultations he had held with the Bar. In this form the bill's passage would have been assured, but its progress was delayed and ultimately thwarted by the amendments proposed by George Nichols which greatly complicated the issue. Nichols moved successfully for the retention of the second clause relating to the study of Greek, and for the inclusion of Scottish advocates on equal terms with barristers of England and Ireland: He failed narrowly with a proposal to allow attorneys of ten years' standing to be admitted to the

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164 19 Vic. No. 31, s. 1.
165 S.M.H., 22.1.1857, p. 5. The speeches of Darvall, Faucett and Dalley illustrate the Bar's fear that its educational standards might be lowered, S.M.H., 7.2.1857, p. 7.
Bar without examination, an object somewhat secondary to the main thrust of the bill.\textsuperscript{166} Undeterred, Nichols moved for the recommittal of the bill on its third reading on the grounds that he had changed his mind about Greek scholarship being negated for students for the Bar. This manoeuvre permitted him to introduce a new clause allowing all those practising at the Bar prior to 1834, and who had remained solicitors, a period of twelve months to elect to join the Bar.\textsuperscript{167} The conservative Council, and particularly the barristers serving therein, opposed such a provision and when the Assembly in return would not accept its deletion the whole bill was laid aside.\textsuperscript{168}

The measure was not reintroduced until 1861 when W.C. Windeyer, a barrister, brought in his Judicial and Other Offices Qualification Amendment Bill. It was, he claimed, 'a very simple measure, its object being to admit the colonial barristers practising in this colony to all the privileges, with respect to judicial appointments, possessed by barristers of the mother country'.\textsuperscript{169} The Legislative Assembly agreed to the second reading without division but in committee passed an amendment to confer similar privileges upon attorneys.\textsuperscript{170} As in 1855 the barristers in the Council strongly opposed this amendment which would have made attorneys of five years' standing eligible for judicial office. In

\textsuperscript{166} S.M.H., 22.1.1857, p. 5.
\textsuperscript{167} S.M.H., 6.2.1857, pp. 4-5; 7.2.1857, p. 7.
\textsuperscript{168} S.M.H., 28.2.1857, p. 6; 6.3.1857, p. 4; 7.3.1857, p. 6; 13.3.1857, p. 5.
\textsuperscript{169} S.M.H., 14.9.1861, p. 6.
\textsuperscript{170} Ibid.
consequence the Council deleted the words 'or attorney' and made its own amendment restricting judicial appointments to barristers of ten years' standing. Fortunately for the bill, the Assembly chose to accept the Council's first amendment and the Council did not insist upon the second when the Assembly disagreed. The bill became law as 25 Vic. No. 9, which rendered barristers admitted under the Barristers' Admission Act of 1848 eligible for office as Chief Justice, Puisne Judge, Master in Equity, or 'any other office in the Colony'. Together with the revised admission rules promulgated in July 1861, it completed the transition which had begun in 1848 to ensure that barristers admitted in New South Wales were of comparable standard and enjoyed similar privileges to those who came to the colony from England and Ireland.

The final factor which contributed to the improved position of both barristers and solicitors by the mid 1850s was a resurgence in legal business from its depressed levels of the previous decade. The number of civil cases tried in the Supreme and Circuit Courts rose from 89 in 1850 to 268 in 1856, with the largest increase in defended cases before juries of four which were up from 67 to 239. As late as 1853 a large group of solicitors had petitioned the judges for an increase in the scale of costs 'both as between Party and Party, and as between Attorney and Client'. They based their claim upon the difficulties which they faced due to increases in rents, the cost of stationery and the necessaries of life,

171 S.M.H., 25.10.1861, p. 3; 31.10.1861, p. 2.
172 S.M.H., 7.12.1861, p. 5.
173 25 Vic. No. 9, s. 1.
174 Statistical Registers of N.S.W., 1848-1856. The criminal figures given are for convictions only and thus do not provide a comparable guide.
and 'the advanced state of remuneration for clerical and other labor'.

The Supreme Court viewed this request sympathetically and recommended to the Legislative Council that, while the actual details of costs were to remain unchanged, each overall bill of costs should be increased by twenty-five per cent. Though this proposal was couched in terms of providing fair remuneration for a diligent, learned and honourable profession, it did not impress the Council which rejected it by nineteen votes to five. Without the substantial increase in legal business during the decade, colonial solicitors would as a result have been hard-pressed. They were particularly vulnerable due to the frequent need to advance moneys in support of actions without any assurance of repayment.

The junior Bar benefitted similarly from the increased court business. Arthur Todd Holroyd, who had been admitted in 1845, recalled in 1857 the difficulties of trying to break into the colonial Bar:

... on my arrival here I found that the Bar was very much crowded; there were a great many eminent gentlemen who held a high position; and, having given a good deal of attention to criminal business in England, I determined upon endeavouring...
to get into practice through the channel of the Quarter Sessions of this Colony. For five or six years I never missed a Quarter Sessions, (with one or two exceptions only,) at Naitland, Berrima - afterwards at Goulburn - and subsequently at Bathurst; and I continue occasionally to attend the Quarter Sessions at Parramatta; and I formerly was a regular attendant there.179

While Holroyd's observations suggest a large Bar in numerical terms, it is more probable that the number of leading barristers was large only in relation to the quantity of legal business. Charles Stafford, a solicitor, recalled of these years that 'we had three or four leading counsel by whom nearly the whole of the business was monopolised'.180 Another solicitor, Gilbert Wright, giving evidence to the select committee on Supreme Court business, confirmed the nature of the change which had taken place. Discussing the practice of seniors transferring briefs when unable to appear simultaneously in both banco courts, he noted that the junior Bar by 'something like a conspiracy' were now demanding the fee as well as the privilege for such transfers.181 The demand for the seniors' services remained high, but court business was sufficient to prevent their monopoly. By reducing such frictions within the Bar and lessening the temptation for solicitors to stray into unprofessional conduct due to financial difficulties, the revival of legal business reinforced even further the improved standing of the profession.

Thus, by the 1850s, the legal profession of New South Wales had established for itself a position of standing and influence in social and

180 Ibid., p. 191.
181 Ibid., p. 162.
political life which appeared to be based soundly on the character of the profession itself. Not only had barristers and solicitors largely overcome their low reputation of earlier years and taken positive steps to lift their own standards and ensure their maintenance, but leaders of both branches were prominent in politics and a wide variety of social activities. In addition, the administration of justice had shaken free from the earlier compromises forced upon it by the colony's penal origins and developed a settled practice and procedure modelled closely upon that of England. One major issue, the question of amalgamation, continued to provoke dissension amongst lawyers, but even it diminished in importance after the 1848 inquiry. The admission of colonial youth to the Bar, increased legal business and the extension of solicitors' rights of audience all helped to defuse criticism of the status quo but some attorneys still felt deprived of their legitimate rights and resented the assumed superiority of the Bar. Such differences did not override, however, the impression of stability and competence conveyed by the judiciary, the crown law officers and the leading members of both branches, virtually all of whom had then been in practice for a decade or more. With the granting of responsible government in 1856 opening up a wealth of new opportunities in politics, administration and social organisation, the lawyers of New South Wales appeared ready and willing to take a leading role.
PART II

THE 1860s: THE LEGAL PROFESSION IN RETREAT

In spite of the authority and standing enjoyed by lawyers in the early 1850s, the ensuing two decades witnessed a dramatic reversal in the profession's fortunes. This section of the thesis analyses the profession's decline after 1856 and suggests that while the social and political transformations sparked off by the gold rushes and responsible government were catalysts for the change, the profession itself possessed several fundamental weaknesses which contributed substantially to the collapse of its influence and reputation. Chapter Two traces the decline in the lawyers' formal political influence and Chapter Three shows how the inability of the profession to respond was due largely to the inexperience and uncohesiveness of the colonial Bar. Though solicitors were less directly involved in these events, they too, as indicated by the failure of the Law Institute discussed in Chapter Four, lacked both the cohesion and the wider sense of purpose necessary to establish an alternate means of professional influence. The final chapter, Chapter Five, looks closely at the character of the individual colonial solicitor to explain why solicitors as a group were undynamic and unresponsive to the Institute's lead.
CHAPTER 2
THE DECLINE OF LAWYERS' POLITICAL INFLUENCE

Immediately after the granting of responsible government in 1856, the legal profession of New South Wales appeared likely to realise fully the potential which it had been displaying in the early 1850s. Its leaders continued to be held in high esteem and by late 1857, after appointments by the first Cowper and Parker ministries, lawyers were easily the largest occupational group represented in the Legislative Council. The four judges or ex-judges, six barristers and seven solicitors in the upper house made up thirty-eight per cent of its membership. \(^1\) They were the most consistent attenders and during the 1857 session cast forty-seven per cent of the total votes. \(^2\) Furthermore, lawyers initiated the bulk of legislation in the Council. Chief Justice Stephen, who became the Council's first president, personally introduced sixteen bills during his term of only two years in the legislature. Barristers A.J.P. Lutwyche and Edward Wise frequently proposed measures of law reform both in private and official capacities and solicitors Robert Johnson, Randolph John Want and George Kenyon Holden drew upon

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1 Connolly, 'Politics, Ideology and the New South Wales Legislative Council, 1856-72', p. 65. The remainder of the Council consisted of 11 Pastoralists/Agriculturalists (24%), 10 Merchants/Manufacturers (22%), and 7 from the Other Professions and Civil Service (16%).

2 Ibid., p. 66. The S.M.H., 14.6.1861, p. 3, referred to 'a great outcry' against the number of lawyers in parliament.
wide practical experience to introduce changes on many legal subjects.\textsuperscript{3}

As a result of their activities, colonial statute law continued to parallel closely that of England.\textsuperscript{4}

This prominent position which lawyers enjoyed in the Council proved, however, to be only shortlived. Events in the decade after 1856 made clear the close links between the profession and the conservative ruling elite which had controlled the nominated Council up to that time but whose ideology and interests were out of touch with the rapid social and political transition sparked off by the gold rushes. There emerged a new radical liberalism which advocated popular democracy, drew its support from the rapidly expanding skilled artisan and small commercial groups, and showed little respect for the opinions of those who had previously exercised authority due either to their records of public service, the extent of their property or the size of their business interests.\textsuperscript{5}

\textsuperscript{3} Details of the measures introduced by lawyers in the Legislative Council may be found in the Alphabetical Registers of Public and Private Bills printed annually in the Council's Journal. Between 1856 and 1861 lawyers, in either private or official capacities, introduced 103 of the 128 bills which began in the Council. W. Forster noted that "anyone who watched that House must see the imposing effect that was obtained by having three Judges in it. The result of this had been that almost the entire legislation and business in that House had been conducted by the Judges, and by some few lawyers ... joined with them ...", S.M.H., 11.11.1857, p. 4.


Representatives of this radical liberalism came to dominate the newly formed Legislative Assembly and, rejecting any notion that their authority should be subject to review by another house constituted along less democratic lines, sought to assert the power of the Assembly to override the Council in all matters of importance. The resultant clashes of interest between the two houses brought the eclipse of conservative power by 1861 and severely damaged the influence of the legal profession.

The first important change to affect the position of lawyers as a group in the Council was the resignation of the Supreme Court judges from that body. The judges had been appointed initially 'to bring their legal skills to the revision of legislation and, in particular, to ensure that nothing passed into law which was unconstitutional, contrary to the laws of England, or an infringement of the rights of any interest'. They were to serve public, not political, ends but even in 1856 there were fears that membership of the upper house would undermine the independence and the integrity of the judiciary. Such apprehensions were most prevalent among liberals who generally disliked or distrusted the conservative leanings of the judges.

Stephen, Dickinson and Therry, on the other hand, firmly asserted that they were entitled to act both as judges and legislative councillors and that the two functions were compatible. They considered

6 Connolly, op. cit., p. 59; Empire, 20.5.1856, p. 4; S.M.H., 15.5.1856, p. 4.

7 Empire, 30.5.1856, p. 5. W. Forster in the Assembly 'looked upon the presence of judges in a legislative chamber in this colony as part of that old colonial system under which the colony so long suffered, and which so long weighed down its resources like an incubus', S.M.H., 11.11.1857, p. 4. The Empire, 7.6.1856, p. 4, claimed that Sir Alfred Stephen's position as President of the Legislative Council was in fact a political appointment dependant upon the Donaldson ministry.
themselves to be 'of no party, of no faction'. Far from detracting from their judicial efficiency, Stephen considered that parliamentary duties were almost relaxation in comparison with their work on the bench.

In 1853 Stephen had proposed a form of Council which would be presided over by the Chief Justice and he felt it only right that the judges' lengthy experience should be pressed into the service of the community at times when the courts were not in session.

Liberals in the Assembly were not prepared, however, to accept these arguments quietly or to wait and see how the judges handled their new positions. Even while the conservative Stuart Donaldson was Premier in 1856, they managed to pass a motion in the Assembly, on the casting vote of the speaker, censuring the judges for accepting seats in the Council. This resolution urged that the political places held by the judges tended 'to abate the respect due to their office, and to affect unfavourably their judicial independence'. Further, it suggested, 'the functions of legislators, in addition to their ordinary duties, cannot but impair their efficiency, or lead to unnecessary expenditure of public funds'. Donaldson managed to have this resolution rescinded

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8 Speech of Therry, S.M.H., 7.10.1858, p. 3. Stephen claimed that he was no 'party' man because he was actuated solely by a desire 'calmly to consider, deliberately to investigate, and impartially and without prejudice or favour of any man or set of men, to decide'.

9 The Chief Justice to the Colonial Secretary, 27.2.1858, V & P (L.A., N.S.W.), 1858, Vol. 1, p. 1159; the Chief Justice to the Colonial Secretary, 30.6.1856, J.L.C., Vol. 1, 1856-57, p. 203.

10 Ibid.; see also Sir Alfred Stephen, Thoughts on the Constitution of a Second Legislative Chamber for New South Wales, Sydney, 1853.

11 Bennett, A History of the New South Wales Bar, p. 77; Empire, 13.8.1856, p. 2.

12 Bennett, op. cit., p. 77.
by twenty-three votes to twenty-two, but the liberals maintained their pressure and introduced a similar motion the following year. Though on principle the judges continued to deny the strength of liberal objections, they were in fact experiencing growing difficulties in sustaining their dual roles due to the pressure of increased business in the courts. In April 1858 Dickinson was forced to admit that he could no longer fulfil both positions satisfactorily and resigned his seat in the Council. He remained adamant that it was proper for a judge to sit in the upper house but that present circumstances did not make this possible. Seven months later he was followed by Sir Alfred Stephen whose health had been weakened by overwork. Stephen, indeed, may have retired earlier if he had not considered his presence in the Council beneficial to the judges' campaign for an additional appointment to the Supreme Court bench, an object which they had been urging since 1855. Therry, the last judge to retire from politics, offered to resign in 1859 during debate upon a bill to provide for an extra judge. He hoped that such a gesture might help the bill to pass but when this failed he relinquished both his legal and political posts and returned to England.

The effect which the loss of the judges would have had upon the

13 Empire, 15.8.1856, pp. 2-4; Molony, An Architect of Freedom, pp. 240-41.


15 Mr Justice Dickinson to the Colonial Secretary, 29.3.1858, J.L.C., Vol. 3, 1858, pp. 149-50.


17 S.M.H., 16.12.1858, p. 3.
influence of lawyers in the Council never became apparent. It was swiftly overtaken by a bitter confrontation between the conservative Council and the liberal Assembly as to their respective powers. The important question was not how much authority the lawyers would enjoy within the Council but whether the upper house itself would continue to wield effective political power. In such a struggle, the influence of the legal profession was very closely tied to the fortunes of the Council since those lawyers who served in it were notable as much for their conservatism as their numbers. By the late 1850s almost all barristers and solicitors in the Council stood in opposition to the liberal policies espoused in the Assembly by the Cowper and Robertson ministries. 18

Further, Want, Johnson, Robert Isaacs and James Norton were leaders of the conservatives' extremist wing which promoted the Constitutional Association to oppose supporters of Cowper and Robertson at the 1860 election. 19 They were the oldest and most established members of both branches of the profession. Several, like John Bayley Darvall, would have been labelled liberal a decade earlier, 20 but the rapid growth of radical liberalism in the wake of the gold rushes and the granting of responsible government had altered significantly the application of that

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18 The only lawyers in the Council to support the Cowper-Robertson ministries between 1858 and 1861, apart from A.J.P. Lutwyche, L.H. Bayley and J.F. Hargrave whom the government appointed so that they could serve as crown law officers, were J.W. Bligh and W.G. Pennington, who both left the Council in 1859. The conservative lawyers, apart from the judges, were G. Allen, G.W. Allen, E. Broadhurst, W. Burton, G.K. Holden, R.M. Isaacs, R. Johnson, J. Norton, R.J. Want, and E. Wise. This division can be seen clearly in the patterns of voting set out by Connolly, op. cit., pp. 333-38.


20 Ibid., p. 111 - apart from Darvall, G.K. Holden, J. Norton and G. Rowley had been associated with the liberal movement in the early 1850s.
term and the whole nature of colonial politics. Leading professional men, businessmen and pastoralists, the cream of the established social order who dominated educational, charitable and religious institutions, were marshalling forces to ensure that the fast flowing 'tide of democracy' did 'not set in with too sudden and formidable force'. The continued influence of colonial lawyers was thus dependent upon the outcome of that much wider struggle for political power consequent upon the introduction of responsible government.

Though tensions had existed between the Council and the Assembly from 1856, it was not until the Cowper ministry introduced its electoral bill in 1858 that the conflict between the houses assumed major proportions. Cowper's proposal to provide for manhood suffrage without a property qualification threatened, from a conservative viewpoint, to hand over voting rights to the ignorant and unintelligent. With a clear majority in the Council, the conservatives struck out the offending clause and substituted a limited suffrage compromise. Only when the more radical Assembly proved unyielding and the distinct possibility arose of the Council being swamped by new appointees did the moderate conservatives, led by the former Colonial Secretary Deas Thomson, accept the inevitable and allow the legislation to pass. In succeeding years liberal ministries made several attempts to replace the nominated Council by an elective upper house but none precipitated a crisis. The major source

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21 Connolly provides a detailed analysis of the differences between liberals and conservatives in terms of their membership of clubs, charitable institutions, educational bodies, etc., ibid., pp. 45, 76-81; see also Therry, op. cit., pp. 67-68, on the mingling of classes brought about by events in the 1850s.

22 Connolly, op. cit., pp. 119-27.

23 Ibid., pp. 128-37.
of continuing controversy - of particular significance, as it happened, for lawyers - was the power of the Council in financial matters. Whereas the framers of the colony's constitution had not foreseen, in the light of British precedent, any necessity to restrict formally the Council's power over money bills, conservative lawyers such as Isaacs, Johnson, Norton and Want adopted during the late 1850s a restricted, technical view of constitutional issues. As there was no express legal provision to the contrary, they insisted that the two houses had coordinate powers over money bills. Early in 1860 the conservatives attempted to gain recognition from the lower house that the Council's powers over money bills were more than nominal by adopting a firm stand upon the Indemnity Bill whereby Cowper was seeking to legalise previous expenditures authorised only by the Assembly. Their threat to refuse appropriation until a suitable indemnity measure was passed, however, left the conservatives in an untenable position. When the Governor advised that in such circumstances he would be forced to swamp the Council, Deas Thomson and seven other moderate conservatives again crossed the floor to allow the passage of the appropriation bill. The lawyers in the Council might have continued to believe that they were giving impartial legal advice upon such questions, but few others would have seen their opinions in that light, particularly among the supporters of Cowper and Robertson.

The conflict between the Council and the Assembly came to a head in the debate over land reform in 1861. Robertson, as Secretary for Lands, was committed to the introduction of the principle of free selection before survey, a step quite inimical to the interests of the landed

24 Ibid., pp. 138-41.
elites. 26 Spurred on by the strength of their 1850 electoral victory, the liberals in the Assembly were prepared to concede nothing. On the other hand, the conservatives in the Council realised that it would be fruitless to oppose such a popular measure outright. They believed, however, that it would make little difference to the practical effects of the land law reforms if their operation was restricted to the colony's settled districts and they amended Robertson's bill accordingly. 27 If negotiated with, the conservatives might have been prepared to withdraw even this amendment but Robertson was not inclined either to debate the issue or to compromise. He advised the Governor that the ministry, which had a large majority, would resign unless he agreed to swamp the Council, whose initial appointments were due to expire in three days' time.

Governor Young, who appreciated the government's clear mandate to reform the land law, agreed to this request and summoned twenty-one new members to the Council on the condition that such appointees would have no claim to reappointment for life when the new Council was nominated. 28 Shocked by the suddenness of this move, the Council's President, Burton, and sixteen other conservatives walked out of the chamber and resigned. 29 This defiant gesture, by depriving the house of a quorum, temporarily delayed the passage of the land reforms but it was clear that in future the Council would be unable to resist initiatives for which a liberal ministry possessed a strong popular mandate. The direct political influence

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27 Connolly, *op. cit.*, pp. 172-78.


of the colony's traditional social elite, which included the leaders of
the legal profession, had been largely eclipsed.

The consequences of the 1861 swamping for colonial conservatism
were not in fact as dramatic as many liberals would have desired. Cowper,
as premier, was committed not only to ensuring that the reconstructed
council would be reasonably amenable to his ministry's policies but also
to healing the rifts among the colony's social and political leaders
caused by the conflict between the houses. To this end, he attached
considerable importance to the views of Governor Young and of Wentworth,
who had recently returned to the colony, but without losing sight of the
need to placate his own supporters in the Assembly. As a result, the
new council still contained a majority of conservatives. Most, however,
had accepted their seats on the understanding that they would not oppose
certain aspects of Cowper's policies, including the passage of the land
law reforms. The influence of these conservatives was limited even
further by the exclusion of their most extreme wing, which had been the
backbone of their struggle with the Assembly, and by the lack of cohesion
which they showed in voting when compared to their predecessors.

The legal profession, it appears, was affected even more severely
by these changes than conservatism as a whole. In numerical terms,

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30 A. Powell, Patrician Democrat - The Political Life of Charles
Cowper, 1843-1870, Melbourne, 1977, pp. 94-95.

31 P. Loveday, 'The Legislative Council in New South Wales, 1856-1870',
Historical Studies, Vol. 11, No. 44, 1964, pp. 489-95; see
generally, Connolly, op. cit., pp. 184 ff., on the role of various
people in the reconstruction of the Council in 1861.

32 Ibid., pp. 196-98.

33 Ibid., pp. 204-06.
lawyers continued to be a significant element. Five of the sixteen conservatives and two of the nine liberals in the session of 1861-1862 were lawyers, while Manning, Plunkett and Holden were among the leaders of the moderate conservatives. However, the removal of the most conservative councillors had robbed the profession of some of its leading spokesmen and most active legislators, including Johnson, Want and Isaacs. Combined with the loss of the judicial members, the retirements of Wise and Lutwyche to fill judicial vacancies, and the earlier resignations of several other legal members, the changes brought by the 1861 crisis thus made serious inroads into the political influence previously enjoyed by the legal profession through the Council. By 1863 Holden, Darvall and Edward Butler had all left the Council. Darvall immediately won a seat in the Assembly and Butler did likewise several years later. Holden resigned to become Examiner of Titles when the Torrens system of land transfer was introduced, an action for which he was roundly condemned by Sir William Manning as it occurred during an important debate on the abolition of future grants in aid of public worship. These losses served only to emphasise the weakening of the profession's authority on the Council.

The effects of this decline in the political influence and involvement of the legal profession were rapidly apparent. In February 1862 the *Sydney Morning Herald* regretted a series of blunders in bills


35 Other lawyers who had left the Council by 1861 were C. Riley of the Bar (1858), and solicitors W. Spain (1858), J.W. Bligh (1859) and W.G. Pennington (1859).


37 *S.M.H.*, 12.12.1862, pp. 4-5, 8.
passed by the parliament. Lawyers, it admitted, might not always be 'the
most broad in their views of public policy, or the best guides to the
principles on which legislation should proceed' but without their 'sense
of the value of particulars' legislation was unlikely to be satisfactory. 38
Unfortunately, few men of the calibre of Want and Johnson remained in
the upper house and those who did had withdrawn 'from any very close and
active interference with the minutiae of legislation'. 39 After 1861
virtually no legislation to amend or reform the colony's procedural and
substantive law was introduced into the Council by lawyers other than
those representing the government. This may in part have been due to the
emergence of new issues and in part to the dominance of the Assembly.
C.H. Currey, in his analysis of the development of the colonial statute
law, has argued that law reform slipped into abeyance after 1861 because
the government's attention was diverted to other pressing issues. 40
However, the particular date which Currey selects as the start of the
divergence between British and colonial laws suggests clearly that his
explanation is inadequate. Above all the cessation of law reform
reflected the displacement of leading New South Wales lawyers from their
traditional position of influence at a time when they had not become
attuned to the new distribution of power emerging under responsible
government.

The legal profession was unable to compensate for this loss of
authority by developing an effective voice within the Legislative Assembly.
By contrast with the situation in the Council, lawyers comprised less than

38 S.M.H., 5.2.1862, p. 4.
39 Ibid.
40 Currey, op. cit., p. 240.
fifteen per cent of the Assembly's membership. Not only were they clearly overshadowed by both pastoral and commercial interests, but the lawyers themselves shared neither the political cohesiveness nor the interest and authority upon issues relating to law reform and the administration of justice that characterised their counterparts in the Council. 41 Several noted lawyers including Manning, Plunkett and Darvall were elected to the Assembly and proved to be active legislators but their chances of continued success were limited by their moderately conservative political views. They gave their support to the ministries of Donaldson and Parker but had little in common with the liberals led by Cowper and Robertson who soon took control of the lower house. 42 They were also disadvantaged by the necessary concern of an elected house to cultivate popular programmes which in general did not encompass the dry and frequently technical aspects of law reform. By the 1860s almost all the barristers and solicitors of this stamp had either faded from politics or accepted seats in the more congenial atmosphere of the Council. 43

In their place, the popular elections returned a new generation of young lawyers to the Assembly, personified by James Martin, Robert Wisdom, James Darvall, and others.


42 The development of the Legislative Assembly between 1856 and 1870 is considered by P. Loveday, 'The Development of Parliamentary Government in New South Wales, 1856-1870', passim.

43 Those who had left the Assembly by the early 1860s included W.M. Manning, J.H. Plunkett, G.R. Nichols, R. Owen, D.H. Deniehy and A. Dick. J.B. Darvall served in the Assembly until November 1860, then in the Council from September 1861 until June 1863 when he was again elected to the Assembly. He resigned and went to England in 1865.
William Bede Dalley and William Charles Windeyer. They were politicians as much as they were lawyers, they were liberals more often than they were conservatives, and what they lacked in experience they made up for in ambition and idealism. Whether barristers or solicitors, the lawyers in the Assembly possessed neither the group identity nor political cohesiveness to represent effectively the interests of the profession.

Half of those lawyers elected to parliament served only one term in the house and several now came from country areas. The latter were less likely to be on intimate terms with their fellow practitioners and were elected as the representatives of regions to which they owed primary responsibility. William Redman, while practising as a solicitor at Forbes, was renowned for his absences from the house due to 'illness', which usually

44 S.M.H., 5.2.1862, p. 4, noted that 'the people ... seem to confine their exclusions to men whose experience might really benefit the community, and the lawyers of their choice are generally more politicians than lawyers, or they are young lawyers, whose rash entrance on political life is their weakness rather than their strength - who would be far more likely to succeed ultimately in life were they to take a few years to study the constitution of their country, and to acquire experience in its interests'.

45 An exhaustive examination of the allegiances and votes of members of the Legislative Assembly between 1856 and 1870 is provided by Loveday, op. cit., Appendices V-XI, pp. 466-533. It reveals how the allegiances of lawyers in the Assembly were divided between the liberals led by Cowper and Robertson and the conservatives led by Donaldson and later Martin.

46 14 out of the 29 barristers and solicitors elected to the Legislative Assembly between 1856 and 1869 served for only one term. 11 served for more than two terms, but these included Plunkett, Darvall and Deniehy. Solicitors who practised in the country while serving in the Assembly in these years were W. Walker (Windsor), C.H. Walsh (Goulburn), and W. Redman (Forbes). These details are based on the New South Wales Parliamentary Record and the Law Almanacs.
meant that he was attending to legal business in the country. 47

A second factor which militated against these lawyers taking action on behalf of the profession, even if they had managed to agree upon desirable objects, was the belligerent attitude which sections of the Assembly adopted towards the judiciary. Besides its confrontation with the Council, the lower house also became engaged in a test of strength with the bench whereby it tried to extend and legitimise its authority. Members frequently commented critically upon the activities of the courts or used the Assembly as a forum for questioning judicial decisions. 48

These activities did little to enhance the reputations of either the Supreme Court or parliament. In April 1861 the Assembly appointed a committee to inquire into certain language reported to have been used on the bench, by the Chief Justice, which reflected upon the character of the house. According to the evidence:

47 S.M.H., 29.5.1863, p. 9.
48 S.M.H., 7.7.1863, p. 4, observed that 'probably we have not yet reached the time when the Assembly will cease to regard itself as a power in antagonism to all other departments of the State, and when it will consider itself a body bound to sympathise with and preserve the proper functions of all'.

In 1861, David Buchanan took an interest in the Burrongong Riot Case. He accused Mr Justice Wise of gross partiality against the prisoners, of 'bloodthirstiness' and of other immoderate deficiencies. When Wise showed no sign of weakening, Buchanan introduced a bill into the Assembly praying that the Governor might remove the judge from the bench. The motion was lost without division. The Herald noted that 'our readers will no doubt feel alarmed by the attacks on the character of the Bench which are now the pastime of our fire eaters', S.M.H., 2.11.1861, p. 6;
30.10.1861, pp. 3-4.

S.M.H., 14.6.1865, p. 4, commented that '... in this community every pettifogging lawyer may aspire to a seat in the Legislature and convert the Parliament into a Court of Appeal - and seek there the indemnity of his clients who may have suffered a defeat however just, or a punishment however merited. Here all a Judge says or does is liable to be presented to the public in the most infamous colours'.
A Prisoner arraigned for trial having been permitted to make some observations to the Court, said, 'I object to being tried by Your Honor', addressing the Chief Justice, 'because you have prejudicial feelings against me'. On this, His Honor, mistaking the word 'prejudicial' for 'political' said, 'Why should I have political feelings against you, - are you a Member of Parliament?'

The committee concluded that the Chief Justice had no intention of reflecting upon the character of the Assembly. It was a trivial incident, perhaps provoked by Stephen's known conservatism, but nevertheless clearly reflected the Assembly's touchiness.

Two incidents during 1863 left no doubt as to the temper of the Assembly in this regard. In July the house passed by eighteen votes to fifteen a resolution calling for certain correspondence, including the judge's report, relating to the trial and execution of Mahomet Cassim, to be laid on the table. It was an unusual case in which two East Indians were found guilty of the murder of an unidentified companion and condemned to death. The sentence had been carried out on only one of the guilty.

The ministers who spoke to the motion, particularly Cowper and Arnold, opposed it on the grounds that it would create a dangerous precedent. They urged that correspondence between the judiciary and the executive on such matters was strictly confidential and that the conduct of the judges should not be subject to review by the house except on the strongest

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50 Ibid., p. 619.
51 S.M.H., 3.7.1863, p. 3.
52 Correspondence re the Trial and Execution of Mahomet Cassim, V. & P. (L.A., N.S.W.), 1863-64, Vol. 2, pp. 693-702.
possible grounds. Surprisingly, however, all those practising lawyers and members with legal training who either spoke or voted upon the issue supported the tabling of the judicial report. Barrister W.B. Dalley argued that, while he had every faith in the administration of justice, it was the duty of the Assembly to act as a final court of review in questions of this nature. Joseph Leary, a solicitor, insisted that the authority of the house was superior to that of the court and justified this claim by reference to the power of the joint houses to dismiss a judge. Marshall Burdekin, who had been admitted to the Bar but seldom practised, believed that it was in the public interest for the reports to be made available, but dissociated himself from supporting any precedent that might weaken the hands of the judiciary.

The following month the judges complained to Cowper about the 'insulting and most offensive censure' which Robertson, then Secretary for Lands, had made upon the Chief Justice and the administration of justice in the Supreme Court. At a dinner speech at Shoalhaven, Robertson had accused the Chief Justice of taking a one-sided approach to a case under the Impounding Act and of having delivered a predetermined judgment. The judges considered that such observations were 'ill-founded' and 'most unbecoming in a Minister of the Crown'. They requested that the government

53 S.M.H., 3.7.1863, p. 3. The Empire, 6.7.1863, p. 4, felt that the Assembly should be able to call for the judges' reports when it was absolutely necessary.
54 S.M.H., 3.7.1863, p. 3.
55 Ibid.
56 Ibid.
57 S.M.H., 12.8.1863, p. 2.
58 The Judges to the Colonial Secretary, 25.5.1863, V. & P. (L.A., N.S.W.), 1863-64, Vol. 2, p. 690.
indicate its views upon such conduct. This approach was clearly aimed to elicit a public apology, but Cowper replied unrepentantly that 'the Government cannot admit the right of the Judges to put such an interrogatory as that contained in your letter and we are further of the opinion that the tone and general construction of Your Honor's communication are such as to render our offering any explanation as a matter of courtesy quite out of the question'. It was not, as the Sydney Morning Herald observed, an attitude calculated to increase respect for and confidence in the administration of justice. In such an atmosphere the opinions of the legal profession or at least the lawyers who served in the Assembly were unlikely to enjoy special influence. This conclusion is borne out by the struggle which developed between the liberal Assembly and the largely conservative Bar over the crown law offices.

The constitution introduced in 1856 provided for an Attorney General and a Solicitor General to be appointed in the colony. They were to be political officers and, according to convention, would be members of the Bar. The conservative Donaldson, who formed the first ministry under responsible government in 1856, had little difficulty in attracting two leading barristers, Manning and Darvall, to accept these positions. However, problems arose in the following August when Charles Cowper

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59 Colonial Secretary to the Chief Justice, 30.5.1863, ibid., pp. 690-91.

60 S.M.H., 17.8.1863, p. 4, observed that 'an attempt seems to be resolutely made to load the Supreme Court with every kind of reproach. Now, the Judges are challenged for their judicial opinions; and now for their most private conversations; now they are attacked as men; and now as functionaries; everything is said that may weaken their influence with the public, and bring their impartiality into suspicion'.

61 18 & 19 Vic., c. 54, s. 18.
brought about the downfall of Donaldson's ministry and attempted to form a liberal ministry under his own leadership. To fill the post of Attorney General, Cowper approached several leading barristers. Plunkett and Edward Broadhurst, who had declined a similar offer from Donaldson and intended to leave the colony within a few months, refused as did Robert Isaacs who had recently arrived from the West Indies. Cowper then turned, despite the tradition that the office of nominal leader of the Bar should always be held by a barrister, to a solicitor and well-known politician, James Martin. Martin was at that moment preparing to sit for his Bar examinations and Cowper later claimed that he had been led to believe by Broadhurst that under these circumstances there would be little cause for either the Bar or other parties to object.

This was not in fact the case. Right from its announcement the propriety of Martin's appointment was challenged. On 30 August 1856 both Chief Justice Stephen and Broadhurst cast doubts upon the accuracy of Cowper's statements. Stephen disclaimed any suggestion that he had expressed approval of Martin's appointment. He also refuted accusations that the court was making special concessions to help Martin pass his examinations quickly. Broadhurst denied that he had ever advised the selection of Martin or indicated that the Bar was unlikely to object to it. A week later he was a party, together with sixteen other barristers, to a petition to Governor Denison which protested against the impropriety

63 S.M.H., 12.9.1856, p. 4.
64 Ibid.
66 S.M.H., 12.9.1856, p. 4.
of appointing anyone other than a barrister to the position of Attorney General. The signatories to that petition included all the leading barristers in the colony. The Sydney Morning Herald echoed these thoughts. It was particularly concerned that, even if the holding of the Attorney Generalship by a solicitor was not illegal, there was still a dangerous incompatibility between the training of a solicitor and the duties of that office. When Cowper and Martin began to differ publicly upon the circumstances under which Martin had been offered the position, these objections and apprehensions gained even greater strength.

When Cowper's ministry first faced the Assembly in mid-September it was subject to a sustained attack from the opposition upon a motion of no confidence over its appointment of Martin. John Hay, who began the debate, made a reasoned argument which centred upon the importance of a colonial Attorney General and the necessity for an appointment of


68 S.M.H., 30.8.1856, p. 4.

69 According to the S.M.H., 11.9.1856, p. 4, 'Mr. Cowper told his friends that nothing should induce him to appoint Mr. Martin as a Law Officer of the Crown. Having made this announcement to Mr. Plunkett and others, he further informs his friends that he would not think of going to Mr. Martin until he had exhausted the Bar. Mr. Martin tells us that no such exhaustion was contemplated; three persons only were applied to, and he had already a promise of long standing from Mr. Cowper that he should have an office in his Government'. See also the statements of Martin, Murray and Cowper, analysed in S.M.H., 12.9.1856, p. 4.
unimpeachable character. He did not consider that Martin answered this
description in view of the disqualification incident in 1849 when
Martin’s property qualification for an election had been deemed non-existent,
perhaps fraudulent. Martin, Hay recalled, had not recanted and had been
successfully re-elected after the seat was declared vacant. 70 In
addition, William Manning questioned the political expediency of Cowper’s
move which placed in jeopardy a vital public office by breaking convention
if not the law. 71 He was supported by Plunkett who feared that any
precedent which tended to belittle the crown law offices would ultimately
affect the quality of the bench as those offices were a major stepping
stone to judicial preferment. Plunkett was also concerned that Cowper
should have taken such a step when he had far from exhausted the many
talents available at the Bar. 72 The vigorous, sometimes vitriolic,
nature of Martin’s self-defence seemed to bear out the belief that he was
not properly suited for the office, regardless of his past. 73 Finally,
after a week of acrimonious debating, the motion of no confidence was
carried and Cowper’s ministry resigned from office. 74 The ensuing Parker
ministry was able to call upon Manning and Darvall to act as Attorney
General and Solicitor General respectively, but even it met with some

70 S.M.H., 18.9.1856, pp. 4-5. For Cowper’s explanation of his
appointment of Martin, see S.M.H., 17.9.1856, pp. 4-5, 8.
71 S.M.H., 20.9.1856, p. 4.
72 S.M.H., 19.9.1856, p. 3.
73 S.M.H., 18.9.1856, p. 4. The Herald considered that ‘we can
scarcely imagine a more decisive justification of the notion of
Mr Hay than the reply of Mr Martin’, ibid., p. 5. For a different
interpretation of these events favourable to Martin, see
74 Molony, op. cit., pp. 243-244; Powell, op. cit., pp. 69-71.
difficulty when Manning resigned due to ill-health in mid-1857. Darvall became Attorney General and Edward Wise, a member of the Council, was appointed to the second post. Wise's selection was criticised because he had been in the colony less than two years, but otherwise his qualifications were good and a major crisis did not arise.75

When Cowper formed his second ministry in September 1857, he was in a much stronger position than when first in office. Martin, now formally admitted to the Bar, returned to the post of Attorney General and Lutwyche in the Council was persuaded to act as Solicitor General. The furore of 1856 was not repeated. Within a year, however, Martin and Cowper were in sharp disagreement over such questions as manhood suffrage and the secret ballot and, when a question arose of maladministration in the Attorney General's department, Cowper requested and received Martin's resignation in November 1858.76 The government managed to avoid any immediate difficulty by moving Lutwyche to the senior position and appointing barrister W.B. Dalley as Solicitor General, but in the following February the situation became far more acute. Dalley resigned and was replaced by the academic John Fletcher Hargrave and shortly afterwards Lutwyche, who was not popular with the Bar, accepted a judgeship at Moreton Bay.77 To solve the difficulty this caused, Cowper called upon Lyttleton Holyoake Bayley, an English barrister who had been in the colony scarcely two months, and offered him the position of Attorney General with a seat in the Legislative Council.

75 S.M.H., 25.5.1857, p. 4; 9.2.1859, p. 4.
76 S.M.H., 17.11.1858, pp. 3-4, gives the conflicting views of Martin and Cowper on why the former resigned.
Bayley's appointment was strongly criticised in the Assembly. Daniel Deniehy, the solicitor, moved a censure motion against the government. He considered the new appointment improper because of Bayley's short residence in the colony which gave no guarantee of his suitability and his not being elected by popular vote. Deniehy insisted that he was not questioning Bayley's personal ability or respectability but the principle behind the government's action. He believed that in such circumstances it would have been better to drop the crown law officers from the cabinet and possibly substitute a ministry of justice for the Solicitor Generalship. Dalley in reply pointed out that Bayley had been distinctly told that he would not be receiving a seat in the cabinet and that the choice had been forced upon the ministry because it was difficult to secure another Attorney General from a Bar whose members were all politically opposed to the government. Cowper followed this up by arguing that they could have made no better selection from the six or seven other possible candidates. He referred to a resolution, passed six weeks earlier, that neither the Attorney nor Solicitor Generals should belong to the cabinet and that their places were to be taken by the Secretary for Lands and Works and the Commissioner for Trade and Customs. In consequence the Assembly rejected Deniehy's motion by nineteen votes to twelve but Cowper's plans to downgrade the crown law

78 S.M.H., 9.2.1859, p. 4.
79 Ibid., p. 4.
80 Ibid., pp. 4-5.
81 S.M.H., 9.2.1859, p. 5; 24.2.1859, p. 5; see also Powell, op. cit., p. 122. The words of the resolution may be found in V. & F. (L.A., N.S.W.), 1858-59, Vol. 1, p. 381.
82 S.M.H., 9.2.1859, p. 5.
offices and make them responsible to the Colonial Secretary were thwarted by the Legislative Council. The upper house refused to sit until the government was represented there by a responsible minister and executive councillor, thus forcing Cowper to restore Bayley to the cabinet. Shortly afterwards, the new Attorney General won a seat in the Assembly at a by-election. Forster, who succeeded Cowper as premier in October 1859, made the law posts non-political during the four and a half months that he held office, but when Robertson returned to power early in 1860 he restored the political basis of those offices.

From 1861 to 1863 the question of the crown law offices lay dormant. The Robertson and Cowper ministries, unable to find a second barrister to assist Attorney General Hargrave, sidestepped the issue by leaving the second post vacant. In the meantime, their use of crown law appointments as sources of patronage saw their relations with the Bar deteriorate even further. The government expanded the duties of the crown prosecutors to lighten the load of the Attorney General and, according to the Empire, entrusted the preparation of crown suits to solicitors of favourable political views such as R.H.M. Forster. That these

83 S.M.H., 24.2.1859, p. 5; 1.3.1859, p. 4.
84 Powell, op. cit., p. 122.
85 Ibid., p. 130; on Cowper's appointment of Robert Owen, a solicitor and M.L.A. for East Camden, as a District Court judge, see also the Report from the Select Committee on Vacant Seat - Question of Privilege, V. & P. (L.A., R.S.W.), 1858-59, Vol. 1, pp. 377-421.
86 Powell, op. cit., p. 132. In September 1863 the Assembly considered at length whether the £150 per annum paid to R.H.M. Forster to conduct cases for the police made him ineligible for a seat in that house, Empire, 18.9.1863, p. 4.
arrangements were unsatisfactory was made clear in August 1863 when Cowper reshuffled his ministry, bringing in Darvall as Attorney General and dropping Hargrave, with his consent, to the post of Solicitor General. 88 Cowper was forced to admit that it was desirable to have an Attorney General in the Assembly and conceded that the crown law departments had not performed satisfactorily while linked to his own position as Colonial Secretary. 89 Hargrave, it seems, had not been at ease in an office which placed great emphasis on the criminal law. 90 How successfully the conservative Darvall might have functioned within the liberal ministry was not resolved as the government fell soon afterwards.

When Cowper returned to office in February 1865 he retained Darvall and Hargrave in the ministry. The omens seemed auspicious, particularly when Darvall announced that neither he nor Hargrave would profit personally from any position created by the government. 91 In view of the liberal ministry's reputation for patronage, this undertaking was particularly important to the successful passage of the Additional Judge Bill which authorised the appointment of a fourth Supreme Court judge. 92 This new vacancy and another created by the death of Mr Justice Wise presented Cowper with a test of judgment and political impartiality. His relations with the Bar were on a knife-edge. By appointing Hargrave and Alfred Cheeke from the District Court to these positions, Cowper blundered badly. Cheeke was popular but not considered sufficiently learned for the higher

88 S.M.H., 1.8.1863, p. 5; Empire, 3.8.1863, p. 4.
89 Empire, 1.8.1863, p. 3; S.M.H., 1.8.1863, p. 5.
90 Speech of Arnold, ibid.; see also S.M.H., 4.8.1863, p. 4.
91 S.M.H., 5.4.1865, p. 3.
92 S.M.H., 18.4.1865, p. 5.
tribunal while Hargrave's main recommendation was his loyal service to Cowper as a crown law officer. Even in the public mind he was not a well respected choice and his standing was not improved by his apparent breach of faith with Darvall's undertaking not to profit personally from such circumstances. Several members of the Bar may have declined the office before Hargrave accepted but, as in 1856, Cowper certainly did not exhaust the eligible members of the Bar before making up his mind. He was rumoured to have refused to consider at least one very suitable barrister of unsympathetic political views. The Bar expressed its disgust by boycotting the swearing-in ceremony. Darvall resigned in protest and left for Europe.

Cowper's action placed his government in an acute position with regard to the crown law offices. Not only were many seniors reluctant to accept such positions to the detriment of their professional interests and incomes, but this most recent incident had served to consolidate their distaste for liberal governments. Further, a junior in good practice could not afford to gamble on a temporary elevation of this nature because he stood to lose more than he gained. As a result, Cowper survived for several months without either an Attorney or Solicitor General. The Crown Solicitor, with the advice of private counsel and the assistance of the crown prosecutors, carried on the government's legal functions. This, however, could only be a temporary expedient and

93 S.M.H., 20.10.1869, p. 5.
94 Speech of James Martin, S.M.H., 8.6.1865, p. 2.
95 S.M.H., 21.8.1865, p. 5.
96 S.M.H., 26.6.1865, p. 4; 27.6.1865, p. 5.
97 Bennett, A History of the Supreme Court of New South Wales, p. 43.
98 S.M.H., 21.8.1865, p. 5.
Cowper was well aware that once the new session began the government
could not do without 'permanently responsible advisers in matters of
law'.\textsuperscript{99} He again toyed with the idea of detaching the law officers from
the cabinet and substituting a ministry of justice but ultimately,
through the good offices of Governor Young, he obtained the services of
Plunkett as Attorney General.\textsuperscript{100}

Plunkett's appointment signified the start of a new type of
relationship between liberal governments and the Bar. The new Attorney
General had always refused previous offers from Cowper, saying that he
would only accept if there was 'a great public necessity'.\textsuperscript{101} With
Manning ill and unwilling to serve, Plunkett found himself in such a
circumstance. In future some senior members of the Bar were prepared to
serve in the office of Attorney General in order to preserve the integrity
of the nominal headship of the Bar, but they refused to be bound by the
politics of the government. William Manning, who became the mainstay
Attorney General of liberal ministries in the late 1860s, declared on
accepting the post in 1868 that he did so 'non-politically'.\textsuperscript{102} He was

\textsuperscript{99} \textit{Ibid.}
\textsuperscript{100} \textit{S.M.H.}, 29.8.1865, p. 4; \textit{Empire}, 26.8.1865, p. 4.
\textsuperscript{101} Molony, \textit{op. cit.}, p. 242. Plunkett wrote to James Macarthur in
1865 that he had accepted it only 'for the honor of the Bar and
the credit of the Country' for fear that the government might be
forced to appoint an attorney or an 'unfledged' barrister,
Connolly, \textit{op. cit.}, pp. 278-79. One reason why Manning refused
Cowper's offer of the Attorney Generalship in June 1865 was
because he 'would feel out of place in your Government as at
present constituted', W.M. Manning to C. Cowper, 25.6.1865, \textit{SIR William
Montagu Manning - Papers}, Vol. IV, Correspondence, 1861-1876,
Mitchell Library MSS. set 246, pp. 41B, 42.
\textsuperscript{102} W.M. Manning... (7), 10.5.1870, \textit{ibid.}, pp. 97B-99.
not to be a member of the cabinet and refused to represent the government in the Council. Manning did not claim the patronage of the law department, but it was understood that no legal appointment would be made without his consent. 103 The events of 1865 had forced the Bar to appreciate that its stubborn refusal to service liberal ministries might produce most undesirable consequences to the detriment of the bench, the profession and the public. Though they possessed no real political influence under this new arrangement, Manning and Plunkett were at least able to keep the administration of justice running smoothly and to preserve the profession from further abuse. At best it was a fragile compromise but it did suffice until 1873.

On the other side of the house, James Martin continued, as he had while in office in 1864, to combine the portfolios of Premier and Attorney General. 104 Though this arrangement eliminated the need to find two barristers willing to serve in the ministry, it did create some concern that his dual role might introduce even the suspicion of partiality into the administration of justice at its highest levels. 105 In combination with the difficulties experienced by liberal governments, this apprehension gave increased popularity to proposals for 'constituting a Minister of Justice, and putting the powers of a public prosecutor in the hands of a man who may not have any duties to discharge save those which are strictly professional and connected with his functions as the legal agent of the

103 Ibid.
104 Martin was both Premier and Attorney General on three occasions, 16.10.1863-2.2.1865; 22.1.1866-26.10.1868; 16.12.1870-13.5.1872.
105 S.M.H., 9.4.1866, p. 4.
The idea of a separate political Minister of Justice and non-political crown law officers had been in the air on several occasions previously and it now appeared to many as the best method of solving the longstanding controversy without compromising either the government or the administration of justice. The main advantage would be to elevate the dignity of the crown law offices above the squabbles and prejudices of faction politics. Barristers would not need to feel politically compromised by accepting such positions and should any reasonable permanency of tenure be given to the law offices the reluctance caused by the danger of damaged professional prospects might be overcome.

Nothing came of this idea until 1873. The accommodation between the Bar and the politicians worked relatively smoothly and no incident of any magnitude arose to disturb its calm. However, in June 1873 Chief Justice Stephen, after twenty-nine years in office, forwarded his resignation to become effective from 5 November that year. Henry Parkes, leading his first ministry, withheld any decision on the matter although he indicated to his friend and current Attorney General Edward Butler that he

106 Ibid.

107 Cf. Empire, 13.8.1856, p. 4; S.M.H., 9.9.1856, p. 4; 1.3.1859, p. 4. In January 1867 Deas Thomson suggested 'that the office of Attorney General should be permanently separated from political functions'. The S.M.H., 9.1.1867, p. 4, considered it to be 'a very serious aspect of affairs when all power in such a community is entrusted to such a functionary. He was not only to determine who shall and who shall not, if accused, be placed upon his trial; but, when the trial is over and the sentence pronounced, he may give evidence with respect to the disposal of the offender and the exercise of the prerogative'.

108 Cf. S.M.H., 22.11.1869, p. 2; 9.4.1866, p. 4; A. Stephen to W.C. Windeyer, 27.11.1873, Windeyer Family Papers, Mitchell Library MSS. 186/7, pp. 281-84.
would receive the position. The time which elapsed allowed speculation
to grow rife. Butler was seen as the likely successor but much discussion
arose on the rights of the Attorney General to a judicial vacancy and
religious prejudices flared quickly against the Catholic Butler.

With the government was subject to several stinging attacks for
its conduct. The government announced on 11 November the appointment of his chief
political rival, James Martin, to the position. That night in the
Assembly, Butler moved an adjournment to explain why he proposed to resign
as Attorney General. He read aloud several letters between Parkes and
himself which revealed the broken promise of the Chief Justiceship.

Against Parkes' assertion that he did not possess the necessary qualifications
from a professional or a public viewpoint, Butler claimed that it was
sectarian pressure which had caused the premier to change his mind.

Though public sympathy was with Butler, Parkes managed to avoid a serious
political challenge because his appointment of Martin was widely approved.

Two weeks later, apparently still smarting from Butler's revelations,
Parkes abolished the office of Solicitor General by parliamentary resolution and created a new Minister of Justice and Public Instruction. He was clearly determined that a future government could not be embarrassed or put upon by the Bar or one of its members. While he admitted that the task of finding two barristers for ministerial offices was not so difficult as it had been in earlier years, Parkes considered that it was an inconvenience to ministries which needed to be overcome. His skilful manoeuvre satisfied most of the Assembly. It also lightened his own ministerial duties by the transfer of educational responsibilities from the Colonial Secretary to the new combined portfolio. Parkes gave the office of Minister of Justice and Public Instruction to a prominent solicitor, George Wigram Allen. Subsequently the post was filled by several laymen and the Attorney General remained excluded from the executive council until restored by Farnell in 1878.

These changes undermined the efficiency of the Attorney General's department and put the final seal for a decade and a half on any effective influence for the legal profession through these channels. George Innes, who replaced Butler in 1873, advised Parkes six years later that 'the work of the Attorney-General, to be properly discharged, is too much for any

115 S.M.H., 14.3.1879, p. 3.
117 S.M.H., 14.3.1879, p. 3.
119 S.M.H., 29.3.1878, p. 2.
one man'. 120 He saw the need for a 'permanent junior Counsel to the
Crown, who, not meddling with political matters, could render great
assistance to the Attorney General in the purely legal part of his work'. 121

The Sydney Morning Herald went a step further and linked the lack of law
reform initiatives to the absence of a Solicitor General. 122 Thus, with
the Attorney General overburdened by work and excluded from the executive
council and the Ministry of Justice frequently controlled by laymen, the
lawyers of New South Wales found that even those positions of authority
which appeared guaranteed by the constitution had ceased to carry real
importance. The standing and influence which they had enjoyed in the
early 1850s had disintegrated before their eyes and they had been quite
powerless to prevent the change.

Both the decline in the influence of the legal profession and the
effect which this had on the development of law and procedure in New South
Wales were thrown sharply into focus by the popular campaign for law
reform which began in 1869. In October 1869 the Sydney Morning Herald
noted that there were few who could view a law suit with composure:

To many, a law suit is terrible. Haunted night and
day by the recollection into what hands they have
fallen, their food is bitter and their rest is broken
... Ignorant of the ins and outs of a profession, they
are distracted by its multifarious contrivances to swell
a bill of costs ... Doubtless, education and increased

120 J.G.L. Innes to H. Parkes, 13.8.1879, Parkes Correspondence,

121 Ibid.

122 S.M.H., 20.6.1879, p. 4 - the Herald claimed that it was 'a
matter of notoriety that the time of the ATTORNEY-GENERAL is
so fully occupied with his multifarious duties, deprived as he
is of the assistance of a Solicitor-General, that he is
positively unable to devote the necessary time to questions
of legal reform'. 
acquaintance with affairs reduce in some degree the awful shadow of the legal profession; but still there is room enough for anxiety where justice is slowly administered, and where, whoever may be the winner of the cause, both parties are not unlikely to be the losers.123

This complaint, though a timeless grouch of laymen against the law and the profession, was particularly appropriate to the conditions existing in New South Wales by the late 1860s. J.M. Bennett, reviewing the equity jurisdiction of the Supreme Court, has concluded that 'many litigants in the equity jurisdiction between 1850 and 1880 must have shared the sense of hopelessness which befell Charles Dickens' suitors before that "most pestilent of hoary sinners", the High Court of Chancery'.124 Sir Alfred Stephen, discussing the Criminal Law Amendment Bill in July 1882, claimed that 'as if we had been asleep, or all unconscious of the advance in criminal law amendment which each year witnesses at home, we are administering an imperfect code half a century old, abandoned in every other Australian community'.125 The picture was little different in other jurisdictions.126 With the collapse of the profession's influence, colonial law reform had virtually ceased. By the late 1860s the important advances being made in England and in particular the work of the Judicature

123 S.M.H., 7.10.1869, p. 4.
124 Bennett, A History of the Supreme Court of New South Wales, p. 100. Sir Alfred Stephen claimed that 'the Equity business at the present moment is simply abandoned to its fate', Report from the Select Committee on the Moreton Bay Judge's Appointment Bill, V. & P. (L.A., N.S.W.), 1858, Vol. 1, p. 1176.
126 Bennett, op. cit., pp. 57-183 provides a detailed account of the development of each of the Supreme Court's jurisdictions and shows how little major reform took place in the 1860s and 1870s.
Commission made the colony's backwardness acutely apparent. In these circumstances, it was not surprising that pressure for law reform became a popular priority nor that many would-be reformers considered reform of the profession itself to be a necessary pre-condition for such improvements.

Ironically, it was Thomas John Fisher, a barrister, who initiated the public campaign for law reform. Fisher had been first admitted to the colonial Bar in 1841 but in recent years had practised in England and been influenced by the law reform movement begun by the doctrines of Bentham. Convinced that these reforms were equally applicable in New South Wales, he developed a detailed plan for their introduction into the colony and made his scheme public through a series of letters in the Sydney Morning Herald from July 1869 to July 1870. The object of his proposals was not, Fisher insisted, to codify the law completely but simply to promote 'those practical reforms which involve cheapness and speediness of justice, with a greater degree of certainty in the administration thereof, than is at present provided for, and which have stood the test of time and experience in different countries'.


For the career of T.J. Fisher, see S.M.H., 27.11.1875, p. 5.

Fisher later published a selection of these letters in a pamphlet entitled Colonial Law Reform, Sydney, 1869.

S.M.H., 9.7.1869, p. 3. To show how these ends might be realised, Fisher published a draft Colonial Law Reform Act. S.M.H., 22.7.1869, p. 2; 29.7.1869, p. 2. When the Select Committee on the Duties of the Master in Equity brought out its progress report in August 1869 (V. & P. (L.A., N.S.W.), 1868-69, Vol. 1, pp. 959-1012), he was quick to point out how his act would provide practical and effective solutions to the most pressing needs shown up by that report, S.M.H., 5.8.1869, p. 3.
considered that Special Courts which consisted of a single judge and had jurisdiction identical to that of the present Supreme Court should handle most litigation.\textsuperscript{131} To make justice quick and effective before them, Fisher advocated a single form of action, simplified pleadings, a system of referees to investigate and try issues of fact, and restrictions upon the possibilities of appeals and new trials.\textsuperscript{132} Most important of all, he urged the fusion of law and equity to eliminate the delays, uncertainty and expense caused by that division.\textsuperscript{133}

Fisher did not, however, consider that these technical solutions by themselves provided the complete answer. He also proposed detailed reforms of the legal profession itself. Amalgamation of the two branches would, he argued, produce not only cheaper law but more efficient practitioners. With little likelihood of a resurgence in the number of barristers arriving from England and Ireland, Fisher suggested that the best way to ensure the quality of both bench and Bar in the future was to follow the example of Canada and the United States and create 'a large body of young men upon common ground, mutually inciting and stimulating each other to improvement in their adopted profession'.\textsuperscript{134} To this end, he wanted to incorporate all colonial barristers and solicitors in a Lyceum of Justice, as members of which they would be entitled to act in

\textsuperscript{131} S.M.H., 22.7.1869, p. 2; Fisher, Colonial Law Reform, pp. 14-15.
\textsuperscript{132} S.M.H., 9.7.1869, p. 3; 13.9.1869, p. 5; 18.9.1869, p. 7.
\textsuperscript{133} According to Fisher, Equity practice was an 'obsolete overgrown system' whose intricacies not even lawyers fully understood. Common Law practice was better understood, but still 'intolerable in respect of its uncertain and crushing expenses' and 'its multitude of contradictory, fragmentary rules', S.M.H., 14.7.1869, p. 3.
\textsuperscript{134} Fisher, Colonial Law Reform, pp. 21-22.
either professional capacity. The profession itself would control the Lyceum which would be responsible for the training and examination of all students for the law.135

Fisher's proposals for law reform met with a mixed reception. The Sydney Morning Herald itself was guarded in its attitude. It insisted that there were defects in the administration of justice that needed to be remedied but considered that it was important to avoid creating greater evils by going too far. While admitting that the public favoured cheaper, quicker and more certain law, the Herald saw little chance of achieving substantial reforms similar to those promoted by Lord Brougham in England.136

Several radical members of the Assembly, however, jumped at Fisher's lead. John Stewart, a veterinary surgeon, and Leopold Fane de Salis, a pastoralist, were strongly imbued with the Benthamite radicalism which had inspired the law reform movement in England. They considered that legal remedies should be simple, speedy and cheap, which they were not, and that the legal profession was a barrier to any reform in that direction.137 Amid much rhetoric, Stewart ultimately moved in the Assembly in October 1869 for the appointment of a law reform commission. Its object, he proposed, would be to draw up a bill which simplified legal proceedings, abolished the distinctions between law and equity and barristers and solicitors, and which removed all unnecessary delays and technicalities.

135 Fisher envisaged that the Lyceum would be controlled by twelve benchers elected from both branches, and have power to institute law lectures and classes, to hold competitive examinations, and to make rules covering the service and articles, tuition and examination of all students for the law, ibid., pp. 24-27; S.M.H., 21.8.1869, p. 5.

136 S.M.H., 24.8.1869, p. 4.

137 Parsons, op. cit., pp. 64-69; S.M.H., 7.12.1869, p. 2; 21.5.1870, p. 3; 24.5.1870, p. 3; 31.5.1870, p. 3.
from the law. The Assembly agreed to these resolutions, but only after certain amendments moved by Colonial Secretary Robertson who considered their nature 'frivilous and unsatisfactory'.

The Cowper ministry appointed the Law Reform Commission in July 1870. It consisted of the Chief Justice, Sir Alfred Stephen, Attorney General Manning, Solicitor General Salomons, barristers James Martin and Edward Butler, and solicitors Thomas Iceton and William Barker. They were empowered:

to make a diligent and full inquiry into the state of the Statute Law of our said Colony, and to submit proposals for the revision, consolidation, and amendment thereof; And also to make like inquiry into the practice and procedure of our Courts of Justice within our said Colony, and to propose amendments of the same, with a view to the simplification and improvement thereof, and to the removal of the inconveniences arising from the separation of jurisdictions in Law and Equity.

The government requested that the commissioners bring down their report within four months or as soon as it could be conveniently completed.

Neither Fisher nor Stewart was satisfied at all by the composition and objects of the Law Reform Commission. Stewart firmly believed in the ability of laymen to reform the law. He saw little chance of substantial innovations being introduced by a body composed solely of lawyers, particularly when it lacked even Fisher's progressive spirit. Similarly, Fisher criticised the appointment of Chief Justice Stephen who

139 Ibid. This view was shared by the Empire, 20.10.1869, p. 4.
141 S.M.H., 27.6.1870, p. 6; see also Stewart on 'Litigation', S.M.H., 21.5.1870, p. 7.
was known to be opposed to the desired ends. He noted that the Commission was dominated by common law lawyers and that their influence was not balanced by either the 'rare intellectual power' of Mr Justice Hargrave or by intelligent merchants and commercial figures like those who had proved so valuable to the English commissioners.\(^{142}\) Further, in Fisher's opinion, both the wide terms of reference and the limited time available to the Commission hampered even more the chances of it producing significant results. He considered that it would have been better simply to authorise a report on the opinions of the English Judicature Commission.\(^{143}\)

Other commentators, if not as specific and strong-worded in their criticisms, were also aware of the Commission's deficiencies. They did not question the eminence and learning of its members but many doubted its ability to bring in systematic and comprehensive law reform. The commissioners were clearly the most competent to deal with technical questions and were certainly aware of the faults in the present system, but neither quality provided an ideal recipe for reform.\(^{144}\) Few thought it possible to develop a perfect system from scratch and in general they agreed that the safest and most promising course was to adopt tried and successful measures from England and America and to rely heavily upon the report of the English Judicature Commission. This, they believed, would reduce the costs and delays of the law without undermining the legal system necessary for a complex, commercially-based society.\(^{145}\)

\(^{142}\) S.M.H., 25.7.1870, p. 2.

\(^{143}\) Ibid.


\(^{145}\) S.M.H., 21.10.1869, p. 4; 22.6.1870, p. 4.
The Law Reform Commission's first report, presented in June 1871, bore out many of the doubts of the radicals and sceptics. The commissioners had begun in a practical way by dividing their task into several subject areas and then inviting suggestions from the profession and the public through circular letters and press advertisements.

As a first step towards the introduction of recent British reforms they had employed three counsel to consolidate the procedural clauses relating to both law and equity. This, they envisaged, would facilitate fusion of the two jurisdictions, if desired, in the future. The commissioners themselves had concentrated upon the Colonial Statute Book and had isolated several areas of law requiring consolidation and substantial amendment. Their first target in this regard was the criminal law and they had delved into English acts, colonial and foreign codes and numerous treatises to discover the best solutions. The result was a massive draft bill, consisting of 464 clauses, to consolidate the criminal law. It repealed and re-enacted in a condensed form upwards of fifty colonial statutes. In other areas, the Commission's work was very incomplete.

The report was received without enthusiasm. Not only was it restricted to the criminal law, observed the Sydney Morning Herald, but it did not give the views of the Commission on the fusion of law and

147 Ibid., pp. 117, 131.
148 Ibid., p. 118.
149 Ibid., pp. 118-19.
150 Ibid., p. 119; a copy of the Draft Act to Consolidate and Amend in Certain Respects the Criminal Law was appended to the report, pp. 133-206.
equity, appeals or costs which were deemed the chief reasons for its appointment. John Stewart was surprised by the 'solemn silence' which surrounded the report's publication. To his mind, the attempt to consolidate and amend the law simultaneously was too ambitious. He feared in consequence that the Commission might not achieve anything at all. His prediction was correct. In June 1872 Sir Alfred Stephen, as president, advised the Colonial Secretary that the Law Reform Commission should be dissolved. The commissioners, all professional men in extensive practice, could not sustain the 'continuous and uninterrupted attendance' necessary to produce substantial results. Stephen considered that a continuing commission 'would doubtless be of immense service to the Country':

... there is much room for reform; and, in some directions much need of it. But the work, to be efficient, should - whether more or less extensive - be well thought out; and be put into shape for the Legislature by practised hands - and neither object can be attained by desultory or unsustained efforts.

The government did not, however, appoint a new commission upon a more permanent basis.

The failure of the Law Reform Commission to produce substantial results at a time when comprehensive reforms were clearly needed confirmed how far the profession's influence had deteriorated by this time. At the same time, it strengthened the belief of radicals that lawyers had no

151 S.M.H., 7.6.1871, p. 4.
152 Ibid., 13.10.1871, p. 2.
153 Sir A. Stephen to H. Pakes, Colonial Secretary, 24.6.1872, Sir Alfred Stephen - Papers, Mitchell Library uncat. MSS. Set 211, Item 1.
154 Ibid.
interest in making the law simpler, quicker and cheaper and that these goals could only be achieved if the profession itself was reformed. As early as May 1871 William Forster had laid a Law and Equity Bill before the Assembly because he saw 'no hope of any reformation of the law at the hands of the Law Commission'. The bill proposed to cheapen and expedite justice by allowing 'agents' to represent litigants, rather than barristers or solicitors. Forster's plan won some support but its radical nature allowed opponents to raise the spectre of dire consequences for the efficiency of the judiciary as well as the profession. John Stewart sought to achieve the same ends through less controversial means in his Legal Practitioners' Relief Bill which called for the amalgamation of the profession and, among other things, an end to the Bar's distinctive attire of wig and gown. Three times he brought this measure before the Assembly but only once, in 1872, did it pass the second reading. Though neither of these bills became law, they did reveal yet another obstacle to the profession maintaining an influential voice in public affairs. Not only were the opportunities which it had to promote law reform very limited but, even when lawyers could take the initiative, their motives for doing so would in future be open to question from at least a vocal minority in the Assembly. Lawyers thus no longer commanded the same standing and influence that they had enjoyed in the 1850s. They had clearly not come to terms with the social and political transformation sparked off in the colony by the gold rushes and the introduction of responsible government.

155 S.M.H., 13.5.1871, p. 4; Empire, 13.5.1871, pp. 2-3.
156 Ibid. - especially the speech of James Martin.
157 S.M.H., 22.7.1872, p. 2.
158 S.M.H., 22.7.1872, p. 2; 31.7.1872, p. 5; 3.8.1872, p. 5; 6.8.1872, p. 3; 14.12.1872, p. 5.
CHAPTER 3

PROBLEMS AT THE BAR

The failure of the legal profession to adjust to the new distribution of political power was, however, only part of the reason why its influence collapsed so completely during the 1860s. Despite their apparent buoyancy just a few years earlier, the lawyers of New South Wales showed no ability and little inclination to respond effectively to the challenges to their authority and standing. The disappearance from public life of several of the profession's most distinguished leaders was clearly one cause of impotence but it also helped to reveal more fundamental weaknesses in the character of lawyers as a group. The rapid social and political transition taking place in New South Wales during the 1850s greatly altered the composition and functions of the profession. Stripped of its leading personalities and deprived of the support of the conservatives, the legal profession suddenly appeared inexperienced and without any sense of esprit de corps or purpose. Its deficiencies, which might in other circumstances have attracted less attention, were highlighted by the need to make the legal system more suitable to the demands of the expanding colony. In this weakened condition, the legal profession had no answer to the attacks from liberal ministries. For two decades it appeared vulnerable, lethargic and inept, a tool for politicians and a target for law reformers.

The primary reason for the profession's ineffectiveness, and in particular the deterioration in its public image during the 1860s, was without doubt the character of the colonial Bar. Its main problem was the change that had occurred in its leadership. Both the depression of the 1840s and the new career opportunities offered by the independence of the settlements at Port Phillip and Moreton Bay had robbed the profession of
several promising advocates. In April 1848 Robert Lowe had observed that the Bar was 'being starved out':

Mr. Windeyer had died; Mr. a'Beckett made a Judge; Mr. Manning made a Judge; Mr. Gordon gone to India; Mr. Michie, one of our ablest practitioners, about to sail for England; and another, of considerable ability, about to leave; although, as he had not quite made up his mind, he would not mention his name. ¹

Others to leave New South Wales in search of improved professional prospects by the mid-1860s included Lutwyche, Redmond Barry, Samuel Raymond, George Innes and Ratcliffe Pring. ² The situation was not improved by the retirement of several of the Bar’s longstanding leaders and the need to fill new judicial vacancies when the District Courts were established in 1858. ³ In consequence, the Bar was left temporarily without a front rank of sufficient size and experience to set the standard for barristers as a whole.

This weakness in the Bar did not pass unnoticed in the 1860s. A newspaper article, entitled 'The Domain of Horsehair' and published in October 1869, suggested that while the New South Wales Bar was stronger in numbers it had 'in other respects ... rather lost than gained strength in late years'. ⁴ One in a series of articles analysing the state of legal

¹ S.M.H., 26.4.1848, p. 3.
² For the careers of these lawyers, see A.D.B., Vol. 3, pp. 108-11 (Barry); ibid., Vol. 4, pp. 459-60 (Innes); ibid., Vol. 5, pp. 109-12 (Lutwyche) and pp. 457-58 (Pring); Bennett, A History of the New South Wales Bar, p. 55 (Raymond). For details of the establishment of the separate legal systems in Victoria and Queensland, see Castles, An Introduction to Australian Legal History, pp. 78-82, 103 ff.
³ The District Courts Act of 1858, 22 Vic., No. 18, and the proclamation issued thereunder divided the colony into five districts, each with its own judge.
⁴ S.M.H., 27.10.1869, p. 7; see also S.M.H., 3.4.1867, p. 5.
practice, it regretted that barristers like Wentworth, Lowe and Richard
Winey were no longer in practice and hinted that the present leaders
of the Bar were neither as numerous nor of the same stature. Sir William
Manning, Attorney General in 1869, was the most senior barrister in
practice. He was able, painstaking and always the master of his case. His
opinions were sound and he was 'a very close reasoner, though his style of
oratory was not very attractive and he tended to rely rather too heavily
upon general principles instead of cases'. His nearest rival, James
Martin, had a quite different manner. He was 'a dashing rather than a
painstaking advocate', possessed of great forensic talent but inclined to
be lazy. Edward Butler, who was also commanded an excellent practice,
fell between these extremes. He was dependable and thorough, with a
knack of identifying himself completely with his client's cause. In
court, Butler had 'a semi-rollicking, and at the same time most emphatic
mode of address, to which a little bit of "the brogue" gives piquancy'.

Apart from these three, however, the article was forced to turn to
several barristers quite recently admitted who were showing promise.
Frederick Matthew Darley had acquired through skill and thoroughness 'an
excellent general practice'. Similarly, Matthew Henry Stephen was
respected for his sensible, concise and telling arguments, although he
lacked the skill of some of his brethren 'in white-washing a dingy client'.

5 S.M.H., 27.10.1869, p. 7. For the career of Manning to that time,
see Empire, 25.4.1856, p. 4.
6 S.M.H., 27.10.1869, p. 7; see also Empire, 17.4.1856, p. 7.
7 S.M.H., 27.10.1869, p. 7.
8 On Darley's early struggles to establish himself, see J.M. Bennett,
'The Life and Influence of Sir Frederick Matthew Darley', M.A.
thesis, Macquarie University, 1969, pp. 16-17, 92-96.
9 S.M.H., 27.10.1869, p. 7.
Alexander Gordon and William Owen had earned a reputation for specialising in equity cases, while William Charles Windeyer was considered to have more ability than he was generally given credit for. Somewhat of an anomaly in this company was Julian Emanuel Salomons, 'one of the sharpest of sharp counsel'. Salomons' methods were as effective as they were unconventional. His 'self-assertive earnestness' and 'peculiarly energetic assumptions of the undeniable justice of his case' were extremely effective with both judge and jury regardless how disreputable a client might be or how tenuous a case. He also had 'a happy knack of sneering, which is quite often as useful as the most learned reasoning when an adversary with a good case has to be grappled with.'

Some other juniors commanded good practices in the District Courts or on circuit. They formed a second rank from which they might aspire to be appointed as a crown prosecutor or a District Court judge. Thus, though not without ability, the Bar was largely inexperienced and lacked the strong leadership necessary to sustain its public standing when recent events had undermined its former political influence.

The absence of an established front rank to set standards of practice and to give leadership meant that the cohesiveness and public performance of the Bar depended very much upon the character of the junior barristers as a group. Unfortunately for the profession, they too possessed certain weaknesses which were fostered by the prevailing circumstances and which consequently exaggerated rather than offset the deficiencies in the Bar's make-up. The two main problems for the junior

10 Ibid.
11 Ibid.
12 Ibid.
Bar were its youthfulness and inexperience, as already noted, and the diverse origins of its members. In 1864 less than one quarter of barristers practising in New South Wales (10/44) had been admitted in the colony more than ten years previously. A decade earlier this figure had been around two fifths (9/23), while by 1869 the proportion was one third (22/63) and by 1879 it was well over a half (46/76). 13 Though some barristers had practised extensively in England or Ireland before coming to the colony, the Bar of the 1860s was still, therefore, very young in terms of experience before the local courts and was unlikely to be particularly homogeneous or to have a developed esprit de corps. Furthermore, eighteen of the forty-four barristers on the roll in 1864 had been trained and admitted in the colony under the 1848 Barristers’ Admission Act and only a few of these had any knowledge at all of practice before the courts of England and Ireland or were imbued with the traditions of the Inns of Court. 14

Both groups of barristers did, however, have particularly strong reasons for wishing to make a success of their career at the colonial Bar. For many members of both bench and Bar it was their legal career which had brought them to Australia. Apparently frustrated by their limited progress and success on the circuits of England and Ireland, and perhaps

13 These figures are derived from the Law Almanacs of New South Wales; V. & P. (L.A., N.S.W.), 1856-57, Vol. 1, p. 898; N.S.W. Roll of Barristers and Solicitors, 1826-1876, X25, A.O.N.S.W.; and Barristers’ Roll, 15.6.1879-1.12.1928, and Attorneys’ Roll, 16.12.1876-10.2.1894, held by the N.S.W. Supreme Court.

14 Apart from Matthew Henry Stephen and Joshua Frey Josephson, I have found no record of any barrister, who was practising at this time and who had been admitted under the 1848 Act, having studied or practised law in England or Ireland.
lacking the superior ability or connections which were the main keys to mobility in a crowded Bar, they sought new opportunities. Some of those admitted to the Bar of New South Wales did not stay long in the colony. Whether their reasons for departing were lack of immediate advancement or personal considerations is difficult to determine. Those who did remain were particularly anxious to reap the rewards of professional success and the benefits of office which appeared unrealisable before the courts of Westminster and Dublin.

The diary of Thomas Callaghan, a young Irish barrister admitted in New South Wales in 1840, suggests that both he and Roger Therry, soon to become a judge of the Supreme Court, were barristers of this mould. Callaghan envied Therry's success and, despite the latter's hospitality, was ever ready to criticise his fellow Irishman. He did not think that Therry was:

a man of more than ordinary intellect, he is certainly by no means a man of talent, yet he is laborious and pushing, having also an admirable opinion of himself. I believe that he thinks himself a gentleman and a man of ability. I should think that naturally he has warm, perhaps generous feelings, but they were dried up by his early and precarious struggles with the world. ¹⁵

Adherence to Catholicism was possibly a further incentive for barristers such as Callaghan and Therry to seek either preferment or opportunity in the colonies. Callaghan's diary suggests that there was a fairly strong community of interest between Catholic barristers in the colony. Edward Brodhurst in particular shared Callaghan's companionship and helped his

¹⁵ Entries for 17.2.1840, 13.3.1840, Callaghan, Diary, Vol. I. In 1843 Callaghan noted that 'I dined with Cheeke and Brodhurst ... They are both men of the world ... full of selfishness and jealousy. There is no chance, no fair play, for a young man at this Bar', entry for 4.6.1843, ibid., Vol. 2.
career. According to his biographer, Edward Butler migrated to New South Wales in 1852 because he 'like many other Catholics in Ireland found that the British government's control of the legal system virtually disbarred him'. In other cases, however, religious belief was unlikely to have been the only reason for barristers to turn to New South Wales.

Peter Faucett, son of a Catholic blacksmith and an uninspiring if diligent barrister, could scarcely have aspired to high judicial office in England. In 1865, thirteen years after his admission in the colony, he was appointed to the Supreme Court bench.

By the 1860s the District Court bench was bristling with barristers of a similar stamp. Callaghan himself, after several uncertain years when law reporting for the daily press was necessary to supplement his meagre income, had advanced through the offices of crown prosecutor and chairman of Quarter Sessions to the bench. William Alexander Purefoy, also a graduate of Trinity College, Dublin and a member of the Irish Bar, had come to New South Wales a year before Callaghan. His path to judicial office was characterised similarly by a succession of government appointments, notably as Chief Commissioner of Insolvent Estates in 1856.

The careers of Isidore John Blake and Henry Ralph Francis showed clearly the comparative benefits of pursuing their profession in the colony.

16 Cf. Entries for 4.1.1841, 16.5.1841, 12.1.1842, 13.2.1842, 22.2.1842, 20.11.1842, 27.11.1842, 2.2.1843, 24.5.1843, 4.6.1843, ibid., Vols. 1 and 2. Attorney General Plunkett, a fellow Catholic, helped Callaghan's advancement in the colony, see entries for 1.9.1840 and 7.9.1844, ibid.

17 A.D.B., Vol. 4, p. 312.


19 Holt, A Court Rises, pp. 21-26.

Blake had come to the colony in 1854 after sixteen years without recognition at the Irish Bar. Within seven years he had established a good practice, served in both houses of the legislature, and been appointed as a District Court judge and chairman of Quarter Sessions.  

Francis' success was meteoric. Though admitted to the English Bar by the Inner Temple in 1848, he had not relinquished his career in teaching and tutoring until 1856 when he began to read with F.O. Haynes, an expert in equity, real property and conveyancing procedure. Francis was not admitted to the New South Wales Bar until August 1859, but in less than two years he held a seat on the District Court bench.

While the 'imported' element at the colonial Bar thus had particularly strong reasons for wanting to succeed in their new environment, colonially-trained barristers tended for different reasons to share this concern. New South Wales did not offer the same scope as Great Britain for legal training to serve as an avenue to other callings outside advocacy in the courts. To become a barrister of note was to reach one of the highest positions in colonial society. It was a key to success for ambitious colonial youth. Robert Wisdom, son of a Lancashire customs collector, had come to Australia with his parents at the age of four. After education at Maitland and Sydney College, he became a literary and political writer in the Maitland area but soon raised his sights. In 1857, he sought from Henry Parkes a position on the staff of the Empire, preferably with some free time to pursue his law studies.

21 Ibid., pp. 63-68.
22 Ibid., pp. 69-72.
23 S.M.H., 4.4.1867, p. 4.
Wisdom considered the Bar 'to be the best opening for a young man in this country' since the introduction of responsible government had opened up 'a fine field for a lawyer who is also a politician'. W.C. Windeyer came from the opposite end of the social scale. Son of the notable barrister Richard Windeyer, he had received an excellent education at W.T. Cape's School, the King's School and the University of Sydney. Windeyer then read in chambers with leading barrister Edward Broadhurst, was called to the colonial Bar in 1857, and prior to the 1860s he took an active role in public affairs and was twice elected to the Legislative Assembly. A letter written by Windeyer in 1866, explaining why he intended to shed his public role temporarily, showed the importance which he attached to success at the Bar. He was determined to wait until he was sure 'that from my position in my profession my voice in the councils of the country commands respect'.

Others, by their determination to reap the benefits of English training even after it became possible to be admitted directly in the colony, endorsed Windeyer's view of the importance of succeeding at the Bar. Joshua Frey Josephson, a leading commercial figure and sometime mayor of Sydney, entered Lincoln's Inn and was called to the English Bar in 1859, even though he had been previously admitted in the colony in June 1855. In 1858, with the financial support of Sydney's Jewish community, Julian Salomons entered Gray's Inn after he had passed a highly

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satisfactory preliminary examination for the colonial Bar. He made this change on the advice of the Barristers' Admission Board that the colonial requirements would soon be revised completely. Salomons was admitted in England in 1861 and returned to practise in New South Wales. Matthew Henry Stephen, the son of the Chief Justice, was admitted to the colonial Bar in December 1850 after serving as associate to both Chief Justice Dowling and his own father. Stephen then spent 3½ years in England studying under an equity draftsman and special pleader. This last step coincided with his father's previously expressed belief that a colonial barrister's training would be incomplete without some tuition in England.

This continued deference to English training, besides demonstrating the importance which some attached to success at the colonial Bar, also appears to have made those trained and admitted in the colony, but without the means or desire to travel overseas, even more determined to succeed and thus counteract the impression that they were inferior. One commentator found most amusing their assumption that a colonially trained barrister was 'a far superior genius to any who have trodden the halls of Westminster':

Jur model young barrister is always tumbling about the top of Parnassus, and keeping up the most hilarious intercourse with everything witty, charming and seductive, and yet doing all things much better than they could have been achieved by Lord ELDON, Lord LYNDHURST, or any such drones!

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29 A.D.B., Vol. 6, pp. 81-83.
30 Meeting, 27.12.1857, Barristers' Admission Board: Minutes - 27-8-1856 to 27-11-1888, p. 45. (These Minutes are currently held by the N.S.W. Supreme Court).
32 Evidence before Select Committee on Division of the Legal Profession Abolition Bill, V. & P. (L.C., N.S.W.), 1847, Vol. 2, p. 469.
33 S.M.H., 4.4.1867, p. 4.
Those directly involved did not, however, consider the matter so lightly. In 1865 James Martin vigorously refuted the suggestion that for some years to come it would be better to seek new judges overseas. It was, he considered, 'an imputation on the members of the Bar of this colony for it to be supposed that there was not any person here who was qualified for a judicial appointment of this nature'.

Both the inexperience of the junior Bar and this particularly strong determination to succeed in advocacy before the courts of New South Wales would have been of less importance if litigation had been plentiful and legal practice settled, but they were not. Between 1864 and the early 1870s the number of registered practising barristers rose from forty-four to around sixty, an increase of one third. Legal business did not keep pace. In the Supreme Court's civil jurisdiction, the number of writs issued and the number of causes entered for trial remained constant except for a brief expansion between 1866 and 1868. The total amount for which judgment was signed followed a parallel course until 1871, then fell quickly to only three-fifths of its level in the mid-1860s. Equity figures were similar. The number of petitions and bills remained steady, but the number of decrees and orders granted by the court dropped from 253 in 1864 to 105 in 1870. Probates and letters of administration increased slowly in quantity, but the amounts sworn to in both cases declined. Even the instances of appeals heard from the Insolvency and District Courts

34 S.M.H., 20.4.1865, p. 3.
35 These figures are taken from the Law Almanacs of New South Wales, 1864-1875. S.M.H., 21.8.1865, p. 5, observed that the barrister's lot was then quite good, but there was little spare room.
fell from twenty-one in 1864 to only one in 1870. 36

In part, this decline in the Supreme Court's business was due to the increasing popularity of the District Courts. The District Courts had been established in 1858 to bring 'justice home to everyman's door' and to replace the less than satisfactory administration of justice by benches of unpaid magistrates. 37 They had jurisdiction in all civil matters up to £200, used less cumbersome procedures than the Supreme Court, and encompassed the metropolitan, coastal and country districts of New South Wales through five regional circuits, each with its own judge. 38

At first both practitioners and suitors shied away from these unproven inferior tribunals and their first years created considerable anxiety and discontent. 39 Camden residents in particular were incensed by the behaviour of District Court Judge Cary. They complained to the Legislative Assembly that his decisions had 'not been calculated to gain the confidence of the inhabitants, nor to induce them without reluctance to submit to his

36 A detailed breakdown of the 'Business of the Supreme Court' may be found in the *Statistical Registers of New South Wales, 1864-1872*.

37 A brief discussion of the formation of the District Courts appears in Holt, *op. cit.*, pp. 5-10. The debates on the District Courts Bill were printed in the *Sydney Morning Herald* in March, November and December, 1857, and May and June, 1858. The Report from the Select Committee on the State of the Magistracy, V. & P. (L.A., N.S.W.), 1857, Vol. 2, pp. 73-242, provides a very detailed set of evidence and conclusions on the administration of justice in New South Wales by unpaid magistrates.

38 22 Vic., No. 18; see also Holt, *op. cit.*, pp. 10-16.

39 *S.M.H.*, 5.10.1869, p. 5; 25.2.1870, p. 6. In 1862 the *Herald* was concerned about how juries were performing their duties in the District Courts, and in particular the 'immense danger that the verdict should finally depend upon the standing of the local lawyer with respect to the particular jury that may be empanelled', *S.M.H.*, 5.4.1862, p. 4.
decision questions in which their rights and interests are at stake'.

They were primarily concerned by a series of cases in which the judge's son represented a certain Alexander Brand. In these, they considered that 'the conduct and general demeanour of the Judge were not such as to give confidence in his impartiality'. As a result of such incidents, it was only after several years' experience that it became clear the District Courts' 'greater cheapness, the comparative freedom of their practice from obstructive technicalities, and the speedy remedies which they offered' were preferable to the protracted litigation and long bills of costs characteristic of the Supreme Court.

The law obtained there may not have always been the best possible, but it was 'found quite good enough for all ordinary purposes'.

The Bar gained little comfort, however, from this new distribution of litigation. Not only did solicitors handle much of the work in the District Courts, and particularly in country areas, but after 1866 District Court business itself declined sharply. The number of suits commenced fell from 12,831 in 1866 to just over 8,000 in the early 1870s. While 4,960 suits came to trial in 1866, this level had shrunk to a mere

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41 Ibid.
42 S.M.H., 5.10.1869, p. 5.
43 Ibid.; see also S.M.H., 21.8.1865, p. 5.
3,164 by 1872. The costs of these suits dropped from in excess of £12,000 to below £10,000.45

This slump in litigation presented no real danger to the four or five English and Irish barristers and two or three colonial barristers who held the bulk of practice in the Supreme Court.46 Henry Darley wrote from Ireland to his brother Frederick Matthew in September 1869:

You speak very charmingly of yourself - your professional income last year was very large, and although it may not be so good this year, yet any falling off will arise from a general decline in business, and not from anything peculiar to yourself, for I understand that you are retained in every important case.47

During 1869, which was a bad year for business, Darley earned £3,090 - a sum which few leaders of the Irish Bar could match 48 and which compared more than favourably with the fixed incomes under the New South Wales civil list, including £2,600 for the Chief Justice, £2,000 for the puisne judges, and £1,000 for the District Court judges, the Master in Equity and the Chief Commissioner of Insolvent Estates.49 By May 1870 Henry Darley was sympathising with his brother that the colony 'is suffering so much from a stagnation of business, and that as a consequence your profession is suffering in equal degree'.50 Even so, it is clear that

45 'District Court Suits', Statistical Registers of New South Wales, 1864-1875. A more detailed breakdown of District Court business was published annually in the Votes and Proceedings of the Legislative Assembly.
46 S.M.H., 8.7.1867, p. 5; 25.4.1867, p. 5.
47 H. Darley to F.M. Darley, 8.9.1869, Sir Frederick Matthew Darley - Papers, Mitchell Library MSS. 2157/Item 3, p. 25.
48 H. Darley to F.M. Darley, 24.3.1870, ibid., p. 27.
49 The Blue Book for 1869 may be found in V. & F. (L.A., N.S.W.), 1869, Vol. 1, pp. 389 ff.
50 H. Darley to F.M. Darley, 17.5.1870, Darley Papers, ML MSS. 2157/3, pp. 31-32.
neither Darley nor other leaders of the Bar were suffering great hardship.

Other barristers, particularly those not long in practice, were less fortunate. They faced a precarious situation with little chance of gaining experience, reputation or reasonable income.\(^5^1\) As early as 1862 when a barrister's lot had been far more favourable, W.C. Windeyer had resigned from the Assembly because he found that his political duties were 'incompatible with the pursuit of (his) profession'.\(^5^2\) In September 1866 a meeting of the Bar at the Attorney General's chambers confirmed how far events had undermined the position of the individual barrister. That meeting drew up a series of rules to govern the conduct of barristers practising in the District Courts and Quarter Sessions. In future, it decided, there would be exceptions to the general rule that a barrister was only to receive briefs through an attorney. These were where there were no attorneys or only a single attorney present, where there existed a combination of attorneys to refuse the Bar employment, where only unsuitable attorneys were present, and where the attorneys present were non-resident advocates.\(^5^3\) To make matters worse, there was little movement within the Bar. Given reasonable ability, progress up the ladder

\(^{51}\) S.M.H., 8.7.1867, p. 5, noted that 'the purely colonial barrister has thus no chance of acquiring practice or experience'; and also S.M.H., 25.4.1867, p. 5, that 'the purely colonial advocates cannot get practice in the District Courts, where the attorneys chiefly practise; nor in the Supreme Court which is chiefly in the hands of a few seniors'.

\(^{52}\) S.M.H., 25.12.1862, p. 2.

\(^{53}\) Printed Circular, 17.9.1866, of Rules agreed on at the Meeting of the Bar in the Attorney General's Chambers on 15.9.1866, Alexander Oliver Papers, University of Sydney Archives, Box P7. See also W.J. Foster to B.R. Wise, 3.9.1885 (6?), B.R. Wise - Papers, Correspondence, 1879-1902, Mitchell Library MSS. 1327/2, pp. 103-05.
of seniority should have provided a greater share of legal business. Without such progress and with legal business not plentiful, many young barristers were losing ground, and not advancing as they might have expected when they had come to the colony or begun to study locally for the Bar several years earlier. Some juniors enjoyed the support of leading counsel, possibly gaining the use of their chambers and libraries while the senior was away, but most who desired advancement had to seek it through other channels, especially in politics or the government service.

The dangers of this situation were made all too evident in 1869 by the controversy which surrounded the retirement from office of District Court Judge Cary and his replacement by Joshua Frey Josephson, then Solicitor General. Shortly after his appointment, Josephson was asked by Robertson, the premier, to be on leave of absence until an inquiry was held into allegations that he had gained his position by bribing Cary with

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54 A comparison of the lists of seniority at the Bar which appeared in the Law Almanacs shows that no barristers progressed more than one place between 1864 and 1869. By contrast, all barristers advanced at least four positions, and some as many as a dozen, between 1869 and 1874. Between 1874 and 1879, most barristers jumped a further four places in the order of seniority.

55 R.E. O'Connor benefited from the use of Darley's chambers in 1876. He wrote that 'I have been doing very well, cleared over £100 since 15th June last when I was called & everything looks as well as possible for next year. I have to thank your kindness in allowing me these chambers for a great deal of my good fortune', R.E. O'Connor to F.M. Darley, 24.11.1876, Darley Papers, ML MSS. 2157/1, pp. 20C-20F; see also W.C. Windeyer to his mother, 25.5.1861, Sir W.C. Windeyer - Papers, Letters to his Mother, Mitchell Library AW77/11.

56 E.g., Robert Wisdom wrote to Parkes in 1874, that 'I have applied to the Attorney-General for the Prosecutorship at the Tamworth Assizes next month but am afraid I will not get it unless through the influence of some friend "at Court". A word from you on my behalf would I have no doubt secure the appointment', R. Wisdom to H. Parkes, 9.9.1874, Parkes Correspondence, Vol. 44, ML A914, pp. 207-08.
misappropriated public funds and an offer of a permanent position in the public service for Cary's son. The subsequent investigation cleared Josephson on these charges but revealed that he had induced Cary, who was too ill to resume his duties, to retire from office rather than seek an additional three months' leave of absence. Josephson had paid him the equivalent of three months' salary from his own pocket so that he might retire immediately. He did this, he claimed, because 'my natural inclination and my habits, pointed out the position of a District Court Judge as a suitable one for me - indeed much more suitable than that of a political Solicitor General'. The government took no action due partly to the opinion of Sir William Manning that Josephson had Cary's welfare at heart and partly to the legal difficulty of taking any action against a judge for conduct preceding his appointment.

The difficulties for a young barrister establishing himself at the colonial Bar in the 1860s were further increased by the lack of adequate law reports and legal textbooks from which a sound knowledge of both substantive law and procedure could be obtained. According to Mr Justice Therry, English law reports reached New South Wales within two months of publication, but that solved only part of the problem. They did not

57 Return with Minutes, Correspondence, etc., re the Retirement of District Court Judge Cary and the Appointment of J.F. Josephson to the Office so vacated, V. & P. (L.A., N.S.W.), 1870, pp. 609-23.
59 J.F. Josephson to the Colonial Secretary, 24.12.1869, ibid., p. 616.
60 The Attorney General to the Colonial Secretary, 31.1.1870, and Confidential Report of the Attorney General, ibid., pp. 616-17, 622-23.
61 Therry, Reminiscences of Thirty Years' Residence, p. 347.
include previous decisions by colonial courts. Alexander Gordon of the
Bar was dismayed at the 'utter absence of anything like reports'. Since
his arrival in August 1857, he had 'personally found the greatest
difficulty in ascertaining the grounds upon which the judgment has turned
in cases before (his) arrival in the colony; and in reference to points
of practice the inconvenience is very great'. This situation was not
remedied until after 1862 when publication began of the Supreme Court
Reports. The early volumes of that series, compiled by barristers
Wilkinson and Owen, contained a selection of court decisions prior to
1852.

Colonial legal textbooks remained similarly scarce. Between 1844
and 1846 Thomas Callaghan had published three volumes covering the Acts and
Ordinances of New South Wales. This was complemented in 1861 by Henry
Cary's Statutes of Public Utility. The primary object of both was
simply to collect and reorganise into a manageable form the legislation
and regulations in force in the colony. Stephen's Constitution, Rules and
Practice of the Supreme Court, together with a supplement written by his
son, Matthew Henry, in 1851, remained the only guide to legal practice.

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62 Evidence before Select Committee ... on Business of Supreme Court, J.L.C., Vol. 2, 1857, p. 196.
63 The Reports were supported by a small vote of funds by parliament, S.M.H., 8.7.1862, p. 4.
64 T. Callaghan, Acts and Ordinances of the Governor and Council of
New South Wales, and Acts of Parliament enacted for, and applied to,
the Colony, 3 vols., Sydney, 1844-46.
65 H. Cary, Statutes Affecting New South Wales: The Statutes of
Practical Utility, 2 vols., Sydney, 1861.
66 A. Stephen, The Constitution, Rules and Practice of the Supreme
Court of N.S.W., Sydney, 1843-45; M.H. Stephen, Supplement to the
Supreme Court Practice, Sydney, 1851.
In other areas of law, the field was equally sparse. Several publications existed on the duties of magistrates, notably one by J.H. Plunkett, and Mr Justice Burton had published a work on insolvency law in 1842 which explained the new bankruptcy provisions introduced to combat the effects of economic depression in the colony. The total was not impressive and would clearly have placed a heavy burden upon an inexperienced barrister who wished to make a career for himself at the colonial Bar, in addition to the difficulties of gaining a share of court business during the 1860s. The combination of these problems and the diverse origins of colonial barristers by the 1860s thus made it very unlikely that the Bar would be able to unite upon wider, less immediate issues such as the decline of professional influence. Many barristers were too absorbed in the very practical pursuit of establishing themselves in a career and even those who did make the time for political service would not all, as noted in the previous chapter, have been concerned at the collapse of the power of the colony's conservative social elite.

Both the general inexperience of the colonial Bar and the concern of individual barristers to establish a sound practice were evidence in its style of advocacy before the courts. Gilbert Wright, a solicitor,

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69 For the career of Gilbert Wright, see Minchin, 'Gilbert Wright: Pioneer Solicitor of Bathurst', pp. 199-208.
giving evidence before the 1857 Select Committee into the Business of the Supreme Court, pointed out that in the courts at Westminster there was 'a class of intellect of a superior character' compared to that existing in New South Wales. It was, he considered, simply a result of the colony's 'juvenility'. Juries were less educated, the bench and Bar did not have a similar capacity for concentration, and attorneys made the matter worse by overloading cases with evidence in an attempt to offset the vagaries of juries. In addition, there were 'some ill-regulated and undisciplined minds at the Bar, who do not know how to control their verbiage, and to concentrate their thoughts'. At present there were no incentives to attract great legal intellects to the colonial Bar and that situation, Wright suggested, would only change if legal business increased, specialization developed at the Bar, and more lucrative rewards were offered for judicial office.

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71 Ibid., pp. 158-59; see also comments of Robert Banbury, a solicitor, on the delays caused by professional tendencies to overload cases with evidence and the excessive arguments over admissibility of evidence, Report from the Select Committee on the Moreton Bay Judge's Appointment Bill, V. & P. (L.A., N.S.W.), 1858, Vol. 1, p. 1191. The 1857 Select Committee concluded (p. 147) that 'not only are the causes which are brought before them more numerous than the relative amount of population would seem to justify, but the questions involved in them are also more intricate, and present more points for decision than are usual upon such trials in other countries. Whilst the ingenuity and interest of Counsel, Attorneys, and parties are more than usually perhaps displayed in the number of witnesses produced, the nature, the extent, and variety of the arguments which it is often extremely difficult for Judges to repress, but which unchecked are apt to run into extremes, by which the public time, and the attention of those who are to decide upon the real points at issue, are alike exhausted'.

Charles St. Julian, the *Sydney Morning Herald*'s law reporter and later Chief Justice of Fiji, was also critical of how counsel conducted their cases before the court. He observed that:

> the practice of fighting out every litigated question, and of arguing every minute point, is one which has insensibly grown up; it has had its origin in the very zeal and care of Counsel for the interests of their clients. Some of the most able and painstaking members of the Bar have thus been led into this system of prolonged trials and arguments to an unreasonable extent. 74

St. Julian thought that the situation was improving but admitted that he had 'often been astonished at the ingenuity with which some gentlemen have managed to include in their addresses to juries, and even the Court, a range of subjects having nothing whatever, in reality, to do with the matter at issue'. 75 He remembered 'a learned gentleman going six times in one speech over precisely the same argument'. 76 The law reporter was quite aware, however, that any change in this area could only be made by the Bar itself. Tight judicial control over counsel's addresses would, in his opinion, have only led to 'unseemly discussions'. 77

This potential conflict between bench and Bar was considered in greater detail by Charles Knight Murray, a barrister. While admitting that there were some grounds for 'imputing great discursiveness to counsel', Murray made clear that judicial interference would worsen, and not remedy, this state of affairs. 78 He stated that the bench was already

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too disposed to interrupt the arguments of counsel. The judges did
not give a barrister sufficient credit 'for making what may, for a time
perhaps, appear to be a little discursive, ultimately work towards the
completion and illumination of his argument'. 79 Interruptions by the
judges tended to be on incidental matters and to divert the counsel from
his particular line of argument. This resulted in repetition and delay
and made barristers appear long-winded. Murray also suggested that it
was the judges who were responsible for delaying legal business in other
ways, particularly by deliberating upon the bench when a difficult decision
had to be made. 80

The interruptions of counsel from the bench referred to by Murray
do not appear to have been aimed at promoting a more concise form of
address by barristers. Chief Justice Stephen, writing to the Colonial
Secretary about the need for an additional Supreme Court judge in 1858,
refuted the suggestion that the judges might save time and facilitate
court business by preventing lengthy speeches, restricting cross-
examinations, and more vigorously refusing new trials. He believed that
anything done in the pursuit of truth and justice could not be considered
a waste. 81 While this mutual arrangement not to interfere with each
other's independence continued, relations between bench and Bar were
cordial. Joking and punning frequently occurred in court with the
barristers' efforts sometimes being copped by the judges. 82

79 Ibid.
80 Ibid.
81 The Chief Justice to the Colonial Secretary, V. & P. (L.A., N.S.W.),
1858, Vol. 1, p. 1158.
82 Evidence of Gilbert Wright to Select Committee ... on the Business
These less than satisfactory aspects of the Bar’s court room performance continued throughout the 1860s. Counsel sifted evidence with the same exaggerated caution, their arguments were often long and tedious, and they frequently discussed technical objections 'with the most wearisome verbosity'.\(^83\) Occasionally the true question at issue was talked 'quite out of sight'.\(^84\) In April 1863 Mr Justice Wise clashed with the junior Bar for imposing a new restriction upon barristers when they were arguing interlocutory objections at nisi prius. With the current pressure of business, the judges had decided that to hear two counsel in support of a mere preliminary objection would cause unnecessary delays and arrears.\(^85\) Barristers were also criticised for becoming too closely identified with their client's cause. Facts were 'often distorted, honest and disinterested witnesses shamefully badgered and browbeaten; character ruthlessly assaulted, and improper motives freely attributed'.\(^86\) In the background, sharp attorneys sometimes managed to prolong proceedings to delay a just claim or to swell a bill of costs.\(^87\) It was not a record

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83. S.M.H., 11.10.1869, p. 2; 6.11.1867, p. 7; Empire, 4.4.1865, p. 4.
84. S.M.H., 11.10.1869, p. 2; 20.1.1865, p. 2.
85. S.M.H., 25.4.1863, p. 7.
86. S.M.H., 6.11.1869, p. 7. The Bathurst Free Press observed in 1872 that 'during the recent sittings of the Court of Quarter Sessions the business of the Court has been considerably retarded by the interruptions of this kind and language of an unseemly character, and quite unsuited to the dignity of a Court of Justice, has been used on several occasions. For instance, we were not a little surprised to hear one member of the Bar saying to another, in open Court, "If that learned gentleman had said what he has now said twenty years ago when duelling was in vogue, he or I would have lost our head; and maybe he would not have said it now did he not know that I am an old man and have had very little to eat for two days and am consequently very weak"', Bennett, A History of the New South Wales Bar, p. 81.
87. S.M.H., 11.10.1869, p. 2.
of which the profession, and particularly the Bar, could be proud and
certainly contributed nothing towards the standing of barristers as a
group, weakened as they already were by the absence of an effective and
respected leadership.

However, the events which above all damaged the reputation of the
colonial Bar and laid bare its weaknesses were those surrounding the
appointments to the Supreme Court bench in 1865. In April that year
Attorney General J.B. Darvall introduced a bill into the Assembly to
provide for the appointment of a fourth judge to the Supreme Court. He
supported his case with the traditional arguments of overworked judges,
colonial expansion and the need for the efficient administration of
justice, but he also raised two other issues of immediate relevance to the
standing and composition of the Bar. These were the role of local
political patronage in judicial appointments and the related question of
whether a new judge should be selected from the colonial Bar or for the
foreseeable future be sought overseas. Darvall himself, while urging
the need for a fourth judge, was not happy at having the personal
responsibility for such an appointment. He dissociated both himself and


89 S.M.H., 5.4.1865, p. 3; Empire, 5.4.1865, pp. 3-4.

90 S.M.H., 5.4.1865, p. 3. - in the debate Darvall said 'He wished that the Government could be relieved from the necessity of having anything to do with the appointment of a new Judge, or indeed of any other official. Nothing was so troublesome, so thankless, so disagreeable, as the distribution of the patronage that fell into the hands of the Government'.
Solicitor General Hargrave from any desire to profit personally by the creation of the new office. Legal ability and not political views, he insisted, must always be the basis for such decisions. 91

Apart from the question of patronage, however, Darvall considered that there were other difficulties in appointing a colonial barrister. Not only would the foremost colonial lawyers not accept a puisne judgeship because of the inadequate salary, but in a small community there was always the danger of the new judge being too closely identified with aspects of both general and court life in the colony. Failing the acceptance of office by a certain limited number of colonial barristers, Darvall thought that for many years it would be wise 'to go to England for a Judge'. 92 He insisted that he had:

... no desire to keep from the profession ... those rewards to which they were entitled. But a higher consideration with him than even the chance of professional advancement was that the better interests of the country should be served by the appointment of a Judge who, coming from England, would bring with him the learning, the character, and the independence of all English gentlemen practised in the law, and having no local connections that might unfit him for the performance of his duties in a way that would be acceptable to the public. 93

Such an admission by the nominal leader of the Bar and one of its most experienced members was scarcely calculated to improve public confidence in the colonial Bar and was vigorously refuted by several members of the Assembly including, as we have seen, James Martin. 94 The success of the

91 Ibid.
92 Ibid. The Empire, 22.4.1865, p. 4, agreed with Darvall that this might be necessary.
93 S.M.H., 5.4.1865, p. 3.
94 See speeches of Buchanan (S.M.H., 5.4.1865, p. 3), Egan, Martin, Hart and Buchanan again (S.M.H., 20.4.1865, p. 3).
legislation did not, however, hinge on this issue and the bill passed both houses by a large majority. 95

The issues raised by Darvell were not altogether new. When the creation of the District Courts was under consideration in 1857, Deas Thomson at least had questioned whether the Bar was large enough to sustain eight judicial posts as well as the other essential crown law offices. 96 By 1865 the matter was much more complex. The circumstances were unique, one correspondent urged, because it was not an ordinary vacancy but a new appointment 'to be made by a ministry mainly consisting of men who have been gravely and repeatedly censured for creating patronage to strengthen their position in the colony'. 97 No one doubted that the leaders of the colonial Bar would be suitable for the post, but considering the sacrifice in pay and conditions which such a move would entail, it was not certain that they would accept. More junior members of the Bar might have a better understanding of colonial circumstances and quirks of law, but many challenged whether this advantage overrode what they

95 Bennett, A History of the Supreme Court of New South Wales, p. 43; Empire, 20.4.1865, pp. 3-4.

96 He made this comment during the committee stages of the Judicial Officers' and Barristers' Admission Bill, S.M.H., 6.3.1857, p. 4.

97 Letter by 'Civis', S.M.H., 18.4.1865, p. 5. In 1861 R.J. Want told the Legislative Council that because of manhood suffrage 'political corruption had become rampant ... - judgeships, prosecutorships, and other public offices of trust and emolument had been given away to individuals as the reward of political services', S.M.H., 25.4.1861, p. 2; James Martin attacked appointments made by the Cowper government in August 1863, S.M.H., 19.8.1863, p. 6; 20.8.1863, p. 3; 25.8.1863, p. 4. On the Cowper government and patronage, see generally P. Loveday, 'Patronage and Politics in N.S.W., 1856-1870', Public Administration, No. 4, 1959, pp. 341 ff.
saw as the more thorough training of the average English barrister.  

The death of Mr Justice Milford late in May 1865 added further fuel to the debate as the Cowper ministry now had two judicial vacancies to fill. The *Sydney Morning Herald* felt that the government had never been confided with 'a more important or solemn trust'. The appointments would be for life, yet it was within the ministry's power to select 'unfit men, either notoriously incompetent in legal attainments or incapacitated by their habits and moral character to assure the confidence of the public'. In the Legislative Assembly, James Martin took up the issue on behalf of the Bar. During an adjournment debate on 7 June, he referred to rumours that Solicitor General Hargrave might be appointed to the second vacancy as his pledge extended only to offices actually created by the government. This rumour, Martin insisted, had created 'a wide-spread  

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98 *S.M.H.*, 8.7.1867, p. 5, observed that 'It is pretty generally admitted that, with the exception of one or two seniors, at the Bar of this colony there is no satisfactory list of men from which judicial preferments can be made ... When there was a large and influential Bar of English and Irish barristers in this colony, and when there was a large number of able men to choose our Judges from, and when there was a continual accession to the colonial Bar of young barristers from home, and when political combinations did not raise the probability of very strange and very eccentric appointments, the judicial elevations in this colony occasioned no great anxiety to the public'. J.F. Josephson, a barrister, while standing up for the reputation of the colonial Bar, admitted that the youngest members were unfit from youth and want of experience from being suitable for judgeships and that if four or five seniors did not accept, the government should send to England for the best talent they could get. *S.M.H.*, 20.4.1865, p. 3.  

99 *S.M.H.*, 31.5.1865, p. 5.  

100 *Ibid.*
feeling of alarm among the profession'. The only proper training for the bench was experience in the court room and Hargrave had practised little, if at all, since his arrival in the colony. The Bar was not, Martin argued, 'a profession in which eminence was obtained by favour'. In his opinion, no government at home would 'for a moment dream of appointing any person to the Bench merely as a reward'.

The Bar's fears were fully justified. The new judges, whose appointments were announced on 22 June 1865, were Alfred Cheeke, currently a District Court judge, and John Fletcher Hargrave. As a District Court judge, Cheeke had been extremely popular and was noted for working quickly and efficiently through the business before his court. In legal circles, however, he was not considered sufficiently erudite as a lawyer to sit on the Supreme Court and the principle of judicial promotion was not widely approved. The appointment of Hargrave was particularly galling because it was in direct opposition to the views expressed by the Bar and was made by the ministry as a reward for political services and against the advice of Attorney General Darvall. Darvall apparently favoured the claims of a

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101 S.M.H., 8.6.1865, p. 2; 9.6.1865, p. 4. The Empire, 3.6.1865, p. 5, on the other hand, welcomed the idea of Hargrave's possible appointment and defended it against Martin's attack, ibid., 9.6.1865, p. 4.

102 S.M.H., 8.6.1865, p. 2.

103 Ibid.

104 S.M.H., 20.10.1869, p. 5. Dowling, Reminiscences, pp. 462, 464, recalled that Cheeke 'had not the reputation of being a great lawyer; he had however great experience, a very large share of common sense, and a knowledge of the world, all most important to a Judge. He possessed too, one admirable attribute, that of punctuality in his attendance at Court; ... he daily despatched an enormous amount of work with satisfaction to the profession and the suitors ...'.
barrister acceptable to the Bar but politically opposed to the government. The ministry overruled his advice. As a result, the Bar declined to attend the swearing-in of Cheeke and Hargrave, a step directed primarily against the latter. Although the court was 'crowded to excess' by spectators, 'all the chairs at the barristers' table remained vacant until after the ceremony was over'. Darvell resigned the Attorney Generalship and left for England.

The conduct of the new judges upon the bench soon confirmed the Bar's misgivings. As early as March 1866 Attorney General Martin made clear to the Assembly 'that he felt, and meant others to receive the impression, that the Bench no longer has the proper confidence of the Government, the Profession, and the people'. His remarks followed the remarkable Bertrand's Case in which, after a two-two division of the judges, the conviction of a murderer was quashed upon a technicality when the junior judge of the court withdrew his opinion. Martin's comments implied that 'the consultations of the Judges were less cordial and confidential than they ought to be'. He pointed specifically to the conduct of Judge Hargrave 'who almost invariably differed from his colleagues'.

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105 S.M.H., 21.8.1865, p. 5. The Empire, 23.6.1865, p. 4, welcomed the appointments of Hargrave and Cheeke as a counterpoise to the conservative biases of the existing judges.

106 S.M.H., 27.6.1865, p. 5. The Empire, 27.6.1865, p. 4, was sure that people would 'know how to estimate this petty exhibition of disappointed vanity, and unavailing ill temper'.

107 S.M.H., 28.3.1866, p. 4. For Martin's speech to the Assembly, see S.M.H., 21.3.1866, pp. 2-3.

108 The Queen v. Bertrand, reported in the S.M.H., 20.3.1866, p. 2.

109 S.M.H., 28.3.1866, p. 4.

110 S.M.H., 21.3.1866, p. 2.
Hargrave quickly became noted for this characteristic - "a sort of intellectual pride and "combativeness" ... which leads him to strike out a separate course of reasoning for himself whenever it is possible ... rather than to appear to be guided by the opinions of his senior colleague".111 The tendency of Cheeke to be led along by Hargrave's often peculiar logic did little to enhance the standing and efficiency of the Supreme Court.112

Besides the personal and legal complications which Hargrave's conduct brought to the bench, it greatly detracted from the court's public image by leaving it open to attacks in parliament and the press. Following Bertrand's Case, when Martin introduced legislation to correct the anomaly shown up thereby, Allan MacPherson delivered in the Assembly a withering denunciation of Hargrave's behaviour. He branded him a 'corrupt lunatic' who, from feelings of spite against the Chief Justice, 'had disgraced his functions in so pitiable and contemptible a manner'.113 Radical David Buchanan predicted that Hargrave would be impeached during the next session. Thoior other members and the press denounced this form of abuse and criticism, none raised any evidence in defence of the judge.115 In December 1867 Hargrave's conduct again made headlines when he differed radically from the position adopted by Stephen and Faucett in the case of MacKenzie Bowman, a lunatic. Hargrave's judgment, expressed in terms of the strongest reprobation against the lunatic's guardian, suggested that "the family influence of the attorney upon the Judge (Milford) was in some

111 S.M.H., 11.10.1869, p. 2.
112 S.M.H., 20.10.1869, p. 5.
113 S.M.H., 6.4.1866, p. 3. The Empire, 9.4.1866, p. 4, decried these attacks on Hargrave, saying that dissension on the bench was a good thing.
114 Ibid.
way or other connected with the transfer of Mr Bowman to the client of
the Judge's son'. Only after several letters to the press by another
son of the late judge refuted in detail the truth of Hargrave's
implication did Hargrave publish a denial that he had intended any
aspersion upon his predecessor's character. The *Sydney Morning Herald*
ho ped that in future he would refrain 'from the utterance of strong
language and the manifestation of a degree of excitement which is scarcely
consistent with his office'. The absence of cordiality on the bench
caused by Hargrave had led to great confusion and difficulty in the
administration of justice.

The courts were also open to censure upon another ground. By the
late 1860s there were many complaints that the sentences apportioned to
various crimes were 'subject too much to the idiosyncracy and peculiar
ideas of the gentlemen administering the law'. Both within the
Supreme Court and between the Supreme and District Courts there were
differences of such magnitude as to border on injustice. While the Chief
Justice in a case of cattle stealing might give a sentence of three years
with hard labour, a District Court judge might award a ten year sentence
for a similar offence. The judges were clearly making no attempt to
bring their judgments into harmony in respect of either facts or opinion.

was reported in *S.M.H.*, 23.12.1867, pp. 2-3.
118 *S.M.H.*, 8.1.1868, p. 4.
120 *S.M.H.*, 24.1.1867, p. 4; 13.9.1871, p. 4.
121 *S.M.H.*, 9.6.1867, p. 4; 34.1.1957, p. 4; 14.8.1872, p. 4. The
*Herald* noted in 1871 that 'There are few amongst us who have not been
perplexed, astonished, overwhelmed by the strange and fatal differences
which are so often displayed in our Colonial Courts', *S.M.H.*, 11.9.1871,
p. 4.
By 1867 Chief Justice Stephen was finding that his relatively severe attitude towards punishments was in opposition to the comparative laxity of his colleagues. A prime offender in this regard was Mr Justice Cheeke. In 1870 the Assembly received a petition from 750 residents of New South Wales dissatisfied with the administration of the criminal law. They were particularly concerned about 'the levity of the sentences recently passed on various grades of criminals and the great contrast between the degree of punishment inflicted by the different Supreme Court and other judges, for offences of a like nature'. The petition specifically condemned several sentences recently passed by Cheeke where the punishment never exceeded three years in prison even though the judge had gone to lengths in his judgment to stress the severity of the charges. The behaviour of some Supreme Court judges thus did little to inspire public confidence in the administration of justice or the ability of the Bar to provide a colonial bench of acceptable standard.

The same was no less true of the District Courts. When the first Mudgee circuit opened in April 1873, the Mudgee Times commented on the striking contrast between this new tribunal and the Quarter Sessions which had been conducted for the past two years by District Court Judge Josephson. It observed that practice at the Quarter Sessions was distinguished by:

- a vacillating judge, continually wrangling with counsel, taunted by the Bar with his want of knowledge; threats and recriminations openly indulged; suitors denied

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122 S.M.H., 8.6.1867, p. 4.
124 Ibid., p. 599.
125 Ibid., pp. 599-600.
justice on the most frivolous pretexts; the most puerile objections allowed by the judge, and argued for hours ... the failure of justice in so many cases tried before Judge Josephson is too glaring to be passed over in silence.126

Another District Court judge whose behaviour left much to be desired was Frederick William Meymott. Prior to his appointment to the bench in 1865, Meymott had been involved in a controversy with Judge Cary over the manner in which he performed his duties as crown prosecutor. As a result, the Attorney General had relieved Meymott of his commission.127

Once appointed to the bench, Meymott's conduct was soon open to further official and public censure. In 1867 the government severely reprimanded him for allowing the Wingham District Court to lapse.128 In 1868 he was charged similarly over the Kempsey District Court but was exonerated due to the flooded state of the country.129 From then until his suspension in 1876, Meymott persistently endeavoured to avoid attendance at the coastal towns which he considered imposed too great a hardship due to their number and situation.130 He feigned illness, missed

126 Judges Times, 25.4.1873, p. 2 (Newsclipping, Sir Alfred Stephen - Papers, Mitchell Library MSS. 211/1). Further criticisms of Josephson’s judicial ability, including the belief of Attorney General Butler that his decisions displayed ‘a singular want of ordinary legal knowledge ... and a singular propensity to decide upon flippant and flimsy technicalities’, are recorded by Holt, op. cit., pp. 90-91.


128 Folder: Re Complaints about Judge Meymott - Papers re lapsing of Wingham District Court on 2.4.1867, Department of Justice - Removal from Office of District Court Judge F.W. Meymott, 1867-83, Part 1, 1867-76, A.O.N.S.W., 7707.

129 Folder: Re Complaints about Judge Meymott - Papers re lapsing of the District Court at Kempsey on 20.2.1868, ibid.

130 Minute Paper for the Executive Council, Department of Justice and Public Instruction, 5.10.1876, ibid., Part 2, 1873-83, A.O.N.S.W., 7708.
steamers and failed to provide full explanations. When he did appear in court, his behaviour was no less provocative. Early in 1870 the jury at Tenterfield Quarter Sessions complained to the government of his intemperate and unjust condemnation of their acquittal of a prisoner. Meymott received a further reprimand from the executive for his court demeanour at the Kempsey Sessions, which had been strongly criticised by C.E. Pilcher as the crown prosecutor. Throughout the early 1870s his conduct was the subject of many similar complaints, both vague and specific. At the Grafton Quarter Sessions in June 1874 Meymott fined Stephen, the crown prosecutor, £3 for lateness, notwithstanding the latter's explanation and apology. Stephen, in his explanation to the government, pointed out that the judge had shown decided bias against him, causing embarrassment and taking unwarranted actions with regard to trying and discharging prisoners which should have involved consultation with the crown. Such an unsatisfactory state of affairs could not be allowed to continue.

131 Minute Paper for the Executive Council - Suspension from Office of Mr. District Court Judge Meymott, 16.8.1876, ibid., Part 1, A.O.N.S.W., 7707.

132 Attorney General Manning and Solicitor General Salomons concluded that there were some grounds for complaints by the witnesses that the judge had thrown doubt upon the truth of their evidence. In general, they observed, 'the Judge too often exhibits a deficiency in that patience, temper and courtesy towards jurors, witnesses, and advocates, which are so essential to the maintenance of respect for the Bench, and without which justice itself may not be satisfactorily administered'. Correspondence re Complaints of Conduct of District Court Judge Meymott by William Small, J.P., and John M’Phee, V. & P. (L.A., N.S.W.), 1870-71, Vol. 2, pp. 365-69.

133 Entry for 5.7.1870, Synopsis of Complaints against Mr. District Court Judge Meymott, Department of Justice - Removal from Office of District Court Judge F.W. Meymott, Part 2, A.O.N.S.W., 7708, p. 16.

134 See generally the Synopsis of Complaints against Mr. District Court Judge Meymott, ibid.

135 Minute Paper for the Executive Council, October 1874, ibid., Part 1, A.O.N.S.W., 7707.
In August 1876 the government suspended Meymott from office and appointed barrister G.C. Davis to make a full inquiry into his conduct. This investigation cleared the judge of charges of corruption by accepting bribes and showing partiality, but not of several other grounds of alleged misbehaviour under s. 29 of the District Courts Act. These were unjustifiable rudeness and discourtesy towards practitioners; unduly and improperly interfering with juries in the discharge of their duties by urging them to reach a particular verdict and being rude and disparaging if they did not; and hurrying through cases with a view to getting rid of them quickly rather than allowing a full and fair consideration of the issues involved. In November 1880, after giving Meymott the opportunity to reply to these charges, the government resolved that he must be removed from office.

Meymott's dismissal, though a unique event in the legal history of New South Wales, must be seen in retrospect as simply the most regrettable incident in a chain of events which lowered considerably the standing and influence of the colonial Bar after 1856. The decline in the power of the colony's conservative elite and the undermining of the crown law offices were undoubtedly major blows to the traditional position occupied by the Bar but their effects were compounded by the character of the Bar itself. Not only did barristers as a group lack the leadership, experience

136 Minute Paper for the Executive Council - Suspension from Office of Mr. District Court Judge Meymott, 16.8.1876, ibid.

137 Report by G.C. Davis of Inquiry into the Conduct of Frederick William Meymott, District Court Judge on the Northern Circuit, and the administration of justice by him in that district, 6.9.1880, ibid., Part 2, A.O.N.S.W., 7708.

138 Minute Papers for the Executive Council, 26.9.1880 and 5.11.1880, ibid.
and numbers to provide the government with an acceptable selection of judicial candidates but they also were without the necessary cohesion and commitment to the more general interests of the profession to develop an effective response to the challenges of liberal governments. Both the standard of advocacy in the courts and the performance of several judges upon the bench threw into question the efficiency of the administration of justice and weakened the profession's standing, thus reducing the likelihood of lawyers developing an effective voice of their own quite independently of their connections with colonial conservatism.
Colonial solicitors as a group proved to be little more effective than the Bar in responding to the decline in the profession's standing and influence during the 1860s. Issues of judgeships, crown law offices and court procedure did not, of course, have the same relevance for attorneys that they held for the Bar, nor were many attorneys who resented the division of the profession likely to be concerned by the Bar's tarnished reputation. At the same time, this distinction must not obscure the more fundamental point that once the leading Sydney solicitors were displaced from their former positions of influence in the Legislative Council colonial solicitors had no spokesman, either formal or informal, to represent and protect their interests. Most important of all, when an attempt was made in the early 1860s to establish such a body, they soon left no doubt that the large majority of solicitors were unconcerned by wider professional issues that affected them only indirectly and had little sense of common purpose with their fellow practitioners. As a result, they, like the Bar, were left largely powerless by the political transformation which followed the introduction of responsible government. Some leading solicitors were clearly not unmindful of these changes and sought to establish an alternate professional presence but their hopes were thwarted by the indifference of their colleagues.

The idea of forming a professional association to represent the colony's solicitors in the 1860s came initially from Alexander Dick, a
solicitor since 1850 and currently a member of the Assembly. ¹ Upon a recent visit to Victoria, Dick had been impressed with the potential benefits of that colony's newly formed Law Institute. Convinced that a need for a similar body existed in New South Wales, he discussed the idea with other solicitors, wrote to the judges about it, and circulated copies of the Melbourne society's rules. ² Encouraged by the response, he arranged for a general meeting of solicitors to be held in January 1862. That meeting, which was attended by about sixteen solicitors, agreed unanimously to Dick's proposal to establish a society with objects similar to those of the Victorian Law Institute. ³ These were:

- to afford the profession greater opportunity for the continuous acquirement and diffusion of legal knowledge,
- to preserve and maintain the integrity of the branch of the legal Profession to which they belong,
- to watch proposed changes and aid amendments and reforms likely to be beneficial in the law,
- to suppress any illegal and dishonorable practice,
- to promote good feeling, and encourage proper conduct amongst the members of the Profession,
- to provide a fund for relieving members of the Institute, and their families, in case of distress or need,
- to afford means of reference for the amicable settlement of professional differences,
- and to consider upon all matters affecting the interests and prosperity of the Profession generally. ⁴

¹ Dick had entered articles with G.K. Holden in Sydney in November 1845 and was admitted to practice five years later on 2 November 1850. Dick served as the member for Liverpool Plains between December 1860 and December 1862.


³ S.M.H., 25.1.1862, p. 5; 24.1.1862, p. 4.

⁴ Provisional Secretary to G.W. Allen, 25.1.1862, Law Institute of New South Wales - Papers, Miscellaneous Letters, Box 2, (henceforth Law Institute Papers - Miscellaneous Letters), W.H. and Elizabeth M. Deane Collection, Fisher Library, University of Sydney. See also Rule III, Rules of the Law Institute of New South Wales, Sydney, 1862, p. 3; and Rules of the Law Institute of Victoria, Melbourne, 1859, pp. 1-12.
The only provision which the meeting rejected was for the formation of a solicitors' benevolent fund. This object, they considered, 'could better be carried out by other societies' and thus leave more funds available to develop a library. In conclusion, the meeting appointed a provisional committee to draw up rules for the new society.

In professional terms, the array of talent and experience assembled to launch the Law Institute was most impressive. The provisional committee consisted of G.W. Allen, W.W. Billyard, A. Dick, G.K. Holden, R. Johnson, W. Spain, W. Barker, E. Daintrey, J. Dunsmure, R. Holdsworth, W.G. McCarthy, M.C. Stephen, R.J. Want and W. Teale. Though neither Allen, Spain, Barker, Dunsmure nor Want had been present at the initial meeting, all except Dunsmure accepted a position on the committee and even Dunsmure professed to agree with the objects sought. Apart from Teale, they had all practised in Sydney for at least ten years and many, including Teale, had practised previously in England. They represented all but two of Sydney's legal firms and were drawn from the most senior colonial attorneys. Their involvement in the Institute's establishment augured well for the society's success.

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5 S.M.H., 25.1.1862, p. 5.
6 Provisional Secretary to G.W. Allen, 25.1.1862; W. Spain to E.A. MacKechnie, 28.1.1862; W. Barker to MacKechnie, 28.1.1862; R.J. Want to MacKechnie, 29.1.1862; J. Dunsmure to MacKechnie, 30.1.1862; Law Institute Papers - Miscellaneous Letters, Box 2.
7 Those members of the provisional committee admitted in England or Ireland before coming to New South Wales were W.W. Billyard (admitted England 1837 - N.S.W. 1847), G.K. Holden (1823 - 1831), W. Spain (1823 - 1846), W. Teale (1839 - 1853) and R. Johnson (Ireland 1826 - N.S.W. 1843). Those trained and admitted in the colony were G.W. Allen (1846), A. Dick (1850), E. Daintrey (1846), R. Holdsworth (1849), and R.J. Want (1837). Of the other members, M.C. Stephen was admitted in Van Diemen's Land (1849), and W.G. McCarthy served his articles in England but was not admitted until he arrived in New South Wales in 1840. W. Barker and J. Dunsmure were admitted in the colony in 1851 and 1842 respectively, but their origins are unknown.
The rules which this committee drafted were adopted on 19 March 1862 and confirmed twelve days later. They drew heavily upon those governing the Victorian association. All attorneys, solicitors and proctors admitted in New South Wales were eligible for membership. They were to be elected by ballot with 'one Black Ball in every five balls' excluding a candidate. After an initial meeting, when all attorneys present had a right to vote, only those elected to the Institute had a voice in choosing future additions to their numbers. In Victoria, disagreements over the need for such ballot provisions had almost prevented that colony's Institute being established, but they do not seem to have caused a similar controversy among New South Wales solicitors. Upon election, each member undertook to conform with all present and future rules made by the Institute. The entrance fee was five guineas, payable within fourteen days, and the annual subscription three guineas or one guinea depending upon whether the member practised within seven miles of Sydney. If a member failed to comply with these provisions or to pay subsequent annual subscriptions on time, he was liable to a penalty of one guinea and the loss of privileges and even membership.

A Council of thirteen, headed by a President and two Vice-Presidents, controlled the affairs of the Institute, its income and property. It was elected annually by a general meeting of the Institute and Council.

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membership was restricted to colonial practitioners 'of at least five years' standing'.

The rules obliged the Council to consider all matters affecting, either directly or indirectly, the interests of the profession and empowered it to make bye-laws, appoint sub-committees, call meetings of members and, when funds were available, to acquire rooms and a library for the use of members. The Council could also suspend any member for 'conduct derogatory to the Profession, or for refusing to conform to the Rules of the Institute'. In such cases, its decision had to be confirmed by a general meeting of the Institute. A solicitor struck off or suspended by the Supreme Court for professional misconduct ceased automatically to be a member. The rules made clear, however, that all these provisions were only a stepping stone to more important objects. The Council was 'as soon as practicable' to seek means to incorporate the members of the Institute by legislation. This incorporation would, in combination with other acts to regulate the admission and practice of attorneys, give the Institute the primary responsibility for the standards and functioning of the profession.

Thus, by mid-1862, the Law Institute of New South Wales was ready to begin operating. The early signs were promising. Its initial membership

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11 Rules XV, XVI, XIX, ibid., pp. 5-6.
12 Rule XXI, ibid., p. 6.
13 To exercise such powers, at least nine members had to be present at the Council meeting and seven of those had to agree to the suspension (Rule XXVIII). The member in question was entitled to attend, hear and answer the charge (Rule XXVIII) and the suspension, once made, had to be confirmed or quashed within a month by a general meeting of members (Rule XXIX), ibid., p. 7.
14 Rule XXX, ibid., p. 8.
15 Rule XLVI, ibid., p. 10.
was thirty-six, a very respectable proportion of both the city profession which boasted just over seventy attorneys and the total number of solicitors in the colony which was around one hundred and thirty.  

Further, as with the provisional committee, the officers and members of the Institute were drawn from the most experienced solicitors practising in Sydney. Most city firms had at least one, and sometimes two, members in the association. Attorneys who had begun their professional careers in England or Ireland were well represented, though not perhaps out of proportion to their numbers in the Sydney profession as a whole.

Predictably in the light of this composition, the membership of the Institute and particularly its Council was also distinguished by its political conservatism. Apart from conservative members and former members of the Legislative Council such as Holden, Want and Robert Johnson,  


Of the 32 members whose origins are known, 9 (Billyard, Chapman, Holden, Robt. Johnson, W.G. McCarthy, Roxburgh, Spain, Stafford and Teale) received their legal training in England. This proportion is comparable with the 31% of English and Irish solicitors in the Sydney profession as a whole (see table 3, p. 181). The extent to which the Institute drew its initial strength from the more experienced solicitors in the colony can be seen in the fact that while nine-tenths of the Institute's members had been admitted to practice before 1856, the initial Law Almanac in 1864 suggests that only two-thirds of all city solicitors fell into this category.
eleven of the thirteen solicitors who had belonged to the Constitutional Association in 1860 were either councillors or ordinary members. This is not to suggest that the primary motivation for the Institute's formation was political, nor that it was formed in direct consequence of the events of 1861. Its proposer, Dick, had been a liberal in the Assembly since 1858 and other liberal political lawyers S.C. Brown and J. Hart belonged to the Institute. It does appear more than a coincidence, however, that the association was formed at a time when the decline in the influence and standing of the legal profession was becoming rapidly apparent. As a group, the members of the Institute represented those solicitors most certain to be concerned by the recent events and thus with a special incentive to make the new body effective.

During its first year the Law Institute made encouraging progress. The Council notified the crown law officers of the society's formation and objects and assured the judges that it would be 'always ready and anxious to assist ... in maintaining the honor of the profession and preserving the integrity of its members'. It obtained and furnished a room in the Supreme Court to serve as a library and meeting room for members and ordered copies of the Law Times, Law Journal and Jurist from England as the

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19 E.A. MacKechnie to Chief Justice Stephen, 11.6.1862, Letter Book, Law Institute of New South Wales, 6.9.1862-24.7.1876, pp. 1-2, in Law Institute of New South Wales - Papers, Box 1, (henceforth Law Institute: Letter Book). Similar letters were sent to judges Milford and Wise and copies of the Institute's Rules to the Prothonotary, Sheriff, Chief Commissioner of Insolvent Estates, Master in Equity and District Court judges Cheeke and Dowling.
foundation of a law library. It also applied to receive copies of the New South Wales Law Reports, Government Gazette and Parliamentary Papers. At its quarterly meeting in October 1862, the Institute elected five new solicitors to its ranks. They included W.H. Mullen, then practising in West Maitland and the first country attorney to belong to the association. The others - G.F. Benbow, G.W. Graham, W. Roberts and T. Weedon - were, like the original members, well-established city solicitors. Roberts and Weedon were the two members of the Constitutional Association who had not joined the Institute at its formation.

From the beginning, the Law Institute showed itself to be concerned with matters relating to law reform and the administration of justice. Dick moved that a committee be named to inquire into and report upon the present mode of admitting attorneys. Want urged that similar action be taken over the equitable jurisdiction of the Supreme Court and he thought suggestions could be made to the judges about the need to adopt English practice as far as possible. Want also called for the draft insolvency bill to be circulated among members and for a special meeting of the Institute to be held to discuss it. The Council assisted the Sheriff


21 E.A. MacKechnie to T. Weedon, 28.10.1862, Law Institute: Letter Book, p. 9. Similar letters were sent to Roberts, Mullen, Graham and Benbow. Roberts was admitted in 1848, Graham in 1850, Weedon and Mullen in 1853, and Benbow in 1859.


to make 'more adequate provisions for carrying out more efficiency the
various civil processes' for which he was responsible.\textsuperscript{25} and called urgent
meetings to consider a letter written by the Chief Commissioner of
Insolvent Estates to the official assignees. That letter, 'in effect,
interdicted the employment of any solicitors except two firms therein
mentioned, for the transaction of legal business connected with the
estates in the hands of such assignees'.\textsuperscript{26} To correct this insult to their
members and undue stretch of authority by the Chief Commissioner, the
Institute first approached the Colonial Secretary and then the Chief
Justice. Though both denied that they possessed any power over the
Commissioner's proceedings except in a few specified instances, the protests
did have the desired effect.\textsuperscript{27} The Chief Commissioner apparently modified
his direction with the qualification that those arrangements would 'only
take effect in cases where the creditors did not appoint a solicitor'.\textsuperscript{28}

The Law Institute's success was most marked in the areas of
professional conduct and practice. In October 1862 it succeeded in having

\textsuperscript{25} E.A. MacKechnie to the Sheriff, 2.9.1862, \textit{ibid.}, pp. 7-8; Council

\textsuperscript{26} Chief Commissioner of Insolvent Estates to J.P. Mackenzie and
R.H. Sempill, Official Assignees, 12.2.1863, Correspondence re

\textsuperscript{27} Council Meeting, 2.4.1863, \textit{Law Institute: Minute Book}, p. 22; E.A.
MacKechnie to the Chief Commissioner of Insolvent Estates, 13.4.1863,
\textit{Law Institute: Letter Book}, p. 16. Similar letters were sent to
the Chief Justice and the Colonial Secretary, \textit{ibid.}, p. 17. Their
replies were received in June, A. Stephen to MacKechnie, 12.6.1863,
and Colonial Secretary to MacKechnie, 20.6.1863, \textit{V. & P. (L.A.,

\textsuperscript{28} Opinion of Mr Attorney General Hargrave, 5.5.1863, \textit{ibid.}, p. 590.
W.P. Moffatt, one of the most notorious attorneys of the period, struck from the roll for inducing a client to commit perjury. The Sydney Morning Herald, reviewing with satisfaction the Supreme Court's decision, observed that it was 'a matter of congratulation that there exists now an organised surveillance of the conduct of the profession'. The paper was under no illusion that 'lawyers have any desire to limit the fair discretion of an attorney, or to impose responsibilities which would be oppressive and embarrassing', nor that the legal profession was subject 'to great scruples of conscience or niceties of morality'. It simply accepted that the Institute's purpose was to 'prevent the public being victimised and the profession disgraced ... by ... the insolent malversations of pettifogging attorneys'. In the Moffatt litigation, the Institute had faced and succeeded in a test of its utility against 'every form of baseness and abuse'. The Institute also took action for contempt of court against an accountant who had drawn a lease although not qualified as an attorney or a conveyancer. The court showed its approval of these activities by the Institute in the case of Croaker and Wife v. McNeil. The suit in question concerned the drawing of pleas by an unauthorised person who lived opposite the court house and the name of an attorney, who had not prepared the documents, appeared on the brief. The Chief Justice referred the matter to the Law Institute for investigation.

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29 The case was reported in the S.M.H., 27.10.1862, p. 2 and the Empire, 27.10.1862, pp. 4-5. The decision to take action against Moffatt was taken at the Council Meeting, 1.9.1862, Law Institute: Minute Book, p. 12.
30 S.M.H., 28.10.1862, p. 4.
31 Ibid.
32 Ibid.
and appropriate action. Only where the conduct in question did not amount to a breach of the law did the Institute experience difficulty in taking effective action.

Despite this encouraging beginning, however, the Law Institute was unable during the next two or three years to live up to its early promise. Council meetings were frequently without quorums, the level of general activities dwindled, the various sub-committees on law and law reform proposed no important initiatives, and membership figures remained static. The Institute did continue to act upon questions of professional conduct, but otherwise appeared to have lost all impetus. In its annual report for 1865, the Council regretted that after three years in operation and considerable success in preserving the integrity of the profession the Institute enjoyed the support of so few solicitors beyond the original membership. It hoped that by reducing the entrance fee from five guineas to two and the annual subscription from three guineas to two that it would attract other solicitors to join in the near future. The feeling of despondency evident in this report was undoubtedly compounded by the recent setback to the Council's plans to incorporate the Institute.


35 E.A. MacKechnie to C.B. Stephen, 22.10.1863, ibid., pp. 24-25.

36 The Law Institute's Minute Book shows that from May 1863 onwards over half the Council Meetings called lapsed for want of a quorum and that at some of those which were held no business was done apart from confirming previous minutes or authorising working expenses.


association's ultimate success and security depended upon either gaining widespread professional support, the legal authority conferred by incorporation, or preferably a combination of these factors. At the close of 1865 neither possibility appeared encouraging.

By 1864 the Council had devoted considerable attention to drafting a bill to incorporate the Institute. The result was an extremely long and complex measure which would establish an incorporated law society with power to control its own affairs and which also laid down comprehensive provisions for the future training, admission and practice of solicitors. Initially the Council had intended to introduce this bill into parliament during 1864 but it deferred these plans due to the impending dissolution of the Assembly. Early the following year, heartened by the approval of the Chief Justice, it circulated copies of the bill to all members of the Institute and invited their comments. The response could not have been favourable and a letter from H.J. Brown, a Newcastle solicitor, suggests why this was so. Brown thought that, preferable to a detailed statutory enactment, joint power should be granted to the judges and the law society to make rules for such purposes. This would allow defects

39 In January 1864 the Council appointed Daintrey, Iceaton and Holdsworth as a sub-committee to take the necessary steps to incorporate the society, Council Meeting, 8.1.1864, Law Institute: Minute Book, p. 35.

40 Annual Report of the Council of the Law Institute of New South Wales for 1864, p. 9; Napier and Daly, op. cit., p. 11.

41 Council Meeting, 6.3.1865; Law Institute: Minute Book, p. 51.

42 E.A. MacKechnie to all members, 12.4.1865, MacKechnie to W.M. Mullen (West Maitland) and H.J. Brown (Newcastle), 19.4.1865, Law Institute: Letter Book, p. 55; MacKechnie to Council members, 22.4.1865, inviting them to consider draft bill to be submitted to parliament, ibid., p. 56.
in the rules to be remedied speedily and effectively and would give the society a clear-cut object. He considered that the only purpose which the present bill would achieve would be to allow the Institute to make rules for its own government and to act as a registrar for admissions, and both these ends could be achieved without legislation. Brown also made detailed criticisms of deficiencies in the bill's taxation provisions and anomalies in it which discriminated against young solicitors and those trained in the colony. In conclusion, he questioned whether 'the way to provide judicious and salutary regulations for the profession is to leave the matter to a popular assembly as a rule adverse to its interests and certainly unacquainted with the evils to be guarded against or the means of remedying those evils'. As a result of these and other criticisms, the Council was forced to abandon the existing bill, which was based on a Victorian proposal, and to set up a committee to draft a new measure similar to the Charter of Incorporation of the Law Society of England.

With this deferral of plans for incorporation, the Law Institute became a largely nominal organisation. There was a brief glimmer of progress early in 1866 when five new members joined but this was not

43 H.J. Brown to E.A. MacKechnie, 15.5.1865, Law Institute Papers - Miscellaneous Letters, Box 2. This letter should be read in conjunction with a printed draft of the Act to amend the law relating to Attorneys and Conveyancers, ibid. Brown's reply was in fact received by the Institute after it had decided to abandon the bill because of criticisms. This was because the copy of the bill originally sent to Brown miscarried, H.J. Brown to MacKechnie, 25.4.1865, ibid.

44 H.J. Brown to E.A. MacKechnie, 15.5.1865, ibid.

sustained. Though the Council occasionally acted upon an issue of professional misconduct, it suggested to most complainants that they should take personal action through a solicitor. A sub-committee, set up to review the admission rules for attorneys, did not bring forward recommendations. The library, which had been under development, lost much of its utility when the Council cancelled most of the Institute's regular subscriptions to law reports and legal journals. The Institute's financial position remained for a time reasonably sound, but this reflected its lack of activity rather than a basis for further progress. Its failure was primarily one of morale. The association had begun with high hopes of gaining widespread support and exercising effective legal authority and influence. It had won support from only one section of the ranks of solicitors - the established and generally conservative city practitioners who appreciated the decline in the profession's influence.

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48 Council Meeting, 12.11, 1867, ibid., p. 89 - there is no further mention of this sub-committee in the Law Institute's records.

49 Ibid.

50 The balance in the Law Institute's account remained above £200 until 1867, but thereafter declined quickly. This slump was due to the reduction in the level of subscriptions, which was not offset by an increase in membership; the need to remunerate the custodian of the library to ensure his regular attendance (E.A. MacKechnie to C. McKenzie, 30.12.1866, Law Institute: Letter Book, pp. 44-45); and the increased rent when the appointment of the fourth judge meant that there was no room for the Institute in the Supreme Court, C.B. Stephen to MacKechnie, 11.7.1865 and 2.8.1865, Law Institute Papers - Miscellaneous Letters, Box 2; Council Meeting, 4.8.1865, Law Institute: Minute Book, p. 59. The Bank Book of the Institute, June 1862 to August 1873, and the Account Book of Subscriptions and other accounts of the Institute for the same period may be found in the Law Institute Papers, Box 2.
and who viewed favourably such an attempt to reinforce its authority and cohesiveness. Neither the younger, less experienced attorneys nor those solicitors practising in the country shared this concern or echoed such a priority. With parliament unlikely to agree to confer far-reaching powers on the Institute by legislation, this apathy amongst all but a small group of solicitors left the Institute with little chance of becoming an effective spokesman for the interests of solicitors.

Its plight was clearly spelt out in a circular calling a general meeting of members in January 1871. That notice requested the attention of members because:

the little interest taken by the profession in this institution, the neglect of members to pay up their fees and the want of an efficient working Secretary, render it imperative either that the Institute shall be worked more vigorously for the future or that it shall be altogether closed, and the library and furniture disposed of, the income at present received being insufficient to pay the current working expenses.51

The meeting considered these points in detail and expressed its disappointment that the Institute had always to pay its own costs and counsel's fees whenever it brought disciplinary matters before the court. 52

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51 Notice of Meeting, 3.1.1871, Napier and Daly, op. cit., p. 12.
In 1871 and 1872 respectively, the Institute's funds were £36.14.7 and £36.5.19 in debt, J.M. Bennett, 'The Law Institute of N.S.W., 1762-1884', Sydney Law Review, Vol. 3, No. 2, 1960, p. 293.

52 The Council claimed that 'a considerable sum of money has during the last 9 years been raised and expended, and a little good has been done in bringing certain cases of misconduct before the Court, but in these cases the Society has been punished more severely than the persons complained against, as it has had in all cases to pay its own costs, Counsellors' fees, etc., whilst the delinquents have been dealt with by the Court with extreme leniency', Napier and Daly, op. cit., pp. 13-14. This problem appears to have been partly due to the Institute's own performance. One correspondent to the Herald suggested in 1869 that the judges were far from happy with the Institute's handling of disciplinary cases. They had 'recently stated from the Bench that when certain complaints of professional peccadilloes were sent to the Law Institute, that body did not feel itself in a position to take these matters up', S.M.H., 6.11.1869, p. 7.
that this action would stimulate renewed interest in the Institute, which appears probable in the light of recent criticisms of the profession by radical politicians and their attempts to reform it by legislation, its plans went unfulfilled. The meeting did not produce positive initiatives. It resolved to pay the society's debts, even if this required the sale of property, to dispense with the services of the assistant secretary, and to remove the library to the office of W. Deane, a member of the Institute's Council. The existing officers were to continue for the ensuing year but no other plans were made for the future.

During 1871, however, the Council left no doubt that it was dissatisfied with these decisions. It chose to ignore the resolutions of the general meeting and set out to diagnose the reasons for the membership's apathy and to remedy it. There were three main elements in this campaign. The Council introduced a new set of rules which were 'as wide, and as liberal as possible'. These abolished the entrance fee, reduced subscriptions, simplified entrance procedures and threw membership open to articled and managing clerks and officers of the Supreme Court. The size of the Council was reduced to only nine members. Secondly, the Council sought to promote a new image for the Institute by a series of lectures and debates. As a final step, the Council revived plans for incorporation. It envisaged a legislative provision whereby both the

53 Draft Minutes of General Meeting, 24.1.1871, Law Institute Papers, Box 2.
55 Ibid.
judges and parliament would have power to confer upon the Institute
authority in respect of attorneys and their affairs, including the power
to make admission rules for the profession. 58

These new initiatives by the Council met with some initial success.
A considerable number of new members joined the association. The majority
were solicitors of at least ten years' experience, although several
admitted in the later 1860s also joined. 59 How far they were influenced by
the new admission rules or by contemporary radical pressure for reform of
the legal profession I do not know. After some hesitation while the
Council tried to have the first address delivered by the Chief Justice, 60
the lecture programme took on a more positive aspect with Sir Alfred
Stephen, Mr Justice Hargrave, barristers F.M. Darley and G.C. Davis and
solicitor J. Norton presenting papers. 61 The Council took no direct
steps towards incorporation but sought full details on the operation of the
Incorporated Law Society in England. 62 Further, it pursued several
limited initiatives in relation to the administration of justice, including

58 Annual Report of the Council of the Law Institute of New South
Wales for 1872, n.p.

59 The new members (and their dates of admission to practice in New
South Wales) were R. Driver (1856), S. Stephen (1864), J. Leary
(1866), R. Yeomans (1859), S. Spain (1860), H.C. Colyer (1866),
H.W. Cooper (...), G.S. Yarnton (1842), E. Dunn (1871), E. Manby
(1860), R.C. Want (1861), J. Johnson (1861), D.L. Levy (1853),
A. de Lissa (1860).

60 Council Meetings, 5.4.1871, 15.5.1871, 12.7.1871, 22.8.1871,
30.11.1871, Law Institute: Minute Book, pp. 120-27;
H. Deane to Chief Justice Stephen, 3.5.1871, Law Institute: Letter
Book, pp. 85-86.

61 Annual Report of the Council of the Law Institute of New South
Wales for 1872, n.p. The first lecture was in fact delivered by Hargrave,
S.M.H., 19.12.1871, p. 5. Its text is reprinted in the S.M.H.,
20.12.1871, p. 3.

a request to the Chief Justice that the Supreme Court and Sheriff's Office would open on all court holidays, except public holidays, until 1 p.m. 63 The Council also foresaw difficulties in the transfer of the duties of the Curator and Registrar to the Master's Office as contemplated by the Equity Reform Bill. 64 As a result of its representations, the Attorney General promised that the arrangements would be left as they were. 65 These early successes proved, however, to be only short-lived. Several larger issues soon tested the Institute's effectiveness and found it wanting.

The most important issue of all related to attorneys from other colonies who were admitted in, and practised in, New South Wales as well as in their own colonies. 66 Sydney solicitor R.H.M. Forster placed the problem before the Law Institute in June 1872 in the light of pending applications from attorneys of Queensland, Victoria and Tasmania for admission in New South Wales. Forster pointed out that at present a New South Wales attorney seeking to practise in Victoria had to fulfil a twelve months' residence requirement. Victorian attorneys coming to New

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65 Council Meeting, 26.3.1873, ibid., pp. 142-43.
66 For an earlier complaint of this nature, see W. Willans, Wagga Wagga to the Secretary, Law Institute, 8.1.1864, 20.1.1864, Law Institute Papers - Miscellaneous Letters, Box 2. The Council indicated that it was prepared to take up the matter on Willans' behalf if he provided sufficient evidence but Willans does not appear to have pursued it, Council Meeting, 7.4.1864, Law Institute: Minute Book, p. 38; E.A. MacKechnie to W. Willans, 4.5.1864 and 21.7.1864, Law Institute: Letter Book, pp. 39, 37-38.
South Wales faced no similar barriers. \(^{67}\) This discrepancy had become very important recently because of the towns and goldfields which had sprung up along the border. Victorian attorneys had a distinct advantage because they were admitted to practice on the New South Wales side as well as having a monopoly on their own. When a dispute arose on the other side of the border, New South Wales attorneys were forced to engage another solicitor. Forster urged that such problems could only be overcome if admission between the colonies was reciprocal. \(^{68}\) In response, the Institute's Council engaged Attorney General Butler to oppose the forthcoming admissions upon the grounds of non-reciprocity. \(^{69}\) The Supreme Court, consisting of Judges Hargrave, Cheeke and Faucett, rejected this petition as contrary to the court's practice. Hargrave did not feel that illiberality elsewhere was a ground for New South Wales to refuse the admissions. Faucett indicated that, while he was aware of the hardship involved, he was not prepared to decide differently unless the rules were changed. \(^{70}\) The Institute found this decision particularly galling because the admission rules, though they did not specifically deny the admission of attorneys from other colonies except under certain conditions, did not sanction their admission in any way either.

\(^{67}\) R.H.M. Forster to H. Deane, 25.6.1872, Law Institute Papers - Miscellaneous Letters, Box 2.

\(^{68}\) Ibid.

\(^{69}\) H. Deane to R. Forster, 10.7.1872, Law Institute: Letter Book, p. 97. Council Meeting, 4.7.1872, Law Institute: Minute Book, p. 134. The Council contacted the three attorneys involved and decided to drop its opposition to Mr Bunton from Queensland because he convinced them that solicitors from New South Wales were admitted unconditionally in Queensland. Butler was still briefed to oppose the applicants from Victoria and Tasmania, Council Meeting, 12.7.1872, ibid., p. 134.

\(^{70}\) Newsclipping, ibid., p. 136.
In consequence, the Institute immediately appointed a sub-committee of the Council to prepare a petition asking the judges to alter the rules relating to the admission of attorneys. That petition, which called for a just and liberal reciprocity between the colonies, was signed by almost fifty attorneys but did not draw an immediate response from the judges. The issue did not, however, diminish in importance in the next few years. In mid-1874, again in response to the application of a Victorian attorney to be admitted in New South Wales, the Council resolved to draw up a new petition, which would be signed by all attorneys and presented in open court, praying for a change in the admission rules.

At the same time Albury solicitor G.T. Fleming called upon the Institute for assistance in this direction. He complained that not only did Victorian solicitors practising along the border have double the scope for general practice but they were preferred by businessmen and capitalists whose transactions frequently involved both colonies and who consequently preferred not to have two independently practising confidential advisers.

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72 The petition pointed out that the admission of persons from other colonies was a matter of practice, not a rule of court, yet other colonies, particularly Tasmania and Victoria, did not follow this liberal spirit. Their admission rules were so restrictive as to exclude absolutely New South Wales attorneys from the right to practise there. The petition asked that reciprocity be achieved, not by unnecessary restrictions upon admission in New South Wales but through consultation with the judges of the other colonies and New Zealand, Petition to the Judges of the Supreme Court, n.d., *Law Institute Papers*, Box 1. When the Council heard shortly afterwards that the Victorian judges proposed to make some new rules in relation to the rules of the New South Wales Supreme Court, it resolved to petition the judges again asking them to make some new rules by which attorneys from other colonies would only be admitted to practice in the colony upon reciprocal terms to those applicable to New South Wales attorneys in those colonies, Council Meeting, 6.10.1872, *Law Institute: Minute Book*, p. 137.
New South Wales solicitors faced much vexation and pecuniary loss and the situation was getting worse. From inquiries he had made with leading Melbourne lawyers, Fleming believed that if the Law Institute approached its Victorian counterpart on the issue, it could set the matter right without difficulty. There is, however, no record that the Institute ever took up this suggestion as it was becoming increasingly preoccupied with the question of its own future.

Besides the issue of reciprocal admissions between the colonies, the Law Institute was proving ineffective in other areas of importance to solicitors. In December 1872 it drew the attention of the Supreme Court to the conduct of an articled clerk who had carried on business at the Kiama office of his master while his master was practising in Sydney and made only occasional visits to Kiama. The court dismissed these objections and ordered the clerk's admission as a solicitor. In a similar incident the Institute was unable to act for want of evidence because it could not use the name of the solicitor who had lodged the complaint. A letter from Parkes solicitor J.R. Edwards in 1874 captured what must have been the attitude of many solicitors, particularly in country districts, towards the Institute. Edwards asked, somewhat sceptically, whether the Institute could be of any real benefit in protecting the profession from encroachments upon the rights of its members by unqualified persons.

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74 Fleming to H. Deane, 28.7.1874, Law Institute Papers - Miscellaneous Letters, Box 2.
Edwards pointed out that Parkes was likely to become a somewhat extensive goldfield and he found himself opposed by four 'legal agents', one or two of whom were designating themselves solicitors. They were in no way qualified, of poor repute, yet acted as agents for legal firms in Sydney. They drew up agreements, leases and transfers of land and were now attempting to practise in the Police Courts and Warden's Court. Edwards himself felt unable to act against them as his actions would be seen as self-interested and his own business would suffer. He urged the need for a more comprehensive and stringent Attorneys' Act to stop such evasions. In these areas of very practical and immediate concern to the average solicitor, the Law Institute had no authority.

On 25 August 1874 nine members of the Institute requested a special meeting of members to consider the present condition of the association and its usefulness to the profession. In consequence, the Institute called two meetings of members in September but these were poorly attended and the Council resolved to arrange a public meeting of all attorneys. That meeting was held on 17 October with J. Norton in the chair and twenty-eight


79 The Council resolved to call a meeting of members in the Supreme Court's Public Chambers when they were available, Council Meeting, 27.8.1874, Law Institute: Minute Book, p. 148. The meeting was held on 9 September, with nine members present, and followed by another a fortnight later, when only six attended, Meetings of 9.9.1874 and 23.9.1874, Law Institute Papers - Rough Minute Book, April 1871 to June 1877, n.p., Box 2, (henceforth Law Institute: Rough Minute Book). Those present resolved to arrange a public meeting for all attorneys and this was organised at a Council Meeting, 7.10.1874, ibid., n.p.
attorneys in attendance. Norton, in a lengthy address, proposed that the
Institute be incorporated. This motion received a mixed response.
J. Leary considered that attorneys 'had done so well without it for so
long they could go on without it', while T. Rolin argued that such a
change would be useless unless the profession as a whole took a far greater
interest in the Institute. Together with W.H. Pigott, he feared the
radical amendments parliament might make to an incorporation bill. Pigott
felt that it would be more advisable to obtain a charter of incorporation
from England. Another criticism came from W. MacGuire who attacked the
Institute as an exclusive organisation, particularly because of its
methods of electing members. Though there is no evidence of other
complaints similar to MacGuire's, this issue may have been of major
importance to the Institute's failure to win widespread support,
particularly among young solicitors. Even those who supported the idea of
incorporation did not do so unequivocally. W.G. Pennington move an
amendment designed to form a new society and not simply to incorporate the
old one. A. de Lissa, in response to MacGuire's remarks, suggested a
compromise whereby all attorneys would be eligible to belong to the new
incorporated association by paying the appropriate fee. Later, when
the secretary approached J.M. Bradley to serve on a committee formed to

80 The meeting took place at the Exchange on 16 October and was continued
on 22 October when thirty-one attorneys attended, Meetings of
Attorneys, 16.10.1874 and 22.10.1874, ibid., n.p. Norton's proposal
to incorporate the Institute was the solution which the Council had
favoured for several years as the way out of the present difficulties,
Annual Report of the Council of the Law Institute of New South Wales
for 1872, n.p.
81 Meetings of Attorneys, 16.10.1874 and 22.10.1874, Law Institute:
82 Ibid.
83 Ibid.
84 Ibid.
incorporate the Institute, he declined because he was not convinced of the desirability of the profession acting together towards this end when it was not very popular and when an unfriendly parliament might well emasculate any incorporation bill. 85

Despite these criticisms and reservations, the meeting resolved to establish a Law Society and appointed a committee of prominent solicitors to realise this end. 86 This committee agreed unanimously that it was not desirable to seek incorporation under the Companies Act of 1874 because that legislation was clogged with restrictions upon limited companies and associations that were not formed for individual profit. Its members felt that only a separate act of parliament would achieve the desired object. 87 Accordingly, they drew up a draft bill similar to the charter of the Incorporated Law Society of England. They also prepared an agreement of association to bind all members to pay an annual subscription of one guinea. 88

On 15 December 1874 the committee presented these proposals to a meeting of only ten attorneys. That meeting adopted the committee's plan and appointed its members as a provisional council with authority to draw up by-laws for the new association and present them to a meeting of solicitors

85 J.M. Bradley to A. de Lissa, 26.10.1874, Law Institute Papers - Foundation of Law Society, 1874, Box 1.


87 Ibid., pp. 15-16.

88 Committee Meetings, Proposed Law Society, 5.11.1874, 11.11.1874, 13.11.1874, 18.11.1874, 26.11.1874, Manuscript Notes in Law Institute Papers - Foundation of Law Society, 1874, Box 1; Printed circular re establishment of Law Society with annexed Report of Provisional Committee, Provisional Agreement and draft Incorporation Bill, W. Deane to all members of the Profession, 7.12.1874, Ibid.
which was to be called before 1 December 1875.\(^89\) Once the Law Society was established, the committee informed the meeting, the Law Institute would take steps to dissolve itself.\(^90\)

Whether the Law Society was ever formed is open to question. On 20 March 1875 the *Sydney Morning Herald* reported that forty or fifty solicitors had given a dinner at the Exchange Hotel to G.W. Allen. This dinner was to acknowledge 'his kind interest in promoting *esprit de corps* and friendly feeling in that body, and ... the aid given by him towards the formation of the Law Society recently established, and of which he is the first president'.\(^91\) Henry Deane, however, painted a different picture the following month in reply to a question from a Kiama solicitor about the correct way of conducting a branch office. Deane wrote that he would place the letter before the Council 'as soon as (I might say) they are in existence'.\(^92\) He informed the solicitor of the steps taken to form the Law Society but indicated that he could do nothing until office-bearers and a council were appointed. It seems certain that the *Herald* was misinformed as the *Law Almanac* continued to list Allen as president of the Law Institute for several years, even though it contained no complete list of office-bearers. In either case, the effect was the same. A correspondent to the *Herald* in December 1876 asked whether it was true that the Law Institute was no longer 'in working order'. Considering the success of similar bodies in the United Kingdom and Victoria, he felt that if such a collapse had occurred it was 'certainly

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\(^89\) Meeting of Attorneys, 15.12.1874, Manuscript Notes, *ibid*.

\(^90\) Napier and Daly, *op. cit.*, p. 15.

\(^91\) *S.M.H.*, 20.3.1875, p. 13.

not complimentary to our progress'. As it emerged several years later, the Council of the Law Institute had resolved, in view of the apathy of its members, that the then office-bearers should hold office until their successors were appointed. This kept the society in existence ready for happier days when the secretary could call a meeting, new members could be enrolled, and the society could resume its activities. Until the early 1880s, little if anything was done.

The Law Institute of New South Wales had managed at no stage to establish itself as the representative of colonial solicitors as a whole. Even when the profession was under strong criticism in the early 1870s, the majority of solicitors clearly did not feel the need for such an association. Consequently the Institute had to try and establish its legitimacy and authority through other channels. Its attempts to render itself indispensable to solicitors either by legislation or rule of court were, however, a failure. When the Institute brought a man before the Supreme Court for issuing summonses and drawing other documents for a fee, the presiding judge awarded only five shillings damages because he apologised. From instances such as this through to the question of reciprocal admissions between the colonies, the record of the Law Institute was not one to inspire confidence. It had shown itself to be quite incapable of providing for the needs of colonial solicitors at a time when competition was increasing and legal business was not plentiful. Further, if McGuire's remarks are a reliable guide, some solicitors at

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93 S.H.H., 2312.1876, p. 5.
94 Cover note to papers of February 1883, Law Institute Papers, Box 1.
95 In re Simpson, Supreme Court Reports (N.S.W.), Vol. XII, 1873, pp. 286-89.
least believed that the Institute was exclusive and not truly a body for all solicitors. This impression appears to be borne out by the restricted character of the Institute’s membership. In sum, even in the early 1870s few solicitors in New South Wales shared any sense of common purpose with their fellow practitioners and the inept performance of the Law Institute gave them no reason to change their minds. When the political transformation which followed the gold rushes and the introduction of responsible government displaced the leading Sydney solicitors from their former positions of influence, colonial solicitors as a group had neither the unity nor the inclination to respond.
CHAPTER 5
SOLICITORS WITHOUT COMMON CAUSE

The failure of the Law Institute to attract widespread support raises the important question of why colonial solicitors were apparently uncohesive and unconcerned for the interests and reputation of their branch of the profession. One reason was simply, as already observed, that solicitors were less directly involved than the Bar in the major controversies which affected the position of the profession in the 1860s. Even those radicals who sought to reform lawyers as well as the law reserved most of their criticisms for the Bar. At the same time, the objects and potential appeal of the Law Institute extended far beyond the more general questions of the standing and influence of the profession. They encompassed many areas of practice and conduct which would have been of considerable value to the individual solicitor in his every day business, including protection from unqualified practitioners, the settlement of professional disputes, the improvement of the legal process and the availability of a comprehensive law library. There were thus strong reasons for solicitors to support the Institute quite apart from any concern they may have held for the wider interests of the profession. Many solicitors clearly did not, however, see the matter in this light and appear to have shared Joseph Leary's opinion that they had survived so far without such a body and 'could go on without it'. Why this was so can only be understood through an analysis of the composition and character of colonial solicitors as a group.

At the head of the junior branch of the profession, there was a type of unofficial elite based on the leading Sydney law firms. It included men like Allen, Johnson, Want, Norton and Holden who had been in practice in the city for at least ten years and who were noted for their involvement in a far wider sphere of public life. They were active, as we have seen, in politics and local government, served on numerous bodies connected with religious, educational and philanthropic causes, and swiftly assumed leadership of the Law Institute when it was established. Their character is best demonstrated by several individual examples, notably George Wigram Allen, Randolph John Want and Robert Johnson.

After his admission to the profession in 1847, Allen followed closely in the footsteps of his father by conducting a well respected and successful legal business and also assuming a prominent position in public affairs. He was mayor of the Glebe for eighteen years after 1859, served in both the Legislative Council and the Legislative Assembly, and sponsored such local improvement societies as the Wentworth Club and the Young Men's Christian Association, and land reclamation schemes. From 1853 until 1867 he was a commissioner of national education, acted as a trustee of the Sydney Grammar School, and was a member of many religious and charitable societies. Later in life he became 'a director of many public companies engaged in steam, mining and commercial ventures, of insurance firms and building societies, including the Bank of New South Wales and the Gaslight Co'.

Want, the son of a London surgeon, had quickly established a reputation after his admission as a solicitor in 1837. During the 1840s he acted as an examiner of articled clerks, advised on the 1843 Insolvency

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Act and appeared before several select committees of the Legislative Council. He later became a member of the New South Wales and Australian Philosophical Societies, served on the committee of the Australasian Botanical and Horticultural Society, was an elected trustee of the Australian Museum and a fellow of St. Paul's College. Want was a foundation member of the Royal Sydney Yacht Squadron, belonged to the Union Club, and was chairman of several mining companies. His active career in the Legislative Council was cut short by the swamping in 1861. Johnson, despite financial difficulties during the depression of the 1840s, was similarly prominent in colonial society and politics. He was joint secretary and treasurer of the St. Paul's College Building Committee, a fellow of that college, and a member of the Benevolent Society, the Union and the Australian Clubs. In the Legislative Council after 1856, he was an extremely active legislator but, like Want, lost his place following the 1861 crisis. He was reappointed two years later. In all, Johnson introduced thirty bills on nineteen different subjects.

At the opposite end of the scale there were some attorneys whose activities did nothing to enhance the profession's reputation. Perhaps the most notorious of the period was William Palmer Moffatt who was struck from the roll in October 1862. Moffatt had begun his legal career some fifteen years earlier as a barrister and attorney in Nova Scotia and had come to New South Wales in 1855. Though he had been previously

3 For details of Want's career, see ibid., Vol. 6, pp. 349-50.
4 For details of Johnson's career, see ibid., Vol. 4, pp. 484-85.
5 Moffatt first arrived in Sydney in 1853. He worked for a time with the Surveyor General then went on a business trip to England and America. Upon his return, he sought admission as a solicitor, Admission Papers of W.P. Moffatt, Barristers' and Solicitors' Admission Board Files, A.O.N.S.W., uncat. Box 22B (henceforth, B.A.B. and S.A.B. Files).
harangued before the court on charges of misconduct, it was Moffatt's activities in relation to the case of Jane Durban which revealed his utter lack of professional honesty and integrity. Moffatt had initially acted for Durban, the mother of an illegitimate child, in gaining maintenance from the alleged father, a respectable Wesleyan. Afterwards, he made a deal with the defendant's son that in return for £150 - £30 of which would be Moffatt's expenses - Durban would sign a statement denying the claimed parentage of the child and would leave the colony. He then, in consequence, induced his client to commit perjury.

These affairs would not have become public except that Moffatt retained a further portion of the £150 to cover his fees. Durban sued for this amount and the Law Institute decided to investigate Moffatt's actions. Before the case was heard, Moffatt wrote letters to the press evidently intended to create the impression that he would not receive a just trial due to judicial antipathy. His conduct throughout the case was aggressive and unrepentant. Immediately after being struck off, he applied unsuccessfully to the magistrates for permission to continue practising before the police courts. By January 1863 he was standing

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7 S.M.H., 16.8.1862, p. 5.
9 S.M.H., 28.10.1862, p. 4.
10 The case is reported in detail in the S.M.H., 7.10.1862, p. 5; 17.10.1862, pp. 4-5; 27.10.1862, p. 2.
11 S.M.H., 7.11.1862, pp. 4-5. Several years later Moffatt wrote to the Chief Justice asking whether there was any chance of his being readmitted if he returned to Sydney. The Law Institute advised that it would consider it to be its duty on behalf of the public and the profession to oppose Moffatt's readmission, E.A. MacKechnie to D.B. Hutchinson, Prothonotary, 19.6.1867, Law Institute: Letter Book, p. 73.
as a 'working class' candidate for West Sydney in the Legislative Assembly. One object of this campaign was to substantiate his claim that the public did not share the judges' attitude towards his misconduct. As part of his law reform platform, he promised to 'apply the broom with unsparing hand to cleanse the Augean stables'. He was not elected.

Another attorney whose conduct was frequently in question was James Carroll. In April 1862, when Carroll asked the court to rescind the remainder of a six months' suspension from practice which he had incurred, it emerged that he had been practising as an advocate in the District Court at Port Macquarie while under suspension. The Supreme Court took a lenient view of this infringement because it appeared that Carroll had been misled by Chief Justice Stephen to believe that he was only barred from the superior tribunal. The court refused to rescind the rest of his suspension, but it also decided not to impose any additional penalty.

By the late 1860s the Law Institute had received a number of complaints against Carroll but was unable to act because they were either too vague or not of a nature that could easily be brought before the court. Finally, in September 1869, Carroll again appeared before the judges on a charge of misappropriating a client's funds. The court again suspended him for six months but Chief Justice Stephen, who disagreed with his

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12 'To the ELECTORS of WEST SYDNEY', and 'Mr. W. Moffatt for West Sydney', S.M.H., 3.1.1863, pp. 4, 5.

13 S.M.H. 28.4.1862, p. 4; 1.5.1862, p. 3. Carroll had incurred his original suspension in December 1861, Ex p. Brett, New South Wales - Supreme Court Reports, 1861-1882, (S.M.H. Extracts), Mitchell Library (Q346.914), p. 62.

colleagues, took a far more serious view of the case. In view of the number of complaints raised against Carroll, he felt that the attorney should have been struck from the roll.\textsuperscript{15}

Only slightly more respectable were the activities of the 'police court' attorneys, whose sharp practices are graphically described in an account of proceedings before the Water Police Court in June 1875. The narrator, William Lyndhurst Vardy, was himself a police court attorney-advocate and closely involved in these events. Judging by the attitude of the magistrates towards him and his own self-confessed activities, Vardy was a rather sharp practitioner who was neither trusted nor easily tolerated.\textsuperscript{16} The particular incident he recounted involved several claims for wages against a shipping master, Archibald Kennedy. Vardy, it seems, had pressed his services upon Kennedy - presumably by touting - and was taking down instructions for the defence when they were:

\begin{quote}
... intruded upon by Mr. Joseph Lowe, an attorney ... who entered the room unannounced, and walking up to my client asked him if he was looking for him, Mr. Lowe, about his cases; in reply to which he was informed ... that he (Kennedy) ... had already retained counsel.\textsuperscript{17}
\end{quote}

Notwithstanding, Lowe accompanied Vardy and Kennedy to the court and continued to urge his professional services upon the latter. When Kennedy 'did not accede ... (he) disappeared and within a few moments

\begin{footnotes}
\footnotetext{15}{\textit{S.M.H.}, 15.9.1869, p. 3; 22.9.1869, p. 3. Carroll does not appear to have greatly altered his ways as a result of this suspension, H. Deane to J. Carroll, 29.2.1872 and 24.7.1876, Law Institute Letter Book, pp. 96, 122.}
\footnotetext{16}{Three months after this particular incident he was convicted for using bad language in court and in November 1875 he was removed from the Water Police Court for failing to recognise the rulings of the Bench, \textit{S.M.H.}, 27.9.1875, p. 3 and 11.11.1875, p. 4.}
\end{footnotes}
afterwards ... appeared for the complainant'.

The tussle between Vardy and Lowe resumed when the second plaintiff against Kennedy was represented by James Greer, not Lowe. The latter called upon the assistance of Dr Hamilton, 'a medical practitioner connected with the shipping of the Port' whom Vardy believed was 'in the habit of introducing clients' to Lowe. After being spoken to in an undertone by both Hamilton and Lowe, Kennedy informed Vardy, to his surprise, 'with considerable embarrassment of manner, that he thought he would appear personally in the case then proceeding'. Lowe then seated himself beside Kennedy and 'advised him to tell the Bench that he wished him, the said Mr. Joseph Lowe, to appear for him and not (Vardy)'. A squabble ensued as to the payment of Vardy's fee and the giving of a receipt and then a physical struggle followed for the possession of the ship's articles which Vardy was determined to retain as a lien for unpaid costs. Ultimately Vardy stormed out of the court with the articles and a court messenger had to be sent after him to retrieve the documents of the case. He was only prepared to return them with a protestation to the court that they remained rightfully his property until the costs of the suit were paid. Such conduct was far removed from the high standards maintained by the leaders of the profession.

The majority of solicitors fell, however, somewhere between these

18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid. Another interesting example of the conduct of 'police court' attorneys can be seen in Ex p. Cory, heard before the Supreme Court in January 1865, S.M.H., 14.1.1865, p. 5.
extremes and it was they who held the key to the success or failure of the Law Institute. An analysis of their character is not easy. In comparison with the Bar, solicitors were far more numerous, their work environments were very diverse, and their conduct was generally 'unobserved by the public at large'. Furthermore, with a few exceptions, they were not the type of people to attract wide public attention or to earn a place in biographical dictionaries. In a bid to overcome these difficulties, I have based the following portrait upon an exhaustive examination of those papers which the admission rules required solicitors to lodge with the court. Some of the conclusions suggested by this information must necessarily be tentative but, at the same time, these records do provide important glimpses into the backgrounds and personalities of these numerous faceless solicitors. When used in combination with the summary provided by the Law Almanacs and the few contemporary observations that do exist, they permit a meaningful analysis of why colonial solicitors appeared largely uncohesive, lacked a comprehensive view of their professional role, and failed to support the Institute.

One important characteristic of colonial solicitors as a group in the 1860s was the diversity of their backgrounds. Although the first articled clerk trained in the colony, George Allen, had been admitted as

22 S.M.H., 23.4.1863, p. 4.
23 These papers make up the Files of the Barristers' and Solicitors' Admission Board. Many were still in the possession of the Supreme Court when this research began, but most have now been transferred to the N.S.W. State Archives. Each file contains the articles and assignments entered into by a clerk, his notices and record of examination, and the certificates of age, good conduct and general compliance with the rules which he lodged when seeking admission to practice. The form of a typical set of articles is set out in Appendix A, pp. 458-60.
early as 1822, solicitors who had received their training and early experience in England or Ireland still made up around forty per cent of the profession in the early 1860s. Their presence was particularly noticeable in country areas where they were a majority of fifty-five per cent in 1864 and still retained a two-fifths share as late as 1879. In contrast, the proportion of overseas solicitors in Sydney began around one third in the 1860s and had shrunk to below a quarter by the end of the next decade. As the training requirements for solicitors in the colony did not differ greatly from those in force in England, this division between practitioners from overseas and those educated locally did not provoke the same frictions which emerged in the Bar. On the other hand, it did mean that a large proportion of solicitors had virtually nothing in common in background and connections, outside their membership of the profession, with those trained in the colony. In addition, the variety of reasons why these solicitors came to New South Wales from England and Ireland suggests that even among themselves they viewed their role in many different lights.

One important lure for these practitioners had undoubtedly at first quite unrelated to their profession - the gold fields of the 1850s in both New South Wales and Victoria. William Smith, for instance, had rushed out to the Victorian gold-diggings within a year of being admitted in England in 1855. By February 1858, his enthusiasm spent and his pockets apparently not lined with gold, he entered a Sydney legal firm and

24 The experiences of Allen, the colony's first articled clerk, are recounted in G.W.D. Allen, *Early Georgian*.

25 These proportions are calculated from the figures in table 3 on p. 181.
three months later was admitted in New South Wales. Thomas Morton Richards had come to the colony for similar reasons. Admitted in England in 1849, he had arrived in New South Wales in July 1852. He tried his luck on the gold fields and then in agriculture before turning back to his profession. He was admitted to practice in the colony in 1855. Many others seem to have followed this pattern. Judging from the admission dates of those who did make the voyage to New South Wales, perhaps as high as twenty per cent of the English and Irish solicitors practising in the colony in the 1860s and 1870s had come initially in search of Eldorado.

For other solicitors, the colony offered a climate which might help to restore their lost health. Thomas Adams had been in practice for seventeen years before he came to New South Wales for this reason in 1841. He then spent two years as co-partner in a sheep farm on the Darling Downs before resuming legal practice in Sydney in 1843. William Whaley Billyard, who came to Australia in 1846 to be chairman of Quarter Sessions and acting judge of the ill-fated colony of North Australia, had been forced by a chest complaint to seek preferment in the colonies. Edward John Glascodine, admitted in New South Wales in

26 Admission Papers of W. Smith, B.A.B. and S.A.B. Files, A.O.N.S.W., uncat. Box 29B.
27 Admission Papers of T.M. Richards, ibid., A.O.N.S.W., uncat. Box 27B.
28 Of the 78 attorneys from England and Ireland known to have been practising in New South Wales during the 1860s and 1870s, 16 came to the colony in the early 1850s. Most had only been in practice in England for a few years and several like Smith, Richards, B. Johns and R.W. Perkins indicated in their admission papers that it was the gold fields which first lured them to New South Wales.
29 Admission Papers of T. Adams, ibid., A.O.N.S.W., uncat. Box 1B.
30 Admission Papers of W.W. Billyard, ibid., A.O.N.S.W., uncat. Box 3B.
1871, had spent the three years since his admission in England travelling to restore his health. His journeys had included the United States, South America, New Zealand and the other Australian colonies.  

Similarly placed was Henry Heron. Admitted in England in 1868, he had read for six months with an equity draftsman and conveyancer of Lincoln's Inn and then become a conveyancing clerk before ill-health forced his migration.  

Irish attorney Thomas Johnson had been in practice since 1846, but in 1874 he too began to travel for his health. Although he had not originally intended to take up his profession again in the colonies, he was admitted to practice in New South Wales in 1876.  

Alfred Roberts, who had practised in Sheffield and Kingston on Hull from his admission in 1866 until October 1874, had to take similar steps for the health of his family. He first worked for a year in New Zealand as a managing clerk and then as a clerk to Searchers to Titles to Real Estate in Oakland, California. He was admitted in New South Wales in November 1877.  

Probably a number of other solicitors came to the colony for this reason but their records have not survived.

Some of those attorneys who migrated in search of gold or better health may also have considered that the colony could offer them improved professional prospects. For others, the latter was clearly their primary motive for coming to New South Wales. George Pinnock, the longstanding Bathurst solicitor, had arrived in the colony in 1849 to

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31 Admission Papers of E.J. Glascodine, *ibid.*, A.O.N.S.W., uncat. Box 13B.
32 Admission Papers of H. Heron, *ibid.*, A.O.N.S.W., uncat. Box 15B.
33 Admission Papers of T.B. Johnson, *ibid.*, A.O.N.S.W., uncat. Box 17B.
further his professional interests after practising for only three years in England. 35 Edward William Meredith, admitted in England in 1852, had begun his career as a legal clerk but soon found that he had no prospects of gaining a partnership. After a short period as an inspector of schools in 1862, he came to New South Wales to improve his position and was admitted in December 1863. 36 Another who may have come to Australia for this reason, even though his prospects in England were encouraging, was William George Augustus Fitzhardinge. After completing his articles, Fitzhardinge spent half a dozen years as a solicitor's clerk and subsequently as a conveyancer before deciding to migrate. His former master, in an endeavour to make Fitzhardinge change his mind, suggested that his interests would have been better advanced in England than elsewhere. In his master's opinion, Fitzhardinge had professional advantages superior to most young men and should soon have been able to look forward to a partnership or to the succession to a good business. 37 The young solicitor was not prepared, it appears, to wait for this eventuality and he arrived in New South Wales in 1838.

Though professional prospects, gold and health are the most cogent and well-documented reasons for English and Irish solicitors coming to New South Wales, they were not the only ones and several other examples are worthy of note. Some solicitors who came to Australia with dreams of succeeding in other walks of life ultimately fell back on their profession.

35 Admission Papers of G. Pinnock, ibid., A.O.N.S.W., uncat. Box 26b.
36 Admission Papers of E.W. Meredith, ibid., A.O.N.S.W., uncat. Box 22b.
Charles Hamilton Walsh, admitted in Ireland in 1842, came to New South Wales in 1848 intending to take up agricultural and pastoral pursuits. By March 1849 he was seeking admission as a solicitor in New South Wales. 39

George Herbert Gibson, who was admitted in England in 1868, spent from 1869 until 1871 engaged in pastoral pursuits in New Zealand. He subsequently tried his hand in Victoria, New South Wales and Queensland but by the mid-1870s had grown discouraged with his new occupation. After some time as a journalist, then as a temporary clerk in the Lands Department, he was admitted to practice in New South Wales in 1876. 39

Stanley George Prudence, after practising in England from 1853 until 1864, migrated to Victoria. He spent two years as a law clerk and then shifted his attention to literary pursuits. He acted as the legal reporter for two Bendigo newspapers, by 1872 was editing Goulburn's Southern Argus, and two years later was admitted as a solicitor in New South Wales. 40

Slightly different was the case of James Carroll who, after being articled to his father in Dublin in 1842 gave up the law for other pursuits. He subsequently claimed that when he had decided to come to Australia he had changed his mind and he sat for his final law examination in the colony. 41 Similarly, William Godfrey McCarthy completed his articles in England but passed his final examination in New South Wales. Prior to sitting for that test in England in 1832, he had received an urgent call to Penang. The following year, due to the financial losses of

39 Admission Papers of C.H. Walsh, ibid., A.O.N.S.W., uncat. Box 32B.
39 Admission Papers of G.H. Gibson, ibid., A.O.N.S.W., uncat. Box 12B.
40 Admission Papers of S.G. Prudence, ibid., A.O.N.S.W., uncat. Box 14.
41 Admission Papers of J. Carroll, ibid., A.O.N.S.W., uncat. Box 58.
a firm with which he was associated, he had decided to move to Van Diemen's Land. There he worked both as a solicitor's clerk and as a clerk to the Attorney General, Alfred Stephen. He appears to have followed Stephen to Sydney when the latter accepted his judgeship and was admitted as a colonial solicitor in April 1840.\footnote{Admission Papers of W.G. McCarthy, \textit{ibid.}, A.O.N.S.W., uncat. Box 20B.}

Those colonial solicitors who had come to New South Wales from England and Ireland were thus not a very homogeneous group and had little in common with those trained and admitted in the colony. Perhaps even a majority of them had come to the colonies for causes other than professional prospects with the law being at best a standby. While it may be misleading to assume without further evidence that they were less attached to the general interests of their profession as a result, it does seem likely that this variety of backgrounds would have led them to view many professional issues from different standpoints. In particular, this would have affected their attitudes towards the Law Institute and their judgment of its utility. As many of these attorneys from overseas practised in country areas, they would not have enjoyed the close and regular contact with a large number of their brethren which would have helped to break down these differences and to produce a widespread consensus on matters of interest to the profession.

Whether the attitudes of those solicitors trained in the colony towards their profession were similarly diverse is impossible to determine. The only figures available on family backgrounds are for clerks who entered articles before they were twenty-one, when a legally responsible person had also to be a party to the articles. Generally, it
was the clerk's father who was joined to the articles in these cases and often he also gave his occupation. The figures given in table 1 are not, therefore, necessarily completely representative of solicitors as a whole, but they are instructive since those who entered articles before they were twenty-one accounted for almost eighty per cent of the profession in these years. They suggest that around one third of colonially trained solicitors in the 1860s came from legal families. They were usually the sons of solicitors but sometimes of members of the Bar. Only a few came from professional or academic backgrounds such as medicine, religion or teaching. The remainder were drawn largely from the commercial and business circles. Their parents would have been people of small but independent means, the ambitious middle and lower middle classes seeking advancement for their offspring. Civil servants and skilled tradesmen were represented but those engaged in manual labour were not. This diversity of backgrounds may have meant that solicitors trained in the colony viewed their profession in different lights but the evidence is not sufficiently conclusive to verify this impression.

A more important reason why solicitors trained in the colony and only just beginning to establish their practices in the 1860s showed little enthusiasm for the Law Institute may have been the difficulties they experienced in entering the profession. The lot of an articulated clerk and the family who supported him was not easy. Most clerks served five years' articles. Those who only served three had to find the initial means to secure a degree in Arts from Sydney University. Further, as shown by

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43 Table 1 appears on p. 170.

44 Of those solicitors, trained in the colony, who practised during the years 1864-70, I have been able to find the age of the solicitor when he entered articles in 113 cases, which is more than 80% of the solicitors so trained and practising. 88 out of these 113 (78%) had entered articles by the time they were twenty-one.
TABLE 1: Fathers' Occupations of Solicitors Trained in New South Wales
who practised during the years 1864–70.

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Admitted by 1861:</th>
<th>Admitted after 1861:</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barrister</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Solicitor</td>
<td>4</td>
<td>18</td>
<td>22</td>
</tr>
<tr>
<td>Gentleman</td>
<td>2</td>
<td>8</td>
<td>10</td>
</tr>
<tr>
<td>Esquire</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Doctor</td>
<td></td>
<td>1</td>
<td>1</td>
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<tr>
<td>Clergyman</td>
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<td>2</td>
</tr>
<tr>
<td>Teacher</td>
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<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Music Professor</td>
<td>1</td>
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<td>1</td>
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<tr>
<td>Landowner</td>
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<td>1</td>
<td>1</td>
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<tr>
<td>Squatter</td>
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<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Civil Servant</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>City Councillor</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Policeman</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Law Clerk</td>
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<tr>
<td>Shipping Master</td>
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<td>1</td>
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<tr>
<td>Innkeeper</td>
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<td>2</td>
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<td>Storekeeper</td>
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<tr>
<td>Auctioneer</td>
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</tr>
<tr>
<td>Merchant</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Cabinet Maker</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Watchmaker</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Builder</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Printer</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Draper</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Overseer</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Butcher</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Pawnbroker</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Settler</td>
<td>1</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Widow</td>
<td></td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Unknown</td>
<td>19</td>
<td>37</td>
<td>56</td>
</tr>
</tbody>
</table>

Totals: 36 90 126

Note: The figures in this table are based largely upon the information available from the articles of clerkship of these solicitors which can be found in the Barristers' and Solicitors' Admission Board Files. Until recently these papers were held by the Joint Admissions Board but they have now been transferred to the New South Wales State Archives. Generally, the father's name and occupation appeared on the articles only when the clerk was under the age of twenty-one and thus could not enter into such a contract without the support of a legally responsible person. Whether or not the father gave his occupation was a matter of choice and the terms 'esquire' and 'gentleman' were frequently used as a formality. Where possible, the father's occupation has been checked against the Post Office and Sand's Directories to remove as much ambiguity as the available information allows. In particular, this check has led to many 'gentlemen' and 'esquires' being reclassified.
a quarter of all articled clerks paid more than a nominal premium to train for the law. The amount of this consideration was usually either fifty or one hundred pounds but sometimes it reached double the latter sum. Occasionally, a solicitor permitted a clerk to pay his premium by instalments but in most cases the whole sum was due when the clerk signed his articles. An additional, though not immediate, burden for some clerks in country districts was a provision in their articles that they should not, for a specified number of years after admission, practise within a certain radius of where their former masters were in business. Solicitors intended such a clause to protect their practices and they generally included an agreed sum of liquidated damages for a breach of its terms. This amount varied between one hundred and one thousand pounds. The provision effectively nullified any goodwill that an articulated clerk might build up during training.

In return for such undertakings and premiums, articulated clerks received little except tuition. In 1865 Henry Brown, a Newcastle solicitor and son of a merchant, objected to a proposal by the Law Institute which would have prohibited clerks from engaging in any other occupation whatsoever during their articles. He considered that this would discriminate against those from less affluent backgrounds who would

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45 Table 2 appears on pp. 172 and 173.

46 Frequently there was a clause included in a clerk’s articles guaranteeing the return of a portion of the premium should death or other unforeseen circumstances prevent either the clerk or his master being able to complete the contract.

47 For example, A.M. Betts who entered articles with C.H. Walsh in Goulburn in September 1861 was bound not to practise within 100 miles of Goulburn for 5 years after his articles expired. If he broke this condition he was liable to pay damages of £500. Admission Papers of A.M. Betts, B.A.B. and S.A.B. Files, A.O.N.S.W., uncat. Box 2B.
### TABLE 2: Formal Conditions of Articles of Clerkship

#### A. Articles entered into with New South Wales solicitors, 1850-1875:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Articles</th>
<th>£50-£100</th>
<th>£100-£150</th>
<th>£150+</th>
<th>NTPW</th>
<th>£1 p.w.</th>
<th>£1+p.w.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1850</td>
<td>6 (6s)</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>1s</td>
<td>1s</td>
<td></td>
</tr>
<tr>
<td>1851</td>
<td>1 (1s)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>1852</td>
<td>2 (2s)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>1853</td>
<td>6 (6s)</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>1854</td>
<td>2 (2s)</td>
<td>-</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>1855</td>
<td>4 (4s)</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>1856</td>
<td>7 (6s 1c)</td>
<td>-</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>1s</td>
<td></td>
</tr>
<tr>
<td>1857</td>
<td>13 (8s 5c)</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2s2c</td>
</tr>
<tr>
<td>1858</td>
<td>15 (9s 6c)</td>
<td>-</td>
<td>2c</td>
<td>1s</td>
<td>1c</td>
<td>1c</td>
<td>1s2c</td>
</tr>
<tr>
<td>1859</td>
<td>14 (11s 3c)</td>
<td>-</td>
<td>3s</td>
<td>1s</td>
<td>-</td>
<td>1s1c</td>
<td>2s</td>
</tr>
<tr>
<td>1860</td>
<td>16 (14s 2c)</td>
<td>-</td>
<td>3s1c</td>
<td>3s</td>
<td>-</td>
<td>1s1c</td>
<td>1s</td>
</tr>
<tr>
<td>1861</td>
<td>23 (18s 5c)</td>
<td>-</td>
<td>5s1c</td>
<td>2s</td>
<td>1c</td>
<td>-</td>
<td>1s1c</td>
</tr>
<tr>
<td>1862</td>
<td>14 (7s 7c)</td>
<td>-</td>
<td>4s</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1c</td>
</tr>
<tr>
<td>1863</td>
<td>15 (14s 1c)</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>3s</td>
<td></td>
</tr>
<tr>
<td>1864</td>
<td>14 (7s 7c)</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>2c</td>
<td>1c</td>
</tr>
<tr>
<td>1865</td>
<td>20 (12s 8c)</td>
<td>2c</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>1c</td>
<td>2c</td>
</tr>
<tr>
<td>1866</td>
<td>17 (13s 4c)</td>
<td>1s</td>
<td>1s</td>
<td>1s</td>
<td>-</td>
<td>2c</td>
<td>1c</td>
</tr>
<tr>
<td>1867</td>
<td>20 (13s 7c)</td>
<td>1s</td>
<td>1s</td>
<td>3s</td>
<td>-</td>
<td>-</td>
<td>2s1c</td>
</tr>
<tr>
<td>1868</td>
<td>23 (15s 8c)</td>
<td>1s</td>
<td>1s1c</td>
<td>2s</td>
<td>2c</td>
<td>2c</td>
<td></td>
</tr>
<tr>
<td>1869</td>
<td>13 (8s 5c)</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>1870</td>
<td>27 (14s13c)</td>
<td>3s</td>
<td>2c</td>
<td>3s</td>
<td>1c</td>
<td>1s</td>
<td>1c</td>
</tr>
<tr>
<td>1871</td>
<td>23 (17s11c)</td>
<td>1s1c</td>
<td>1s1c</td>
<td>2s</td>
<td>-</td>
<td>-</td>
<td>1s2c</td>
</tr>
<tr>
<td>1872</td>
<td>16 (11 5c)</td>
<td>1c</td>
<td>2s2c</td>
<td>-</td>
<td>-</td>
<td>1c</td>
<td>2s1c</td>
</tr>
<tr>
<td>1873</td>
<td>15 (1s 4c)</td>
<td>1s</td>
<td>2s1c</td>
<td>2s</td>
<td>-</td>
<td>1c</td>
<td>1c</td>
</tr>
<tr>
<td>1874</td>
<td>18 (13s 5c)</td>
<td>2s</td>
<td>3c</td>
<td>5s</td>
<td>1c</td>
<td>-</td>
<td>3c</td>
</tr>
<tr>
<td>1875</td>
<td>20 (16s10c)</td>
<td>2s</td>
<td>1s3c</td>
<td>1c</td>
<td>2c</td>
<td>2c</td>
<td>1s</td>
</tr>
</tbody>
</table>

Totals: 364 (2478117c)  94  18 (14s4c)  49 (31s18c)  27 (26s1c)  9 (1s6c)  18 (6s12c)  39 (19s20c)

*This table (2A) is based upon all the surviving articles of clerkship for these years lodged with the Solicitors' Examination Board. These records are not complete for this period, as indicated by the twenty-five per cent unknowns in table 2B, but such losses as have occurred were apparently due either to the insecure means by which they were kept (bound originally in pink ribbon) or to several moves of their location, most recently to the New South Wales State Archives. On these grounds, there is no reason to assume that they are not reasonably representative of the conditions of articles generally. The Articled Clerks' Register, which begins in 1870, records 126 sets of articles entered into between 1870 and 1875, thus indicating that at least for the later years table 2A includes almost all clerks who entered articles. The Articled Clerks' Register has recently been transferred to the N.S.W. State Archives.

Table 2B has been included to show that the proportions in Table 2A, which
TABLE 2 (contd.)

takes into account all articled clerks regardless of actual admissions, are reflected fairly closely among those who actually practised between 1864 and 1870, where they are known. Neither table includes, of course, informal agreements between solicitor and clerk as there is no systematic record of such arrangements.

B. Articles served by solicitors practising in New South Wales, 1864-1870:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Articles</th>
<th>£50-£100</th>
<th>£100-£150</th>
<th>£150+</th>
<th>NTPW</th>
<th>Average Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>£</td>
<td>£</td>
<td>£</td>
<td></td>
<td>£/p.w.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>£1+</td>
<td>£1+ p.w.</td>
</tr>
<tr>
<td>------</td>
<td>----------------</td>
<td>----------</td>
<td>-----------</td>
<td>-------</td>
<td>------</td>
<td>-------------</td>
</tr>
<tr>
<td>-1850</td>
<td>26s</td>
<td>1s</td>
<td>4s</td>
<td>1s</td>
<td>-</td>
<td>2s</td>
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<tr>
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<td>3s</td>
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<td>-</td>
</tr>
<tr>
<td>1851</td>
<td>-</td>
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<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1852</td>
<td>3s</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1853</td>
<td>3s</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1s</td>
</tr>
<tr>
<td>1854</td>
<td>2s</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>-</td>
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</tr>
<tr>
<td>1855</td>
<td>2s</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1856</td>
<td>5s1c</td>
<td>-</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>1s</td>
</tr>
<tr>
<td>1857</td>
<td>7s4c</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1s2c</td>
</tr>
<tr>
<td>1858</td>
<td>7s5c</td>
<td>-</td>
<td>2c</td>
<td>1c</td>
<td>1c</td>
<td>2s</td>
</tr>
<tr>
<td>1859</td>
<td>7s</td>
<td>-</td>
<td>2s</td>
<td>1s</td>
<td>-</td>
<td>2s</td>
</tr>
<tr>
<td>1860</td>
<td>4s2c</td>
<td>-</td>
<td>1s1c</td>
<td>-</td>
<td>-</td>
<td>1c</td>
</tr>
<tr>
<td>1861</td>
<td>10s5c</td>
<td>-</td>
<td>3s</td>
<td>1c</td>
<td>1c</td>
<td></td>
</tr>
<tr>
<td>1862</td>
<td>5s7c</td>
<td>-</td>
<td>2s1c</td>
<td>-</td>
<td>-</td>
<td>1c</td>
</tr>
<tr>
<td>1863</td>
<td>7s2c</td>
<td>1s</td>
<td>1s</td>
<td>1s</td>
<td>-</td>
<td>1s</td>
</tr>
<tr>
<td>1864</td>
<td>3s2c</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1865</td>
<td>2s</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1866</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Totals: 125
(57s28c) 2 19 5 3 7 12

No. of Solicitors from Overseas: 61
No. of Solicitors trained locally: 125
No. of Solicitors training unknown: 55

Abbreviations in tables 2A and 2B:
s = Sydney articles
c = country articles

1 NTPW = condition in articles that Not To Practise Within a certain distance of where the master solicitor is in business for a specified number of years after either the completion of articles or of admission.

2 Average Pay has been calculated upon the total amount of salary guaranteed to a clerk under his articles divided by the number of years he had to serve.
be forced to abandon their aspirations for the law if forbidden to earn a little extra by working after hours. After all, Brown noted, solicitors paid them little enough for their services while they were being trained. His observations are supported by the details of contemporary articles of clerkship. Less than one in six clerks enjoyed any guarantee of remuneration. The amounts varied from a few shillings up to several pounds a week, frequently rising as the clerk became more experienced and thus more able to contribute to his master’s business. In most cases there was no direct connection between pay and premium. Sometimes a solicitor paid a large salary to a law clerk of longstanding who, with his master’s indulgence, had resolved to enter the profession himself. A country articulated clerk was more likely to receive a guaranteed salary than his city counterpart and might also receive board and lodging from his master.

49 See table 2, pp. 172 and 173.
50 Fairly typical was W. W. Capper who was articulated to W. H. Mullen of West Maitland in September 1861. Capper’s articles guaranteed that during the third, fourth and fifth years of his articles he would receive £30, £40 and £50 respectively, Admission Papers of W. W. Capper, B.A.B. and S.A.H. Files, A.O.N.S.W., uncat. Box 58. S. H. Dent, articulated to R. W. Robberds in Sydney in December 1860, was assured a progressive salary of £20, £30, £40, £50, £75 per annum throughout the five years of his articles. Dent paid an initial premium of £150, Admission Papers of S. H. Dent, ibid., A.O.N.S.W., uncat. Box 73.
51 For example, G. C. Gillett, articulated to T. Robertson of Deniliquin in 1864, was guaranteed a salary of £6 per week. Gillett was then 27 years old, Admission Papers of G. C. Gillett, ibid., A.O.N.S.W., uncat. Box 12B. R. Pigou, articulated to W. H. Mullen of West Maitland in October 1858, received £200 per annum during his articles. He did not enter articles until he was 38 years old, Admission Papers of R. Pigou, ibid., A.O.N.S.W., uncat. Box 20B.
should this be necessary or desirable.\textsuperscript{52} Such advantages were, however, counterbalanced by the need to attend law examinations in Sydney and were enjoyed by too few to alter the position of the average articled clerk.\textsuperscript{53} To become a solicitor thus demanded considerable sacrifice and financial hardship, particularly for those who had no prior connections with the profession.

In addition, both uncertain examination standards and disagreements with a master solicitor could jeopardise an articled clerk's chances.

In July 1869 Harmsworth Robert Way appealed to the Supreme Court against the refusal of the law examiners to issue him with a certificate of fitness to be admitted. He pointed out that his examination had contained eighty-four questions in the various branches of law and equity. As he was only allowed from ten o'clock in the morning until six o'clock in the evening to answer these, 'the Answers were hurriedly written and there was no time to reconsider the same.'\textsuperscript{54} The judges accepted Way's argument that fuller answers would have been impossible within the time and ruled that

\begin{itemize}
\item Clerks known to have received board and lodging with their master solicitor during articles were R. Colquhoun (Orange, 1862), J. Leader (West Maitland, 1867), J.C. McLachlan (Bathurst, 1862), and G. Waring (Goulburn, 1859). Their admission papers may be found in B.A.B. and S.A.B. Files, A.O.N.S.W., uncat. Boxes 6B, 19B, 29B, 32B.
\item The difficulties which trips to Sydney involved for some articled clerks can be seen in the Petition of R.A.H. Brennand to the Chief Justice, 16.9.1863. Brennand wished to be presented to the judge at the Armidale District Court before he entered articles instead of coming to Sydney to appear before the Supreme Court judges. To come to Sydney, he pointed out 'would entail great hardship and inconvenience upon, and would be attended with an expense of at least Thirty pounds to your petitioner and would necessitate his absence from the office of Mr Payne for at least a fortnight', Admission Papers of R.A.H. Brennand, \textit{ibid.,} A.O.N.S.W., uncat. Box 3. B. Ramsay, articled to J.D. Brodribb of Mudgee in 1864 and presented to the judges at Bathurst, did not sit for his first law examination until September 1866 when in Sydney on business for his master. Neither he nor his father were able to afford the expense of him travelling to Sydney from Mudgee, Admission Papers of B. Ramsay, \textit{ibid.,} A.O.N.S.W., uncat. Box 14.
\item Admission Papers of H.R. Way, \textit{ibid.,} A.O.N.S.W., uncat. Box 32B.
\end{itemize}
he was eligible to apply for admission. In October 1863 William Edward Murphy had to apply to the court for a similar order because a master solicitor was unwilling to provide a certificate of proper conduct and service. When assigned to this particular solicitor in November 1860, Murphy had received an unwritten understanding that he would be paid a certain progressive remuneration for the remainder of his articles.

However, due to a slump in his business in 1862, the solicitor was forced to reduce his staff. He offered to continue to train both his articled clerks, but without pay, an arrangement quite unsatisfactory to Murphy who threatened to sue for the recovery of unpaid wages. The master in reply charged Murphy with negligence and poor attendance. Murphy subsequently completed his articles with another solicitor but was unable to sit for his final examination without the certificate of his former master. The judges, having investigated the matter, granted the order he desired but commented unfavourably on the acrimonious and misleading nature of the affidavits presented by both parties.

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55 The Supreme Court made this order on 30.8.1869. Earlier, in September 1863, solicitor W.G. McCarthy had clashed in the press with examiners S.C. Brown and W.G. Pennington over their refusal to re-examine his son despite a judicial direction to that effect. Without attempting to judge the propriety of the examiners' refusal, it is clear that many of the questions were of unusual difficulty and that there was an emphasis upon points of practice, an area where articled clerks might necessarily have little experience. The judges 'expressed an opinion that several of the questions ought not to have been put to mere neophytes', S.M.H., 4.9.1863, p. 8; 8.9.1863, p. 3; 15.9.1863, p. 7.

56 Ex p. Murphy, reported in S.M.H., 14.10.1863, p. 2. The Admission Papers of W.E. Murphy, B.A.B. and S.A.B. Files, A.O.N.S.W., uncat. Box 22B, contain a large collection of affidavits setting out the facts of this case.

57 The case was reopened later in October because the solicitor involved felt that his reputation had been brought into question by the publication of Murphy's affidavits in the press report of the case without he himself having had the opportunity to reply, S.M.H., 15.10.1863, p. 2; 21.10.1863, p. 3; 24.10.1863, p. 5. The court confirmed its original order, Order of the Supreme Court, 23.10.1863, in Admission Papers of W.E. Murphy, B.A.B. and S.A.B. Files, A.O.N.S.W., uncat. Box 22B.
For solicitors who had made such sacrifices to enter the profession, the establishment of a successful practice must have been a major priority. It would not, however, have been easy. Throughout the 1860s and 1870s the total number of solicitors practising in New South Wales rose rapidly. 137 in 1864 grew to 189 in 1869, 274 in 1874 and 350 in 1879 - a two and a half fold increase in only fifteen years. In consequence, the level of experience possessed by the average solicitor declined significantly. Whereas half the colonial solicitors had been in practice for eleven years or more in the early 1860s, by 1874 the same proportion had been admitted less than eight years previously. With the level of legal business virtually unchanged, the competition was intense among the latest recruits to the profession. They would have had little time or money to devote to the Law Institute unless it had been able to offer them practical assistance and this, as we have seen, it did not do.

The movement of many of these young solicitors into country areas in search of a practice lessened even further the Institute's chances of

58 These figures are based on the information available in the Law Almanacs of New South Wales, 1864-1879.

59 In 1864, 74 (54%) of the colony's 137 solicitors had been in practice for eleven or more years, that is, since 1853 or earlier. By 1869, 95 (50%) out of 189 solicitors had been in practice for ten or more years, that is, since 1859 or earlier. In 1874, 139 (50%) out of 274 colonial solicitors had been in practice from 1866 or earlier, that is, for eight years or more. These figures are drawn from the Law Almanacs of New South Wales for those years used in conjunction with the N.S.W. Rolls of Barristers and Solicitors, 1824-1876, A.O.N.S.W., X25.

60 The state of legal business during the 1860s was considered in Chapter 3, pp. 102-07, in relation to practice at the Bar. One solicitor who suffered badly due to the decline in legal business was Gilbert Wright who became bankrupt even though he had been earning £3,000-£4,000 in 1858, Minchin, 'Gilbert Wright: Pioneer Solicitor of Bathurst', pp. 207-08.
encompassing all or most colonial attorneys. The ratio of city to
country practitioners changed from 77/60 in 1864 to 100/89 in 1869, 143/131
in 1874 and 166/184 in 1879. As a result, country solicitors were
considerably less experienced than their city counterparts. 61 One
Macquarie Act observing this trend noted that by the late 1860s solicitors
had become:

... a very numerous body ... How they all manage
to live Heaven only knows. The District Courts and
Courts of Petty Sessions scattered over the interior
find employment for a great many; and wherever one
lawyer can scrape out a living there is room for a
second. Still, the supply is considerably in excess
of the demand. 62

The extent of this new distribution of solicitors' practices was
quickly apparent in the Law Almanacs. Prior to the District Courts Act,
country solicitors had settled primarily in the major centres visited by
the circuit courts – Bathurst, Maitland and Goulburn. 63 The 1858
legislation made the chances of establishing a practice in other areas
both more possible and more attractive. Grafton and Armidale in the north,
Deniliquin and Albury in the south, and Mudgee, Forbes and Young in the
west boasted several resident attorneys within a few years. 64 The rapid

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61 In 1864 half of the solicitors (39/76) then in Sydney had begun
practising in 1853 or later while half of the country solicitors
(29/60) had commenced practice in 1855 or later. By 1879 this
gap had widened. 85 out of 166 city solicitors had begun practising
in 1868 or later but 92 of the 185 country solicitors had not been
in practice before 1872. These figures are also based on the Law
Almanacs and the N.S.W. Rolls of Barristers and Solicitors, 1824-1876.


63 In 1856, there were 29 attorneys practising in country areas of
New South Wales. 14 of these were residents of Bathurst, Goulburn
or Maitland and 6 others lived close to Sydney at Windsor, Parramatta
and Campbelltown, List of all Barristers and Attorneys resident in

64 N.S.W. Law Almanacs, 1864, pp. 20-21.
growth in the number of solicitors in the 1860s and 1870s not only consolidated this expansion but pushed it even further. By 1869 Hay, Wentworth, Tenterfield, Inverell, Eden and Panbula appeared in the Law Almanac, and within the next five years Bourke, Glen Innes, Bombala and Kempsey. Wilcannia, Moama, Corowa, Narrandera, Casino, Lismore, Narrabri and Coonamble all had resident solicitors before 1880. By this time Newcastle and Maitland could each claim a dozen solicitors, Bathurst had nine, Albury and Deniliquin around seven, and Tamworth, Orange, Dubbo and Wagga Wagga six each. The colony's 184 country attorneys gave their services in sixty-six different towns.

One important effect of this change was to break down the potential bases for cohesion among colonial solicitors as a group. Before 1860 most solicitors had served their articles in Sydney. This picture changed rapidly over the next decade and by 1874 around one third of colonially trained solicitors then in practice had received their tuition in country areas. The judges acknowledged this shift in December 1867 when they introduced a rule whereby an articled clerk from the country might serve up to twelve months with the Sydney agent of his master without assignment. They simply required that the agent complete identical declarations of the clerk's good conduct and service during that time to those required from the master solicitor covering the remainder of his service.

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65. Ibid., 1869, pp. 21-22.
67. Ibid., 1879, pp. 29-33.
68. The figures in table 2A (p. 172) suggest that at least four-fifths of articles undertaken before 1861 were with city solicitors and that this proportion was much higher prior to 1857.
figures in table 3 show clearly the need for such a provision. Well into
the 1870s virtually no solicitors who had served their articles in
country areas were practising in the city. Few appear to have had any
extended experience of legal practice in Sydney and most chose to practise
in the same area as they had been trained. 70

There were, of course, some countervailing influences. Since 1857
the judges had required that every attorney who:

    does not practise in Sydney, or within one mile thereof
    ... shall add (to the address of his office filed with
    the Prothonotary) the name of some Attorney practising
    in Sydney, at whose Office all Process, Notices, and
    Papers, for him, in any Cause or Proceedings in the Court,
    or before any Judge thereof, may be served.71

How often these formal relationships extended beyond technical legal
business and whether the services which the agents provided tended to
enhance or break down the alienation between a country attorney and his
city counterpart is not clear. Such arrangements did not always work
smoothly and efficiently. Late in 1864 the action of his Sydney agent
placed William Willans of Wagga Wagga in a difficult situation. He had
asked his agent to facilitate the transfer of a case which he had been
conducting to an Albury solicitor, but this had not been done and Willans
was sued for the delay and costs incurred thereby. The jury at first
instance decided that Willans was responsible for his agent's actions and
awarded damages of £103 0s. 7d. against him.72 The full Supreme Court
later quashed this decision on appeal.73 Possibly those legal firms in

70 Table 3 appears on p. 181.
72 S.M.H., 9.11.1864, p. 2.
73 S.M.H., 30.11.1864, p. 3; 22.6.1865, p. 8.
TABLE 3: The Relationship Between Places of Training and of Practice among New South Wales Solicitors in 1864, 1869 and 1874.

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>1864</th>
<th>1869</th>
<th>1874</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>s</td>
<td>c</td>
<td>s</td>
</tr>
<tr>
<td>Sydney articles</td>
<td>34</td>
<td>6</td>
<td>62</td>
</tr>
<tr>
<td>Country articles</td>
<td>1</td>
<td>11½</td>
<td>0</td>
</tr>
<tr>
<td>Trained overseas</td>
<td>16</td>
<td>26½</td>
<td>18</td>
</tr>
<tr>
<td>Unknown</td>
<td>26</td>
<td>16</td>
<td>20</td>
</tr>
<tr>
<td>Totals</td>
<td>77</td>
<td>60</td>
<td>100</td>
</tr>
</tbody>
</table>

(s = Sydney, c = Country)

This table is based on information available in the Law Almanacs and the Barristers' and Solicitors' Admission Board Files. It includes all solicitors who were registered as practising in the colony in those years.
which one partner ran the city office and the other a country branch were more satisfactory but they were too few to make much difference.

Another effect of this new geographical diversity among solicitors was to lessen the pressures for conformity and correct practice normally applied by proximity to fellow practitioners. With young solicitors anxious to establish a practice and the quantity of legal business limited, it was not surprising that the numerous complaints received by the Law Institute revealed that attorneys in country areas were extremely competitive and sometimes tempted to use dubious methods to further their interests. The main device by which solicitors sought to extend their business was to set up branch offices under the control of unqualified clerks. The solicitor involved would personally handle any non-routine matters which arose. Competition from such unauthorised agents such as auctioneers and innkeepers who were prepared to draw up legal documents for a fee complicated the position even more.

74 In 1865, H. Brown, a Newcastle solicitor, alleged that the practice was 'gradually gaining ground of Attorneys resident in Sydney and the larger towns in the interior carrying on business in distant parts of the Colony by means of branch offices or agencies conducted for the most part by non-professional persons'. Similar cases had been brought under the notice of the Law Institute by other country attorneys besides Mr Brown and the Council (was) inclined to think that the practice was unwarranted and illegal', E.A. MacKechnie to W. Readett, 9.1.1865, Law Institute: Letter Book, pp. 46-47; Council Meeting, 8.9.1865, Law Institute: Minute Book, pp. 60-61. For a similar complaint, see Council Meeting, 6.3.1866, ibid., p. 68.

75 E.A. Scarvell complained to the Law Institute in 1867 that 'with three attorneys in the town the professional services of publicans can scarcely be requisite, and the sooner they are stopped the better', E.A. Scarvell, Braidwood, to E.A. MacKechnie, 9.12.1867, Law Institute Papers - Miscellaneous Letters, Box 2. See also E. Manby, Twofold Bay, to E.A. MacKechnie, 17.7.1866; A.B. Freestone, Young to H.C. Stephen, 6.12.1867, ibid., and E.A. MacKechnie to B. Lipscomb, Newcastle, 8.2.1866; E.A. MacKechnie to J. Ryall, Gundagai, 8.2.1866; E.A. MacKechnie to G. Powall, Bathurst, 9.3.1866; H. Deane to E. Manby, 18.4.1871, Law Institute: Letter Book, pp. 65-67, 84.
On the other hand, isolation from their fellow practitioners also allowed some solicitors to earn a livelihood regardless of their personal behaviour or integrity. George Walker, a Mudgee schoolteacher, wrote to his brother William, a solicitor of Windsor, in January 1866 that:

we have one Solr. here now ... who is a confirmed Drunkard and who only last week had a fit of Delirium tremens and is likely to go off like the snuff of a candle any day there is also great complaint of his retaining clients moneys - James is nearly as bad although he attends to his business the People here are getting afraid to trust either of them and there is a first rate opening for any clever Steady person he may not get into much practice at first but I am quite sure he would eventually ...

In 1869 an attorney at Wagga Wagga was suspended for six months from practising in the magistrate's court 'for having used language to the members of the Bench which had been considered offensive'. A more general indictment of the behaviour of country attorneys emerged from the case of Thurlow v. Bullen, heard before the Kiama District Court in July 1868. In this action, an attorney was seeking damages of £50 in consequence of certain expressions used in a letter which referred to him as a 'pettifogging attorney' and a 'rascally attorney'. The defendant opened his address to the jury by claiming that the expressions were not intended to apply to Mr. Thurlow in particular, but to the race of attorneys in general, and ought to be construed in that sense, in which nobody could deny that they were just!' The jury awarded damages of one shilling to the plaintiff.

This situation in country areas posed the most difficult challenge

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76 G. Walker to W. Walker, 3.1.1866, William Walker Papers, Mitchell Library uncat. MSS.501. For a further complaint about a solicitor who was not fit to address a bench of magistrates due to intoxication, see the Admission Papers of W. Grantham, B.A.B. and S.A.B. Files, A.O.N.S.W., uncat. Box 13B.


78 S.M.H., 25.7.1868, p. 5.
of all to the effectiveness of the Law Institute. To establish its legitimacy and to command authority among colonial solicitors, the Institute had to win support from both country attorneys and the latest recruits to the profession. Its aims of encouraging fair and honourable practice and protecting the interests of the profession were fine in theory but must have appeared rather hollow to those solicitors struggling to earn a livelihood in the interior. If the Institute had been able to produce substantial benefits in this regard, the least experienced and most distant solicitors may well have accepted its leadership. At the same time, the association had little chance of being effective unless these very practitioners swung their weight behind it. It was a vicious circle. Any chance that the Institute may have had to break this deadlock was rendered very remote by the diverse origins of many solicitors and the generally difficult times facing the profession and in particular those with little experience who were flooding into its ranks. To many solicitors in the 1860s the Law Institute must have appeared as a rather useless luxury which they could not afford amid other more pressing concerns.
PART IX

THE 1880S: THE LEGAL PROFESSION FINDS NEW STRENGTH

By the late 1880s there were distinct signs that the legal profession of New South Wales had largely overcome many of the problems which had undermined its standing and influence in the 1860s. The Bar, stronger both in numbers and experience, was now able and determined, as Chapter Six shows, to raise the standard of the judiciary above the criticisms and political influence which had damaged its reputation in earlier years. Further, this consciousness of standards and common interests among barristers was being heightened in the 1880s by increasing awareness of their identity as a colonial profession, as expressed in the attention being given to legal writing, the admission rules and legal education. Solicitors too had changed considerably from the motley and apparently uncohesive group they had been two decades earlier. Chapter Seven describes how the new colonial character of the individual solicitor and the circumstances of practice were making solicitors far more aware of their common interests and providing the basis for effective professional organisations. Even the question of division or amalgamation, which had long poisoned the relations between the two branches, was ceasing to have major relevance. Both barristers and solicitors, Chapter Eight suggests, were displaying a new spirit of accommodation towards their respective rights. The combined effect of these changes in the profession's character flowed through into its political performance and, as Chapter Nine points out, lawyers were able to exercise far greater influence in parliament than at any period since the 1850s.
CHAPTER 6

CHANGES AT THE BAR

By the late 1880s the legal profession of New South Wales was no
longer the small, inexperienced and uncohesive group of practitioners it
had been several years earlier. Lawyers were not only far more numerous
than they had been in the 1860s but they were also much more experienced
in years of professional practice in the colony. These changes, important
in their own right, had even greater significance, however, because they
were accompanied by the emergence of a new professional character.
Colonial lawyers were beginning to display an awareness of their common
interests and a concern for standards which had not been evident in the
1860s. At the root of these changes lay a growing separation, both in
composition and sentiment, among lawyers in New South Wales from their
British origins. Increasingly barristers and solicitors were coming to
accept their identity as a colonial profession and the responsibilities
which this entailed if they were to maintain their reputation and
interests. Henceforth, the condition of and influence exercised by the
legal profession of New South Wales would depend largely upon the
standards which it laid down for itself and not upon such arbitrary
factors as the government of the day or how many British lawyers decided
to migrate to the colony and for what reasons.

Nowhere were the profession's new strengths more apparent than in
the composition and attitudes of the colonial Bar whose weaknesses, as we
have seen, were major contributors to the earlier collapse of the
profession's standing and authority. Though the size of the colonial
Bar doubled from 57 to 113 between 1872 and 1892, the most important

1 Law Almanacs of New South Wales, 1872-1892.
change in its character by the 1860s was in terms of professional experience. Whereas only a fifth of the Bar had been practising in New South Wales for ten years or more in 1864, by 1879 over one half had been in practice for at least that time. Of those practising in 1885, three-tenths were advocates of fifteen or more years' standing, a marked increase over the one-tenth a decade and a half earlier.² Darley, Salomon, Pilcher, Want, Manning, Davis and M.H. Stephen were all reputed in 1881 to be earning in excess of £3,000 per annum. F.E. Rogers and C.B. Stephen were not far behind.³ In addition, there were specialists such as William Owen in Equity and highly respected political lawyers like Dalley, G.B. Simpson and W.J. Foster whose standing was higher than their incomes from the law made apparent. Unlike the 1860s when governments had experienced extreme difficulty in selecting suitably qualified barristers to fill judicial vacancies, there was a clearly defined set of barristers to whom they might and did offer positions on the bench and whose appointments were justifiable solely in terms of their professional expertise.

Foremost at the Bar was Frederick Matthew Darley. Darley had come to New South Wales in 1862 after practising for ten years on Ireland's Munster circuit. Success had not come easily at first, but by his great application and command of procedure he earned a large and varied practice by the time he took silk in 1878. As a member of the Legislative Council after 1868, Darley enjoyed a reputation as a law reformer rivalled only by that of Sir Alfred Stephen. His initiatives were most noticeable in

² These conclusions are based upon the information set out in table 4, p. 188.
TABLE 4: Barristers Practising in New South Wales in 1864, 1869, 1874, 1879, 1884, 1889 - Years in Practice in the Colony.

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>1864</th>
<th>1869</th>
<th>1874</th>
<th>1879</th>
<th>1884</th>
<th>1889</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>no. %</td>
<td>no. %</td>
<td>no. %</td>
<td>no. %</td>
<td>no. %</td>
<td>no. %</td>
</tr>
<tr>
<td>Admitted by 1854</td>
<td>9 20.5</td>
<td>6 9.7</td>
<td>3 4.7</td>
<td>2 3.0</td>
<td>2 2.5</td>
<td>- -</td>
</tr>
<tr>
<td>&quot; 1859</td>
<td>19 43.2</td>
<td>15 24.2</td>
<td>12 18.6</td>
<td>10 12.3</td>
<td>4 5.1</td>
<td>1 1.0</td>
</tr>
<tr>
<td>&quot; 1864</td>
<td>16 36.4</td>
<td>16 25.8</td>
<td>14 21.9</td>
<td>13 16.3</td>
<td>7 8.9</td>
<td>3 3.0</td>
</tr>
<tr>
<td>&quot; 1869</td>
<td>- - 25 40.3</td>
<td>24 37.5</td>
<td>21 26.3</td>
<td>10 12.7</td>
<td>11 11.1</td>
<td></td>
</tr>
<tr>
<td>&quot; 1874</td>
<td>- - - - 11 17.2</td>
<td>11 13.8</td>
<td>8 10.1</td>
<td>6 6.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot; 1879</td>
<td>- - - - - 23 28.6</td>
<td>20 25.3</td>
<td>15 15.2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot; 1884</td>
<td>- - - - - - 28 34.5</td>
<td>29 29.3</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot; 1889</td>
<td>- - - - - - - 34 34.3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals:</td>
<td>44 100.1</td>
<td>62 100.0</td>
<td>64 99.9</td>
<td>80 100.3</td>
<td>79 100.0</td>
<td>99 100.0</td>
</tr>
</tbody>
</table>

This table includes all barristers practising in New South Wales in each of those years and has been constructed from information available in the Law Almanacs, the Admission Rolls, and the B.A.B. and S.A.B. Files.
company law, equity, matrimonial causes and bankruptcy and he constantly
stirred the conscience of ministries whenever defects became apparent in
the administration of justice. On a wider plane, Darley was actively
involved in Sydney University and several charitable institutions.  

Close behind Darley in public respect stood Matthew Henry Stephen. Sir
Alfred's third son, Stephen had been admitted to the colonial Bar in 1850
and then spent a year in England studying under an equity draftsman and
special pleader. His reputation at the Bar was made quickly and he acted
as leading counsel for the crown on many occasions. Stephen represented
Mudgee for a time in the Assembly, but most of his non-professional
activities were of a charitable nature, including service with numerous
church, benevolent and welfare societies. He was a patron of cricket
and chairman of the trustees of Sydney Grammar School.  

Perhaps even more astute as a lawyer and certainly more colourful
was William Bede Dalley who became a Q.C. in 1877. After an education at
Sydney College and St. Mary's College, Dalley had been called to the
colonial Bar in 1856. His primary expertise was in criminal law but he
limited his appearances at the Bar to important cases. The time Dalley
devoted to both politics and literary pursuits did not, however, reduce
the vigour with which his legal services were sought and rewarded.
Dalley was widely reputed as a scintillating speaker and conversationalist,
a patron of literature, and a leader in clothing fashions. On several
occasions he declined the offer of a judicial vacancy and continued to

4 Darley's career is considered in detail by J.M. Bennett, 'The
Life and Influence of Sir Frederick Matthew Darley', M.A. (Hons.)

5 For the career of M.H. Stephen, see A.D.B., Vol. 6, pp. 190-91.
devote his talents to politics where his liberal philosophy coincided with that of the Cowper-Robertson ministries. He frequently filled the office of Attorney General in which he strove to keep the administration of justice functioning smoothly. 6 Another to gain prominence both as a lawyer and politician was George Bowen Simpson. Simpson had been admitted to the Bar in 1858 after a notable scholastic career and quickly won a lucrative practice in both civil and criminal courts. His success led him to accept a District Court judgeship in 1867 when aged only twenty-nine, but he resigned in July 1874 because he did not consider that the salary was adequate. Simpson subsequently acted as a crown prosecutor and in 1885-86 was Attorney General for the Robertson ministry with a seat in the Council. He later served as Attorney General to both Parkes and Reid. 7

There was also more depth in the second rank of the Bar from where appointments were made to the District Court bench. William Hattam Wilkinson had come to New South Wales as a teacher in 1852 but subsequently became a student for the Bar and was admitted in 1858. During the 1860s he served as associate to Mr Justice Wise, as a Common Law reporter, as Parliamentary Draftsman, and as an acting District Court judge. Wilkinson also completed a new edition of Plunkett's *Australian Magistrate*. By 1869 Attorney General Manning had no doubt as to Wilkinson's qualifications for judicial office. Manning considered that he possessed 'in more than ordinary degree the special qualities required for judicial duties'. 8

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6 For the career of W.B. Dalley, see *A.D.B.*, Vol. 4, pp. 6-9.
7 Holt, *A Court Rises*, pp. 84-87.
Charles Edward Robertson Murray was the son of colonial barrister and former Parliamentary Draftsman Charles Knight Murray. After early schooling at St. Mark's Church of England Grammar School, Murray had displayed considerable ability at Sydney University in science, mathematics and classics, receiving his M.A. in 1865. He first thought of becoming a solicitor but soon changed his mind and after serving as associate to judges Wise and Faucett was admitted to the Bar in 1867. He practised in common law and in 1870 was co-author with W.J. Foster of *The Practice of the District Courts of N.S.W.* In June 1875 Murray gained permanent appointment as a crown prosecutor for the south-western district and three years later became a District Court judge. Others for whom success at Sydney University led to a lucrative legal practice, crown law appointments and ultimately a District Court judgeship were Ernest Brougham Docker, Alfred Paxton Backhouse and Grantley Hyde Fitzhardinge.

The effects of this new strength and maturity at the Bar were most obvious in the independence and dignity which it was restoring to the judicial office and, in particular, to the Supreme Court bench. Whereas in the 1860s barristers of little colonial and sometimes little general experience had filled many judicial posts, those appointed during the 1880s were both experienced and well-known. Darley had been in practice for thirty-three years, the last twenty-four in New South Wales, before he became Chief Justice in 1886. M.H. Stephen could boast thirty-seven years, William Owen twenty-eight, George Hibbert Deffell forty-one - the

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last thirty-one in the colony, and William Foster thirty years. Apart from the twenty-eight years of Alfred Cheeke, the barristers appointed in the 1860s had been far less experienced. Peter Faucett had been a barrister for twenty years - thirteen in New South Wales, and James Martin for seventeen years, while the legal career of John Fletcher Hargrave had been very patchy. In contrast, Darley, Stephen, Owen and Foster had all become members of the Inner Bar before their elevation while Deffell was well qualified to become first Judge in Bankruptcy as a result of his prior service as Chief Commissioner of Insolvent Estates.

The main reason why these senior barristers accepted elevation to the bench was that it represented the pinnacle of their professional ambitions. It was a recognised reward for legal services in the courts and frequently in politics. When W.C. Windeyer accepted Parkes' offer of a temporary judgeship in 1879, he wrote that he could not refuse 'what is always an object of honourable ambition to most members of my profession'. His sentiments echoed those he had felt when undertaking his first piece of parliamentary drafting twenty-three years earlier. On that occasion he had written that 'the highest honours which my profession can give are now open to me, the thing is to deserve them'. Similarly

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11 For details of the careers of Deffell, Foster, and Owen, see A.D.B., Vol. 4, pp. 39, 206-7; and John's Notable Australians, Adelaide, 1908, p. 242.

12 For details of Hargrave's rather disjointed professional career, see A.D.B., Vol. 4, pp. 345-46.

13 Darley had become a Queen's Counsel in 1878, Stephen in 1879, Owen in 1882, and Foster in 1886. Deffell had served as Chief Commissioner of Insolvent Estates since 1865.


15 W.C. Windeyer to Mary (?), 9.11.1856, Windeyer Family Papers, ML MSS. 186/5.
J.G.L. Innes reminded Parkes at that time that he waited patiently 'for
the fulfilling of my ambition for a seat on the Bench'. When he
succeeded Hargrave two years later, Innes noted that 'it would be the merest
hypocrisy on my part were I to affect that it does not gratify my highest
ambition'.

Even if a leading barrister had some personal reservations about
accepting a judgeship, there was always the question of whether it was
better to take the position rather than have other less senior barristers
awarded apparently greater recognition. When Sir William Manning accepted
a judgeship in 1876, Sir Alfred Stephen wrote to him, sympathising with
Manning's financial sacrifice but observing that:

... after the age of sixty, a successful barrister
may be forgiven if he should see with some feeling
of vexation younger and less qualified men placed
over him - and, to prevent this, should desire the
Judicial office for himself.

Whether this reason was in fact of major concern to Manning I do not know.
It was, however, clearly an issue that weighed with W.J. Foster. When
the Sixth Judge Bill was passed in 1887, Foster as Attorney General urged
Parkes that 'to be passed over for this judgeship would be to do me an
irreparable injury in my professional character even though another

16 J.G.L. Innes to H. Parkes, 13.8.1879, Parkes Correspondence,


18 Sir A. Stephen to W.M. Manning, n.d., Sir William Montagu Manning -
Papers, ML MSS. 246, pp. 193-96. When he asked Manning to accept
the vacant judgeship, Attorney General Dalley pointed out that
he was 'deeply impressed with the consciousness that acceptance of
the office will involve on your part a considerable pecuniary
sacrifice; and will deprive the public of the value of your
services in ... the legislature ... but I am equally certain that
you will not hesitate to make any reasonable sacrifice if you are
convinced that it is necessary for the interests of the public that
you should do so', W.B. Dalley to W.M. Manning, 26.4.1876, ibid.,
pp. 113-17.
judgeship should afterwards be offered me. He threatened to resign should Parkes not grant his wish. Foster's ambitions to the bench were vital to his holding of office. He argued that his professional income had been so reduced by ministerial duties that it was a serious inconvenience to his family for him to continue. Foster's belief that future vacancies would not be so favourable to his chances explained his urgency. In his opinion, an equity lawyer would replace Manning and it would be difficult for a pronounced Protestant to follow the Catholic Faucett. As it was, M.H. Stephen received the sixth judgeship, leading equity lawyer William Owen replaced Manning, and Foster succeeded Faucett. The Sydney Morning Herald, which had disapproved of Foster's attitude over the sixth judgeship, admitted that he was the most senior and suitable barrister available to replace Faucett. Judicial office had become synonymous with legal ability and reputation. It was no longer an open field for the ambitious lawyer with connections.

At the same time, the acceptance of a judgeship was not a step to be taken lightly, even by a leading barrister. Certainly, there was a pension

19 W.J. Foster to H. Parkes, 12.5.1887, Parkes Correspondence, Vol. 52, ML A 922, pp. 48-51.

20 W.J. Foster to H. Parkes, 18.4.1887, ibid., pp. 58-61. Parkes, however, refused to agree to Foster's appointment under the new act and suggested that the government's duties did not include making stepping stones for their own personal interests. He asked Foster to remain in the ministry until the end of the session because his resignation would create considerable difficulties for the government which had only been in office for four months at this time. Foster rejected this argument and Parkes accepted his resignation in May, H. Parkes to W.J. Foster, 18.4.1887, 11.5.1887, 17.5.1887, 18.5.1887, n.d., Parkes Correspondence, Vol. 61, ML A 931, pp. 376-91.

21 S.M.H., 19.5.1887, p. 6.

22 S.M.H., 14.2.1888, p. 6.
to be earned at the end of fifteen years service, but the conditions of service meant that a judge's life was by no means easy. In 1875 the *Sydney Morning Herald* observed that the judges were clearly overworked. Judges Milford and Wise had died as a result and Cheeke had 'been so impaired in health' that it was questionable whether he would be able to resume his duties. He died the following year. In 1876, shortly after he succeeded Cheeke, Manning complained that 'my medical adviser tells me that if I go on as I have done in the struggle to prevent suffering to suitors, I shall simply die'. By 1880 both Chief Justice Martin and Mr Justice Faucett were compelled by illness to seek leave of absence and Manning was granted the same in 1883. The size of their burden was made clear between 1879 and 1881 when even the addition of Windeyer to the bench as a temporary judge failed to stem the accumulation of arrears.

As early as 1874 the judges had made a joint appeal to the government for an addition to their numbers. Attorney General Dalley attempted to legislate for an extra judge but his bill was soundly defeated

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23 18 and 19 Vic., c. 54, s. 51.
24 *S.M.H.*, 31.5.1875, p. 5.
26 Faucett urged in November 1880 that 'after fifteen years of continuous judicial work I feel that some rest is desirable. My recent illness also, the effects of which it will take me some time to get over, renders such rest almost absolutely necessary. Under these circumstances I beg to apply for leave of absence for twelve months', P. Faucett to R. Wisdom, 29.11.1880, *Department of Justice - Supreme Court Judges and Administration of Justice, 1876-1894*, (henceforth *Papers re Supreme Court Judges, 1876-1894*) A.O.N.S.W., 7724. Similarly, Manning claimed that he had abundant warnings that his labours were so severe that they could not be safely continued without a respite, W.M. Manning to Minister of Justice, 21.12.1882, *ibid.*
27 *S.M.H.*, 12.3.1879, p. 3.
after a debate which centred upon the issues of temporary judgeships and judicial salaries and avoided the real point in question. 28

Thereafter, the inability of the bench to handle all the business coming before the Supreme Court forced the government to rely increasingly upon the appointment of temporary judges from either the Bar or the District Courts. Darley condemned this practice in the Legislative Council in 1878 when he called for the tabling of all correspondence relating to the question of an enlarged bench. 29 The matter came to a head in 1879 when Hargrave sought leave of absence and the Chief Justice advised the government that an additional judge was urgently needed. 30

Attorney General Windeyer introduced legislation to this effect but the bill was lost when Stephen Campbell Brown, a solicitor, inserted a clause making attorneys of ten years' standing eligible for the new post. 31 Consequently, the government resorted to a Temporary Supreme Court Judge Act under which, by a quirk of fate, Windeyer received the appointment for two consecutive terms of one year each. 32 During that time arrears continued to worsen despite Windeyer's assistance and many of the sceptical, including the new Attorney General Robert Wisdom, had to concede

30 S.M.H., 12.3.1879, p. 3. Martin informed the government that 'my colleagues and I are thoroughly persuaded that they cannot take upon themselves any more work than they have hitherto had imposed upon them, from which it must inevitably follow that if a fifth judge be not appointed the interests of suitors in this court must severely suffer'.
32 The relevant statute was 43 Vic. No. 2 whose operation was extended for a further year by 44 Vic. No. 9. The debates which led to these enactments may be found in S.M.H., 13.6.1879, p. 3 and N.S.W.P.D., Vol. 3, 1879-1880, pp. 2759-67, 3118-3124.
that an additional permanent judge was necessary. In 1881 the Supreme Court (Additional Judge) Bill was passed and Windeyer gained the position. This step gave the judges some relief but still left them all fully occupied.

When Manning applied for leave in 1883, Chief Justice Martin asked the government to appoint a temporary judge to transact equity and ecclesiastical business during his absence. He insisted that the court could not carry out its work efficiently without the full complement of judges. In February 1886, when the Attorney General was in court, the judges called for the appointment of an additional judge as there were not at present three available to hear equity appeals during the absence of Mr Justice Windeyer. The next day in the equity court, Manning endorsed the words of his fellow judges. He stated that, while on principle he simply did his best and did not ask for assistance, he considered that any new appointee should be a second judge in equity. The increased business flowing from the 1880 Equity Act had made the proper discharge

33 Even when renewing Windeyer's temporary appointment in June 1880, Wisdom believed that he could show that an additional permanent judge was not necessary, *N.S.W.P.D.*, Vol. 3, 1879-1880, p. 2759. By July 1881, when introducing the Supreme Court (Additional Judge) Bill, Wisdom was forced to admit that 'notwithstanding the fact that during six of the last twelve months ... five judges were actually presiding at the court the arrears have not been got rid of, indeed they have accumulated to a large extent' - an additional judge was absolutely necessary, *N.S.W.P.D.*, Vol. 5, 1881, pp. 233-37.

34 45 Vic. No. 1, s. 1.

35 J. Martin to H.E. Cohen, Minister of Justice, 15.1.1883, *Papers re Supreme Court Judges, 1876-1894*, A.O.N.S.W. 7724.

36 *S.M.H.*, 15.2.1887, p. 5.
of his duties as primary judge impossible.\textsuperscript{37} When the government rejected this request, he proposed as an alternative that the restrictions upon other judges sitting in equity or divorce should, if necessary, be removed.\textsuperscript{38}

The lack of adequate remuneration and poor working conditions made judicial tenure even less attractive. When James Martin accepted the Chief Justiceship from Parkes in 1873, he had obtained an undertaking from the premier that judicial salaries would be increased.\textsuperscript{39} Nothing was done and in 1876 Manning, when appointed to the bench, urged that judicial salaries be revised to provide 'rates of emolument more suited ... to their high offices'.\textsuperscript{40} Manning's plea, like Martin's, failed to provoke an immediate response and the situation had not improved by 1879 when M.H. Stephen declined to accept the temporary judgeship. He pointed out that not only were the judges taxed unreasonably by their duties but 'a judge's salary compared with the income which a barrister in full practice, may reasonably expect is not such as, in my case at all events, to induce the sacrifice of exchanging one for the other'.\textsuperscript{41}

\textsuperscript{37} S.M.H., 16.2.1887, p. 6. Manning raised the issue of appointing a second equity judge again in December 1886 when the Sixth Judge Bill was coming up for consideration. He pointed out that 'it is not possible that the work of the Equity Branch of Supreme Court Jurisdiction can continue to be disposed of by a single Judge even with the conditions of uninterrupted health and untiring strength ...', W.M. Manning to Minister of Justice, 22.12.1886, Papers re Supreme Court Judges 1876-1894, h.O.N.S.W. 7724.

\textsuperscript{38} W.M. Manning to Minister of Justice, 1.4.1887 and 18.4.1887, \textit{ibid}. Chief Justice Darley supported Manning's proposal, F.M. Darley to Minister of Justice, 19.4.1887, \textit{ibid}.

\textsuperscript{39} J. Martin to H. Parkes, 5.12.1881, Parkes Correspondence, Vol. 55, ML A 925, pp. 176-77.

\textsuperscript{40} W.M. Manning to Attorney General W.B. Dalley, 28.4.1876, \textit{Sir W.M. Manning - Papers}, ML MSS.246, pp. 124-25.

\textsuperscript{41} M.H. Stephen to H. Parkes, 30.7.1879, Parkes Correspondence, Vol. 38, ML A 908, p. 141.
The government did not do as the judges wanted until the early 1880s. In 1881 Martin jogged Parkes' memory by pointing out that 'it is notorious that barristers in the third rank receive larger incomes than I do'. He found this particularly galling because colonial prosperity had made money more plentiful and diminished its buying power. In response, Parkes introduced a measure which would have allowed only small increases but it lapsed with the end of the session. The Stuart ministry, which took office in January 1883, proved more sympathetic. Attorney General Cohen brought in a generous bill which raised the Chief Justice's and puisne judges' salaries from £2,600 and £2,000 to £3,500 and £2,600 respectively. The act also increased judicial pensions accordingly under the seven-tenths formula. Even these rates, however, could not induce Darley to accept the Chief Justiceship when it was first offered to him in 1886. Darley regretted that despite all he owed to his adopted country he was compelled 'to decline the great position of usefulness' because he was 'unable in the interests of (his) family to give up (his) profession'.

43 Parkes proposed to raise all judicial salaries by £400 p.a., but gave only half-hearted support to even those increases. He argued that the increases were justified in terms of the more numerous and more important questions coming before the courts as the country became more populous and more prosperous, but he also suggested that rises in the cost of living and the relative salary rates of those outside the public service were not proper grounds for reviewing judicial salaries, N.S.W.P.D., Vol. 7, 1882, p. 1120.
44 46 Vic. No. 15. The debate on the Judges' Salaries and Pensions Bill may be found in N.S.W.P.D., Vols. 8 and 9, 1883, pp. 1020-33, 1117-24, 1150-51, 1206-21, 1260-69. Section 51 of the Constitution Act 1855 provided for seven-tenths of a judge's salary to be paid to him annually upon retirement after fifteen years' service.
45 F.M. Darley to Sir P. Jennings, published by S.M.H., 15.11.1886, p. 3.
In addition, the courts in which the judges sat left much to be desired. Accommodation in the Supreme Court was very limited and ventilation and noise provided major headaches. The main Banco and Jury Courts were the principal offenders:

... for the rooms are so ingeniously constructed that the Judge on the bench can far more easily hear what is said in the corridor than what takes place in Court. With the triple view of giving more air, more light, and of enabling the external noise to go athwart the Court-room, a large window has been opened on the south side of the room; but, as this opens onto another lobby in which suitors congregate, the only result is that the noise renders the Judge more irate, and the usher has double duty to perform. That the Court-rooms are small, poky and inconvenient follows as a matter of course ...

In 1889 Mr Justice Stephen, finding the crowded court's 'vitiating atmosphere unbearable', ordered all windows to be fully opened, but the noise of traffic outside compelled him quickly to reverse the order. In the same year the Incorporated Law Institute obtained better accommodation for solicitors in the Jury Court, but made no progress in the Banco Court which was 'so small that ... no alteration for the present could be conveniently made'. In August 1892 the Minister of Justice had to take action to provide witnesses' rooms and to overcome the inconvenience being experienced in the Chancery Square courts. Chief Justice Darley firmly believed that there was a need not only for a complete reorganisation of the courts but that this could only be

46 S.M.H., 26.3.1877, p. 3.
47 S.M.H., 10.9.1887, p. 7.
achieved by establishing new courts in a different location. 50

Judges also had to endure the disruption and inconvenience caused by the demands of circuit courts. The Chief Justice was called upon constantly to rationalise the number of centres at which circuit courts were held and to resist petitions from communities desiring their extension. 51 Possession of a circuit court promised to give a town great commercial advantages over its neighbours, 52 but for the judges it meant only more frequent journeying and wasted days, sometimes to hear not even a single case. 53 In 1887 Darley suggested to the Minister of Justice that he might facilitate circuit business and reduce expenses if, when there was little or no work at a circuit town, he transferred those cases


51 The difficulties which Chief Justice Darley experienced in this regard can be seen clearly in his correspondence with the Minister of Justice, e.g., F.M. Darley to the Minister of Justice, 15.10.1888 and 20.11.1888, Supreme Court - Chief Justice's Letter Book, 12 February 1884 to 21 December 1888 (henceforth Chief Justice's Letter Book (1)), A.O.N.S.W., COD 89A, pp. 354-62, 582-85, and F.M. Darley to the Minister of Justice, 21.6.1889, 7.11.1889, 13.11.1890, 26.5.1891, Chief Justice's Letter Book (2), A.O.N.S.W., COD 89B, pp. 491-94, 536-40, 621-24, 686-88.


53 A good illustration of the judges' attitude to circuit work came in October 1889 when Chief Justice Darley asked to be relieved of the Grafton circuit. Darley doubted whether the cases at Darlinghurst would be completed in time and did not want to travel that distance by land or sea to hear what he believed to be a few unimportant criminal cases. However, when the Minister of Justice informed him that there was a 'heavy' case to be tried and two civil causes, Darley changed his mind, F.M. Darley to A.J. Gould, Minister of Justice, 3.10.1889 and 8.10.1889, Papers Re Supreme Court Judges, 1878-1894, A.O.N.S.W., 7724.
elsewhere and postponed the particular sitting.\textsuperscript{54} Often the judges had to choose between completing the causes to be heard in Sydney and allowing arrears to accumulate while they went on circuit.\textsuperscript{55} On circuit there were the added disadvantages of inadequate facilities in some areas and the absence of any law library beyond the volumes judges carried with them. In 1891 Darley approached the Minister of Justice to see if a solution could be found to this latter problem although he was fully aware of the likely expense involved in such a project.\textsuperscript{56} A judgeship was clearly not a sinecure for barristers who were past their prime. It was a position reserved by the nature of the Bar for the most experienced and capable barristers and one which demanded dedication and sacrifice in return for the benefits of prestige, security and ultimately a pension.

Furthermore, the Bar was keen to preserve the reputation and integrity of its judicial leadership. This concern was evident in the events which led Darley finally to accept the Chief Justiceship in 1886. When Sir James Martin died in office in 1886, Attorney General J.H. Want was quick to maintain his \textit{ex officio} right to the vacant Chief Justiceship.

\begin{itemize}
\item \textsuperscript{54} F.M. Darley to Minister of Justice, 2.9.1887, Chief Justice's Letter Book (1), A.O.N.S.W., COD 89A, pp. 114-17.
\item \textsuperscript{55} Cf. J. Martin to H.E. Cohen, Minister of Justice, 12.9.1883, Papers Re Supreme Court Judges 1876-1894, A.O.N.S.W., 7724. In that letter, Martin advised Cohen that, because of the large number of cases to be heard and the probable duration of many of them, the sittings would have to be extended into the following month. He pointed out that Mr Justice Innes would be able to replace him at Hay, Young, Yass and Goulburn but a temporary judge would still be needed for Grafton and Mudgee.
\item \textsuperscript{56} Darley believed that there should be a small law library in each circuit town holding copies of crown cases and a few leading texts (which he listed) on the criminal law for use by Police Magistrates, District Court judges and Supreme Court judges on circuit. F.M. Darley to Minister of Justice, 27.5.1891 and 23.9.1891, Chief Justice's Letter Book (2), A.O.N.S.W., COD 89B, pp. 691-94.
\end{itemize}
He indicated, however, to the government that he waived this right because he wished to continue at the Bar and in politics. The Jennings ministry which had not in any case acknowledged Want's claim, turned to W.B. Dalley, but Dalley declined on the grounds of ill-health. Darley also refused, as already noted, because the financial sacrifice was too great. His professional income was estimated at the time to be £9,000 per annum. The ministry finally asked Julian Salomons, that 'sharpest of sharp counsel', whose income at the Bar was second only to Darley's. Salomons accepted, but resigned shortly afterwards before he had been sworn in because he did not consider that his appointment commanded the respect of the other judges. To Mr Justice Windeyer, he informed the government, it appeared 'to be not only distasteful, but so wholly unjustifiable as to have led to the utterance by him of such expressions and opinions respecting my fitness to be Chief Justice as to make any intercourse in the future between him and me quite impossible, either as a Judge or otherwise'. Ultimately the government induced Darley to reconsider his previous refusal and appointed him in Salomons' stead.

Though certain aspects of the Salomons affair remain unclear,

58 Ibid., p. 102.
60 According to the *Bulletin*, 20.11.1886, p. 8, Darley received fees in excess of £9,000 and Salomons' annual income was estimated at £7,000 per annum.
62 Bennett, op. cit., p. 107.
sufficient evidence exists to explain its significance. In many respects, Salomons was well qualified. He was a keen advocate and an able lawyer. At the same time, many did not consider that his devastating wit and sharp, sometimes unchivalrous, methods, together with his expertise in the criminal courts, were suitable qualities for the office. Even Alexander Oliver, who was favourably disposed towards Salomons' appointment, admitted that 'he may not take, at first, much solemnity and decorous self-consciousness to the office'. With one or two exceptions, the daily press echoed this concern. Salomons was not worried by the apparent public hesitancy to endorse his appointment without question, but he was disturbed by the attitude of his fellow judges. Both Manning and Faucett, in his opinion, gave him only a cool reception while Windeyer did not even acknowledge his elevation to the bench. When Salomons himself took the unprecedented step of calling upon Windeyer, the latter brusquely accused him of lacking the strength and mental stability necessary to be Chief Justice. Salomons, who had long been a friend

63 'As You Like It', S.M.H., 17.11.1886, p. 5.
64 For example, Daily Telegraph, 13.11.1886, p. 5; Evening News, 19.11.1886, p. 4. Even the Bulletin, 20.11.1886, p. 4, which strongly approved of Salomons' appointment admitted that he was perhaps 'too prone to resort to tricks of the trade'.
65 S.M.H., 19.11.1886, p. 7.
of Windeyer's, could not shrug these accusations aside, although he denied their truth, and two days later he resigned from office. Whether Windeyer's attack was particularly sharp because he was suffering from overwork at the time I do not know, but Salomons' reaction did show a lack of confidence and strength of character which may have been detrimental to the proper performance of the duties of his new office.

The attitude of the Bar as a whole is somewhat obscure. Salomons claimed that his appointment commanded both public and professional respect. At the same time, when the Attorney General attempted to convene a meeting of the Bar to organise a complementary dinner to the new Chief Justice, it was apparently postponed indefinitely because many barristers desired to accord only formal recognition to the appointment. Their reticence could not have been related to Salomons' ability as a lawyer, in which respect he outshone even Darley, but they do appear to have believed that Salomons was too sharp a lawyer to be a suitable first ambassador for the profession. They doubted whether the holding of office would transform the new Chief Justice into a pillar of judicial behaviour and rectitude. Possibly they considered that a display of only qualified support for the appointment would make Salomons very aware of the trust

68 Bennett, op. cit., p. 106.
69 F.M. Darley to W.C. Windeyer, 2.12.1886, Windeyer Family Papers, ML MSS.186/8, pp. 77-79. William Walker, the noted Windsor solicitor, agreed with the judge that the appointment was a mistake and that the public would be grateful to Windeyer for taking the action he had, W. Walker to W.C. Windeyer, 3.12.1886, ibid., pp. 95c-95e.
70 Salomons himself did not feel that the Bar was hostile, J. Salomons to Sir Patrick Jennings, 22.11.1886, ibid., p. 48. Darley had, it appears, been influential in promoting Salomons' appointment, S.M.H., 19.11.1886, p. 3.
71 Bennett, op. cit., p. 104.
which had been committed to his hands and the need for him to adjust his habits to the office. Barristers did not, however, intend this as a blanket condemnation similar to that which had greeted Hargrave in 1865. Following Salomons' resignation, a meeting of the Bar on 19 November 1886 resolved unanimously that he be asked to withdraw it. Sixty barristers and a large number of solicitors signed petitions to this effect. The chairman of the meeting, M.H. Stephen, strongly denied a report in the Daily Telegraph that several speakers had condemned Windeyer's action. He insisted that the meeting had not considered it correct to discuss the action of the judges. The Bar clearly wanted to preserve the bench from criticism as well as to maintain its high standards and reputation.

Darley's change of mind was undoubtedly due to this concern among many barristers that the judiciary should be above reproach, controversy and politics. To that end, he was prepared to make a considerable personal sacrifice. The same events may have led M.H. Stephen to accept a seat on the bench in 1887, although he had refused an earlier offer because the pay and conditions of service were unattractive. A less publicised case of a similar nature occurred in 1896 when, after the retirement of Mr Justice Innes, William Owen surrendered his position as Chief Judge in Equity to become an ordinary puisne judge of the Supreme Court. C.J. Manning moved from his judgeship in Bankruptcy to Owen's former position and the

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72 Daily Telegraph, 20.11.1886, p. 5.
73 Daily Telegraph, 20.11.1886, p. 5; 22.11.1886, p. 5; M.H. Stephen to the Editor, Daily Telegraph, 20.11.1886, Windeyer Family Papers, ML MSS.186/8, pp. 39-41.
74 There were, of course, other reasons for Stephen to change his mind. Judicial salaries had been increased, the earlier offer had been for a temporary judgeship, and Stephen himself was now in his sixtieth year. No evidence remains, however, as to which factors weighed most heavily with Stephen.
new judge, A.H. Simpson, became Judge in Bankruptcy. Shortly afterwards, Owen wrote to Alexander Oliver that he had not willingly resigned as Chief Judge in Equity - 'a position I liked better than any other'.

His action, he said, had been prompted by the difficulties which the government was experiencing in selecting from the Common Law Bar. 'Dreading the scandal to the bench, of having the appointment hawked about', Owen had resolved that by relinquishing his own position it would be possible for the government to appoint an equity barrister instead. His pleasure at Simpson's appointment reconciled Owen to the sacrifice.

Most importantly, those barristers who were elevated to the bench carried with them this determination to preserve the independence and the reputation of the judicial office. M.H. Stephen, when appointed to the Supreme Court in 1887, wrote to Mr Justice Windeyer that he looked forward to harmonious intercourse on the bench between friends of long-standing. Early the following year Darley agreed with Windeyer that an absence of freedom of intercourse between members of the judicial bench must be prejudicial to the public interest and indicated his willingness at all times to meet with Windeyer in that spirit. Further, as Windeyer himself subsequently described the situation, the role of the judge was by now quite distinct from politics. He informed Parkes that 'like a woman who

75 W. Owen to A. Oliver, 29.11.1896, Alexander Oliver - Papers, Correspondence, Box K, Sydney University Archives, Fisher Library, University of Sydney.
76 Ibid.
77 Ibid.
78 M.H. Stephen to W.C. Windeyer, 6.7.1887, Windeyer Family Papers, M. MSS. 186/8, pp. 113-16.
has taken religious vows I can as a Judge only regard politics as part
of the sweet dead past'. 80 Such attitudes ensured that the degrading
clash between judge and judge, and judge and executive, which had occurred
during Governor Robinson's visit to Fiji in 1874 would not recur. On
that occasion Chief Justice Martin had refused to order the removal of a
suspected lunatic to an asylum because he had not been appointed as
Lieutenant Governor, as was customary during a governor's absence. 81 A
heated exchange had ensued between Martin and the Minister of Justice.
Finally, Mr Justice Hargrave had not only authorised the admission of the
lunatic but had criticised the attitude of his judicial superior. 82 By
the late 1880s the harmony on the bench and the judges' concern to maintain
the dignity of their office made similar incidents most unlikely.

Judicial cohesion was also vital if the bench was to maintain its
independence from politics. As in the 1860s there were some direct
confrontations between the court and the executive but these did not
throw a similar shadow over the competence and standards of both bench
and Bar. The strongest accusation raised against the judges in the 1880s
was that they were 'too arrogant, too presumptuous, and too tyrannical'. 83
In 1884, in the case of the Bretnall Brothers, Chief Justice Martin
pointed out that he made no claim to the exclusive control of the judges

80 W.C. Windeyer to H. Parkes, 25.10.1893, Parkes Correspondence,
Vol. 43, ML A 913, pp. 230-33.
81 E. Grainger, Martin of Martin Place, pp. 126-28;
82 Ibid.
83 F.M. Darley to H. Parkes, 15.7.1889, Parkes Correspondence,
Vol. 51, ML A 921, pp. 298-301.
over the officers of the court except when they were engaged in the administration of justice. He claimed that it was not merely perilous for the executive to interfere with the judges in the exercise of their judicial discretion, but impossible. At the root of this particular controversy, and other similar clashes, was an administrative arrangement of 1880 whereby the Minister of Justice was made responsible, for the time being, for all matters relating to the Chief Justice and the judges.

The judges, for their part, insisted that the courts were not subject to any department and they strove to restore the Colonial Secretary, and not the Minister of Justice, as the usual channel for communications for themselves and the executive. When the government proposed in 1887 to replace the fixed sum arrangements for circuit court expenses by a daily allowance, Chief Justice Darley refused to consider it. He argued that it would undermine the dignity of the bench and personally refused to be accountable to any officer of the government, no matter how high.

Another point of friction was the question of whether judges' notes were available to either government or parliament and in what circumstances. Correspondence between Sir Alfred Stephen and Mr. Justice

84 Chief Justice Martin to A. Stuart, Colonial Secretary, 26.6.1884, 'Correspondence re Reports from Judges to the Executive, and between Bretnall Brothers and the Department of Justice' in Department of Justice - Publication of Judges' Reports on Convicted Persons and Judges' Authority over Supreme Court Officials, 1882-1884, A.O.N.S.W., 7710.

85 F.M. Darley to the Minister of Justice, 21.12.1894, Papers re Supreme Court Judges, 1876-1894, A.O.N.S.W., 7724.


Windeyer in June 1883 shows that the judges considered their reports on criminal cases to be confidential unless they were called for by either house upon sufficient grounds. However, in 1888, Windeyer rejected the claim of the Minister of Justice that he was entitled to a copy of the judge's notes on Christenson's Case. He offered to show them to the Minister as a favour if he wished to verify something but only if the latter withdrew his claim that the judge must hand them over as a matter of right. Two years later Darley firmly advised the Attorney General that his notes were private property and that he would not forward them to the government in addition to the report on a case which they had already received from him. At the same time the judges demanded support from the government for their decisions. In 1889 Windeyer sentenced several witnesses at Tamworth to terms of six to twelve months in prison for being drunk, or at least feigning drunkenness, to enable a possibly guilty man to escape just punishment. The severity of these sentences provoked a public outcry and rumours soon spread that the government was contemplating an early release of the prisoners. Darley sprang to Windeyer's defence and insisted, against the recommendation of Gould, then Minister of Justice, that an early release would be a blow to the administration of justice. Gould believed that Windeyer was trying to

belittle his office while the judge, and probably the rest of the bench, considered Gould's aggressiveness to be a danger to judicial efficiency and authority. Not even in 1894 were the judges and the politicians able to agree upon the exact dividing line between their respective authorities, but the former were firmly resolved not to relinquish any part of their judicial independence.

Thus by the 1880s the Bar of New South Wales had not only the numbers and the experience to lift the bench above the political influence and poor repute which had plagued it during the 1860s but also a strong desire to preserve the bench's renewed standing and independence. Relations between the judges were cordial, their legal knowledge and personal character were of a high standard, and there was no longer any suggestion that it might be necessary to seek judges outside the colony.

At the same time, the Bar was being made even more aware of its own particular needs and character and of its independence from British origins.


Windeyer wrote to Parkes in 1889: 'I do hope John will take over the Supreme Court & administration of justice as soon as possible as things are becoming intolerable under Mr Gould's management. This demand for an enquiry into Christenson's case is simply an attack upon me personally & I am afraid he is lending himself to it. In every case in which he has had to do with my cases he has gone against my advice & has done much to injure respect for the Law & to interfere injuriously with the administration of justice', W.C. Windeyer to H. Parkes, 2.10.1889, Parkes Correspondence, Vol. 43, ML A913, pp. 446-49.

When the Minister of Justice informed Darley in 1894 that Foster had retired and G.B. Simpson had been appointed, the Chief Justice insisted that 'the proper and sole channel of communication between the Chief Justice and the Executive is the Prime Minister for the time being', F.M. Darley to the Minister of Justice, 21.12.1894, Papers re Supreme Court Judges, 1876-1894, A.O.N.S.W., 7724.
by both the individuality of the laws with which it was dealing and the inadequacy of colonial admission rules and legal education to cater for the needs of the increasing number of native-born seeking entry to the profession. The changes which these new circumstances required were made neither quickly nor without difficulty because they implied a revision of certain fundamental assumptions which had determined the Bar's character from its earliest days in the colony. That the Bar was prepared to introduce such changes during the 1880s showed how far many barristers had begun to accept their identity as a colonial profession and to adjust their requirements accordingly.

In August 1887 Augustus Nash, a barrister who had quite recently arrived from England, called for the establishment of a colonial school of law. Even the present proportion of lawyers who had received their training in England or Ireland was 'not likely to be a lasting condition' and he did not believe it 'wholly desirable that it should be'. The wants of Australians, Nash asserted, were 'even now different from those of the people of England' and both law and lawyers 'should vary to suit them'. These sentiments, previously restricted to a few progressive liberals at the Bar, were in the late 1880s being shared by a far larger proportion of the profession. They found their practical expression in both the new emphasis being given to legal writing and in the development of admission standards and legal education which catered specifically for colonial circumstances.

96 A. Nash, 'A Plea for a School of Law', Sydney Quarterly Magazine, Vol. IV, No. 4, pp 307-10. Nash's comments were prompted by what he saw as the inadequacy of the three lectureships set up by Sydney University in 1887. The Sydney Morning Herald, 19.3.1887, p. 13, shared his dissatisfaction with those arrangements.
Prior to the late 1880s the legal profession had for too long considered colonial law to be little more than a pale reflection of that applicable in England and not a subject worthy of attention in its own right. As a result both the law and procedure applicable in New South Wales were unnecessarily complex and confused. G.W. Millard, when he published his *New South Wales Appendix to William's Real Property* in 1894, pointed out the 'great difficulties and disadvantages' involved in studying the law of real property applicable in New South Wales from English texts. They contained much material which was only partially relevant or even totally inapplicable, 'while some of the law of real property in force here is peculiar to this country, and not to be found in an English work'.

Millard's latter reference was clearly to the Torrens Title system of land registration which had been in use in New South Wales since the early 1860s but had not been adopted in England. Before Millard, no other author had for thirty years attempted to unravel its complexities and procedures for either student or practitioner. The picture was the same in other areas of law. In 1892 W.D. McIntyre observed 'that it is extremely difficult for students to gather New South Wales law from English text-books, will I think go uncontradicted'.

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99 W.D. McIntyre, *Manual of the Law of Real Property in Force in New South Wales*, Sydney, 1892, preface, n.p.; see also B.R. Wise and H. Davies, *The Bankruptcy Act*, 1887, Sydney, 1888, p. iii. *The Weekly Notes Covers*, Vol. II, No. 21, 10.6.1893, p. lxxii, noted that 'it is a matter of common complaint that the colonial law, in some of its departments at least, is much more "hard to get at" than corresponding portions of English law. This defect is due partly to the circumstances of its origin, and partly to the absence of convenient text books, dealing exclusively with the law as applied in the colony. We are glad to see that, so far as the latter cause is concerned, the defect is being gradually remedied'.

to his *The Practice in Equity* first published in 1884, explained that a most important aim of the new publication was to 'save the practitioner the trouble of frequent piece-meal references to English text-books'.

Even in such an essential guide as Pilcher's *Practice*, Sir David Ferguson later recalled, 'one found a collection of rules that had been promulgated piecemeal from time to time throughout many years. Quite a number of them were inoperative, because they had been superseded by later rules, or because the procedure to which they related had become obsolete. Then there were new rules promulgated since the publication of Pilcher (the first edition was in 1881, the second in 1895), and these could be discovered by consulting someone who had taken the precaution of cutting them out of the newspapers as they appeared'.

The only guide to the link between English law and colonial legislation remained Oliver's *Index to the Statutes*, published in 1879. Ferguson remembered this 'admirable 'compilation' as 'very useful if only one had a friendly guide to supply fingerposts through the wilderness of words'. There was not even a colonial legal journal or summary of reports available to keep practitioners up to date with the most recent decisions and rules until the official bound law reports for a particular year were published.


101 Sir D. Ferguson, 'Before the Law School' in T. Bavin (ed.), *The Jubilee Book of the Law School of the University of Sydney, 1890-1940*, Sydney, 1940, p. 2.

102 A. Oliver, *Collection of Statutes of Practical Utility, Colonial and Imperial, in Force 1824-79*, Sydney, 1879, and *Chronological Table and Index*, Sydney, 1881.

From the mid-1880s onwards, colonial barristers, with the assistance of a few solicitors, set about remedying these deficiencies. Watkins, O'Connor, Nash and Browning produced an eight volume *Digest of Cases in the Supreme Court*, a series later to be continued by Cockshott and Lamb.\(^104\) This was followed soon afterwards by Tarleton's *Private Acts of Public Utility*.\(^105\) The Incorporated Law Institute was particularly anxious about the 'great inconvenience' caused to both profession and public by the lack of an 'alphabetical arrangement of the Statutes' since 1879. It suggested to the Minister of Justice that a sum be provided in the estimates to enable publication of a supplement to Oliver's *Statutes*.\(^106\) This need was answered when such a volume became available in 1892.\(^107\) Two years later McIntyre and Curlewis produced a *Comparative Table of Statutes of England - N.S.W.*\(^108\) At the same time as these guidance volumes, colonial lawyers also produced a spate of works on both procedural and substantive law. The land law and Real Property Act, which as already noted differed from England due to the introduction of the Torrens system from South Australia, were particularly well served with publications by

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Canaway, McIntyre, Millard and Watkins. Works appeared on Ecclesiastical Practice, the Probate Act, Bills of Sale, Divorce, the Companies Act, and Bankruptcy Law and Practice as well as new editions of existing colonial textbooks. From 1891 onwards, the publication of the *Weekly Notes Law Reports* and the *Weekly Notes Covers* kept colonial lawyers far better informed of recent court decisions and changes in the law. The profession had clearly begun to appreciate the individuality of the laws and the legal system with which it worked and to take responsibility for their organisation and clarity.

Similarly, some barristers were becoming concerned that the existing arrangements for the training and admission of students for the Bar were both inadequate and inappropriate to the colony's needs. Their concern was justifiable in terms not only of the absence of any provision for systematic legal education in the colony but also of the changing character of the Bar itself and of the students at law who were seeking admission to its ranks. Though the Barristers' Admission Board had made a concerted


effort between 1848 and 1861 to develop an effective set of admission rules which guaranteed the character and legal expertise of prospective barristers, it had not introduced a formal course of legal education.

Sydney University, whose law faculty had been in nominal existence since 1855,\textsuperscript{111} had similarly neglected the question. John Fletcher Hargrave and Alfred McFarland had delivered several series of lectures on English jurisprudence at the University between 1858 and 1867\textsuperscript{112} but the Senate had discontinued these in the latter year because it considered the attendances to be inadequate.\textsuperscript{113} From then until the 1880s the University continued solely as an examining body whose law degrees gave no advantage to those seeking admission to the Bar and New South Wales was without any provision for educating barristers except through reading in chambers with

\textsuperscript{111} In January 1855, the University Senate appointed a committee 'for the purpose of considering the expediency of revising the by-laws, and instituting faculties of Law and Medicine', Meeting of 2.1.1855, \textit{Sydney University Senate: Minutes}, Book 1, February 1851 to December 1855, n.p., Sydney University Archives. In December, it postponed the question of the conditions of appointing a Professor of Law until the Governor-General gave his assent to the draft by-laws, Meeting of 3.12.1855, \textit{ibid.}, n.p.

\textsuperscript{112} The Senate resolved in September 1858 to appoint a Reader in Jurisprudence with a salary not exceeding £100 plus fees. The position was renewed annually and Hargrave gained the initial appointment, Meetings of 4.8.1858, 1.9.1858, 15.9.1858, \textit{Sydney University Senate: Minutes}, Book 2, January 1856 to February 1865, pp. 168, 171-72. The \textit{S.M.H.} reproduced a detailed summary of the form and content of two of Hargrave's lecture series between March and September 1864 as each lecture was given.

\textsuperscript{113} When renewing Hargrave's appointment in 1865, the Senate resolved that 'unless there shall be a considerable increase in the number of students attending the lectures, it will not be expedient further to continue the office', Special Meeting of 13.2.1865, \textit{Sydney University Senate: Minutes}, Book 2, January 1856 to February 1865, n.p. In February 1868 it resolved not to reappoint a Reader in Jurisprudence, Meeting of 10.2.1868, \textit{Sydney University Senate: Minutes}, Book 4, April 1866 to April 1871, p. 102.
a practising barrister. 114

The first sign that either the judges or the Bar were interested in upgrading the admission standards for barristers came in 1877 when the Board introduced new and consolidated rules. 115 These rules reaffirmed the statutory authority by which the Board was established and empowered to make rules and they incorporated changes made by more recent laws, including the exemption of Arts graduates from Sydney and other recognised universities from the preliminary literary examination and the substitution of either Logic or French Language and Literature for the study of Greek. 116

In future, the rules laid down, a candidate for the Bar who had satisfied the preliminary literary requirement was to be known as a 'student at law'. 117 He was still required to pass the final law examination within three years but henceforth could not undertake that test until at least a year of his studentship had elapsed. 118 During that time and until his admission to the Bar, a student at law was to 'pursue no business or

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114 In February 1860 Faucett moved successfully to appoint a committee to consider the expediency of establishing a Faculty of Law, Meeting of 1.2.1860, Senate Minutes (2), p. 225. Nothing happened, however, until the first person applied to sit for the LL.B. examination early in 1863. The Senate appointed a committee to consider arrangements for it and resolved to appoint a board of three examiners, Meetings of 1.4.1863 and 6.5.1863, ibid., n.p. For many years thereafter, the Law Faculty consisted of a professor from another department (e.g. Badham or Pell) and several judges and leading barristers, including W.C. Windeyer, W.M. Manning, J. Martin, P. Faucett and N.H. Stephen.

115 These rules were drawn up by a committee consisting of the Attorney General, judges Hargrave and Manning, and barrister W.J. Foster. The subject was considered by the Board at meetings of 7.6.1877, 25.6.1877, 8.11.1877 and 14.12.1877, B.A.B. Minutes (1), n.p.

116 Rules 4 and 5, 'Rules for the Admission of Barristers', 14.12.1877. From 1878 onwards all rules governing the admission of barristers were published annually in the Law Almanaco.

117 Rules 4, 5, 11 and 12, 14.12.1877.

occupation otherwise than in the way of study and preparation for the
Bar or in the nature of a literary pursuit'. 119 This rule was not, as it
was subsequently portrayed, 120 a deliberate attempt by the Board to apply
restrictive social criteria to admission to the Bar. The Board was simply
carrying further a decision it had made in the late 1860s that a
candidate who failed any subject at his first examination must undertake
a second examination in all subjects unless he had gained three very satis-
factory or four satisfactory passes at his first attempt. 121 It had made that
change on the advice of examiners Windeyer and Owen 'that to allow candidates thus
to pass their examination piecemeal would have the effect of encouraging
cram, which in the absence of any prescribed period of study is already
apparent in the examinations which have been conducted by us'. 122 The
new rule clearly sought to introduce that prescribed period of study.
Further, the 1877 rules expanded the final law examination for the Bar
into two sections and required that the first part on the theoretical
subjects - Roman, Constitutional and International Law - be passed
satisfactorily before a candidate attempt the second. This final part
followed closely the five divisions of practical legal subjects initiated
by the 1861 rules. 123

120 One of the rule's strongest critics was E.W. O'Sullivan who argued
that it was a bare-faced attempt to establish a close corporation
for the sons of rich men, N.S.W.P.D., Vol. 64, 1892-93, p. 5890.
121 Meeting of 12.6.1868, B.A.B. Minutes (1), n.p.; Secretary of the
B.A.B. to the Law Examiners, 13.6.1868, Windeyer Family Papers,
ML MSS. 186/7, pp. 225-27.
122 W.C. Windeyer and W. Owen to the Barristers' Admission Board,
8.4.1868, received at meeting of 4.6.1868, B.A.B. Minutes (1), n.p.
How far these rules were the result of changes taking place within the profession and how far they were prompted by the recent attempts of Robert Burdett Smith, a solicitor, to legislate for detailed changes in professional admission requirements, is difficult to determine. In 1876 parliament had finally agreed to Burdett Smith's proposals that a candidate for the Bar should be able to study either French or Logic instead of Greek and that a candidate who had passed two annual examinations at Sydney University should not be examined in the classics or mathematics. Burdett Smith's own plans went, however, much further. They included facilitating transfers between the two branches and introducing matriculation to Sydney University as an alternative to the existing preliminary literary examination for the Bar. Even if the judges and barristers who made up the Board had not been concerned that parliament would begin to usurp their functions, they must have been made particularly conscious by Burdett Smith's activities that the quality of the Bar would depend increasingly upon barristers trained and admitted in the colony and that the local admission rules needed in consequence to be made as clear and as effective as possible. The rules promulgated in 1877 were in no sense revolutionary but they did seek to tighten up the standards for admission to the colonial Bar and to ensure that prospective barristers passed their examinations not by cram and chance but through a thorough understanding of the law.

124 39 Vic. No. 32.
126 Table 5, p. 221, shows clearly that the Bar of New South Wales had begun to move away from its initial dependence upon English and Irish barristers by the 1870s.
### Table 5: Barristers Practising in New South Wales in 1864, 1872, 1882 and 1892 - Places of Training

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>1864</th>
<th>1872</th>
<th>1882</th>
<th>1892</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>no.</td>
<td>%</td>
<td>no.</td>
<td>%</td>
</tr>
<tr>
<td>Trained in:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New South Wales</td>
<td>18</td>
<td>40.9</td>
<td>32</td>
<td>56.1</td>
</tr>
<tr>
<td>Overseas/Other Colonies</td>
<td>26</td>
<td>59.1</td>
<td>25</td>
<td>43.9</td>
</tr>
<tr>
<td>Unknown</td>
<td>0</td>
<td>0.0</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Totals:</td>
<td>44</td>
<td>100.0</td>
<td>57</td>
<td>100.0</td>
</tr>
</tbody>
</table>

This table includes all barristers practising in New South Wales in each of those years and has been constructed from information available in the Law Almanacs, the Admission Rolls, and the B.A.B. and S.A.B. Files.
The 1877 rules stood unchanged for almost a decade but their stability belied the important changes taking place in the character of the profession. The Bar of New South Wales was rapidly gaining the strong colonial character commented upon by Nash. Barristers trained and admitted in the colony dominated both the Inner Bar and the profession in general. Overall, colonial practitioners outnumbered those who had come initially from overseas or other colonies by two to one. This situation was far different from the 1860s when barristers from England and Ireland had swamped the ladder of seniority and constituted three-fifths of the total number of barristers registered as practising in the colony. In addition, this colonialisation of the Bar was accompanied by a change in its social composition. Colonial prosperity had greatly increased the popularity of the Bar as a career for a wide section of New South Wales society and was thus beginning to break down the social exclusiveness formerly apparent among barristers. As Wilfred Blacket observed:

Two of the men in the 1887 list had served for some time before the mast of deep-sea ships; one had manufactured very good soda water; two were of the clergy; one had sold newspapers at the street corner; others had been schoolteachers; another had driven many bullocks before he tried his persuasive and more refined eloquence on juries; others came...

127 Of the seven Queen's Counsel practising in 1883, only two (W.B. Dalley and M.H. Stephen) had been first admitted in New South Wales. The other five (E. Broadhurst, F.M. Darley, J. Salomons, A. Gordon and W. Owen) had received their legal training in England or Ireland. Five years later the situation was quite different. Salomons alone of the eight Queen's Counsel then in practice had been trained in England. The others (Dalley, R. Wisdom, W.J. Foster, G.B. Simpson, F.E. Rogers, C.E. Pilcher and J.H. Want) had all received their professional education in the colony. In the 1860s barristers from England and Ireland held 16 of the first 20 positions at the colonial Bar. By the 1880s they held only 10 of those positions.

128 See table 5, p. 221.
from banks and the civil service; and several had been journalists.129

In the face of these changes, the Bar admission rules soon appeared out of date and inadequate. There was a clear need both to provide for systematic legal education in the colony and to develop new rules which were flexible enough to accommodate the many educational and social backgrounds among students at law while still maintaining the professional standards of the Bar.

In consequence, the Board was forced to introduce a number of important changes in the admission rules between 1887 and the early 1890s. In March 1887 it extended the qualifying time for a student at law from one year to three years.130 Graduates or undergraduates of two years' standing in Arts at Sydney University 'or of any other University recognised by it' enjoyed the privilege of serving only two years.131 In June 1888 the Board went a step further and exempted law graduates of Sydney or other recognised universities, Bachelors of Civil Law at Oxford, and first class graduates of the Oxford and Cambridge Schools of Jurisprudence from further studies in Roman, International and Constitutional Law.132 It also accepted the challenge of a solicitor to modify

129 W. Blacket, May It Please Your Honor, Sydney, 1927, p. 172.
130 Rule 1, 2.3.1887. This proposal came originally from Mr Justice Manning but its introduction was delayed by the death of Chief Justice Martin, Meeting of 28.10.1886, B.A.B. Minutes (1), n.p.; B.A.B. to the Chief Justice, 29.9.1886 and 14.12.1886, Barristers' Admission Board Letter Book, 8.9.1879 to 28.10.1890, (B.A.B. Letter Book (1)), A.O.N.S.W., 2/8340, pp. 216, 230-31.
131 Rules 2 and 3, 2.3.1887. This concession was later extended to members of at least four terms standing at the Inns of Court, Meeting of 16.9.1890, Barristers' Admission Board Minutes, 13.2.1889 to 19.2.1908, (B.A.B. Minutes (2)), pp. 51-52.
132 Rule, 22.6.1888. Windeyer proposed this rule which the Board discussed and agreed to at meetings of 3.5.1888 and 22.6.1888, B.A.B. Minutes (1), n.p.
the restrictive conditions that required solicitors of five years' standing to have their names removed from the roll before entering into studentship. The new rule, which followed the precedent of England and Ireland, limited the term of studentship for such candidates to twelve months and abolished the need for a solicitor to have his name struck off before proceeding to the preliminary examination. Solicitors were still bound by statute to comply with all Bar examination conditions.

The most significant change of all was, however, in the rule which restricted the occupations which a student at law might undertake during his final year. By 1887 the rule which prevented students at law pursuing any business or occupation 'otherwise than in the way of study and preparation for the Bar, or in the nature of a literary pursuit' was causing endless difficulties of interpretation for the Board. It had frequently to decide what were suitable occupations within the meaning of the rule. Cases which the Board approved included the coaching of pupils for a few hours daily, being a judge's associate or Clerk of Petty Sessions, employment as an official historian in the Government Printing Office, and unpaid work in the Crown Solicitor's Office followed by twelve months' reading in chambers. On the other hand, the Board

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133 This particular change is discussed in detail in Chapter 8, pp. 320-22.
135 B.A.B. to S. Robinson, 4.3.1880, B.A.B. Letter Book (1), p. 18; B.A.B. to A.P. Canaway, 28.5.1884, ibid., p. 103.
137 Meeting of 26.10.1887, ibid., n.p.
decided that salaried employment in a solicitor's office, a clergyman in active ministry, and the work of a plan draftsman or acting police magistrate was unacceptable. The dividing line was fine.

Occasionally, the Board simply refused to decide and, to the consternation of some candidates, left the question open for a future Board to decide. An assistant master at All Saints' College, Bathurst, who was placed in the position, appealed to the Board:

Could not candidates who are now left in a state of uncertainty, obtain some assurance that hard work and success in examinations should have their fair reward? or at least be directed to some pursuit which is 'literary' without a doubt, in order that we may know assuredly that our admission to the Bar depends on ourselves alone, and not on the strict or lenient interpretation of a rule?

The rule in its present form was clearly inadequate and was becoming more so with every year that passed.

The issue came to a head in May 1887. A student at law, who was employed in the office of the Custodian of Wills, applied to be admitted to the Bar. The Board granted this request as he had been allowed to proceed to all examinations and because others had been admitted under

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141 B.A.B. to A.J.P.G. Reynolds, 13.2.1889, ibid., p. 557; Meeting of 3.5.1888, B.A.B. Minutes (1), n.p.; Meeting of 13.2.1889, Barristers' Admission Board Minutes - 13.2.1889 to 19.2.1908, (B.A.B. Minutes (2)), p. 3.
143 Meeting of 5.5.1887, B.A.B. Minutes (1), n.p.
144 A.W. Jose to B.A.B., 16.5.1887, Admission Papers of A.W. Jose, B.A.B. and S.A.B. Files, Supreme Court of New South Wales. Jose's plea was in reply to a letter from the Board, B.A.B. to A.W. Jose, 6.5.1887, B.A.B. Letter Book (1), p. 295.
somewhat similar circumstances. They did not, however, consider that his occupation was a 'literary pursuit' within the meaning of the rules. In exasperation, the Board decided that the rule had to be changed to remove such ambiguities. As a result, they resolved in July 1887 that the final twelve months of a student's term should be spent exclusively in the study of law. The press immediately condemned this decision as being socially discriminatory. The Bulletin accused the judges of tightening even further the close corporation of the Bar by keeping out competent men who could not afford to sustain themselves during studentship. The profession, it argued, had been handed over finally 'to the curled darlings of fortune whose sires possess fat banking accounts and mansions ... at Edgecliff Road, or in some equally aristocratic location'. The Herald, in a more restrained editorial, agreed that the rule would tend to exclude those with insufficient means to support themselves for the required period. It concluded that the rule had been made in a clumsy attempt to prevent the occurrence of overcrowding similar to that being experienced in England. If the Board intended it to act as either a property qualification or as a deterrent to cramming, the Herald considered its new measure to be inappropriate.

Both press reports failed to appreciate the indecision which gripped the Barristers' Admission Board over this issue. The Board had made the change not because it was committed to any far reaching alteration in

145 Meeting of 18.5.1887, B.A.B. Minutes (1), n.p.
146 Rule, 27.7.1887; Meetings of 18.5.1887, 22.6.1887 and 27.7.1887, B.A.B. Minutes (1), n.p.
147 Bulletin, 10.9.1887, p. 4.
the admission rules, conspiratorial or otherwise, but because of the difficulties it was experiencing in interpreting the 1877 regulation. For all its apparent faults as a solution, the new rule was in accord with the general philosophy behind other changes the Board was making at that time. The Board continued to believe in the virtues of a prescribed period of study as an integral part of a barrister's education. As it pointed out in 1883, neither judges' associates nor Clerks of Petty Sessions were required 'to devote a year to law study or literary pursuits exclusively' because 'their duties are so closely connected with Law'.

The Board would have been reluctant to abolish such a safeguard. On the other hand, the Bar's elevated view of its own position blinded many members to the weight of arguments against a regulation which was in fact socially discriminatory. As late as 1882 Sir William Manning had justified the priority of Science and Medicine in the University's funding by proclaiming that the law was too well paid a profession to require charity.

Two years later, in August 1889, the Board reversed its decision and abolished all restrictions upon the character of employment which a student at law might undertake. Radical members of the Assembly subsequently claimed that the Board had been forced to back down by the


150 W.M. Manning to A. Oliver, 15.4.1882, Alexander Oliver Papers, Correspondence Box L, Sydney University Archives, Fisher Library.

but the Board's own minutes suggest that this claim was exaggerated and probably false. Even when it had imposed the total restriction in July 1887, the Board had considered several alternative solutions to its dilemma. Following its introduction, the circumstances of individual candidates continued to raise questions for the Board and it is doubtful whether the 1887 rule ever constituted the complete restriction which it appeared to be. In August 1888, in response to the pleas of Attorney General Simpson, the Board resolved to amend the rule once again and to allow a student at law to engage in any scholastic or literary occupation. This change, which was to be included in a completely revised set of Bar admission rules, was never promulgated. The Board apparently began to doubt the extent of its power to impose such conditions and it decided unanimously in August 1889, on the motion of Windeyer seconded by Simpson, that it was preferable for the moment to repeal the rule in question than issue fresh rules. At the same meeting, also at the instance of Windeyer, the Board abolished the


153 Meetings of 18.5.1887 and 22.6.1887, B.A.B. Minutes (1), n.p.

154 Cf. Meeting of 26.10.1887, ibid., n.p., when the B.A.B. decided that F.M. Bladen, who was engaged in the Government Printing Office compiling the parliamentary history of the colony, was following a literary pursuit, but held that clerks in the Telegraph, Railway and Post Office Departments could not be admitted as students at law. The three clerks promptly resigned their positions and were then admitted to candidature for the Bar, Meeting of 14.12.1887, ibid., n.p.; B.A.B. to C. Teece, 17.2.1888, B.A.B. Letter Book (1), p. 430.


requirement that a student at law must supply a reference from either a barrister or a university graduate of twelve months' acquaintance.¹⁵⁷

This repeal of all occupational restrictions upon a student at law during his final year was not, therefore, a dramatic reversal of policy in the face of public criticism. In practice, the Board's decision of July 1887 had proved little more satisfactory than the dilemma it had been intended to solve. Rather than drop all such restrictions, the Board had then cast about for a more liberal and less ambiguous form of the original regulation but must have encountered the same sorts of definitional problems which it was really trying to avoid. Ultimately, when doubts arose as to the extent of its authority in this regard, the Board resolved to repeal the questionable rule completely and to satisfy the requirement for the prescribed period of study through other means. This it achieved in September 1889 by introducing a new timetable for the taking of examinations. This timetable laid down that students at law who were graduates could not proceed to the second law examination until they had been students at law for at least eighteen months. Non-graduates were required to wait two years.¹⁵⁸

The difficulties which the Barristers' Admission Board experienced in resolving this issue show clearly that the change which was taking place was not simply a question of minor adjustments but a fundamental

¹⁵⁷ Rule 1, 13.9.1889 which repealed Rule 1, 14.12.1877; Meeting of 26.8.1889, _ibid._, pp. 16-17. The new rule said that 'such notice shall be accompanied by certificates from two or more persons resident in the colony testifying that they have been well acquainted with the applicant and that he is a person of good fame and character. And the Board may require the applicant to give such further proof as to his fame and character as it may deem necessary'.

revision of the bases for admission to the Bar. Until that time the
rules for the admission of barristers in New South Wales had followed the
earlier British assumption that to become a member of the Bar a person
would have the breeding and habits of a gentleman.\textsuperscript{159} Given the
opportunities in the colony for upward social mobility, this was no longer
necessarily so.\textsuperscript{160} As a result, there was a need to tighten the
educational criteria for admission to the Bar as a substitute for the more
socially oriented provisions which had sufficed previously. Some
barristers including Alexander Oliver, Mr Justice Windeyer and Sir William
Manning, all of whom were closely connected with Sydney University,\textsuperscript{161}
accepted the need for change at a relatively early date, but others were
more reluctant to break with those traditional guarantees of the Bar's
standards and esprit de corps. The changes which took place in the
admission rules in the late 1880s demonstrated that the bench and Bar of
New South Wales were beginning, if not without some hesitation, to break
away from the traditional forms they had inherited from England and to
develop new standards appropriate to colonial circumstances.

\textsuperscript{159} A. Carr-Saunders and P.A. Wilson, \textit{The Professions}, Oxford, 1933, pp. 7-58.

\textsuperscript{160} \textit{Law Chronicle}, Vol. II, No. 1, 1.6.1893, pp. 1-2. R.E.N. Twopeny
observed in his \textit{Town Life in Australia} (London, 1883), that 'the
great tendency of Australian life is democratic, i.e. levelling. The
lower middle-class and the upper middle-class are much less
distinct than at home, and come more freely and frequently, indeed
continually, into contact with each other. This is excellent for
the former, but not so good for the latter ... The small tradesmen's
sons are going into the professions ...', C.M.H. Clark (ed.),

\textsuperscript{161} Sketches of Manning's and Windeyer's involvement in University
life may be found in \textit{Hermes}, Vol. I, No. 1, 26.4.1895, pp. 2-4
and Vol. III, No. 6, 30.11.1897, pp. 4-7. Oliver's role at the
University is less well documented but his attitudes can be seen
clearly from the text. For a general outline of Oliver's career,
Those who first saw the trend towards a colonial Bar with its own character were no less concerned than their more conservative colleagues with the need to maintain its standards and reputation. Without the salutary presence of the Inns of Court and the great legal citadels of Britain, they foresaw the need for a systematic programme of legal instruction to cope with the demands of colonial youth. To this end they threw their weight into promoting the Law School of Sydney University. Once again it was an innovation whose acceptance could only be won slowly and grudgingly from a leadership still closely tied to a tradition of which they were a part.

The first glimmer of hope for a revived Law School came in October 1881 when parliament voted an additional endowment of £5,000 to the University. The chief beneficiary, in accordance with the wishes of the legislature, was the faculty of Medicine but the University also provided for the appointment of a lecturer in law. 162 This position was accepted in March 1883 by George Knox, a barrister of Lincoln's Inn who had been practising in the colony for ten years. 163 This, however, was as far as the University was prepared to go, even though it received a further endowment of £1,000 which might have helped to introduce a fuller law curriculum. 164 Alexander Oliver, a strong supporter of colonial legal education who had recently obtained information on the legal training provided by London's university colleges and the Inns of Court, 165

162 Special Meeting of 23.12.1881, Sydney University Senate Minutes, Book 6, September 1878 to March 1884, (Senate Minutes (6)), n.p.
163 Meeting of 7.3.1883, ibid., n.p.
164 H.E. Barff, A Short Historical Account of the University of Sydney, Sydney, 1902, pp. 94 ff.
165 R.M. Sly to A. Oliver, 30.3.1882, Alexander Oliver Papers, Correspondence Box L, Sydney University Archives, Fisher Library.
complained to the Chancellor, Sir William Manning, about 'the insufficiency of money provided for legal education'.

Manning agreed but indicated his belief that Law 'could get along by itself, or rather under present extra University care, until we could see our way better'. He hoped that all lawyers would eventually pass through the University, but that time had not yet arrived. As with the admission requirements, there was at this stage little awareness of the need for a change. Several candidates for the Bar endorsed the strength and perhaps practicality of tradition by journeying to England to obtain their professional qualifications. Oliver again attempted to press the issue in 1885 by moving for the appointment of a legal committee of the Senate to inquire into the condition of the Law Faculty. That body, it appears, did not bring in a report. Not surprisingly in this climate, Knox resigned as lecturer in law in February 1886 due to the lack of encouragement given to his department.

His action broke the spell. The Senate deferred the resignation and appointed a legal sub-committee 'to consider the best means of establishing the Law School upon a proper footing'. Its reports

166 W.M. Manning to A. Oliver, 15.4.1882, ibid.
167 Ibid.
168 Ibid.
169 These included E. Scholes, R.H.L. Innes, D. Maughan and R.C. Broomfield, The Cyclopedia of New South Wales, Sydney, 1907, pp. 311-320.
170 Meeting of 20.7.1885, Sydney University Senate Minutes, Book 7, April 1884-May 1888, (Senate Minutes (7)), p. 147.
171 Meeting of 15.2.1886, ibid., pp. 227-28.
172 The committee consisted of the Chancellor, the Vice-Chancellor, Sir James Martin, Sir Alfred Stephen, Mr Justice Faucett, F.M. Darley, E. Barton and A. Oliver, Meeting of 15.2.1886, ibid.
displayed a mixture of present caution and future optimism. They recognised that at present the University possessed neither the financial means to provide a full and efficient staff of instructors, nor the authority to confer any practical advantage in the direction of admission to the profession. The latter point was considered essential if the Law School was to secure the attendance of sufficient students. 173 Despite these problems, the committee proposed the appointment of several lecturers to deliver evening courses in distinct areas of law. At first it recommended that each course conclude with an examination and that recognition of its value should be sought from the admission board. 174

However, in a second report in March 1887 the committee decided not to seek that recognition. It pointed out that 'the opportunities offered by them to Articled Clerks and to students preparing for the Bar for receiving systematic instruction such as is at present wholly wanting to them, will probably prove sufficient to induce ample attendance ...'. 175

By then the committee was considering the new lectureships as only an interim arrangement, an attitude influenced almost certainly by knowledge that the Faculty of Law would be earmarked for priority when the benefits of the substantial Challis bequest became available to the University. 176

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173 Meeting of 17.5.1886, *ibid.*, pp. 274-75.
175 Meeting of 7.3.1887, *ibid.*, pp. 378-79.
176 When H. Challis, a self-made Sydney businessman, died in 1880 he bequeathed his entire fortune, estimated at £100,000, to the University. Ultimately, the Challis Estate realised almost twice that amount for the University and the funds from it became available in 1890, Barff, *op. cit.*, pp. 116-18. The *S.M.H.*, 19.3.1887, p. 13, was dissatisfied with the three lectureships, 'considering the relative importance of Law in the practical business of life'. It considered that 'the only excuse for it is that it is a mere makeshift, a temporary arrangement intended to fill up a gap until a Law School can be properly equipped'.
With the financial drawback removed and with the increasing number of students at law strengthening further the need for a colonial school of law, the prospects of successfully establishing such an institution and gaining recognition of its value appeared encouraging.

Events soon justified the committee's optimism. In February 1889 the Challis Chairs Committee of the University Senate resolved to establish a School of Law and set aside £2,000 per annum for this purpose.177 A year later, after extensive advertising overseas, the Senate appointed Pitt Cobbett, M.A., D.C.L. (Oxon.), as Challis Professor of Law.178 Together with four part-time lecturers, each a practising barrister, he was to deliver such lectures and courses of instruction as 'shall be sufficient for full preparation when required for admission to the Legal Profession'.179

The initial by-laws for the LL.B. degree laid down that a candidate had to be a graduate in Arts and was to attend a two year course of legal studies and examination.180 The Doctorate of Laws required two further

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177 Meeting of the Challis Chairs Committee, 11.2.1889, Sydney University, Minutes of Standing and Special Committees Appointed by Senate, Vol. 2, 1888-1900, (Sydney University Committees), Sydney University Archives, Fisher Library, p. 30. The practical decisions to implement these plans were taken at meetings of 14.12.1888 and 13.5.1889, ibid., pp. 22, 80 and meetings of 5.7.1889, 18.11.1889, 3.3.1890, 16.6.1890, 21.7.1890, Sydney University Senate Minutes, Book 8, June 1888 to June 1891, (Senate Minutes (8)), pp. 148-49, 190-91, 219-20, 255-57, 265-67.


180 Sydney University Calendar, 1890, pp. 118-19. The initial by-laws were adopted by Senate at its meeting of 18.11.1889, Senate Minutes (8), p. 191, and amended at its meeting of 3.3.1890, ibid., pp. 219-20. During the first year of legal studies, students undertook Real Property and Equity, Obligations, Personal Property and Contracts, Roman Law, and International Law. During the second year they studied Civil and Criminal Wrongs, Procedure including Evidence, Jurisprudence and Constitutional Law.
years to elapse, the attainment of twenty-five years of age, and the
passing of special examinations in Jurisprudence and Principles of Legis-
lation. Soon afterwards, at Cobbett's suggestion, the faculty made
 provision for Arts undergraduates of two years' standing to enter upon a
three year law course without graduating first. It also expanded the
scope of the doctoral examination to encompass Jurisprudence, Roman Law,
English Law and Colonial Law, International Law and Conflict of Laws.

Lectures began in less than ideal surroundings on the top floor of
the legal chambers known as Wentworth Court. The law students resented
having 'to attend lectures in a bare and cheerless room of which the only
furniture is one hat peg and a few dilapidated old desks which were too
bad for use at the University, and finally to have the voice of the lecturer
drowned in the clanging of workmen's hammers, the screeching of trams, and
the roar of the awakening city, except when every door and window is
closed'. The lecture room was draughty and dingy, and the seats 'of

181 Sydney University Calendar, 1890, p. 119.
182 Sydney University Calendar, 1891, pp. 124-25. In the three year
Law course, the theoretical subjects - Jurisprudence, Roman Law,
Constitutional Law and International Law - were studied in the
first year, while the second and third years were devoted to the
professional subjects. The decisions to make these changes were
made at the meetings of 6.5.1890 and 15.5.1890, Faculty of Law:
Minute Book, 1890-1941, (Law Faculty Minutes (1)), Sydney University
Archives, pp. 1, 3. The Senate approved them at its meetings of
19.5.1890 and 16.6.1890, Senate Minutes (8), pp. 247, 255-57.
183 Sydney University Calendar, 1891, p. 125.
184 Hermes, Vol. V, No. 6, 5.5.1890, pp. 6-7. When the University
established the three evening lecturerships in 1887, the judges had
offered the use of one or more court rooms, Meeting of 7.3.1887,
Senate Minutes (7), p. 378. In 1890, however, the court was not
available for law lectures and the Senate resolved to hire a suitable
room in Wentworth Court for twelve months at no more than 30/- a
week, Meeting of 17.3.1890, Senate Minutes (8), p. 229.
choicest iron-bark'. Fortunately the Law School moved next year to other quarters in Phillip Street, 'furnished with a degree of luxury never dreamt of in our wildest imaginings' reported Hermes, the student journal. There was a reading room 'with a highly fashionable carpet, comfortable table and chairs', a lecture room which would be the envy of other schools, a smoking room, and a 'first-rate library'. The students' indignation at their isolation from the main campus dwindled accordingly.

Despite these early inconveniences, the Law School gained many advantages from being situated near the law courts and away from the University. Practising barristers were available as lecturers, thus assuring both expertise of instruction and economy in expenditure. Further, the Law School's proximity to the courts provided greater opportunities for attendance as well as close contact with the students' future career environment. As lectures were delivered early in the morning, at lunch hour, or late in the afternoon, those whose jobs left them

186 Hermes, Vol. VI, No. 1, 29.4.1891, pp. 6-7. The Law Faculty acknowledged the need to find better accommodation for the Law School at its meeting of 2.8.1890, (Law Faculty Minutes (1), pp. 7-8) and the Senate appointed a committee to investigate, Meeting of 22.9.1890, Senate Minutes (8), p. 285.
188 Bavin, op. cit., p. viii, 9; S.M.H., 24.3.1890, p. 6.
189 Hermes, Vol. VI, No. 1, 29.4.1891, p. 7, observed that 'Dr. Cullen has kindly undertaken to give us extra lectures in Conveyancing, also giving us various conveyances to draw, ... We shall also shortly commence regular attendance in Court, and begin to take notes on cases. Mr. Rich has promised to give us opinions to write, so that everything that can possibly be done to make the Law School training of the greatest practical value is being done'.
insufficient time for journeys to the University could attend. These hours also made it possible for articled clerks to benefit, although the faculty did not envisage that in the immediate future the law degree would be of particular value to them. Its first priority was to gain recognition of the degree as a suitable qualification for admission to the Bar and the situation of the Law School where it was able to establish close contacts with, and exercise influence upon, the legal fraternity would have been a useful advantage in this campaign.

Even so, the initial relations between the Law School and the profession were tense and filled with difficulties. To be effective, the Law School had to have its degrees recognised as a suitable qualification for legal practice, but this required either an act of parliament or the cooperation of the judges and the admission board. The first option posed not only considerable technical problems but ran the risk of the legislature introducing amendments which the University considered undesirable. On the other hand, to gain the approval of the Barristers' Admission Board, the Law School had to overcome what the Herald referred to in April 1888 as 'much opposition from members of the Bar, who do not

190 S.M.H., 24.3.1890, p. 6. Lecture times were 8.45 a.m., 12.30 p.m., and 4.30 p.m., Sydney University Calendar, 1891, pp. 156-57. G.E. Flannery later recalled how being in 'the Lawyers' "Street" and the nearby courts gave a definite reality ... to careers we were setting out to attempt. The situation of the School and the active practical experience of the lecturers was ... an incentive to budding lawyers ... The courts attracted us and of course the common law side. We were encouraged to look for "models", G.E. Flannery, 'Brothers-in-Law, 1892-4', in Bavin, op. cit., pp. 68-70. In November 1894 the Law Faculty introduced a new class regulation that: 'every candidate for the degree of LL.B. shall be required to produce certificates from the Lecturer in Procedure and the Lecturer in Equity that he has during his law course attended in Court, and taken a satisfactory note of such cases as shall be approved of by the said lecturers', Meeting of 30.11.1894, Law Faculty Minutes (1), p. 31.
readily give up legal traditions'.\textsuperscript{191} The reasons for this opposition are not difficult to appreciate. The Law School, completely untried as an educator, was threatening to destroy the profession's control of its own standards as well as challenging the Bar's strong belief that legal education alone did not make a barrister. Unless the University could convince the judges and the barristers who served on the Board that it would not have a detrimental effect upon the future character and standards of the Bar, the Law School had little chance of gaining acceptance.

On 5 July 1889 the Senate granted its Law School Committee authority 'to confer with the Judges ... on the question of the regulations necessary to secure the attendance on University lectures of intending barristers and attorneys and the operation of Degrees in Law in relation to the legal profession'.\textsuperscript{192} The committee had made no progress by November, however, when the Senate adopted the draft curriculum of the new faculty. It suggested that the Senate should ask the judges to attach 'to the LL.B. degree the right of admission to practice at the Bar, as in Victoria (and to the Roll of Solicitors if they shall think fit), subject only to enquiries as to personal fitness and to fees by rule of Court'.\textsuperscript{193} At the same time the committee was not sure whether the judges had the authority to grant this request without additional legislation.

\textsuperscript{191} \textit{S.M.H.}, 16.4.1888, p. 7; 15.4.1890, pp. 3, 6.

\textsuperscript{192} Meeting of 5.7.1889, \textit{Senate Minutes (8)}, pp. 148-49. This was in response to recommendations of the legal committee of the Senate drawn up in May, Meeting of 13.5.1889, \textit{Sydney University Committees}, p. 81.

\textsuperscript{193} The Law School Committee asked the Chancellor to arrange a meeting between the judges and the committee on the Law curriculum and appointed the Chancellor, Oliver and C.B. Stephen as a sub-committee to draw up that curriculum, Meeting of 26.7.1889, \textit{Sydney University Committees}, p. 82. The committee received this report, adopted it, and forwarded it for consideration by the full Senate, Meeting of 21.10.1889, \textit{ibid.}, p. 84.
being passed. 194

The issue took on greater urgency early in 1890 with the appointment of Professor Cobbett and the adoption of by-laws. Alexander Oliver advised Manning to introduce a short bill into the Legislative Council which would entitle LL.B. holders 'to the same privileges ... as are enjoyed by those who are admitted as barristers under the Admission Act'. 195 It would meet no opposition in the Council and would not, Oliver felt sure, be mutilated in the Assembly. He could guarantee the cooperation of the opposition through his friendship with Dibbs and expected that Bruce Smith and Carruthers would sway the government. 196 In April Manning called for the recognition of the law degree during his address at the University's annual commemoration ceremony 197 and the following month he took the issue up with Mr Justice Windeyer. Manning by then considered it 'not very probable that the Judges will do anything towards giving a practical, professional, effect to our School of Law' and sought Windeyer's advice as to whether legislation was necessary. 198 To overcome possible hostility from those who favoured amalgamation of the profession, he suggested that the full B.A./LL.B. course of five years should qualify a candidate for

194 Ibid. The Senate responded by appointing the Chancellor, Vice-Chancellor, P. Faucett, A.P. Backhouse, A. Oliver, C.B. Stephen, and F.E. Rogers as a committee to confer with the judges. They did this on 30 November but gained no immediate results, Meetings of 4.11.1889 and 2.12.1889, Senate Minutes (Q), pp. 185, 194.


196 Ibid.

197 S.M.H., 15.4.1890, pp. 3, 6.

198 Sir W.M. Manning to Mr Justice Windeyer, 29.5.1890, Peden Family Collection - Legal Papers - Miscellaneous, 1833-1933, ML MSS. 1633/12, pp. 27-30.
either branch provided that solicitors were still required to serve some reasonable term of articles. Windeyer's reply has not survived, but later events suggest that he counselled a more conciliatory approach, at least for the moment. As in the case of the Bar admission rules, Windeyer appears as a liberal and innovative spirit rather out of step with the conservatism and excessive caution of his judicial colleagues. His interest in University affairs was well demonstrated. He had served as Vice-Chancellor between 1883 and 1886 and in 1895 would succeed Manning as Chancellor.  

In mid-1890, apparently on the advice of Windeyer, the Law School introduced a revised set of by-laws in a new endeavour to make its curriculum acceptable to the judges. A lengthy press release, written by Professor Cobbett, spelt out clearly the objects of these changes. Cobbett began by justifying the establishment of the Law School not so much in terms of public need but with reference to the demonstrable benefits of similar institutions in neighbouring colonies and the United States and to the future demands of Sydney as a commercial city. He admitted that the initial by-laws had been imperfect but claimed that the new changes had made a significant improvement. They embodied 'a scheme of instruction which will bring the course into close relation with the professional examinations, and which promises to increase largely its practical usefulness'. By placing all theoretical subjects in the

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199 Ibid.  
201 S.M.H., 16.7.1890, p. 8. The Law School had agreed to these new by-laws at its meeting of 21.5.1890, Law Faculty Minutes (1), pp. 4-6.  
202 S.M.H., 16.7.1890, p. 8.
first year of study, the by-laws introduced 'almost complete harmony' with
the first branch of the Bar examinations. The regrouping of the second and
third year LL.B. subjects closely paralleled the Bar's final examination
provisions in similar fashion and differed little from the like test for
articled clerks. Cobbett suggested that during these final years a
student would have the opportunity to engage in either office or chamber
work. He emphasised that 'special regard' had been given to the Law
School's practical utility for the profession. On this new foundation,
Manning again approached the Barristers' Admission Board and requested
that the Law School's courses and examinations be accepted as a suitable
qualification for the Bar. This time he was successful.

At its meeting on 8 December 1890, the Board decided that 'the
University degree of LL.B. be accepted as a certificate of the examiners
that the candidates have passed all the examinations directed by the
Board'. This decision did not, however, mean that the Board was
relinquishing its control of Bar admission standards to any large extent.
It required that the University's law degree meet such detailed conditions
as it laid down from time to time. The rule stipulated that the LL.B.
must be passed in the same subjects and on the same books as specified in

203 Ibid.
204 Ibid.
205 The Law Faculty approved Manning's draft letter asking for the
recognition of the law degree in October, Meeting of 23.10.1890,
_Law Faculty Minutes (1)_ p. 10. The following month the Senate
resolved to send the letter to the Supreme Court judges and the
Barristers' Admission Board, Meeting of 3.11.1890, _Senate Minutes
(8)_ p. 295.
the Board's final course. Further, the Board chose to include the Professor of Law amongst its examiners but rejected a suggestion that it use the Law School's examiners as its own. Candidates for the Bar who proceeded through the University had to pay all admission board fees, including those for examination, as well as their University dues. The Law School had won the acceptance which it desired but only when it had satisfied the judges and the Board that it did not represent a challenge to their authority nor a potential danger to the quality and standards of the profession.

The establishment and recognition of Sydney University's Law School confirmed the growing appreciation at the New South Wales Bar, already apparent in both legal writing and the admission rules, of its identity as a colonial profession and the responsibilities which this entailed. Until this time, the colonial Bar had drawn much of its standing, its influence and even its attitudes from the traditions and people which it had imported from England, but these were by the 1880s becoming increasingly inappropriate as foundations for its future standards and performance. Change came only slowly, however, because many leading barristers and particularly the

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207 Rule 13, 24.9.1891; Meeting of 4.6.1891, B.A.B. Minutes (2), pp. 71-72. The first LL.B. graduates had to provide evidence of substantial compliance with this rule because their books 'though more numerous, were not exactly the same as those prescribed for the final examination for the bar', Meeting of 30.5.1892, ibid., p. 89; B.A.B. to Professor Cobbett, 9.8.1892, Barristers' Admission Board, Letter Book, 29.10.1890 to 8.5.1899, (B.A.B. Letter Book (2)), A.O.N.S.W., 2/8341, p. 239. The Law School changed the wording of its regulations and added certain texts to bring its requirements into line with the final Bar examination, Meetings of 27.5.1892, Law Faculty Minutes (1), p. 18.


judges were reluctant to depart from the well-established criteria under which they themselves had entered the profession unless an undeniable need was demonstrated and a safe solution possible. This caution was sometimes beneficial, as it was in the rejection of the Law School's claims under its initial by-laws, but it could equally provoke uncertainty and delay, as with the admission rules while the Board fumbled towards an acceptable remedy. In these circumstances, what was really important was not the speed of the changes but that headway was being made at all.

By the 1880s, therefore, the Bar of New South Wales was no longer the pale offspring of the British profession which it had been in the 1860s. Not only did it have the numbers and experience to keep its own standards high and to provide suitable candidates for the bench but it was strongly conscious of the need to maintain the standing and independence of its judicial leadership. This awareness among barristers practising in New South Wales of their common interests and responsibilities was being heightened even further in the 1880s by the need to adjust admission rules and provide legal education to cope with the Bar's new colonial character. The links between the legal traditions and the laws of England and the colony were too strong ever to be abandoned completely but henceforth colonial barristers had both the strength and sense of their particular identity to stand on their own. The spirit of this change was neatly summed up in 1889 when several barristers petitioned the judges asking that some restriction be placed upon the admission of barristers from England and Ireland into the colony. The judges rejected the suggestion, but it was a sign of the colonial practitioners' confidence that it could even be raised.

CHAPTER 7

SOLICITORS WITH A NEW OUTLOOK

Colonial solicitors too had changed by the 1880s. Though in the 1860s their weaknesses were not as publicly evident as those of the Bar, the failure of the Law Institute to win widespread support left no doubt that solicitors in New South Wales had little appreciation of their common interests. They were a motley group of practitioners, divided in terms of their origins, their reasons for entering the colonial profession, and increasingly their places of practice. Most appear to have been too preoccupied with the task of scraping out a living amid declining legal business to spare any thought for the wider interests of their profession. Two decades later, not only were colonial solicitors coming rapidly to appreciate their common interests and the benefits of corporate action in protecting these rights, but they were also beginning to display a strong awareness of the status and standards of their profession and a concern that these might be preserved. The reasons for this change lay primarily not in external pressures challenging the position of solicitors in New South Wales but in the new character of the profession itself as it had evolved by the 1880s.

The most obvious changes were in numbers and experience. The overall number of solicitors practising in New South Wales rose two and a half times between 1876 and 1893, from 288 to 717. This was due primarily to a threefold increase in the size of the city profession, although the number of country practitioners doubled during the same period.\(^1\) Even

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\(^1\) In 1876 there were 140 solicitors in Sydney and 148 in the country. By 1882 the ratio was 215/192; in 1888 it was 318/216; and by 1893 there were 416 city solicitors and 301 practising in the country. These figures are based on the Law Almanacs for those years.
allowing for this influx of new blood into the profession, the higher level of experience possessed by many solicitors was no less impressive. In actual numbers, experienced solicitors - those of ten or more years standing - grew faster than the profession as a whole, from 95 out of 275 in 1874 to 240 out of 544 in 1889. As a result, forty-four per cent of solicitors could by the latter year be counted as established and experienced, a definite advance over the thirty-four per cent a decade and a half earlier. Almost thirty per cent of solicitors had been in practice for fifteen years or more in 1889. At the Bar, similar changes had been important, as we have seen, not only for their own sake but because of their wider ramifications for the character of that branch. The same was no less true of colonial solicitors. Where previously the rapid increase in the size of the profession during the 1860s had broken down significant elements of cohesion and homogeneity within the ranks of solicitors, this very factor was by the 1880s helping to heal those divisions and to give solicitors a new appreciation of their common interests.

One important foundation for these changes in the character of colonial solicitors as a group was, without doubt, the increase in the amount of legal business. Whereas in the 1860s the profession had been expanding at a rate which declining legal business could not justify, litigation and law transactions generally were by the 1890s growing sufficiently to sustain the greater number of lawyers. The number of writs issued by the Supreme Court rose steadily from 2,530 in 1876 to

2 These conclusions are based on the figures set out in table 6, which appears on page 246.

3 The following analysis is based upon the details of legal business published annually in the Statistical Registers of New South Wales from 1876 until 1893.
TABLE 6: Solicitors Practising in New South Wales in 1869, 1874, 1879, 1884, and 1889 - Years of Practice in the Colony.

<table>
<thead>
<tr>
<th>Practising from:</th>
<th>1869</th>
<th>1874</th>
<th>1879</th>
<th>1884</th>
<th>1889</th>
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</thead>
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<td>no.</td>
<td>no.</td>
<td>no.</td>
<td>no.</td>
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<tr>
<td>1869</td>
<td>114</td>
<td>95</td>
<td>79</td>
<td>64</td>
<td>49</td>
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<td>1865-69</td>
<td>77</td>
<td>71</td>
<td>59</td>
<td>50</td>
<td>44</td>
</tr>
<tr>
<td>1870-74</td>
<td>-</td>
<td>108</td>
<td>92</td>
<td>86</td>
<td>67</td>
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<tr>
<td>1875-79</td>
<td>-</td>
<td>-</td>
<td>117</td>
<td>108</td>
<td>80</td>
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<tr>
<td>1880-84</td>
<td>-</td>
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<td>-</td>
<td>157</td>
<td>124</td>
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<tr>
<td>1885-89</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>180</td>
</tr>
<tr>
<td>Totals:</td>
<td>191</td>
<td>274</td>
<td>347</td>
<td>465</td>
<td>544</td>
</tr>
</tbody>
</table>

This table is based upon information from the Law Almanacs, 1864-1889. It includes all solicitors practising in New South Wales in those years.
6,205 in 1893, while the total amount for which the court signed judgment jumped from £106,257 to £724,211. All areas of equity business increased between two and eightfold, especially after the beneficial effects of Darley's Equity Act in 1880 became apparent. Probates and letters of administration multiplied from around nine hundred to in excess of two thousand and the amount sworn to in both categories rose from under two million pounds to in excess of twice that sum. District Court business also showed a substantial increase. The costs of suits tried trebled between 1870 and 1891, from £9,286 to £28,855 and the total amount sued for rocketed from £123,071 to £335,528 in 1892. Though the number of summonses issued had been as low as 6,873 in 1881, they were 13,475 a decade later. The amount of fees collected by the Prothonotary, Master in Equity and other law offices all went up considerably in excess of the proportional increase in the profession.

This more favourable environment was, however, only the fertile ground which allowed the increasingly homogeneous character of colonial solicitors to find its full expression. Most importantly, solicitors were, like the Bar, assuming a strongly colonial character. This trend first received official recognition in December 1877 when the judges issued new and consolidated admission rules for solicitors at the same time as they promulgated those for the Bar. Prior to this date, the rules relating to solicitors had been piecemeal and considerable ambiguity had surrounded their operation. The 1877 rules replaced uncertainty with

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4 *S.M.H.*, 9.2.1878, p. 5, claimed that 'the rules have fully dealt with the subject matter, the position of articled clerks has been well defined, examinations have been increased in number, the standard of proficiency has thereby been raised, and the competency of the candidates will be fully tested'.
clarity and created a Board of Examiners, consisting of two barristers and four solicitors selected annually by the court, to control the examinations. Further, they required that solicitors from neighbouring colonies who desired admission in New South Wales must have met 'a standard of qualification substantially equal to that of this colony' and that such other colonies had to permit reciprocal admission of New South Wales solicitors. The inability of the Law Institute to gain protection of this kind for colonial solicitors had been, it will be remembered, an important reason for its failure to win widespread support. By these rules, the judges had clearly accepted that a colonial profession

5 Rule 9, 18.12.1877. These admission rules and all subsequent rules were published in the Law Almonac from 1878. The rules of 18.12.1877 were very comprehensive. They laid down five categories of persons eligible for admission as solicitors. These were attorneys from England and Ireland and Scottish Writers to the Signet; attorneys from other Australasian colonies where admission standards were similar and New South Wales solicitors were admitted on similar terms; articled clerks who had served five years articles (three if a graduate in Arts) in New South Wales and passed the necessary examinations; articled clerks who had served their articles in England, Ireland or Scotland, or part in those countries and part in the colony and passed their final law examination in New South Wales; and those who had already commenced a term of five years clerkship in the office of the Supreme Court or Crown Solicitor and similarly passed the final examination. Further, the rules detailed the conditions under which a clerk could enter articles, the examinations which a clerk had to pass (which now included two intermediate examinations in History and Law during the course of his articles as well as the final law examination), and the times and conditions which applied to those tests. The intermediate law examination centred upon Williams' texts on Real Property and Personal Property while the final examination was divided into six sections, at least four of which had to be passed. The sections were Real Property and Conveyancing; Common Law; Equity, Divorce and Matrimonial, and Ecclesiastical Law; Criminal Law; Practice of the Supreme Court and Insolvency; and Jurisdiction and Practice of the Inferior Courts. Once a clerk had served his term of articles and passed these examinations, he had to provide certain certificates of good service and conduct and give notice of his intention to apply for admission in the press, at the court house, and to the Prothonotary.

6 Rule 3, 18.12.1877.
was beginning to emerge in its own right, that its standards depended very
much upon local admission rules, and that its rights needed to be
safeguarded.

The close analysis of the composition of the profession set out in
table 7 shows how strongly colonial in character solicitors as a group had
become by the 1880s. Whereas forty per cent of all solicitors practising
in New South Wales in the early 1860s had come initially from England or
Ireland or another colony, by 1883 this proportion was down to twenty-five
per cent and ten years later it was only sixteen per cent. The picture
was the same in both city and country. One third of solicitors practising
in Sydney in the early 1860s had received their legal training outside the
colony but by the 1890s such men constituted little more than a tenth of
city practitioners. In country areas, the change was even more significant.
Solicitors from overseas had previously been in the majority outside
Sydney but they now accounted for only twenty-two per cent. Similarly,
within legal firms, solicitors trained in the colony held the overwhelming
majority of positions. As a whole, these figures leave no doubt that
solicitors in New South Wales had by the end of the 1880s assumed a strong
colonial character.

This colonialis~ion of the junior branch of the profession was of
particular importance because it implied that not only had most solicitors
come into the profession through a common system but that they were likely

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7 Table 7 appears on page 250.

8 In 1872, 13 (19.6%) of the 66 solicitors in law firms in New South
Wales had come initially to the colony from overseas or another
colony. By 1893, only 21 (10.45%) of the 201 solicitors then in
legal partnerships had received their legal training outside New
South Wales. These figures are based on the Law Almanacs, the
**TABLE 7: Solicitors in Practice in New South Wales in 1872, 1883, and 1893 - Training, Experience and Present Place of Practice.**

<table>
<thead>
<tr>
<th></th>
<th>NSW S</th>
<th>NSW C</th>
<th>NSW S+C</th>
<th>Overseas Other Colony</th>
<th>Unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Practising in:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>s</td>
<td>c</td>
<td>s</td>
<td>c</td>
<td>s</td>
</tr>
<tr>
<td>A. 1872</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From 1864</td>
<td>34</td>
<td>9</td>
<td>0</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>1865-69</td>
<td>28</td>
<td>13</td>
<td>0</td>
<td>12</td>
<td>0</td>
</tr>
<tr>
<td>1870-72</td>
<td>17</td>
<td>6</td>
<td>0</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>Totals:</td>
<td>79</td>
<td>28</td>
<td>0</td>
<td>28</td>
<td>5</td>
</tr>
<tr>
<td>B. 1883</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From 1864</td>
<td>24</td>
<td>4</td>
<td>0</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>1865-69</td>
<td>24</td>
<td>9</td>
<td>1</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>1870-74</td>
<td>27</td>
<td>10</td>
<td>2</td>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>1875-79</td>
<td>29</td>
<td>8</td>
<td>3</td>
<td>15</td>
<td>4</td>
</tr>
<tr>
<td>1880-83</td>
<td>42</td>
<td>6</td>
<td>1</td>
<td>13</td>
<td>10</td>
</tr>
<tr>
<td>Totals:</td>
<td>146</td>
<td>37</td>
<td>7</td>
<td>52</td>
<td>22</td>
</tr>
<tr>
<td>C. 1893</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>From 1864</td>
<td>16</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>1865-69</td>
<td>20</td>
<td>7</td>
<td>1</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>1870-74</td>
<td>23</td>
<td>8</td>
<td>2</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td>1875-79</td>
<td>24</td>
<td>6</td>
<td>3</td>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>1880-84</td>
<td>39</td>
<td>13</td>
<td>1</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>1885-89</td>
<td>57</td>
<td>12</td>
<td>4</td>
<td>15</td>
<td>5</td>
</tr>
<tr>
<td>1890-93</td>
<td>107</td>
<td>30</td>
<td>6</td>
<td>26</td>
<td>9</td>
</tr>
<tr>
<td>Totals:</td>
<td>286</td>
<td>79</td>
<td>17</td>
<td>85</td>
<td>31</td>
</tr>
</tbody>
</table>

s = Sydney  
c = Country

This table includes all solicitors practising in New South Wales in each of those years and has been constructed from the Law Almanacs, the Admission Rolls, and the B.A.B. and S.A.B. Files.
to have done so for more similar reasons than had been the case in the
1860s. Many solicitors who had come to the colony from overseas in
earlier years had considered their profession at best a standby occupation
should their other plans fail to succeed. Now that solicitors came
primarily from colonial backgrounds such wide diversities were less likely
to occur. Though there is little direct evidence available on how
colonial solicitors of the 1880s viewed their profession, the social
backgrounds which I have been able to discover for solicitors practising
in these years do suggest that a large proportion of the profession would
have been conscious of the position which they had won and have been
determined to preserve its status and rights from challenge or deterioration.

The figures in table 8, though they cannot be considered strictly
representative because they are based upon information which was given
voluntarily and are confined largely to clerks who entered articles
before they were twenty-one, suggest that by the 1880s and especially the
1890s articled clerks came from many social backgrounds from which admission
to the profession would have been an important step up in the world.\footnote{Table 8 appears on page 252. The number of 'gentlemen' and
'esquires' included in tables 8 and 9 must be treated cautiously
as these terms were used to cover a wide variety of occupations.
This can be seen clearly in the figures set out in Appendix B, p. 461,
which shows how many of these people had to be reclassified when
their claimed occupation was checked against the Sands' and Post
Office Directories.} Not
only were the sons of lawyers following their fathers' footsteps, but an
increasingly large part of the profession was being drawn from commercial
families, civil service backgrounds and even the sons of the skilled
tradesmen. Those who came to the law from other professional backgrounds
were frequently, as the more detailed breakdown in table 9 shows, the sons
of teachers, accountants, surveyors, engineers or journalists, few of whom
TABLE 8: Solicitors in Practice in New South Wales in 1872, 1883 and 1893 - Social Backgrounds.

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>1872</th>
<th>1883</th>
<th>1893</th>
</tr>
</thead>
<tbody>
<tr>
<td>Background:</td>
<td>no.</td>
<td>%</td>
<td>no.</td>
</tr>
<tr>
<td>Lawyers</td>
<td>34</td>
<td>38.2</td>
<td>37</td>
</tr>
<tr>
<td>Gentlemen/Esquires</td>
<td>9</td>
<td>10.1</td>
<td>26</td>
</tr>
<tr>
<td>Other Professions</td>
<td>7</td>
<td>7.9</td>
<td>15</td>
</tr>
<tr>
<td>Landed - Farmers/Graziers</td>
<td>5</td>
<td>5.6</td>
<td>11</td>
</tr>
<tr>
<td>Civil Servants</td>
<td>4</td>
<td>4.5</td>
<td>13</td>
</tr>
<tr>
<td>Commercial</td>
<td>24</td>
<td>27.0</td>
<td>38</td>
</tr>
<tr>
<td>Skilled Tradesmen</td>
<td>1</td>
<td>1.1</td>
<td>11</td>
</tr>
<tr>
<td>Others</td>
<td>5</td>
<td>5.6</td>
<td>9</td>
</tr>
<tr>
<td>Totals:</td>
<td>89</td>
<td>100.0</td>
<td>160</td>
</tr>
</tbody>
</table>

Total No. of Colonially Trained Solicitors: 184 346 614

Tables 8 and 9 are based upon information available in the B.A.B. and S.A.B. Files. There was no obligation in the rules for an articled clerk to state his father's occupation, but it was frequently given when the clerk was under twenty-one years of age and a legally responsible person, usually his father, had also to be joined to the articles. The occupations given have been checked where possible against the Sands' and Post Office Directories. The restriction of the sample to those who entered articles by the time they were twenty-one should not greatly affect its representativeness of the profession as a whole. Of 852 sets of articles entered into between 1876 and 1893, which are still among the B.A.B. and S.A.B. Files, the ages are known of 716 clerks (84%). 89.2% (639/716) of those clerks were 22 years or under when they entered articles.
could perhaps in those years have claimed an equal standing with lawyers.\textsuperscript{10}

Two decades of prosperous economic development after 1870 had, it would seem, greatly enhanced the opportunities for people from a wide cross-section of society to aspire to traditional professions such as the law.\textsuperscript{11} As the \textit{Law Chronicle} observed in June 1893, Australia differed from England where social conditions remained unaltered and a son followed faithfully the occupation of his father. In the colony, 'the labourer of to-day may be the successful merchant of tomorrow and the merchant of today may aspire to place his sons among the highest in the land'.\textsuperscript{12}

The general prosperity, combined with the spread of education, had tended to bring manual labour into disrepute:

\begin{quote}

The father who sees his son eclipsing his own youthful accomplishment says to himself "Tom's a smart fellow, I'll make him a lawyer", reckoning with the commercial spirit of the age that the money expended will be well invested and that the family name may possibly be ennobled.\textsuperscript{13}
\end{quote}

Many solicitors practising in New South Wales by the 1880s would, it seems certain, have fallen to a greater or lesser extent within this description.

Another factor which suggests that many solicitors from colonial origins, and particularly those who had taken a step up in the world by entering the profession, would have been very conscious of the new position

\begin{flushright}
\textsuperscript{10} Table 9 appears on page 254.
\textsuperscript{13} Ibid.
\end{flushright}
TABLE 9: Solicitors in Practice in New South Wales in 1872, 1883 and 1893 - Social Background.

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>Background:</th>
<th>1872</th>
<th>1883</th>
<th>1893</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solicitor</td>
<td></td>
<td>30</td>
<td>33</td>
<td>57</td>
</tr>
<tr>
<td>Judge, Barrister</td>
<td></td>
<td>4</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Gentleman</td>
<td></td>
<td>7</td>
<td>15</td>
<td>26</td>
</tr>
<tr>
<td>Esquire</td>
<td></td>
<td>2</td>
<td>11</td>
<td>27</td>
</tr>
<tr>
<td>Doctor</td>
<td></td>
<td>2</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>Minister</td>
<td></td>
<td>1</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>Teacher</td>
<td></td>
<td>4</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>Accountant, Surveyor, Engineer, Journalist</td>
<td></td>
<td>0</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>Grazer</td>
<td></td>
<td>3</td>
<td>4</td>
<td>16</td>
</tr>
<tr>
<td>Farmer</td>
<td></td>
<td>2</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>Policeman, Police Magistrate</td>
<td></td>
<td>2</td>
<td>5</td>
<td>13</td>
</tr>
<tr>
<td>Clerk of Petty Sessions, Sheriff's Officer</td>
<td></td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Inspector of Schools</td>
<td></td>
<td>0</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Gaol Governor</td>
<td></td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Other Civil Servants</td>
<td></td>
<td>1</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Manager, Director, Banker</td>
<td></td>
<td>1</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>Manufacturer, Importer</td>
<td></td>
<td>0</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Innkeeper, Hotelkeeper</td>
<td></td>
<td>6</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>Storekeeper, Merchant</td>
<td></td>
<td>6</td>
<td>12</td>
<td>29</td>
</tr>
<tr>
<td>Auctioneer, Broker, Agent</td>
<td></td>
<td>4</td>
<td>6</td>
<td>14</td>
</tr>
<tr>
<td>Draper, Tailor, Printer</td>
<td></td>
<td>7</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>Builder, Contractor</td>
<td></td>
<td>0</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>Wheelwright, Mason, Tanner, Ironmonger, Plasterer</td>
<td></td>
<td>1</td>
<td>5</td>
<td>11</td>
</tr>
<tr>
<td>Clerk, Bank Officer</td>
<td></td>
<td>2</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Householder, Landowner</td>
<td></td>
<td>3</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td><strong>Totals:</strong></td>
<td></td>
<td><strong>89</strong></td>
<td><strong>160</strong></td>
<td><strong>313</strong></td>
</tr>
</tbody>
</table>
which they had won was the increasingly high cost which they had been prepared to pay for articles. During the 1870s, as table 10 shows, between a quarter and a third of articled clerks paid premiums of twenty-five pounds or more for their training. This proportion rose rapidly during the next decade and by 1890 half of those clerks entering into articles were paying premiums of at least that size. At the same time, very high considerations were becoming the norm, not the exception. In 1891 one clerk in five paid £201 or more for his legal training and every cost bracket of articles registered a significant increase. From 1876 to 1880, eight out of eighty-nine new articled clerks paid from £151 to £200; yet between 1886 and 1890, thirty-one out of one hundred and eighty-four paid similar amounts. Parallel figures for the £51-£100 and £101-£150 categories showed a trebling of numbers - 13 to 38 and 12 to 34 respectively - against only a twofold increase in the total figures for those entering articles. The figures further suggest that between 1881 and 1893 almost two-fifths of all articled clerks paid more than a nominal premium. Though the amount a solicitor charged to provide legal training was generally higher in the city than in the country, three-tenths of country articled clerks during this period were also subject to some form of geographical restriction upon their future practice. Should they break such a provision, they were liable to pay

\[14\] Table 10 appears on page 256.
### Table 10: Formal Conditions of Articles of Clerkship entered into with Solicitors in New South Wales between 1876 and 1893.

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Articles</th>
<th>£25-£50</th>
<th>£51-£100</th>
<th>£101-£150</th>
<th>£151-£200</th>
<th>£201+</th>
<th>NTPW(^1)</th>
<th>Average Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-£1 p.w.</td>
<td>£1+ p.w.</td>
</tr>
<tr>
<td>1876</td>
<td>12(12s 14c)</td>
<td>2s 1c</td>
<td>-</td>
<td>2s</td>
<td>1s 2c</td>
<td>3c</td>
<td>1s</td>
<td>1s 2c</td>
</tr>
<tr>
<td>1877</td>
<td>44(31s 13c)</td>
<td>-</td>
<td>1s 3c</td>
<td>2s 2c</td>
<td>2s</td>
<td>1s</td>
<td>4c</td>
<td>1s</td>
</tr>
<tr>
<td>1878</td>
<td>22(13s 9c)</td>
<td>-</td>
<td>1s 1c</td>
<td>1s 2c</td>
<td>2s</td>
<td>1s</td>
<td>3c</td>
<td>1s</td>
</tr>
<tr>
<td>1879</td>
<td>17(13s 4c)</td>
<td>-</td>
<td>1s 1c</td>
<td>-</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1880</td>
<td>20(14s 6c)</td>
<td>-</td>
<td>1s 1c</td>
<td>2s</td>
<td>1s 1c</td>
<td>1s</td>
<td>1s</td>
<td>1s</td>
</tr>
<tr>
<td>1881</td>
<td>33(21s 12c)</td>
<td>-</td>
<td>1s 1c</td>
<td>1s 2c</td>
<td>1s</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1882</td>
<td>32(25s 7c)</td>
<td>-</td>
<td>1c</td>
<td>5s 1c</td>
<td>4s 1c</td>
<td>1s</td>
<td>1c</td>
<td>2s</td>
</tr>
<tr>
<td>1883</td>
<td>39(31s 8c)</td>
<td>-</td>
<td>1s 3c</td>
<td>6s 1c</td>
<td>5s</td>
<td>1s</td>
<td>1c</td>
<td>2s 1c</td>
</tr>
<tr>
<td>1884</td>
<td>56(47s 9c)</td>
<td>-</td>
<td>2s 3c</td>
<td>4s 1c</td>
<td>1s 1c</td>
<td>4s</td>
<td>7c</td>
<td>1s</td>
</tr>
<tr>
<td>1885</td>
<td>38(27s 11c)</td>
<td>1s</td>
<td>2s 3c</td>
<td>4s 1c</td>
<td>2s</td>
<td>4s</td>
<td>4c</td>
<td>3s</td>
</tr>
<tr>
<td>1886</td>
<td>50(39s 11c)</td>
<td>-</td>
<td>3s 2c</td>
<td>5s 2c</td>
<td>3s 1c</td>
<td>3s</td>
<td>3c</td>
<td>2s</td>
</tr>
<tr>
<td>1887</td>
<td>55(37s 18c)</td>
<td>-</td>
<td>3s 3c</td>
<td>7s</td>
<td>5s 4c</td>
<td>2s</td>
<td>6c</td>
<td>4s 1c</td>
</tr>
<tr>
<td>1888</td>
<td>72(43s 29c)</td>
<td>1s</td>
<td>4s 3c</td>
<td>3s 2c</td>
<td>5c</td>
<td>9s</td>
<td>9c</td>
<td>4s 1c</td>
</tr>
<tr>
<td>1889</td>
<td>76(48s 28c)</td>
<td>2s 1c</td>
<td>6s 5c</td>
<td>4s 5c</td>
<td>4s 1c</td>
<td>4s</td>
<td>7c</td>
<td>4s 7c</td>
</tr>
<tr>
<td>1890</td>
<td>66(50s 16c)</td>
<td>1s 1c</td>
<td>3s 3c</td>
<td>4s 2c</td>
<td>7s 4c</td>
<td>11s</td>
<td>4c</td>
<td>1c</td>
</tr>
<tr>
<td>1891</td>
<td>62(40s 22c)</td>
<td>-</td>
<td>3s 2c</td>
<td>3s 7c</td>
<td>-</td>
<td>13s</td>
<td>10c</td>
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</tr>
<tr>
<td>1892</td>
<td>62(38s 24c)</td>
<td>1c</td>
<td>4s 4c</td>
<td>2s 3c</td>
<td>1s 1c</td>
<td>5s</td>
<td>5c</td>
<td>3s 1c</td>
</tr>
<tr>
<td>1893</td>
<td>65(42s 23c)</td>
<td>3c</td>
<td>2s 2c</td>
<td>1s 2c</td>
<td>5s 6c</td>
<td>1c</td>
<td>4c</td>
<td>3s 1c</td>
</tr>
<tr>
<td>Totals:</td>
<td>835 (571s 264c)</td>
<td>62 (56s 32c)</td>
<td>88 (46s 16c)</td>
<td>11 (5s 6c)</td>
<td>81 (40s 41c)</td>
<td>62 (67s 5c)</td>
<td>72 (77c)</td>
<td>50 (23s 27c)</td>
</tr>
</tbody>
</table>

\(s = \text{Sydney, } c = \text{Country}\)

\(^1\) NTPW = Not to practise within ... miles of ... where the master solicitor was practising for a specified number of years or without his consent.

Note: Table 10 includes all the articles of clerkship entered into between 1876 and 1893 which still remain in the B.A.B. and S.A.B. Files. As the Articled Clerks' Register, which recorded all articles, has only 882 entries for the corresponding period, the figures in table 10 can be accepted as quite representative (94.7%) of the terms of articles generally during these years.
In return for these undertakings, articled clerks received very little apart from tuition. Only eleven per cent of clerks had a guarantee of remuneration for the services they rendered to their master included in their articles and just over four per cent were promised a sum which averaged out at one pound or more per week for the whole period of their articles. Those trained in the country enjoyed one advantage in that sixteen per cent of their number had an assured pay during articles, but in eighty per cent of cases this was below one pound per week. In addition, they faced the added burden of journeys to Sydney to sit for their examinations. Frequently, their masters introduced them to the judge at the nearest circuit court before they commenced articles to avoid an extra

15 For example, George Holden Forbes, the son of District Court Judge David Grant Forbes, entered articles with Albury solicitor G.T. Fleming in April 1876. Those articles bound him not to practise within 50 miles of Albury without Fleming's written consent. If he broke that agreement, Forbes was liable to pay Fleming £1000 liquidated damages. Forbes also had to pay a premium of £150 for his articles, Admission Papers of G.H. Forbes, B.A.B. and S.A.B. Files, A.O.N.S.W., uncat. Box 6. Edward Howard, the son of a Yass bootmaker, faced similar restrictions when he entered articles with J.T. Gannon, a Goulburn solicitor, in August 1881. He agreed not to practise within 60 miles of Goulburn for a period of five years after his articles expired. If he did so, he was to pay Gannon a penalty of £500, Admission Papers of E. Howard, ibid., A.O.N.S.W., uncat. Box 8.

16 This analysis is also based on the information set out in Table 10.

17 Articled clerks made many representations to the judges and the Solicitors' Admission Board asking that at least their intermediate examinations might be held in country centres. Joseph Carroll, for instance, pointed out in 1895 that 'the cost to a clerk from this town (Dubbo) for this exam is nearly £15 including travelling and board expenses', J. Carroll to C.R. Walsh, Secretary of S.A.B., 23.10.1895, Admission Papers of J. Carroll, B.A.B. and S.A.B. Files, A.O.N.S.W., uncat. Box 5B.
Almost half those clerks in the city who received a guaranteed remuneration were assured of one pound or more per week but these represented only four per cent of all city clerks. Significantly, there was no direct correlation between the premium paid and the salary guaranteed. Only a tenth (7/72) of those who paid more than £200 for their articles had an assured pay, whilst a fifth (12/62) of those paying £151-£200 were similarly placed, as were a quarter (22/88) of those who paid £101-£150. One third of clerks who were assured a certain pay had given no premium at all according to their articles. Even to begin training for the legal profession clearly demanded much thought and considerable sacrifice by many articulated clerks and their families.

The prospect must have been even more daunting for those who stopped to consider the problems which might arise during a five year course of training, as the experiences of several articulated clerks testify. Gerald Joseph Barry, the son of a Raymond Terrace hotelkeeper, entered articles in East Maitland in 1869 but was not admitted until 1880. The premium of £60 he paid was as much, it seems, as the family could afford and Barry was presented to a judge on circuit to avoid the expense and inconvenience of a trip to Sydney. His articles were later interrupted, however, as his

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18 For example, James Wentworth Anderson, who was about to enter articles with J.R. Garland, a solicitor at Wagga Wagga, pointed out to the judges in September 1875 that he resided 'more than three hundred miles from Sydney and the expenses of his coming to Sydney would be large and the waste of time great'. The court accepted his argument and ordered that he be introduced to the judge at the ensuing circuit court in Wagga Wagga, Admission Papers of J.W. Anderson, ibid., A.O.N.S.W., uncat. Box 1.

19 Similarly to Table 10, these figures are drawn from the B.A.B. and S.A.B. Files.

master explained, 'because of his father having got into embarrassed circumstances for a time and Mr G.J. Barry had no means of supporting himself longer in expensive lodgings and I in consequence sanctioned his leaving for a time until he could calculate upon pecuniary help from his relatives, I paid him no salary'. In fact, Barry went as an ordinary law clerk to the office of his master's brother in Newcastle.

Other delays sometimes occurred because of the death or movement of a clerk's master. Herbert Justin McCarthy was articled to his father in October 1880 but his father died in the following June. He was then assigned to George Colquhoun and ordered by the court to serve an additional forty days under articles to make up for time lost. In May 1883 McCarthy was assigned again, this time to Henry Heron. While serving with Heron, he was absent from the colony for about four months with the New South Wales contingent in the Soudan. McCarthy resumed service with Heron upon his return, but less than four months before his term would have ended if he had not gone to the Soudan, the court ruled that Heron was of unsound mind and incapable of managing his own affairs. McCarthy was assigned once again and was finally admitted in May 1886. Generally, the death of a master solicitor did not cause a long suspension of a clerk's articles and the transfer of the articles was sometimes included as a condition of purchase of the late solicitor's business. Frederick Bland ran into difficulties, however, when the widow of his deceased-master went to Victoria and

21 Answers provided by H. O'Meagher, ibid.
22 Admission Papers of H.J. McCarthy, ibid., A.O.N.S.W., uncat. Box 11.
23 Ibid.
'neglected and refused to prove the said will'. Her actions forced Bland to obtain a court order authorising his assignment. Robert Mackenzie found difficulties when both his father and his master solicitor migrated to England. He did not like the change and returned to Australia to complete his articles with another solicitor.

Similarly, poor health could cause considerable delay in a clerk's progress. Arthur Robertson, who entered articles in Sydney in 1877, was forced by bad health to spend half a dozen years on a station in the interior and was not admitted until 1890. William Symons Gray took almost as long, being forced by eye troubles to travel to England to see an oculist. More fortunate was Henry Louis Janison who, after a serious illness, came from Tamworth to Sydney for medical treatment in 1878. While there he worked for some time with his master's city agents, thus avoiding a lengthy interruption to his articles.

Sometimes, clerks had to suspend their articles as a result of far more spectacular causes. Robert Alexander Forster, asking to delay his

29 Admission Papers of A.J. Robertson, *ibid.*
30 Gray had begun his articles with G.T. Fleming in Albury in April 1878. He was absent on his trip to England from April 1882 until April 1883. Gray entered fresh articles upon his return with J. McLaughlin in Sydney and he was finally admitted in June 1890, Admission Papers of W.S. Gray, *ibid.*
intermediate law examination in November 1890, claimed that while watching the departure of Governor Carrington he had become involved in a disturbance in Market Street. He was mistaken for a special constable and without provocation on his behalf was struck over the head with an iron bar rendering him unconscious. Though this statement was by affidavit, his previous deferrals of the examination on the excuse that too much office work had rendered him unfit for study at night suggest that this latest reason may have been an exaggeration. Even more spectacular, but certainly genuine, was the misfortune which befell another articled clerk, Frederick James Hitchins, in June 1889 when riding in Centennial Park. He pointed out that:

my horse becoming restive and vicious bolted and afterwards threw me and one of my feet remaining in the stirrup I was dragged by the horse I am informed by an eye witness a distance of over two hundred yards along Randwick Road until I was dashed between two posts on the footpath when I was released from the stirrup my left arm having a compound fracture and my shoulder head and left side receiving serious injuries and signs of cerebral irritation.

After the accident, Hitchins was in hospital for three months, then resident in the Blue Mountains for four, before he accepted medical advice that he take a long sea voyage and reside for a time in a cold climate. He left for England and there is no record of his ever having resumed his legal studies in the colony.

31 Affidavit of R.A. Forster, 14.11.1890, Admission Papers of R.A. Forster, ibid., A.O.N.S.W., uncat. Box 11B.
32 Admission Papers of R.A. Forster, ibid.
33 Application by F.J. Hitchins for extension of his articles, 24.2.1890, Admission Papers of F.J. Hitchins, ibid., A.O.N.S.W., uncat. Box 15B.
34 Ibid.
Sometimes, though not very frequently, it was the actions of the clerk himself in the performance of his articles that caused the difficulty and delay. George Henry Greenwood had three years of his articles cancelled by the court because he had practised as a certificated conveyancer while under articles, a step he considered valid under the ruling in *Ex p. Helleyer* decided in 1857.35 Frederick William Tietyens, clerk to Emerson and Fowler of Albury, was prosecuted for having laid a false information against a certain Walckenhaar, causing him to be arrested for debt to Emerson and Fowler. The judge found Walckenhaar to be an unprincipled and unreliable witness and ruled that though the conclusions Tietyens had drawn about his debts were wrong, he had not drawn these conclusions wilfully. Emerson and Fowler had been handling the plaintiff's monetary affairs at the time.36 Of a less serious nature was the absence without leave from his master's office of George Frederick Jones from November 1889 until June 1890. Jones had taken this step because he believed that a certain 'claimed' conveyancer was drawing the deeds in the office to the detriment of his training as an articled clerk.37 When Jones presented himself for his final examination at the end of five years


36 *S.M.H.*, 17.3.1893, p. 6. Walckenhaar had obtained a loan from Emerson and Fowler on the understanding that he would repay it when he received certain moneys they were seeking for him from Germany. He received the money, paid various creditors but not Emerson and Fowler, then went on a short trip to Wagga. Tietyens had him arrested for intent to defraud his masters and claimed that Walckenhaar was about to leave for Germany, Admission Papers of F.W. Tietyens, *B.A.B. and S.A.B. Files*, Supreme Court of New South Wales.

the court did not permit him to proceed because of the interruption to his articles. A.M. Shaw and W.T.J. Curtis had to ask the court to extend their articles because neither they nor their masters had adjusted to the 1877 rule which required the intermediate law examination to be passed during the course of their articles and not at the end as had previously been the case.

The conditions under which solicitors had both entered and served their articles therefore give strong support to the impression suggested by the known social backgrounds of articled clerks that many lawyers practising in New South Wales in the 1880s viewed their profession in basically similar terms. They had made considerable sacrifices to reach their new position and frequently had made important gains in social and occupational terms by doing so. They would have been particularly conscious of the importance of belonging to the profession and concerned to make sure that its reputation, its interests and its rights were maintained and defended. Now that the profession had become primarily colonial in its origins and legal business was sufficiently plentiful to sustain its increased size these forces appear to have brought about a fundamental revision in the character of colonial solicitors as a group. Solicitors in New South Wales were no longer the motley body of lawyers who had served the colony in the 1860s. At least in composition, they were far more homogeneous and had strong reasons to be aware of their common interests and the possible benefits of corporate action.


The possibility that colonial solicitors would not only recognise their common interests but also give them some form of positive expression was further enhanced by the new physical organisation of the profession. In the 1860s, as we have seen, the rapid increase in the number of solicitors at a time when legal business was depressed had led to a disintegration, at least in geographical terms, of professional cohesion and forced many young solicitors into country areas where they had only limited contact with other lawyers. With the resurgence of legal business in the 1870s and particularly the 1880s, this trend had been reversed even though the profession continued to grow rapidly.\textsuperscript{40} Of those solicitors practising in 1872, who had served their articles in the city and begun practice since 1864, thirty-five per cent were listed in the Law Almanac as country attorneys. By 1883 only sixteen and a half per cent of those solicitors who had been trained in the city and commenced practice since 1874 were practising in country towns. Further, where no solicitors who had served their articles in the country and had been recently admitted were practising in Sydney in 1872, by 1883 one eighth of such solicitors had their practices in the city. Twenty per cent of solicitors trained in the country and commencing practice since 1884 were by 1893 members of the city profession. In consequence, fifty-eight per cent of all solicitors were practising in Sydney in 1893, a sharp contrast from the late 1870s when a majority of the profession had resided in country areas.

This greater concentration of the profession, and particularly of young solicitors, in Sydney would not only have increased the probability and frequency of direct contacts between lawyers but also have provided

\textsuperscript{40} The following conclusions are drawn from the information set out in table 7, p. 250.
norms of practice and conduct to guide those just beginning to establish their practices. In addition, those solicitors who did practise in the country in the 1880s and early 1890s were far less likely to be isolated from regular and varied contact with fellow lawyers than they had been several decades earlier. In 1864 the average number of solicitors practising in each of the twenty-eight centres which lawyers served had been only 2.25. Almost half the solicitors then practising in the country resided in towns with two or less lawyers and under thirty per cent practised in the same place as at least three other solicitors. By 1893 little more than a quarter of country attorneys were in towns of two or less solicitors, while fifty-five per cent practised alongside three or more of their brethren. Newcastle and West Maitland between them boasted thirty solicitors, or a tenth of all solicitors practising in the country. An average of 3.05 solicitors served in the ninety-nine country towns where lawyers had their practices. The worst effects of the geographical dislocation which had divided solicitors in the 1860s had clearly ceased to be of major importance.

The first signs that these new elements of homogeneity among colonial solicitors would soon take a more concrete form emerged in the early 1880s. In June 1882 several members of the Council of the old Law Institute held a meeting, apparently in response to renewed interest within the profession, to consider the desirability of incorporating the association under the Companies Act. The meeting directed the secretary

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41 The evidence to support these observations about the geographical distribution of country solicitors is set out in table 11, p. 265.
42 Napier and Daly, op. cit., p. 17, claim that renewed interest in the incorporation of the Law Institute began with A. de Lissa and others around 1879.

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>1864</th>
<th>1872</th>
<th>1883</th>
<th>1893</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>no.</td>
<td>%</td>
<td>no.</td>
<td>%</td>
</tr>
<tr>
<td><strong>Places with:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>½ solicitor</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>1 &quot;</td>
<td>8</td>
<td>12.7</td>
<td>15</td>
<td>12.6</td>
</tr>
<tr>
<td>1½ solicitors</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2 &quot;</td>
<td>11</td>
<td>34.9</td>
<td>14</td>
<td>23.6</td>
</tr>
<tr>
<td>2½ &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>3 &quot;</td>
<td>5</td>
<td>23.8</td>
<td>3</td>
<td>7.6</td>
</tr>
<tr>
<td>3½ &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>4 &quot;</td>
<td>3</td>
<td>19.0</td>
<td>7</td>
<td>23.6</td>
</tr>
<tr>
<td>4½ &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>5 &quot;</td>
<td>-</td>
<td>-</td>
<td>2</td>
<td>8.4</td>
</tr>
<tr>
<td>5½ &quot;</td>
<td>-</td>
<td>-</td>
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<td>4.6</td>
</tr>
<tr>
<td>6 &quot;</td>
<td>1</td>
<td>9.5</td>
<td>1</td>
<td>5.0</td>
</tr>
<tr>
<td>6½ &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>7 &quot;</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>5.9</td>
</tr>
<tr>
<td>8 &quot;</td>
<td>-</td>
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<td>-</td>
</tr>
<tr>
<td>9 &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>10 &quot;</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>8.4</td>
</tr>
<tr>
<td>11 &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>12 &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>13 &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>14 &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>15 &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>16 &quot;</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

| Total No. of Places: | 28 99.9 | 46 100.1 | 72 99.9 | 99 99.8 |
| Total No. of Country Solicitors: | 63 | 119 | 204 | 302 |

This table is based upon information printed in the *Law Almanacs*. Where a fractional number of solicitors is referred to in the table, e.g. ½, 1½, this signifies that a solicitor was registered as practising at two different places, usually close by, such as Wollongong and Kiama, Lismore and Casino, Deniliquin and Wentworth.
to prepare articles of association based on the rules of the Law Institute and to submit them for registration under section 54 of the Companies Act. The meeting also received a report upon a recent application for admission which the Institute had opposed and which was subsequently withdrawn. 43

Even more important than this renewed activity by the Council were two petitions forwarded to it several months later. They requested that a meeting of the legal profession be called to consider the present status of the Law Institute and carried the signatures of nineteen legal firms and thirty-two individual solicitors. 44 In response, the Council resolved to call such a meeting by circular, contacting every solicitor listed in the Law Almanac. It drew up resolutions urging upon that meeting the need to increase the Institute's efficiency and bring about its incorporation. 45

No evidence remains of the events which occurred between March 1883 and May of the following year. On 16 May 1884 a meeting of solicitors at the Metropolitan Hotel passed a resolution to form an Incorporated Law Institute registered under the Companies Act. That meeting itself was convened not by the Law Institute but by a circular signed by gentlemen taking an interest in realising that object. 46 Whether or not this change was significant is difficult to determine. Several prominent members of the old association, notably William and Henry Deane, were clearly not involved in, nor interested in joining, the new body. A considerable number of those solicitors who had signed the 1883 petitions did not become members of the Incorporated Law Institute when it was established. However,

44 Petitions to H. Deane, 15.2.1883 in Law Institute Papers, Box 1.
46 Napier and Daly, op. cit., p. 18.
if a division did exist upon either the utility or the form of that body, it did not unduly hamper its formation and initial progress. Subsequent to the May 1884 meeting, a provisional committee prepared a Memorandum and Articles of Association. These were approved by two further meetings of solicitors in the Supreme Court and subscribed to initially by thirty-six solicitors. The society then obtained the requisite licence from the Governor and became incorporated. Its first President John Williams, who was also the Crown Solicitor, the two Vice-Presidents Thomas Robertson and William Wilson Pigott, and temporary Secretary Alfred de Lissa had all belonged to its predecessor. As a final preparatory step, the new Council informed all colonial solicitors of the incorporation and objects of the new society.

The stated objects for which the Incorporated Law Institute had been formed differed very little from those of its predecessors. According to its Memorandum of Association, the society intended:

to consider, originate and promote reform and improvements in the law; to consider proposed alterations, and oppose or support the same; to remedy defects in the administration of justice; to effect improvements in administration or practice. And for the said purposes to petition Parliament


49 Napier and Daly, op. cit., p. 19.
or take such other proceedings as may be deemed necessary.50

Further, and perhaps most importantly, the Institute aimed:

to represent generally the views of the profession;
to preserve and maintain its integrity and status;
to suppress dishonourable conduct or practices;
to provide for the amicable settlement or adjustment of professional disputes, and to consider and deal with all matters affecting the professional interests of members of the Institute.51

In addition, the Memorandum stated that the Institute would promote better legal education and provide a library and club rooms for the use of members.52

As ideals, these objects were suitably impressive but previous experience had shown that by themselves such noble intentions did not guarantee success. What counted most was the support which the society was able to win and its effectiveness in representing the interests of solicitors.

In mid-1884 the Incorporated Law Institute was thus no more and no less promising than the Law Institute had been in 1862. The next half dozen years of steady progress told a different story. By the first annual meeting in June 1885 membership figures had risen to fifty-seven.53 A year later they were 125 and in 1887 the number reached 147.54 At the start of 1891 the Institute could claim the support of 176 out of the colony's 625 solicitors, 255 of whom practised in the country. Most importantly,

50 Incorporated Law Institute of New South Wales Memorandum of Association, 22.9.1884, Sydney, pp. 3ff.
51 Ibid., p. 3.
52 Ibid., pp. 3-4.
53 Napier and Daly, op. cit., p. 20.
54 Half Yearly Reports of the Council of the Incorporated Law Institute, (henceforth Half Yearly Reports of I.L.I.), July 1886, pp. 8-9 and July 1887, p. 5. In 1887 the Law Almanac began to place an asterisk beside the names of all members of the Institute.
however, where its predecessor had won support only among the well-established city practitioners, the new Institute was broadly representative of solicitors as a whole. The figures in table 12 show that by 1891 just under two-thirds of the Institute's members were city solicitors and the rest practised in the country.\(^5\) As the association had originated among Sydney solicitors and was based in that city, the slightly lower representation of country solicitors, who accounted for two-fifths of the total number of solicitors, was perhaps to be expected. More significant was the success of the Institute in attracting support of this size from beyond the metropolitan area. Similarly, in terms of professional experience, the Institute received support from a wide cross-section of the profession.\(^6\) Solicitors who had come originally from overseas were less prominent in the association than their overall strength warranted but equally they were present in sufficient numbers to rule out any sign of discrimination against them. This wide cross-section of support clearly gave the Incorporated Law Institute a legitimacy as a spokesman for the interests of solicitors which the early society had failed to gain at any time.

At the same time, the Institute quickly won official support for itself as the representative of solicitors. Not only did the new society gain the use of a room in the Supreme Court\(^7\) but it received strong judicial

\(^5\) Table 12 appears on page 270. By 1891, 31.1% (114/370) of city solicitors and 24.3% (62/255) of country solicitors belonged to the Institute.

\(^6\) The only group not to be represented in reasonable proportion with their share in the profession as a whole were those admitted since 1885. They made up 46.6% of all solicitors but only 11.4% of the Institute's membership. Their failure to join was, however, more a consequence of the short time they had been in practice than any antipathy towards the Institute. By 1899, solicitors who began practice between 1885 and 1889 made up 16.1% (77/477) of the Institute's membership and 16.5% (143/865) of the profession.

\(^7\) Napier and Daly, op. cit., p. 20.
TABLE 12: Solicitors Belonging to the Incorporated Law Institute in 1891 Compared to All Solicitors Practising in New South Wales in 1891 - Training, Experience and Present Place of Practice.

A. Solicitors in the Institute:

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>NSW S</th>
<th>NSW C</th>
<th>NSW S+C</th>
<th>Overseas Other Colony</th>
<th>Unknown</th>
<th>Total No.</th>
<th>Total %</th>
</tr>
</thead>
<tbody>
<tr>
<td>From 1864</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1865-69</td>
<td>10</td>
<td>4</td>
<td>0 0 0</td>
<td>2 4</td>
<td>1 1</td>
<td>24</td>
<td>13.6</td>
</tr>
<tr>
<td>1870-74</td>
<td>15</td>
<td>2</td>
<td>1 1 1</td>
<td>3 3</td>
<td>0 1</td>
<td>21</td>
<td>11.9</td>
</tr>
<tr>
<td>1875-79</td>
<td>13</td>
<td>5</td>
<td>1 2 1</td>
<td>2 2</td>
<td>1 2</td>
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<td>1880-84</td>
<td>22</td>
<td>4</td>
<td>1 3 1</td>
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<td>4 1</td>
<td>47</td>
<td>26.7</td>
</tr>
<tr>
<td>1885-91</td>
<td>8</td>
<td>1</td>
<td>0 0 1</td>
<td>1 1</td>
<td>2 1</td>
<td>20</td>
<td>11.4</td>
</tr>
<tr>
<td><strong>Total No.</strong></td>
<td>83</td>
<td>20</td>
<td>4 8 8</td>
<td>8 14</td>
<td>9 12</td>
<td>176</td>
<td>100.0</td>
</tr>
<tr>
<td><strong>Total %</strong></td>
<td>47.2</td>
<td>11.4</td>
<td>2.3 4.5</td>
<td>4.5 8.0</td>
<td>5.1 5.8</td>
<td>5.7 4.5</td>
<td>100.0</td>
</tr>
</tbody>
</table>

B. All Solicitors in New South Wales:

| From 1864      |       |       |         |                       |         |          |        |
| 1865-69        | 16    | 3     | 0 3 3   | 2 2                   | 4 2     | 44       | 7.0    |
| 1870-74        | 18    | 8     | 1 1 1   | 4 3                   | 1 1     | 40       | 6.4    |
| 1875-79        | 26    | 6     | 2 1 3   | 2 2                   | 4 4     | 61       | 9.8    |
| 1880-84        | 25    | 7     | 2 2 2   | 2 3                   | 5 2     | 77       | 12.3   |
| 1885-91        | 40    | 11    | 1 1 1   | 9 12                  | 10 2    | 112      | 17.9   |
| **Total No.**  | 243   | 59    | 11 72   | 29 45                 | 44 58   | 625      | 100.0  |
| **Total %**    | 38.9  | 9.4   | 1.8 11.6| 4.6 7.2               | 7.0 9.3 | 6.9 3.4  | 100.0  |

s = Sydney, c = Country

This table is based upon information from the Law Almanacs, the Admission Rolls, and the B.A.B. and S.A.B. Files.
approval in September 1888 when the judges directed by a rule of court that all persons applying to be admitted conditionally as solicitors should pay the sum of forty guineas to the Prothonotary. In due course that officer would hand the amount over to the Institute as an addition to its library fund. The Prothonotary, Frederick Chapman, provided the society with copies of new Supreme Court rules and printed cause lists and generally did his best to increase the influence of the Institute and raise the position of the profession. The Institute's finances were sound, provided funds were used cautiously and subscriptions paid on time. By 1891 the library fund was assuming healthy proportions due largely to the number of solicitors seeking conditional admission in the colony.

Besides the support it won from solicitors, the Incorporated Law Institute also differed from its predecessors in that it was able to produce positive benefits for colonial solicitors. The society was successful in enforcing a stricter observance of professional etiquette and curbed the practice among some solicitors of carrying on business by means of agencies and advertising such agents or agencies. It also acted promptly against the practice of certain solicitors allowing their


60 Ibid., July 1887, p. 5. The Institute's bank balance grew from £56.4.4 in July 1886 to £150.18.3 in March 1891. Its financial position can be traced from the 'Statements of Receipts and Expenditure' which appeared at the conclusion of each Half Yearly Report.

61 In March 1891 the library fund stood at £98.16.0 and £52.10.0 had recently been expended on a complete set of N.S.W. Law Reports, 'Library Fund', Half Yearly Report of I.L.I., March 1891, n.p.

names to be printed on legal documents intended to be used by unqualified persons. To guard against the admission of undesirable lawyers from England and elsewhere, the Institute established contacts with other law societies and was able to provide information to attorneys who desired to practise in another colony or part of the empire.

Further, the society took up wider issues which affected solicitors both materially and professionally. It originated moves for an increase in the scale of equity costs. The Master received these proposals favourably and the desired changes were introduced in 1891. The Institute gave attention to the need to revise the rules for admission to the profession and sought from the judges a more satisfactory arrangement for access to Administration Papers, Wills and Bills of Sale. These documents were held in the offices of the Supreme Court and were thus not available at all during court vacations and holidays. Though the society did not itself propose large reforms of the substantive law, it gave its support to government initiatives which updated colonial legislation in many areas along lines similar to those adopted in England and offered all practical assistance in this regard to the Attorney General. The Institute asked the judges to make a rule to relieve a solicitor from liability for sheriff's poundage and other fees where the bailiff was withdrawn without the intervention of the attorney on the record.

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63 Ibid., July 1886, p. 8.  
64 Ibid., p. 7.  
66 Ibid., July 1887, p. 6.  
67 Ibid., pp. 7-8.  
68 Ibid., March 1891, p. 6.
referred a bill which would repeal 11 Vic. No. 3, s. 14 relating to the admission of certificated conveyancers, the Institute advised that in view of the profession's rapid expansion the public interest would not be endangered if no more conveyancers were admitted in the future.  

The society also approached the judges to remedy complaints about 'the want of convenience for the accommodation of Solicitors in the Supreme Court, and the discourtesy which they had met with from some of the officials'.  

The judges promised to make improvements in the Jury Court but the Banco Court proved too small to permit any changes.  

To help resolve discontent about the state of the law respecting the employment and remuneration of counsel, the Institute set up a full inquiry into solicitors' rights of audience.  

At the same time, the Institute's record for the first half dozen years was not all success. Some country attorneys were not happy about their disadvantages as members, being unable to serve on the Council or use the library. The Council was unable to help. It explained that the association's object was simply to protect and extend the interests of the profession as a

69 Ibid.

70 Ibid., p. 5.


72 Half Yearly Report of I.L.i., March 1891, p. 5. Earlier, in July 1887, the Institute's Council had observed that 'the fact that one class alone in the community, whose employment is obligatory, is not amenable to the ordinary law of contract in relation to its services, is in itself an anomaly. In the branch of the profession represented by this Institute a practitioner, who accepts payment for work which he cannot and does not perform or who neglects or mismanages business intrusted to him, is held strictly accountable in damages to his client, besides being subject to the summary jurisdiction of the court. There seems no reason why counsel should not be placed under similar obligations', ibid., July 1887, p. 7.
whole and that country members could have access to the library through their city agents. The Council also stuck rigidly to its rule of returning all complaints to attorneys who were not members. Further, the Institute was unsuccessful in a bid to copy the precedent of England and some of the colonies and to have the right to appoint examiners in law and to organise admission examinations conferred upon the Council. In the handling of cases of professional misconduct it found itself handicapped whenever coercive or penal measures appeared necessary. Despite these drawbacks, however, the society had won the support of a significant proportion of colonial solicitors and had proved itself to be an energetic and frequently successful promoter of their interests. There were no traces of the stagnation or ineffectiveness which had preceded the collapse of the earlier Law Institute both in the 1860s and when it was revived in the early 1870s.

The establishment and success of the Incorporated Law Institute in the 1880s was a direct consequence of the profession's new colonial character. Possibly the proposals by Abbott in 1881 and Taylor in March 1884 to amalgamate the legal profession had acted as a catalyst by making some solicitors aware that they had no organised spokesman to stand up for their rights. At the same time any such initiative could not have been successful, as previous experience had shown, without a fundamental change

73 Ibid., July 1886, p. 8.
74 Ibid., p. 9.
75 The Institute's Council sought this authority in 1887, ibid., July 1887, p. 5.
76 Ibid., July 1887, pp. 6–7, March 1891, p. 7.
77 These two debates are considered in detail in Chapter 8, pp. 294–303.
in the attitude of colonial solicitors towards their role and a new awareness of common interests with their professional brethren. As a result of their more homogeneous origins, apparently similar appreciations of the position they had won, and increased possibilities for contact with other lawyers, a significant and growing proportion of solicitors in New South Wales saw the need for an organisation which would represent their interests, reinforce their status, and improve the practical lot of a lawyer. Solicitors were becoming, as Louis Francis Heydon rather too glowingly described his brethren in July 1889, a body marked out 'as one singularly homogeneous, united, and apart from other classes, in sentiment, situation, and necessities; and therefore requiring more than other classes, to form itself into strong and effective organizations for common objects'.

By no means all solicitors practising in New South Wales at the end of the 1880s were as yet convinced of the value of corporate action through the Institute, but the basis clearly existed for a strong and effective professional cohesion should the fundamental rights and interests of solicitors be seriously challenged.

How closely the new corporate spirit apparent in the profession was tied to the character of the individual solicitor and the conditions under which he had entered the law was graphically demonstrated by the formation of the Articled Clerks' Association in June 1887. In that month a large gathering of articled clerks at the Supreme Court realised 'a long felt want' when they resolved to form a society for the mutual improvement and cultivation in debate of articled clerks. Besides the discussion of


79 *Articled Clerks' Journal*, Vol. 1, No. 1, 1.3.1889, p. 3; see also *S.M.H.*, 18.6.1887, p. 7.
questions of law, literature and politics, the association would, the
meeting decided, aim to protect and promote the interests of articled
clerks in New South Wales. These sentiments were not mere platitudes.
During the next few years, the Association took a wide variety of
initiatives designed to ensure that the education and training of
articled clerks was far more complete and meaningful than it had been in
the past and that the profession of a solicitor maintained the relatively
high social and legal standing it had achieved by this time. Even while
training for their new career, articled clerks were strongly identifying
themselves with the profession and recognising that their reputation and
rights could best be secured through united action.

The activities of the Articled Clerks' Association took three forms.
These were the holding of regular meetings, moots and social occasions;
the publication of the Articled Clerks' Journal, subsequently renamed the
Law Chronicle; the promotion of changes in colonial admission requirements
and the improvement of legal education for articled clerks. The first six
months of the Association's existence were encouraging. Meetings were well
attended and the proceedings animated. Much of this was due, however, to
the novelty of these activities and for several months early in 1888
attendances dropped with consequences for both the standard of discussion
and the spirit of the association. The committee, concerned by this

80 The meeting of 1 June appointed 'a provisional committee ... for the
purpose of arranging a basis for the management of the Association.
The necessary rules for the conduct of business having been defined,
the first office-bearers of the Society elected, and other preliminary
matters attended to, the inaugural meeting of the Society ... was held
on the 7th July, 1887, Mr. Frederick Chapman, Prothonotary of the
Supreme Court, the President of the Association, occupying the Chair',
Articled Clerks' Journal, Vol. 1, No. 1, 1.3.1889, pp. 3-4. The
Committee appears to have consisted of seven or eight articled
clerks elected annually.

81 Ibid., p. 3.
decline quickly discovered an effective remedy. Despite much opposition, it varied the form of meeting to parallel closely the thrust and parry of a political debating society. The committee overcame the qualms of many members that the Association might become a purely political one by providing for the regular discussion of legal subjects. Therefore, attendances increased steadily and 'the natural ambition on the one hand of the Government in seeking to retain office as long as possible, and that of the Opposition ... to bring about the downfall of the governing party ... very materially added to the success of the debates'.

Between April 1888 and 1893 the committee made only minor changes to this form. The topics for discussion or debate at the Association's meetings - held fortnightly during each law term - were most diverse. They ranged from discussions of particular statutes or specific areas of law, through debates on political matters such as Henry George's taxation proposals and the advantages of trade unions, to more general literary and intellectual topics. The latter included debates upon the possibly elevating effects of Sarah Bernhardt's visit on colonial drama, the social dangers inherent in Tolstói's works on the marriage question, and the

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82 The original method of debate had been 'by means of an Opener and Respondent to be appointed for each meeting by the Committee', ibid., p. 4.
83 Ibid.
85 Ibid., Vol. 2, No. 2, 1.5.1890, p. 2.
86 The report on the Association's fourth annual meeting sets out in detail activities which it pursued at its meetings during 1891-1892, Law Chronicle, Vol. 1, No. 1, 1.6.1892, p. 3.
87 Ibid.
correctness of Bellamy's *Looking Backwards* in foreshadowing the ultimate state of society. For variation, the Association devoted evenings to readings from well-known literary figures and by 1893 had introduced a system of moots which took the form of trials of issues upon points of law. Members of the Association acted as counsel for both the plaintiff and the defendant and after they had presented their arguments all those present would take part in an informal discussion of the points involved. Generally, either a barrister or a solicitor would preside at the moot. There were also speech and essay competitions with prizes presented by members of the profession and an occasional smoke concert which proved extremely popular. On a wider scale, the Articled Clerks' Association held several muck trials in St. James Hall which were very successful and attracted between three and four hundred lawyers and their friends.

The average attendance at the Association's meetings was between eighteen and twenty-one, although the committee did not consider this to be satisfactory in view of the large increase in membership by 1890. It appears that the Articled Clerks' Association had around ninety members in

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July 1889 and a year later, forty of whom attended the annual general meeting. Some eighty-eight articled clerks and students at law are referred to in the Articled Clerks' Journal and Law Chronicle between 1889 and 1893 as active participants in these meetings, although from the average attendances there must have been considerably more present who did not take a leading role. The greater interest shown whenever legal topics were under consideration suggests that most members viewed the Association as a legal organisation and not as a political debating society.

The Association carried further its aims of promoting better legal and general education for articled clerks and to a lesser extent students at law by publishing the Articled Clerks' Journal from March 1889. Besides providing up-to-date information on statutes and legal decisions, the Journal sought to assist the Association in binding together 'in mutual unity the increasing number of Articled Clerks'. It hoped to assist in giving the 'broader and deeper legal culture' which was the basis of a successful and respected profession and to become the organ and the legal magazine of the articled clerks and students at law of the colony. On a wider plane, the Articled Clerks' Journal aimed to stir the conscience of

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95 Ibid., Vol. 1, No. 3, 1.7.1889, p. 6.
96 The numbers were sufficient for the Articled Clerks' Association to secure and furnish a room in Williamson's Chambers for its general purposes. The room was available to members at all times, Articled Clerks' Journal, Vol. 2, No. 3, 1.7.1890, pp. 10-11.
97 16 out of these 88 active participants were students at law and the remainder were all articled clerks.
100 Ibid.
the profession upon the necessity of law reform in certain areas and
offered its services as an agency for finding and filling positions for
articled clerks and young solicitors. 101

The format of the magazine reflected these priorities. Each issue
began with an editorial upon a subject of immediate relevance either to
the legal profession generally or to articulated clerks in particular. Each
included several concise articles upon specific areas of substantive law,
legislation or practice and a section entitled 'Legal Notes and Decisions'
which summarised the most recent decisions in case law. There were reviews
of new legal textbooks, copies of the latest rules of court, and notes upon
recent events of more general relevance to the profession and the
administration of justice. For the benefit of members of the Association
and articulated clerks as a whole, the Journal published the minutes of the
Association's meetings, copies of law examination papers, and details of
examination results and admissions. It was thus quite comprehensive and
potentially catered for an audience much wider than the membership of the
Association.

The initial success of the Articled Clerks' Journal was far greater
than its founders had dared to hope. Within a year its list of subscribers
numbered around 350 and its balance sheet showed a considerable credit. Its

101 The Journal pointed out that 'we do not look for startling
revolutions in our judicial constitution ... but it is undeniable
that there exist conditions and restrictions which have no
justification, either on the grounds of justice or expediency, which
however warrantable in their origin, are now arbitrary and absurd...
We have little doubt that the legal profession would not only
deserve but would command greater confidence and respect if it
were more active in its efforts either to minimise or remove those
evils which are as a galling yoke upon the necks of many; too often
harrassing commercial dealings and defeating justice', ibid., p. 2.
only cause for regret was that budding lawyers had not taken the
opportunity to contribute to its columns. However, the expectations
of even further success to which these events gave rise were soon to prove
illusory. By early 1892, due chiefly to 'the laxity of country readers in
forwarding their subscriptions', the publication of the Journal became
irregular and new arrangements had to be made for publication. Further,
the editors changed its title to the Law Chronicle because its former
name suggested a narrow sectionalised interest which they claimed was not
the case. They pointed out that most subscribers were not members of the
Association, while the membership of the Association itself by then included
'not articled clerks only, but students at law and junior members of both
branches of the legal profession'. In future, they announced, the Law
Chronicle would appear monthly instead of two-monthly and the annual
subscription would be doubled to five shillings as a result. The editors
also expressed their desire that the journal might help to break down the
sense of isolation experienced by country solicitors.

By mid-1893 the Law Chronicle had only partially realised these hopes.
Many previous subscribers refused to continue receiving the new publication
because they feared that it might encounter the same difficulties as its

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102 Articled Clerks' Journal, Vol. 1, No. 6, 1.1.1890, p. 1. To
encourage articled clerks to contribute, the editors argued: 'It
will be said, and truthfully too, that our readers benefit more by
the writings of experienced men than by those of tyros, but it appears
to us, reckoning as we do on being enabled to enlarge the Journal,
that a portion of it might with advantage be set apart for the
contributions of Articled Clerks, for the paper would be then serving
the dual purpose of disseminating knowledge and providing a field
wherein beginners might set forth their mental productions'.

104 Ibid.
105 Ibid., pp. 1-2.
predecessor. In addition, poor financial returns forced the editors to reduce the size of the journal from sixteen to eight pages and to find a new publisher. On the credit side, the subscription list was over four hundred and members of both branches of the profession voluntarily supplied many learned articles for its columns. Though by no means totally secure, the Law Chronicle continued to provide an important source of information for lawyers and budding lawyers in New South Wales and assured the Articled Clerks’ Association a prominence which it could not otherwise have enjoyed.

By far the most important initiatives taken by the Association were, however, its endeavours to improve the standard and effectiveness of both admission rules and legal education for solicitors. The first sign that articled clerks were taking positive action upon such questions came in October 1887. The Association drew up and forwarded to the judges a petition pointing out that training by articles lost much of its utility if a clerk was always distracted by pending examinations. The judges responded favourably and made a rule permitting a clerk to proceed to his final examination at any time during the last year of his articles. The rule did not confer any right to be admitted prior to the expiration of articles. Shortly afterwards, the Association again petitioned the judges, this time with a view to imposing some form of restriction upon the influx

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107 Ibid., and Vol. I, No. 12, 1.5.1893, p. 186.
109 Articled Clerks’ Journal, Vol. I, No. 1, 1.3.1889, p. 4. The original petition to the judges, dated 24.10.1887, and a covering letter are preserved at the rear of B.A.B. Minutes (1).
110 Rule 1, 13.11.1888.
of English and Irish attorneys fleeing from overcrowding in their own professions. Colonial articled clerks feared that these new arrivals might snatch away their own career opportunities.\footnote{Articled Clerks' Journal, Vol. 1, No. 1, 1.3.1889, p. 4.} The judges agreed to introduce an admission fee of forty guineas upon each solicitor who came to New South Wales from another colony or from overseas but they did not accept the additional proposal that such applicants must also pass a compulsory examination in colonial law.\footnote{Rule 26.9.1888; Secretary, S.A.B. to J. Howarth, 2.10.1888, Letter Book of Attorneys Admission Board, 6 September 1879 to 20 June 1889, (henceforth S.A.B. Letter Book (1)), A.O.N.S.W., 3/4829, p. 606.} That step might well have dissuaded the able as well as the incompetent practitioner.

Just how seriously articled clerks were treating the question of improved legal education became obvious in 1889 when the Articled Clerks' Journal began publication. There had recently been a marked improvement in the social and legal status of solicitors the Journal pointed out. At the same time, the profession of a solicitor was becoming ever more responsible and demanding greater abilities and learning. If clerks were to maintain and even increase this new prestige they had a duty, the Journal urged, 'to jealously guard against that superficiality which cannot fail to keep us down to an undesirably low level'.\footnote{Articled Clerks' Journal, Vol. 1, No. 5, 1.11.1889, p. 2.} They needed to obtain 'a broad and comprehensive idea of the great principles of jurisprudence' which, when added to the benefits of a liberal education, would make the

\footnote{Shortly after the rule was introduced, English solicitor A.M. Hemsley requested remission of the £42 fee on the ground that he had left England prior to the date of the rule and had then been informed that no fee was payable upon conditional admissions. The judges agreed to suspend the operation of the rule until the following term, Rule 1, 25.2.1889; Meeting of 13.2.1889, Judges' Minutes, p. 2.}
average solicitor 'a far better lawyer and practitioner'. The course of training for articled clerks should be designed to bring out their real abilities, stimulating a 'proper ambition' and rewarding genuine talent.

With this object in view, the Articled Clerks' Association arranged early in 1890 for the delivery of two series of evening lectures in No. 2 Jury Court. One consisted of twenty-four lectures and catered specifically for the final solicitors' examination while the other, of twelve lectures, covered the subjects for the intermediate examination. The initial attendances at these lectures - fifty-five and thirty-three respectively - strongly endorsed the Association's plans.

These steps were, however, only the beginning. With the establishment of Sydney University's Law School the articled clerks redoubled their efforts to upgrade the legal education of solicitors in the colony. The Journal acknowledged unreservedly the great boon which the Law School gave to students at law. It called for a remodelling of 'the whole systemless system of legal education' and urged that 'some proper means of theoretical education must be engrafted on our present methods of practical training'.

114 Ibid., p. 1.
115 Ibid., p. 2.
117 Ibid., Vol. 2, No. 1, 1.3.1890, p. 3. The Law Chronicle, Vol. II, No. 2, 1.7.1893, p. 13, reported that the lectures on the subjects for the final examination delivered by barristers Walker and Mason had been attended by a large number of articled clerks, all of whom expressed satisfaction at the great benefits they had derived from them. It also noted that due to the parallel courses now being arranged by the University, the Association was taking no steps to continue its own series.
118 Law Chronicle, Vol. 1, No. 3, 1.8.1892, p. 34.
The main problems which it saw with the existing arrangements were the varying efficacy of tutelage by articles and the fluctuating standards of examinations. Many solicitors failed to provide their clerks with the necessary technical training while examination papers on the same subject varied 'in one year from the hopelessly difficult to the beautifully simple'. Further, the Journal considered the comprehensive and singular nature of the final examination for solicitors to be an unwarrantable ordeal for mind and memory. It questioned both the content and sequence of examinations and demonstrated that textbooks on colonial law were inadequate and poorly organised.

This campaign gained its first success in May 1892 when the Law School arranged four series of evening lectures for articled clerks and others who wanted to attend. The subjects of those courses related directly to the six sections of the final examination for solicitors, were based on the same textbooks, and were designed to point out the differences between

119 The Law Chronicle argued that 'in far too many cases the relationship between solicitor and clerk is simply a commercial transaction. The clerk pays his premium and the solicitor allows him to occupy the vacant chair which is generally ready for the use of a premium-paying clerk even in the most crowded office. Once in that vacant chair the clerk is either allowed to follow his own desires, and work or not as he feels inclined, and as he gets or makes the opportunities for work, or if his master be more economically minded the clerk becomes a kind of manual labour amateur in the professional game. In such cases the master, and sometimes the pupil also, seem to forget that technical skill cannot be developed without technical training, and that the master is bound legally to his clerk and morally to the public to supply that technical training', Law Chronicle, Vol. 1, No. 3, 1.8.1892, p. 34 and Vol. IV, No. 11, 30.4.1896, p. 85.

120 Ibid., Vol. IV, No. 12, 30.5.1896, p. 89.


the English and New South Wales statutes in each area of law. The Law Faculty did not see any immediate possibility of introducing evening lectures for the LL.B. degree but recommended to the Senate that steps be taken to gain recognition of the degree as equivalent to the solicitors' final examination. Further, at the instance of Leonard Dobbin and other interested solicitors, the Law School organised the delivery throughout the year of twenty lectures on 'Current Legislation and Legal Decisions'. By this scheme, Dobbin, who had been an active member of the Articled Clerks' Association before his admission in March 1892, hoped to 'supply a long-felt want - to supply an impetus to a young lawyer's reading and assistance to those who, by pressure of work, are unable to keep themselves posted in the modern changes in the law'. The Law School set the fees at two guineas which would make the course self-supporting provided that not less than thirty attended. Unfortunately, it appears that the University had to abandon these programmes during 1893 when the government, due to the

123 The four subject areas were Real Property and Conveyancing; Practice of the Supreme and Inferior Courts; Common Law (including Criminal Law) and Torts; Equity, Probate and Matrimonial Law, Law Chronicle, Vol. 1, No. 8, 1.1.1893, p. 114. These lecture courses were arranged by the Law School and agreed to by the Senate, Meetings of 2.5.1892 and 9.8.1892, Law Faculty Minutes (1), pp. 16, 20; Meetings of 4.7.1892 and 6.3.1893, Sydney University Senate: Minutes, Book 9, July 1891 to August 1893 (Senate Minutes (9)), pp. 188-90, 318-19.

124 Meeting of 2.5.1892, Law Faculty Minutes (1), p. 17.

125 Meeting of 9.8.1892, ibid., p. 24; Meeting of 5.9.1892, Senate Minutes (9), p. 237.

126 Law Chronicle, Vol. 1, No. 3, 1.8.1892, p. 46 and Vol. 1, No. 6, 1.11.1892, p. 94.

127 In March 1893 the Senate agreed to bring the scheme 'tentatively' into operation 'subject to the enrolment of not less than twenty students at least one week prior to the commencement of the course', Meeting of 6.3.1893, Senate Minutes (9), pp. 318-19.
deepening financial depression, withdrew a portion of its aid. 128

At the same time, these lectures were only part of a wider campaign to bring about a complete revision in the bases upon which articled clerks were examined and to gain recognition of the University's law degree as an alternative qualification for admission as a solicitor. Though Sir William Manning as Chancellor had approached the judges upon the latter subject as early as February 1891, 129 the articled clerks made little progress on either issue before late 1893. This delay by the judges appears to have been due not so much to any disagreement with the ends which the articled clerks were seeking but to a strongly entrenched belief that it was the Bar whose competence was the scientific study of law. Many barristers simply did not consider that a grasp of the wider principles and concepts of law was necessary to a solicitor's more technical and less elevated duties. 130

B.R. Wise, criticising the subjects set for the University's LL.B. examination in 1884, had observed that 'besides its narrowness of range the

128 There is no record of the lectures continuing after 1893. The Law School itself, at the direction of the Senate, cut its expenses by £250 per annum. It achieved this by reducing the salaries of the four lecturers by £50 each and combining the offices of attendant and librarian, Meeting of 24.7.1893, Law Faculty Minutes (1), p. 24.

129 Meeting of 18.2.1891, Judges' Minutes, p. 19. Manning also raised the issue in his address to the University's annual commemoration in April 1892. He regretted the inability of the Law School so far to help out articulated clerks but pointed out that the power to grant that benefit belonged to the judges, S.M.H., 25.4.1892, p. 4.

130 For example, in August 1890, R.E. O'Connor claimed that, while not decrying the knowledge of attorneys and the standard of their examinations, 'knowledge for the purpose of passing examinations is one thing, and that practical and scientific knowledge of principles which enables a man to apply those principles to the everyday affairs of life is another thing; and it is impossible unless a man has made a scientific study of the law, devoted the whole of his time to it, for him to advise with safety on the enormous complications which the simplest facts produce in the present state of the law', N.S.W.P.D., Vol. 47, 1890, p. 2979.
examination seems to me to have the greater fault of having a technical rather (than) an educational value, and to be more appropriate for a Solicitors' Admission Board than a University'. From such a viewpoint they would scarcely have understood the urgent need which articled clerks felt for bringing their examination requirements more into line with those for the Bar and to gain the benefits of the University's law degree.

This attitude must have changed rapidly in 1892, however, when parliament agreed to Crick's Legal Practitioners' Act which gave solicitors equal rights of audience with the Bar in all courts of the colony. In August that year the judges moved to break down the excessively rigid technicality which had previously characterised their interpretation of the admission rules. In future they empowered themselves to overlook an inadvertent failure to comply strictly with a particular admission rule. A year later, the extent to which the articled clerks' aims had gained a new legitimacy and immediacy became clear. The judges raised the standard of pass which an articled clerk had to achieve in his final examination. Henceforth, satisfactory results were necessary in all subjects, not simply in four out of six. The object was, the judges stressed, 'to bring the standard of examination as a solicitor in some measure nearer to the standard of the Final Law Examination for the Bar'. In response to a letter from the Incorporated Law Institute, they also resolved to reduce from three to

132 55 Vic. No. 31. The passage of Crick's bill is considered in detail in Chapter 8, pp. 304-19.  
133 Rule, 16.8.1892.  
134 Rule, 20.9.1893; Meeting of 20.9.1893, Judges' Minutes, p. 44.  
135 Ibid.
the number of articled clerks that a solicitor might train at any one
time. They were not prepared to go as far as the Institute desired and
to limit each solicitor to a single articled clerk.

Further, by late 1893 the judges were drafting a new set of admission
rules which included comprehensive changes along the lines desired by the
Articled Clerks' Association. These rules were ultimately promulgated in
September 1894. They introduced a new, more formal examination structure
which closely paralleled the changes made in the Bar admission rules in 1889
and 1890. A matriculation certificate would only be acceptable if a
candidate had passed in all subjects recognised by Sydney University as
necessary for intending articled clerks. Most importantly, the rules
divided the final examination for solicitors into four sections and laid
down set intervals which had to elapse between each section. They also
provided that an articled clerk with a law degree from Sydney University
was exempt from all admission examinations except the section on practice
and procedure. As under the Bar rules, a law graduate was still obliged

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136 Meetings of 26.7.1893 and 20.9.1893, ibid., pp. 40, 44. This
particular rule was not in fact promulgated until 1902.


138 Rule 1, 21.9.1894.

139 Rules 2, 3, and 4, 21.9.1894. The four sections were (1) Real
Property and Conveyancing; (2) Equity, Divorce and Matrimonial, and
Ecclesiastical Law; (3) Common Law, Evidence, and Criminal Law;
(4) Practice of the Supreme Court in all its Jurisdictions, and
Jurisdiction and Practice of Inferior Courts. For non-graduates,
the rules laid down that these sections were to be taken twelve
months apart. For graduates the period worked out at six months
for each section.

140 Rule 13, 21.9.1894; Meeting of 21.9.1894, Judges' Minutes, pp. 59-61;
S.A.B. to the Vice Chancellor, Sydney University, 22.10.1894, Letter
Book of Attorneys' Admission Board, 29 April 1893-29 July 1897,
A.O.N.S.W., 3/4831, pp. 305-06.
to give all notices and pay all fees required by a clerk proceeding to his final examination. To avoid placing an unfair burden on articled clerks in the country by these new arrangements, the judges allowed those clerks who resided more than two hundred miles from Sydney to take the sections of their final examinations en bloc, thus reducing the number of journeys they were required to make to the city. 141 The rules realised many of the goals which the Articled Clerks' Association had been seeking since its formation. They gave official recognition to the articled clerks' claim that the profession of a solicitor was now far more responsible and demanded higher qualifications than had been considered necessary in the past.

Even these successes, however, did not make the Articled Clerks' Association complacent. The division of the subjects of the solicitors' final examination into sections had one unexpected consequence. It soon emerged that, while clerks currently articled could choose to come within the new rules, the set times at which sectional examinations had to be taken negated any advantage those already articled might have gained by the change. A sub-committee of the Association fully investigated both this question and that of clerks who suffered by the new requirement for a pass in all six subjects. 142 They petitioned the judges against these injustices and received important concessions by the rules of December 1895. 143 Shortly

141 Rule 6, 21.9.1894.
143 Rules 1 and 2, 20.12.1895. The rules made by the judges followed closely the suggestions put forward by the Association's sub-committee. They reduced to six months the time which had to elapse between sections 3 and 4 for clerks articled before 21.9.1894 and allowed those clerks, if they sat for all subjects of the final examination at once, to gain credit for those sections which they passed. They did not have to be re-examined in all subjects but only in those they failed.
afterwards the *Law Chronicle* raised the possibility of articled clerks being admitted to the University's LL.B. degree without studying for two years first in the faculty of Arts. The campaign bore fruit in December 1896 when a meeting of over one hundred articled clerks in the Banco Court heard Professor Cobbett outline a scheme 'for enabling future articulated clerks to attend the Law School after passing a preliminary examination equivalent to the Senior Public Examination'. The fees were to be far less than those then paid by law students at the University and lecture hours, Cobbett pointed out, would be 'so arranged as to meet the convenience of clerks without entailing too great an additional labor'. The meeting endorsed these proposals and the Senate acceded to them on 7 December 1896. The new LL.B. course of five years, with entry upon the same standard as Medicine and Science, realised an object which the Association had been striving for since the creation of the Law School in 1890.

The activities of the Articled Clerks' Association thus confirmed that the new awareness of common interests which solicitors in New South

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146 *Law Chronicle*, Vol. V, No. 6, 12.12.1896, p. 33. The meeting also suggested that the LL.B. degree should be attainable without attending lectures and that the subjects passed already in the Solicitors' Admission Board's course might count towards the degree, but the Senate rejected these proposals.


148 By-laws 5 and 6, *Faculty of Law, Sydney University Calendar*, 1897, pp. 18-19.
Wales were displaying by the 1880s had its roots in the less diverse origins of articled clerks and in their apparently more united approach to their prospective profession. With the price of articles rising and with the influx of English and Irish solicitors threatening their future careers, there were strong reasons for articled clerks in New South Wales to unite in defence of their own interests, but the breadth of the Association's initiatives suggests that this was only one aspect of a much wider identification with the profession for which they were training.

Even before admission, articled clerks were clearly conscious of the rights and reputation to which they were aspiring and of the need to preserve and perhaps enhance these through united action. As the number of 'imported' lawyers in the profession decreased, such sentiments would have become far more prevalent among colonial solicitors. In combination with the greater geographical cohesion among solicitors' practices, they laid the foundation for the success of the Incorporated Law Institute at a time when professional practice generally appeared stable and prosperous.

In similar fashion to the Bar, solicitors in New South Wales had broken away from their British origins. The strengths they possessed by the 1880s depended not upon imported reputations and personnel but upon the strongly colonial nature of solicitors as a group and the concern with their standing and common interests which this new character implied.
CHAPTER 8

IMPROVED RELATIONS BETWEEN BARRISTERS AND SOLICITORS

Of equal importance to the new strength developing within the legal profession was the relationship which existed between barristers and solicitors. As noted in the first chapter, solicitors had not readily accepted the division of the profession imposed by the Supreme Court in 1834. Even the most experienced and well-established attorneys, who professed no interest at all in practising at the Bar, resented the imputation that they formed the lower branch of the legal profession. As in England, it was a situation which either rightly or wrongly placed additional strains on solicitors to justify and improved their standards. Privileges for the Bar suggested a superiority which the Bar was happy to foster but which solicitors considered unjustified and to their own detriment. Though the issue had not assumed really major proportions at any stage since 1848, it had continued to simmer in the background, frequently coming to the boil when questions which arose affecting the administration of justice also involved the rights of either or both branches. On several occasions, legislation had been introduced to bring about the amalgamation of the profession but such measures had lacked the necessary support, particularly in the Legislative Council, to enable them

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1 A good example of the tensions between the two branches of the profession was the failure of Attorney General Windeyer’s attempt to legislate for the appointment of a fifth Supreme Court judge in 1879. The bill failed because a solicitor, S.C. Brown, insisted that solicitors of ten years’ standing should be eligible for the new judgeship, Bennett, A History of the Supreme Court of New South Wales, pp. 45-46.
to pass. By the early 1890s, however, the renewed interest in law reform once again brought the question of the profession's utility and efficiency to the forefront of public debate. The issue by then had additional importance for the profession because of events in Queensland and most recently Victoria where legislation to fuse the branches of the legal profession had provoked a hostile confrontation between barristers and solicitors without ultimately producing any real change. A new spirit of compromise was evident in the approaches of both branches to the issue by the early 1890s.

Between the law reform legislation of the early 1870s and 1890 there were three attempts to alter the relationship between barristers and solicitors practising in New South Wales. The first bill, introduced by solicitor Robert Burdett Smith in April 1875, was withdrawn a few months later without debate. The second, Joseph Palmer Abbott's Legal Practitioners' Bill, was also the work of a solicitor. Abbott, who had been a solicitor and pastoralist in the Hunter Valley since 1865, first introduced the bill in July 1881 and it was debated extensively in the Legislative Assembly before it was finally discharged. Adolphus Taylor, a journalist, was responsible for the third measure which passed the Assembly with virtually no debate in March 1884 only to receive a crushing rejection

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2 In particular, it will be recalled, there were several attempts to amalgamate the legal profession in the early 1870s in the wake of the popular movement for law reform begun by barrister T.J. Fisher. These were discussed in Chapter 2, p. 91.


from the Legislative Council. Though none of these measures was ultimately successful, the speeches given and the votes cast provide at least a limited insight into the opinions which barristers and solicitors had of each other and their respective positions.

Abbott, moving the second reading of his 1881 measure, argued at length that the distinction between barristers and solicitors was 'an artificial hindrance to justice and to the proper administration of our laws'. Division caused unnecessary duplication and expense and conferred upon the Bar privileges which were not really justified in the public interest. Abbott singled out both a barrister's lack of responsibility for his actions and the practice of giving daily refreshers during a case as examples of the undesirable consequences of a divided profession. A suitor

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5 Taylor proposed to give both barristers and solicitors the right to appear in all courts without the intervention of each other. Attorneys would be able to hold judicial office and barristers could sue for the recovery of fees. The debates on Taylor's Legal Practitioners' Amalgamation Bill (No. 2) are recorded in N.S.W.P.D., Vols. 11 and 12, 1883-84, pp. 2316, 2481-83, 2549, 2667-79, 2739-48, 2959-66.


7 He pointed out that 'a barrister is a man who is responsible to no one ... (he) is not obliged to go into court; he is not obliged to accept a brief, and if he does accept it, it is a matter of honor with him whether or not he goes into court, and whether he conducts his client's case as it ought to be conducted. I ask why should not a barrister be subject to the same responsibilities as those of attorneys? ... I know that, as a rule, the barristers in the colony hold a very high position socially - they are looked upon as an honourable set of men; but their social standing does not counteract that which appears to me to be a gross evil - that is, their irresponsibility to everybody', ibid., p. 379. Abbott was particularly concerned because in England it was not uncommon for barristers to accept briefs and never appear in court and he believed that this practice was springing up in the colony, ibid., p. 383.

8 Abbott claimed that there could be 'no reasonable doubt that the main cause of the heavy expense of modern litigation is due to the largely increased fees paid to counsel of late years, and especially to the comparatively recent practice of giving daily refresher fees ... will any one say that these refreshers are not an inducement to prolong a case?', ibid., pp. 383-84.
should have the option of employing only one lawyer and the solicitor who prepared a case would understand it as well as any barrister. Solicitors, Abbott contended, had a more thorough training than the Bar as they had to pass several examination and to serve five years of articles. All but one of the other attorneys who spoke during the second reading endorsed Abbott's sentiments, insisting that it was the public interest and not that of either branch which must come first. Stephen Campbell Brown, while admitting during the second reading that he was on 'most cordial' terms with the barristers and had a high opinion of many of them and that their services were often worth the high value placed upon them, observed later in committee that:

... it was the tone of assumed superiority used in speaking of the Bar, which formed a constant ground for complaint. It seemed to be thought because persons were admitted to the Bar that they could arrogate the right to exhibit airs of superiority with regard to people quite their equals in ability and learning.

He argued strongly that division disadvantaged suitors, particularly at circuit courts, and that gross absurdities existed at present as to solicitors'

9 Abbott asked, 'which is the better able to comprehend the facts - the man who prepared the evidence and who has dealt with the case from its commencement, or the man by whom the case is afterwards taken in hand?', ibid., p. 380.

10 In his view, 'a barrister has really no legal training. He may study a few books and pass examinations in law which I undertake to say any man of ordinary intelligence could pass', ibid., pp. 380-81.

11 Ibid., pp. 389-92.

rights of audience. William Joseph Trickett and William Hilson Pigott took up this refrain. The latter pointed out that division only served as a form of protection for the interests of young, inexperienced barristers. He wanted advocacy in the Supreme Court limited to either barristers or solicitors of ten years' standing. The Bar's opposition, Pigott insisted, was motivated by the fear that they would be degraded by this legislation. In fact, it would raise the status of attorneys to that position which they were entitled to as lawyers.

The barristers serving in the Assembly took a quite opposite view of Abbott's bill. Attorney General Robert Wisdom, who followed Abbott in the debate, noted that the proposed legislation simply extended attorneys' rights but did not provide for full amalgamation. Due to the 'complex and highly civilised state of society', barristers would continue to be employed to the same extent as they were at present, while attorneys were not known

13 Brown observed that under the present statutes 'attorneys have equal audience with barristers in chambers before a Judge; but - look at the absurdity - not before the same Judge in court! I may in chambers argue prohibitions, injunctions, and other questions involving the most important points of law; but immediately his Honor leaves chambers, puts on a wig and gown and enters the court, I am no longer at liberty to appear before him. Although the action is undefended, and only upon a promis...note, I am obliged to give a barrister five guineas to appear'. Ibid., p. 391. Why in country areas, Brown asked, 'should a man be compelled to bring a barrister from Sydney to defend him if he has confidence in a local attorney?', Ibid., p. 392.

14 Ibid., pp. 508-09 (Trickett), pp. 517-18 (Pigott).

15 Pigott was critical of Foster's claim that attorneys were responsible for giving young barristers experience. He did not see why these young barristers should be merely sucking at the hands of attorneys. Nor ... why attorneys should spend their clients' money in nursing young barristers'. He was also astonished to hear that attorneys did not appear in the lower courts. In Pigott's opinion, 'eight out of every ten important cases in the district courts are conducted by attorneys', Ibid., p. 517.
for the smallness of their bills of costs. Charles Edward Pilcher considered that to pass such a bill would be a 'fraud on the public' for the benefit of attorneys. While denying that the Bar sneered at attorneys as the lower branch, he was quick to refute the argument 'that there is some special virtue in five years' service in an attorney's office, or in an examination'. Later in committee, he pointed out that many attorneys had been struck off but he did not know of a single disbarment. The simple fact was that barristers and solicitors filled different roles. 'A man may be excellent in one line of life for which he has been trained, but he cannot be everything. He may be a good wheelwright, but a perfect fool as a tinsmith; a first-class attorney, but an idiot as counsel; and a first-class counsel may not be able to earn bread-and-salt as an attorney'. An attorney of standing, Pilcher argued, could not afford the time away from his office to appear in courts, unless in a partnership, and partnerships had proved even more expensive than division. He followed Wisdom in suggesting that the measure would have been more beneficial to the public if it threw advocacy in the courts open to all and allowed talent to be the sole

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16 Wisdom argued further that as it was attorneys had the right to appear in all courts except the Supreme Court but did not exercise those rights either before the District Courts or Quarter Sessions. He tended to agree about the extravagant fees of barristers but asked 'has no one heard of an extravagant bill of costs from an attorney, irrespective of barristers' fees?', and he quoted from several recently published bills of costs to support his point, *ibid.*, pp. 385-88.


19 *Ibid.*, pp. 395-96. Pilcher pointed out that attorneys had rights of audience in most courts, 'but do we hear of the genius of these brilliant young men finding its level in these courts? not at all; they are never seen nor heard of'.

criteria. Pilcher was also concerned that the way in which the bill had been presented showed an absence of 'esprit de corps among the leading men of both branches' and he decried the tactic of dragging 'a brother professional in the dirt'.\textsuperscript{21} William John Foster and George Houston Reid objected to the bill upon similar grounds, with the latter suggesting that the only protection a client had was the advice of 'an independent high branch of the profession'.\textsuperscript{22}

The only lawyers who disagreed with the arguments put forward by their colleagues were barrister David Buchanan and solicitors Andrew Hardie McCulloch Jnr. and Robert Palmer Abbott. William Consett Proctor, a solicitor speaking in the house for the first time that evening, voted with his colleagues for the second reading but showed in committee an independence which worried the other solicitors. Buchanan's position was somewhat equivocal. During the second reading, he had announced that he supported amalgamation but opposed this particular bill because it did justice to solicitors but not to barristers.\textsuperscript{23} When the debate resumed and the vote was taken several days later, he voted for the second reading.\textsuperscript{24} It may have

\textsuperscript{21} \textit{Ibid.}, p. 396.

\textsuperscript{22} \textit{Ibid.}, p. 521. Foster claimed that the two branches were 'naturally distinct' and that it was 'as absurd to suppose that the mere fact of being a lawyer fits a man to be an advocate as to suppose that fitness to mix medicines qualifies a man to be a surgeon or a physician'. He believed that 'though you may compare the better members in each branch, no one will say that the lower ranks of the two branches are equal', \textit{ibid.}, pp. 512-13.


\textsuperscript{24} \textit{N.S.W.P.D.}, Vol. 5, 1881, p. 528.
been that he intended to introduce amendments in committee, but he was absent from the house when the Assembly discussed the bill in detail.

McCulloch's position was far clearer. He was opposed to the bill because he considered the two branches of the profession to be entirely distinct. In his opinion, an attorney's business consisted 'among other things, of dealing with his client's property, of buying and selling, and of borrowing and lending money, preparing settlements and that description of work', all of which were beyond the duties and training of a barrister. He did not feel that attorneys had much to gain from access to the Supreme Court and argued that it was really the barrister who was the partisan professional in a case and as often as not the solicitor who brought about a settlement before trial. Abbott, though he did not speak, must have shared this belief because McCulloch was well aware of his concurrence when he spoke. They clearly did not share the fear of other attorneys that their branch was or was considered inferior.

The two amendments which Proctor proposed in committee sought to realise the professed object of cheaper law yet to help the bill pass by a compromise between the interests of the two branches. They provide an interesting reflection upon the sincerity and strength of solicitors' arguments that the measure was in the public interest. Proctor first moved that appearances by solicitors in the Supreme Court and on circuit be limited to 'non-contentious or undefended matters or proceedings'. These were the

25 Ibid., p. 527.
26 Ibid.
27 Ibid.
major areas in which solicitors had contended that savings could be made. Brown vigorously opposed this amendment, saying that it destroyed the real effect of the bill, and it was defeated with all solicitors except Proctor, McCulloch and Abbott voting against it. Secondly, Proctor proposed that where no counsel was employed in a case no fees should be allowed 'for instructions for brief drawing or copying briefs or any fees to which counsel would have been entitled'. Barristers supported this change as likely to lead to cheaper law, but solicitors Pigott and Brown insisted that it would destroy the major principles of the bill. Pigott pointed out that:

Everyone must know, however, that seeing witnesses, getting up the cases, subpoenaing the parties, issuing writs, and doing all the other work in connection with a case before it came on, involved the expenditure of a great deal of time, labour and money; yet solicitors were to receive nothing for it.

Apparently sensing that the bill was beginning to lose support, Abbott then moved to postpone the debate. The Assembly carried his motion despite Bar objections.

The debate on Taylor's Legal Practitioners' Amalgamation Bill in the Legislative Council in 1884 did not produce the same sharp division of opinion, but it did provide further evidence on the relationship between the two branches. Attorney General Dalley, replying to Archibald Jacob who

29 Ibid., pp. 1042-52. W.J. Foster strongly supported the amendment because he believed that the bill, in that form, answer all the claimed inconveniences advanced by the supporters of amalgamation (pp. 1042-43).

30 Ibid., p. 1055.

31 Ibid., p. 1056.

32 Ibid., p. 1057. The barristers in the Assembly - Reid, Pilcher, Foster and Wisdom - considered it extraordinary that attorneys should shy away at the very moment when the possibility of introducing the cheap law they had been clamouring for came before them.
moved the second reading, denied that one branch was superior to the other.
The respective roles of barristers and solicitors were 'wholly and essentially
different'. They could seldom, he believed, be combined in one person
because 'in all professions the fulness of power is only attained by a
concentration upon given points of intellectual energy'. 33 Frederick
Matthew Darley, Alexander Gordon and Sir Alfred Stephen supported these
arguments. 34 Only two solicitors spoke or voted on the second reading.
They were R.P. Abbott, now in the Council, and James Norton and neither
supported Taylor's bill. Abbott simply asserted that reputable solicitors
did not believe such a change would be in the public interest. 35 Norton,
on the other hand, was rather scathing of his brethren. He considered that
solicitors were inferior and that there were 'many reasons why it should be
so'. A barrister was not in contact with the same influences which tended
to degrade attorneys. He did not have, Norton pointed out, 'to keep
elaborate bills of costs, nor to make up trumpery charges from 6d. to a
guinea'. Though it was only a legal fiction that a barrister's fee was an
honorarium, it did raise the barrister 'above the consideration of paltry
charges and account-keeping which annoy and degrade the attorney',
especially when the taxing officer had to be got around. 36 Norton believed
that the main effect of Taylor's bill would be to lower the standing of the
Bar and ultimately of the bench.

33 N.S.W.P.D., Vol. 12, 1883-84, pp. 2669-74.
34 Ibid., pp. 2676-78 (Darley), pp. 2739-41 (Stephen), pp. 2744-46
(Gordon).
35 Ibid., pp. 2746-47.
36 Norton feared that if the profession was amalgamated the Supreme
Court might become 'a bear garden overrun with the lowest class of
practitioners', ibid., p. 2743. He later claimed that his remarks
had been completely misunderstood and that they had been merely
intended to emphasise certain difficulties which solicitors faced,
ibid., pp. 2959-60.
The evidence provided by these two debates suggests that in the early 1880s there was little agreement between barristers and solicitors as to their respective roles. The attitude of the Bar was both united and straightforward. Except for the maverick David Buchanan, barristers believed that the duties of each branch were essentially different and specialised. It would be virtually impossible for a single lawyer to fulfil both roles and certainly not at a lesser cost to the public. Though several barristers specifically denied that they were superior to solicitors, they clearly considered their position to be that of an independent intermediary between the attorney and his client and the court. Further, when goaded, barristers often referred to both the public responsibility of their office and the comparative records of professional conduct of each branch.

Attorneys, on the other hand, were far from being unanimous. Some argued that division only produced unnecessary duplication and expense, aiding the junior Bar but not the public. They firmly believed that a solicitor's lack of audience in the Supreme Court branded him inferior and they went to great lengths to assert the value of solicitors' training and their qualifications to practise in the court. Other solicitors opposed amalgamation because they agreed with the Bar that each branch had a distinct role to play in the administration of justice. They distinguished between being different and being inferior. Only Norton considered that his branch could not, by its nature, be the equal of the Bar. Until these conflicting views were reconciled, relations between barristers and solicitors in New South Wales remained strained and unsatisfactory.

By the early 1890s these tensions between the two branches of the profession seemed to be decreasing. The cooperation between articled clerks and students at law in the Articled Clerks' Association boded well for the
continuation of this trend. A sub-committee of the Incorporated Law Institute, which investigated the whole question of solicitors' rights of audience, concluded in 1891 that 'while the separation of the professions... was an act of doubtful validity at the time, it has now been so long recognised, both by the practice of the Court and by enactments depending upon such separation, that the question may be considered as settled'. The Institute did not rule out the possibility of extending solicitors' rights of audience by legislation, such as had recently been achieved in the Probate Act, but it virtually renounced solicitors' claims to a re-amalgamation of the profession. The new spirit of compromise displayed by both barristers and solicitors in parliament towards their respective rights and privileges soon confirmed that the Institute's attitude was not taken in isolation but was part of a more general improvement in relations between the two branches.

The renewed interest in law reform of the early 1890s once again raised the question of whether and how the legal profession might be improved. Both Trickett and William Patrick Crick, also a solicitor, introduced bills to amalgamate the legal profession. Trickett brought his bill into the Legislative Council in 1890. The upper house allowed it to pass but only after amendments which reduced its effect to a simple extension of solicitors' rights of audience. The bill received a favourable reception in the Assembly but was withdrawn because it could not pass during

37 Of the 88 active participants in the Articled Clerks' Association between 1889 and 1893, 16 (18.2%) were students at law.

the session. Crick's Legal Practitioners' Bill, introduced a year later in August 1891, passed the Assembly with several amendments which sought to ensure that it was fair to the interests of both branches. It was brought into the Council by Trickett, but then taken over by Burdett Smith who accepted a compromise put forward by Pigott. This limited its effect to the extension of solicitors' rights of audience and to facilitating changes between the two branches. It became law as 55 Vic. No. 31.

Several laymen also attempted to reform the profession at this time but without success. John Neild proposed in December 1891 that all qualifications for the law except the tests of legal ability should be abolished and that control of admissions should be taken from the judges and given to an elected board of practitioners. His bill passed the Assembly easily, despite professional opposition, but received no support all in the Legislative Council. The Assembly passed it again in April 1893 but it was not proceeded with in the Council. Thomas Walker

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39 The debates on Trickett's Legal Practitioners (Solicitors' Rights of Audience) Bill are recorded in N.S.W.P.D., Vols. 44, 46, 47 and 50, 1890, pp. 60, 2351-82, 2962-94, 3318-32, 3507, 3548, 6668-82.

40 The debates on Crick's Bill are recorded in N.S.W.P.D., Vols. 53, 54, 57 and 58, 1891-92, pp. 1137-52, 1190, 1198, 2254-68, 2411-18, 3046, 6315, 6888-95, 7052, 7247-48.

41 The debates on Neild's Law Practitioners Bill appear in N.S.W.P.D., Vols. 52, 55 and 56, 1891-92, pp. 435, 3610-28, 5190, 5232, 5265, 5857-58, 5868. Neild claimed that the Bill aimed to do two things, 'namely, to throw open the practice of the law to the mature intellects as well as to the school boys of the colony - to the poor as well as to the rich; and, secondly, to provide that, by this process, there may be less difficulty and delay in reaching the position of a legal practitioner', ibid., p. 3610.

42 Neild's 1893 Bill was the same as his 1891 measure except for the addition of schedules setting out the subjects for examination. These he copied directly from the Supreme Court Rules then in force. The debates on it appear in N.S.W.P.D., Vols. 64, 65 and 66, 1892-93, pp. 5666-97, 7120-23, 7891, 7921, 7924.
took a different approach and tried to reduce the expense of litigation by allowing costs for only one barrister. Twice Walker's bill passed the Assembly but was defeated on its second reading in the Council due largely to the united opposition of the profession. Among lawyers, only the strongest advocates of amalgamation - Crick and Trickett - gave it any support.

The views expressed by lawyers in these debates revealed the important shift which had occurred in the relations between barristers and solicitors. Trickett, it must be admitted, had not changed his position very much. His sentiments in introducing his Legal Practitioners' Bill in 1890 differed little from those he had expressed a decade earlier. Trickett began by setting out the reasons for his continued belief in the benefits of amalgamation and pointed out what he saw as the absurd anomalies in solicitors' rights of audience. Solicitors, he said, could appear in important actions in the District Courts and in chambers but not before the Supreme Court, even to apply for the granting of an uncontested probate. These anomalies had been partly removed by the Bankruptcy Act and before the Land Court, but he considered that it was still necessary to break down

43 Walker was particularly concerned about the ability of a rich litigant to buy up the talents of leading barristers and thus compel his opponent to employ members of the junior bar not noted for any special ability. In these circumstances a poor litigant was likely to lose his case and, when costs were taxed, to pay for the services of every barrister his opponent had brought against him. Walker also wanted a rule laid down to prevent barristers appearing in chambers except when the judge ordered that a barrister was necessary, N.S.W.P.D., Vol. 50, 1890, pp. 6682-83. The subsequent debates on Walker's Reduction of Cost of Litigation Bill are recorded in N.S.W.P.D., Vols. 52, 54 and 56, 1891-92, pp. 435, 684, 2359-74, 2392, 2395, 4659-61; Vols. 59 and 60, 1892-93, pp. 878, 1391-1400, 1425, 1429, 2320-27; and Vol. 67, 1893, pp. 94, 101, 610-18, 727, 734.
those customs which required the merely formal intervention of a barrister. His bill, Trickett claimed, would give equal rights and privileges to both branches. A barrister would in future be accountable for his conduct and there would be a single mode of admission. He used the same arguments a year later when he moved the second reading of Crick's bill in the Council. However, when the Council amended his own bill so that it simply extended solicitors' rights of audience to all courts, Trickett acknowledged that this change would not affect his ultimate object. Crick, whose behaviour and attitudes rendered his position as a solicitor similarly anomalous to that of Buchanan at the Bar, also continued to criticise the Bar vigorously. Barristers, he insisted, were 'privileged to rob without being brought to account'. Crick argued that the profession must be amalgamated or, at the least, a suitor should be able to choose whether he would employ a barrister. His 1891 bill proposed to give solicitors full rights of audience, to permit transfers between the branches for lawyers of three years' standing, to make the Bar responsible in like manner to solicitors, and to give attorneys' signatures the same weight as those of barristers. He also wished to do away with the wig and gown. When Bruce Smith, a barrister, proposed certain amendments in committee to make the measure

44 N.S.W.P.D., Vol. 46, 1890, pp. 2355-57.
47 Ibid., p. 3330.
one of pure amalgamation, Crick readily agreed.\textsuperscript{50}

Though Trickett and Crick won considerable lay support for their bills,\textsuperscript{51} other solicitors did not share their views. One who had certainly changed his mind was Pigott, Trickett's former partner. During the second reading of Trickett's 1890 bill, he admitted that while he had favoured such a bill eight to ten years ago, he now would not support it. At that time he had been ambitious to go to the Bar, having built up his practice 'to a very large extent by ... success as an advocate in the district courts'.\textsuperscript{52} Now, after careful consideration and inquiry, Pigott considered that amalgamation would bring little public benefit. In his opinion, it would be sufficient to give solicitors the right to appear in all courts in cases where they were engaged as attorneys. There were people in his own branch, Pigott observed, whom he would not like to see as advocates before the Supreme Court or as eligible for the bench.\textsuperscript{53} When Crick's proposals came before the Council a year later, Pigott, recently nominated to that house, did not speak on the second reading. In committee, however, he took charge of proceedings and had the bill altered so that in place of amalgamation it simply gave solicitors full rights of audience in their own

\textsuperscript{50} Ibid., p. 1152.

\textsuperscript{51} When the Council agreed to the second reading of Trickett's Bill by 17 votes to 15, 15 laymen supported the Bill and only six opposed it. Two former judges (P. Faucett and W.M. Manning), four barristers (E. Barton, R.E. O'Connor, J.E. Salomons and G.B. Simpson) and three solicitors (J. Norton, W.H. Pigott and W. Walker) opposed the measure. Robert Burdett Smith was the only lawyer to support Trickett, \textit{N.S.W.P.D.}, Vol. 47, 1890, pp. 2992-93. Crick's bill passed its second reading in the Assembly without division, \textit{N.S.W.P.D.}, Vol. 53, 1891-92, p. 1152.

\textsuperscript{52} \textit{N.S.W.P.D.}, Vol. 47, 1890, p. 2965.

\textsuperscript{53} Ibid., pp. 2966-70.
cases and facilitated transfers between the branches.\textsuperscript{54}

The other solicitors who spoke in either house supported Pigott's call for extended rights of audience but also echoed his new respect for the rights of the Bar. Thomas Michael Slattery, who moved the second reading of Trickett's bill in the Assembly, stressed the anomalies which existed in solicitors' rights of audience but at the same time acknowledged that the bill would damage in some degree the interests of the junior Bar. To rectify this, which could not be done within the present order of leave, he promised to introduce a bill in the next session.\textsuperscript{55} Even Burdett Smith, who had strongly supported Trickett's 1890 amalgamation proposal, attacking the high fees received by barristers and their irresponsibility,\textsuperscript{56} willingly supported Pigott's amendments in Crick's bill which he was guiding through the Council. Far from blustering about Bar privileges, he endorsed the idea of a compromise fair to both branches.\textsuperscript{57} Gould, the Minister of Justice, took a similar line to Slattery, while the other solicitors who

\textsuperscript{54} *N.S.W.P.D.*, Vol. 58, 1891-92, pp. 6888-95. As a result of Pigott's amendments, barristers and solicitors of five years' standing were entitled to be admitted without examination to the other branch provided the person concerned satisfied the court that he was a fit and proper person to be so admitted, ibid., p. 6894.

\textsuperscript{55} *N.S.W.P.D.*, Vol. 50, 1890, p. 6669.

\textsuperscript{56} One of Burdett Smith's strongest criticisms was that the high fees demanded by senior barristers compelled solicitors to give a correspondingly heavy fee to their juniors. On average, he argued, fees had risen from eight guineas for a senior and five for a junior to between twenty and twenty-five guineas for a leading barrister and between ten and eighteen guineas for a less experienced counsel. By contrast, 'solicitors at the present day, notwithstanding that rents for office are quadrupled, and that expenses of clerical services at least doubled, are working exactly on the same scale of charges ... that obtained forty years ago', *N.S.W.P.D.*, Vol. 47, 1890, p. 2974.

\textsuperscript{57} *N.S.W.P.D.*, Vol. 58, 1891-92, pp. 6888-90.

\textsuperscript{58} *N.S.W.P.D.*, Vol. 50, 1890, pp. 6668-69.
spoke showed no enthusiasm for amalgamation. William Walker believed that though amalgamation might come eventually it would not reduce expenses and was likely to degrade the profession. Norton was of the same opinion and indicated that unless Pigott's amendments had been accepted he would have opposed Crick's bill.

The same moderate attitude was evident in solicitors' voting and in their low key approach to Walker's proposals to limit to one the number of counsel for whom costs might be sought. Gould, opposing Walker's bill in 1890, argued that in many cases it was desirable to employ two or more barristers and that this measure only deprived a poor man of that opportunity. Joseph Hector Carruthers took the same line of argument three years later, pointing out that Walker's bill would not deter the rich suitor but only disadvantage the man of moderate means. Burdett Smith was concerned that such a measure threatened the existence of all but the senior Bar. Once again, Crick and Trickett were the exceptions. Crick was particularly aggressive. He attacked the idea of giving a case to a barrister at all and castigated the methods by which a Queen's Counsel and his juniors coordinated and were well paid. He insisted that the bill should go further and limit the outrageous fees charged by counsel. The two counsel system

60 *NSWPD*, Vol. 58, 1891-92, p. 6892.
61 'It must be borne in mind', Gould reminded the house, 'that when the bill of costs comes on for taxation the Prothonotary has to be satisfied that there was a necessity for a large array of legal talent before he will grant the costs of all the barristers', *NSWPD*, Vol. 50, 1890, p. 6683.
was, he argued, a haven for 'mental imbecility'. Trickett was more subdued. He pointed once again to the danger of barristers not being accountable for their own actions and suggested that one barrister plus two or three solicitors would be a preferable alternative. These views were certainly not, however, in accord with those expressed by most solicitors. In general, solicitors in parliament echoed the opinion of the Incorporated Law Institute that the profession was and would remain divided. Their only concern was to extend solicitors' rights of audience to the Supreme Court and this they achieved in principle in 1892. Otherwise, their former hostility towards the Bar and their desire to tear away Bar privileges had largely abated.

While the basic thrust of barristers' argument remained unchanged, they too displayed in these debates a new willingness to accept a compromise suitable to both branches. Attorney General George Bowen Simpson, opposing the second reading of Trickett's bill in 1890, reiterated the Bar's established arguments against amalgamation. The duties of both branches were, he asserted, quite distinct and it was not possible to fulfil both offices. An attorney, particularly if he had a large practice, could not 'devote that amount of time which is absolutely necessary to enable him to become a master

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64 N.S.W.P.D., Vol. 54, 1891-92, pp. 2363-65. Crick argued that 'some of the biggest fools in creation are pitchforked into this so-called learned profession by fathers who have imbecile sons. They cannot allow their sons to go out of doors to earn their living in a way suited to their physical capacity, as opposed to their mental imbecility; but they must pitchfork them into some learned profession, making them doctors, lawyers, or barristers, and in time they may come to this point: that some of them cannot be heard unless they have a junior to carry their bag', ibid., p. 2365.

65 N.S.W.P.D., Vol. 61, 1892-93, pp. 2326-27.
of the law, and make himself thoroughly conversant with all its principles'.

consequently, Simpson pointed out, attorneys must constantly refer questions
to barristers for their opinion. A divided profession made specialisation
at the Bar possible, thus ensuring that attorneys received the best possible
advice on a certain point of law. Further, the Bar acted as a check upon
attorneys who naturally tended to become partisan to their client's cause.
Simpson believed that amalgamation would reduce standards but not legal
expenses. He strongly rejected the claim that the apparently formal
appearances by barristers in cases such as the granting of probates were
simply devices to rob the public for the benefit of lawyers. In those
matters, barristers had to give their word that the papers were in order,
thus taking the responsibility and providing the check which a busy attorney
might not have time to do. O'Connor, Salomons, Edmund Barton,
Pilcher and former judges Stephen, Manning and Faucett all supported Simpson's arguments.

Barristers also continued to maintain that advocacy in the court required a high standard of education which the existing rules for solicitors did not guarantee. Manning argued that Trickett's bill would nullify the efforts of the University's new Law School to elevate the study of law and to bring to the Bar young men of the highest education that the country could offer. He did not mean to imply that it was not desirable for solicitors to have an equally high standard of education, nor that many did not already have such attainments, but while it was desirable for solicitors it was essential for the Bar. At the same time, this assertion did not carry the same derogatory overtones towards attorneys which had accompanied it a decade earlier. When Humphrey moved in committee that solicitors simply be given rights of audience in all colonial courts, Faucett, Salomons and Simpson supported his amendment. Faucett suggested that a high standard of education might be introduced to the great advantage of the profession as a whole and Simpson took care to explain away his earlier remarks which might have appeared critical of the depth of attorneys' knowledge. A year later, when Pigott moved his amendments to Crick's bill, barristers in the Council reacted similarly. Faucett, Manning and O'Connor supported Pigott, while Simpson only objected to the proposal to facilitate transfers

74 N.S.W.P.D., Vol. 46, 1890, p. 2359.
75 Ibid., p. 2366.
77 N.S.W.P.D., Vol. 46, 1890, p. 2366.
between the two branches. He considered that such a clause was unnecessary when the bill already gave full rights of audience to solicitors.

In the Assembly, only four barristers spoke upon these proposals to amalgamate the profession and two of these, Arthur Bruce Smith and John Henry Want, supported the idea of amalgamation. Want believed that Trickett's bill, reduced by the Council to simply extending solicitors' rights of audience, would only be beneficial to a few 'windbags'. As a freetrader, he argued that it would be far better to throw the profession open to those with the best ability and he suggested that the only way to prevent delays in court was to allow those who knew how to conduct the business to take it in hand. Bruce Smith approached Crick's bill from a similar perspective and introduced amendments in committee which ensured equal advantages for both branches. He considered that the Bar should be made more responsible and legal training standardised so that a candidate need not decide which branch he preferred until admission. However, Bruce Smith rejected the suggestion that a barrister should be bound to appear in a particular case and defended the practice of a senior piloting several cases at the same time.

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79 N.S.W.P.D., Vol. 58, 1891-92, pp. 6888-95. Earlier in the committee stages Faucett had proposed an amendment to allow barristers to act in every respect as solicitors and vice versa. He also wanted to unite the two admission boards. In his opinion, this would make the Bill not only fair to both branches but, above all, to the public, N.S.W.P.D., Vol. 54, 1891-92, pp. 2413-16.


81 N.S.W.P.D., Vol. 50, 1890, pp. 6673-76.


83 Ibid., pp. 1143-45.
The other barristers who spoke, William Portus Cullen and Walter Edmunds, objected to solicitors receiving privileges without similar gains for the Bar. Edmunds, who had reached the Bar from humble origins, insisted that the Bar was not the restricted elitist institution which it was commonly portrayed as and he questioned the wisdom of extending attorneys' rights of audience when they did not even use their existing privileges. He also advanced many of the usual arguments against amalgamation. Cullen pointed out that to give solicitors all the rights of barristers without reciprocating was to keep up an unnecessary distinction. Though these arguments did not follow the pattern set by barristers in the Council, they were more concerned with ensuring that the Bar was not unduly disadvantaged than with resisting the claims of solicitors. The opinions of Cullen and Edmunds, both of whom had been in practice for less than ten years, probably reflected a natural uncertainty among young barristers as

Bruce Smith pointed out that it would take a very high fee to convince a senior barrister to concentrate upon only one case at a time. That problem was provided against, he argued, by the retaining of a junior counsel 'who is really supposed to take the greater part of the hard work of a case off the shoulders of the senior in order that the senior may do what is called the piloting of the case, so that he may determine what witnesses shall be and shall not be called, what questions shall be asked, and what questions shall be left carefully alone for fear that they might tell against a client', ibid., p. 1145.

Edmunds was the son of a West Maitland saddler, Holt, A Court Rises, p. 155. During the debate he observed that 'the hon. and learned member for East Sydney (G.H. Reid) and I myself furnish examples of how free and liberal the bar of this colony has been. It would have been impossible for me ever to become a pampered attorney and to go through the long articleship required', N.S.W.P.D., Vol. 50, 1890, p. 6678.

Ibid., pp. 6678-80.


Cullen was admitted to the Bar on 30.4.1883 after reading in chambers with George Knox. Edmunds was admitted on 31.7.1882.
to how such measures would affect their livelihood.\textsuperscript{89}

There appear to be several explanations for this change in the attitudes of barristers and solicitors towards each other by the early 1890s. Foremost among these were the experiences of Queensland and Victoria in attempting to resolve the same question of division or amalgamation. Queensland had inherited a divided profession when it separated from New South Wales in 1859, but that arrangement soon came under attack in parliament. During the 1870s solicitor J.M. Thompson and grazier W.H. Walsh led a barrage of parliamentary attempts to fuse the Queensland profession.\textsuperscript{90} They finally succeeded in 1881, despite the opposition of Attorney General Cooper and Samuel Griffith, and the Legal Practitioners Act became law.\textsuperscript{91} The Bar immediately called for resistance to this new legislation and blacklisted all practitioners who sought to avail themselves of its provisions. There was considerable friction inside the legal profession as a result but the Bar's veto had the desired effect and within a few years the amalgamation statute was virtually a dead letter.\textsuperscript{92}

In Victoria, there were numerous attempts to amalgamate the profession between 1875 and 1890. These measures, many of which paused the Assembly but

\textsuperscript{89} One ground upon which Cullen criticised Crick's Bill was that it would not reduce legal costs or affect senior counsel, but would only undermine the position of junior barristers, \textit{N.S.W.P.D.}, Vol. 53, 1891-92, pp. 1146-47.

\textsuperscript{90} Forbes, \textit{op. cit.}, pp. 213-228. Section 13 of Queensland's Supreme Court Constitution Act, 1861, declared that all barristers and solicitors of New South Wales then in the new colony should be deemed, without further formality, practitioners of Queensland. Section 67 of that Act empowered the court to admit barristers and solicitors separately.

\textsuperscript{91} \textit{Ibid.}, pp. 228-30.

\textsuperscript{92} \textit{Ibid.}, pp. 231-43.
were shelved in the upper house, produced much tension both within the Bar and between the branches. As in Queensland, solicitors resented the assumed superiority of the Bar and their attitudes resembled those current in New South Wales in the early 1880s. When Victoria's Legislative Council held an inquiry into the question in 1884, the weight of opinion divided equally on the relative merits of division and amalgamation. This helped to sustain those who were arguing against any change and it was not until 1891, while Crick's bill was being discussed in New South Wales, that the Legal Profession Practice Act was finally forced through the Victorian parliament, aided by the disenchantment of solicitors with certain new scales of costs.

The Victorian debates, though they were not specifically referred to during consideration of Crick's Legal Practitioners' Bill, must have greatly influenced the deliberations in New South Wales. The Council did not discuss Pigott's amendments to the bill until late in February 1892 and their ready acceptance, particularly by Burdett Smith, was probably assured by the events which followed amalgamation in Victoria. Immediately the Victorian Act was passed, barristers there who opposed the measure had formed a Bar Association. This Association soon came into bitter conflict with other barristers, with 'amalgams' and with the Law Institute. The hostile criticism to which it was subject soon forced the Bar Association itself to dissolve but many continued to support the principles for which it had stood. By February 1892 the Weekly Notes Covers, the New South

94 Ibid., pp. 94-98.
Wales law journal, could observe that the movement was continuing as a kind of informal 'inn of court' and that 'it now seems probable that for most practical purposes very little permanent change will be effected by the Act'. It was a salutary lesson for lawyers in New South Wales on the possible complications, frictions and futility of amalgamating the profession.

The arguments put forward during the debates of 1890 and 1891 in New South Wales confirm that lawyers were very conscious of the state of relations between barristers and solicitors in other colonies. Trickett took a broad overview in supporting his amalgamation bill by stressing that the profession was fused in four of the six Australian colonies. Others used more detailed evidence to argue against amalgamation. Pigott left no doubt that his changed attitude was due to the evident failure of Queensland's legislation. He quoted letters from both a barrister and a solicitor, who was secretary of the Queensland Law Association, to the effect that the 1881 Act there was virtually a dead letter and that the public did not profit at those times when its provisions were used. Those who had taken advantage of it were by no means the most reputable lawyers. O'Connor endorsed Pigott's remarks about Queensland and drew upon the evidence of the 1884 Victorian Committee of Inquiry to refute the claimed benefits of amalgamation. Edmund Barton quoted Dr Madden, a leading Victorian barrister, in support of division as well as Chief Justice Way from South

97 Ibid., p. xcviii.
98 N.S.W.P.D., Vol. 46, 1890, p. 2352.
100 Ibid., pp. 2981-85.
Australia, a colony where the profession had always been fused. Though other solicitors did not raise similar examples, they were undoubtedly well aware of the difficulties which amalgamation might entail and were content to achieve their desired ends by less comprehensive means. Norton, supporting Pigott's amendments which limited Crick's bill to extended rights of audience, suggested that the proposed clause would do all that the public had a right to expect but would avoid the difficulties of amalgamation.

The second factor which helped to break down the tensions between barristers and solicitors over their respective rights by the early 1890s was that several of the strongest grievances felt by solicitors had already been removed by either political or judicial action. The Bankruptcy Act of 1887 gave insolvent persons, creditors, and other persons having business in the court the right to appear before the Judge in Bankruptcy, effectively ending the Bar's monopoly in that jurisdiction. Further, the Bankruptcy Act provided for the appointment of solicitors of not less than seven years' standing, as well as barristers of not less than five years' standing, as the Judge in Bankruptcy. Solicitors also gained rights of audience in proceedings before the new Land Court in 1889, and the following year

101 Ibid., pp. 3319-21.
103 N.S.W.P.D., Vol. 46, 1890, pp. 2354-55. Section 134 of the Bankruptcy Act, 51 Vic. No. 19, laid down that 'nothing in this Act, or the transfer of the Jurisdiction in Insolvency to Bankruptcy shall take away or affect any right of audience that any persons have had at the commencement of this Act, and all persons who had the right of audience before the Chief Commissioner of Insolvent Estates or the Registrar in Insolvency shall have the like right of audience before the Judge in Bankruptcy or the Registrar'.
104 51 Vic. No. 19, s. 128 (II).
105 The Crown Lands Act of 1889, 53 Vic. No. 21, s. 8 (II) laid down that 'all parties may be heard by counsel, attorney, or agent'.
the Probate Act abolished the procedure of moving for grants of probate in open court. Many solicitors appear to have regarded the Bar's monopoly of that latter practice as symbolic of their disadvantages.

While the legislation was being discussed in committee, Burdett Smith moved that in future application by petition should be employed in all estate matters, thus removing the need to retain counsel. Norton supported him by questioning whether the existing requirement of motion by a barrister provided the safeguards which were claimed by the Bar.

These legislative trends, together with the events in Queensland and Victoria, must have suggested to the Bar the dangers of stubborn opposition to the extension of solicitors' rights of audience through amalgamation and given weight to the idea of a compromise solution, if in the solicitors' favour. Solicitors, on the other hand, accepting the Incorporated Law Institute's analysis of the potential complexities which amalgamation might entail, must have been heartened by the thought that their objectives could be achieved without a major confrontation.

The judges and the Barristers' Admission Board were similarly showing

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106 Section 13 of the Probate Act, 54 Vic. No. 25, stated that 'all applications for probate or letters of administration may be made by petition to the Judges of the Supreme Court without the necessity of application being made in open court. Provided that notice of such intended application shall be published in the Gazette and in one Sydney newspaper at least fourteen days before such application is made'.

107 Burdett Smith's motion created considerable disagreement between both barristers and solicitors in the Council as to whether application by petition was the best method of conducting probate business. It was only after a long and sometimes bitter debate that Burdett Smith had his way, *N.S.W.P.D.*, Vols. 48 and 49, 1890, pp. 4664-75, 4729-37, 4918-28.

108 Norton pointed out that these formal motions were usually handled by inexperienced juniors who frequently accepted the solicitor's word as to the correctness of the papers and did not check them personally, *ibid.*, pp. 4674-75, 4927-28.
a less rigid attitude towards the division of the profession. Michael Ryan, a solicitor recently arrived from Ireland, raised the question of facilitating transfers between the two branches of the profession in December 1887. He petitioned the Board requesting that the rules be altered, in accordance with the practice in England and Ireland, so that solicitors of five years' standing might be admitted to the Bar after one year of studentship and passing the final Bar examination. The Board resolved to comply with this request as far as possible, but its hands were tied by the statutory provisions which prescribed the examinations to be passed by all candidates for the Bar. As a result, it promulgated a rule in March 1888 permitting solicitors of five years' standing to serve only one year of studentship and to pass the literary examination before they had their names removed from the roll of solicitors. They had then to serve their studentship and pass the final examination. The following year Everard Digby, a barrister, asked the court to apply this rule in reverse to enable him to become a solicitor. The judges rejected the application as 'utterly impossible' under the existing rules but agreed

109 Meeting of 14.12.1887, B.A.B. Minutes (1), n.p. Ryan had first approached the Board soon after his arrival in the colony in November 1886 upon the conditions under which he might become a student at law. The Board informed him that he would have to have his name removed from the Roll of Irish Solicitors and that it would be contrary to the rules for him to serve in a solicitor's office during his studentship, B.A.B. to M.J. Ryan, 22.12.1886, B.A.B. Letter Book (1), A.O.N.S.W., 2/8340, p. 235. Ryan was subsequently admitted as a solicitor on 28.5.1887, Admission Papers of M.J.N. Ryan, B.A.B. and S.A.B. Files, Supreme Court of New South Wales.

110 Meeting of 29.2.1888, B.A.B. Minutes (1), n.p.

111 Rule, 29.3.1888. This decision was taken at the Board's meeting on 29.2.1888, ibid., n.p.
to consider the question of a new rule. Significantly, the counsel for the Incorporated Law Institute supported greater flexibility in this regard. Digby then petitioned the court to frame a rule authorising the admission of barristers as solicitors on being disbarred. He based his case upon the English statute 41 Vic. c. 25 and the recent rule which made it easier for solicitors to join the Bar. In consequence, the judges decided in June 1890 that a barrister of five years' standing might in future be admitted as a solicitor upon being disbarred and passing the final examination for solicitors. He was not required to serve articles. A month later, the Board abolished the need for a solicitor who wished to transfer to serve any studentship or have his name struck off before he had passed either the literary examination or the first section of the final Bar examination if he had not previously satisfied these requirements. Statutorily, a solicitor had still to meet all Bar examination provisions. Crick's amended Legal Practitioners Act of 1892 removed this last restriction by providing for the direct transfer of barristers and solicitors of five years' standing.

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112 (1890) 6 Weekly Notes, pp. 90-92. Digby had been called to the Irish Bar in November 1880 and had come to New South Wales the following year, Admission Papers of E. Digby, B.A.B. and S.A.B. Files, Supreme Court of New South Wales.

113 (1890) 6 Weekly Notes, p. 92.


115 Rules 1 and 2, 25.6.1890.

116 Special Meeting of 17.7.1890, B.A.B. Minutes (2), pp. 45-47.

117 55 Vic. No. 31, s. 3. Further, in February 1892, the Board decided that a student at law might continue under or enter into articles during his studentship provided that he did not attempt to sit for the final Bar examination while still under articles, Meeting of 22.2.1893, B.A.B. Minutes (2), p. 97.
The implementation of these rules was not without complication.

In November 1892 James Grant, admitted in Ireland in 1883 but in New South Wales only in 1891, applied to be disbarred under the 1892 Act. The court granted this application on the grounds that he came within the Act from the date of his call in Ireland, not from his local admission which had been less than five years previously. The soundness of this decision was, however, soon in question and when a similar case arose in 1896 the judges overruled Grant's Case and decided that they had no power to disbar a barrister called in England or Ireland. This ambiguity was only removed when the Legal Practitioners Act was consolidated in 1898. Section 14 of that Act provided that:

any barrister of five years' standing from the date of his admission in New South Wales, upon having his name on his own application removed from the roll of barristers in the court, shall be entitled, without examination to be admitted as a solicitor.

This new wording, Commissioner Heydon contended, made the 'evident intention' of the original statute 'quite clear'.

These difficulties must not, however, obscure the important changes which had taken place in the relations between barristers and solicitors in New South Wales even before the passage of the Legal Practitioners Act in

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118 Admission Papers of J. Grant, B.A.B. and S.A.B. Files, Supreme Court of New South Wales.
119 (1892) 9 Weekly Notes, p. 77.
120 Ex parte Mugliston, (1896) 12 Weekly Notes, p. 120; Bennett, op. cit., pp. 109-110.
121 Act No. 22, s. 14.
1892. Both in sentiment and in law, the division between the two branches was rapidly disappearing. With the extension of their rights of audience and the new possibilities for transferring to the Bar, solicitors had far less reason to feel that being different to the Bar also marked them as inferior. Full amalgamation, as the experiences of Queensland and Victoria had shown, was unlikely to produce substantial benefits for either branch. Barristers, on the other hand, appear to have felt that it was preferable to extend solicitors' rights of audience rather than, by resisting any change, to risk the complete amalgamation of the profession. The tightening up of the admission rules for solicitors and the new desire among articled clerks to put their training standards on a par with those of barristers would have helped to alleviate fears that such concessions might have undesirable consequences. Where the conflict between barristers and solicitors over their respective rights had previously frustrated many attempts to reform the law and improve the administration of justice, the profession had now far more chances of being effective upon these questions. This was important at a time when both branches were coming to appreciate their common interests and the responsibilities linked to their position as a colonial profession.
CHAPTER 9

THE REVIVAL OF LAWYERS' POLITICAL INFLUENCE

The renewed influence and strength which these changes in the profession's character were giving to lawyers in New South Wales became apparent when popular interest began to revive in law reform in the late 1880s. Not only did the major political parties begin to pledge themselves to improve both the substantive law and the administration of justice, but the crown law officers were able once again to take important initiatives in this direction. Those lawyers who served in parliament promoted many changes and displayed a marked cohesion, even across party lines, in support of measures of law reform. The profession no longer commanded the numerical strength which it had enjoyed in parliament in the 1850s, but its united opinions carried far more weight than they had during the 1860s when lawyers had suffered because of the close connection between their leadership and the colony's conservative elite. The influence which the profession possessed by the late 1880s did not depend upon such fragile social or political combinations but was based soundly upon the reputation and unity of lawyers as a group.

Though the number of barristers and solicitors who served in either the Assembly or the Council during the 1880s was not large and lawyers were

1 During the 1870s there were between 10 and 15 lawyers in an Assembly of 72 members. In the 1880s the number of lawyers rose to between 18 and 26 while the House itself grew firstly to 108 members and by 1890 numbered 115. Overall the profession's share of the Assembly's membership fluctuated between 11.3% and 23.4%, being highest in the tenth and eleventh parliaments of the early 1880s. In the Legislative Council there were never more than eight lawyers, mostly barristers, until the late 1880s. The nomination of several solicitors who had served an apprenticeship in the Assembly then lifted their numbers to more than 12. The details of which lawyers served in the Assembly or the Council during these years are set out in Appendix C, pp. 462-67.
not, in the Assembly at least, distinguishable from other members either in
terms of their electoral platforms or political allegiances, they still
enjoyed a prominent position by virtue of their personal calibre. Their
standing reflected the greater maturity of the profession itself. Those
solicitors who won seats in the Assembly fell roughly into two groups.
Firstly, there were the experienced and well-known city practitioners such
as George Wigram Allen, Robert Burdett Smith, William Wilson Pigott and
William Joseph Trickett, who had records of considerable public service
even before they entered politics. Allen, as we have seen, had been mayor
of the Glebe, an active promoter of better colonial education, and a supporter
of numerous religious and philanthropic causes. Both Pigott and Trickett
had been admitted as solicitors in 1866 and two years later had entered into
partnership. Before entering politics simultaneously in 1880, they had been
active in local government and involved in a variety of public causes.
Trickett was an alderman of Woollahra for thirty-five years after 1873,
mayor from 1879 to 1881 and again from 1886 to 1888, and in 1875 had served
as a royal commissioner on the railways into Sydney. Burdett Smith had won
recognition in a more dramatic way with his public speeches following the
attempted assassination of the Duke of Edinburgh in 1868 and was active in
the creation of the Australian Patriotic Association in that year.

2 Parsons, op. cit., p. 62.
3 Apart from those solicitor-politicians discussed individually in the
text, the following city practitioners fell within this category - R.F. Abbott, S.C. Brown, A.H. McCulloch, J. McLaughlin, G. Merximan,
T.M. Slattery and S.A. Stephen. Brief biographical details may be
found in Martin and Wardle, Members of the Legislative Assembly of
New South Wales, 1856-1901, Canberra, 1959, pp. 1 ff.
4 For details of Pigott's career, see Bulletin, 14.9.1880, p. 2.
5 For details of Trickett's career, see A.D.B., Vol. 6, p. 302 and
6 For details of Burdett Smith's career, see A.D.B., Vol. 6, pp. 154-55.
The second group of solicitors frequently elected to the Assembly in the 1880s were the solicitors from large country towns who, by 1886, were said to divide 'with the doctor or magistrate of the township where they lived the honour of almost regal reverence'. John Thomas Gannon had been practising in Goulburn for twenty-one years before his election to the Assembly in 1881. In that time he had served as town clerk and mayor, honorary secretary to the hospital and chairman of several companies closely linked with the progress and prosperity of the region. Albert John Gould, who continued to practise at Singleton for much of his long parliamentary career, was similarly identified with the public life of that community. He had served as president of the Mechanics' Institute, vice-president of the Northern Agricultural Society, on the committee of the District Hospital, and had been prominent in the volunteer movement. George Robert Dundas Fitzgerald, who represented the Upper Hunter from 1885 to 1893, practised continually in Muswellbrook for sixty-four years after 1869. Like Gannon and Gould, he was a leading figure in local government and business and played an active part in most aspects of community life. In general, the solicitors who served in the Assembly between 1870 and 1893 were lawyers of considerable experience with a reputation for public service. They represented either communities of which they were an integral part or country areas in which the election of a prominent Sydney personality appeared.

7 'As You Like It', 22.12.1886, Newspaper Clippings, Alexander Oliver Papers. Apart from those solicitor-politicians discussed individually in the text, the following country solicitors appear to have fallen within this category - J.P. Abbott, H. Dawson, J.A. Gorrick, T.H. Hellyer, L.F. Heydon, R.H. Levien, W.C. Proctor, R.W. Thompson, J. Wilkinson and F. Woodward. Brief biographical notes may be found in Martin and Wardle, op. cit., pp. 1 ff.

8 Australian Men of Mark, Vol. 1, Series 1, Set 2, pp. 253-55.

9 For details of Gould's career, see Martin and Wardle, op. cit., p. 88.

10 For details of the career of Fitzgerald, see Martin and Wardle, op. cit., p. 73.
the best guarantee that their local interests would receive proper
consideration. 11

Those barristers who were elected to the Assembly during this period
were quite different. Whereas less than a quarter of the solicitors had
entered parliament within five years of their admission to practice, and over
a half had been in practice for at least ten years, ten of the twenty barristers
in the Assembly were elected during the first few years of their professional
career. 12 The reason for this appears to have been not professional
advertising or advancement but the compatibility which existed between a
career at the Bar and involvement in politics. George Reid explained in his
Reminiscences that he had entered the Bar 'because it was the one occupation
which enabled (him) to enter public life'. 13 Few other barristers in the
Assembly were probably such political careerists as Reid, but the relatively
leisured life of the colonial Bar did provide the opportunity to dabble or
indulge in politics. Further, there was considerable truth in the Law
Chronicle's assertion that 'the lawyer ... receives in his professional
career ... just that kind of training which fits him for the political world',
especially with the 'arts of advocacy and debate'. 14 John Henry Want, who
asserted the Attorney General's right to a vacant judgeship in 1886 but
personally renounced such an advantage, later stated that not only was he

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11 Robert Burdett Smith, for instance, enjoyed 'the well-earned reputation
of having received more favors from successive Governments, and dipped
more heavily into the public purse for local objects, than any other
constituency in the country', Parsons, op. cit., p. 90.

12 This distinction between the level of professional experience possessed
by barristers and solicitors who served in the Assembly was pointed
out by Parsons, op. cit., p. 96. It is supported by the evidence set


14 Law Chronicle, Vol. 1, No. 12, 1.5.1892, p. 177.
'too fond of the active life and excitement' of his profession to accept a seat on the bench but he also hoped to be 'of some little use in the stirring field of political life'. Bernhard Ringrose Wise, the Attorney General who initiated the important measures of law reform in 1887, had done much debating at the Union during his education at Oxford. His early appearances in New South Wales politics were spasmodic due not to any lack of interest or natural ability but because his livelihood depended upon practice at the Bar. Colonial attorneys were suspicious of barristers who mixed law and politics. Once out of the house, Wise informed Parkes in the late 1880s, 'the Sydney attorney estimates me at twice my former value ... so much nearer the time when I can disregard attorneys'.

Compared to colonial solicitors, for whom a political career was generally an adjunct to their legal practice and the culmination of public service in other spheres, the barristers in the Assembly appeared both more ready and more able to devote time throughout their careers to non-professional activities, including politics. Bruce Smith, a Victorian barrister who came to New South Wales in 1880, devoted much time and effort to business as well as politics. Others such as the maverick David

17 B.R. Wise to H. Parkes, 1.4.1888(?), Parkes Correspondence, Vol. 42, ML A 912, pp. 258-59. On another occasion, Wise wrote to Parkes that 'I have some very heavy Court work next week, & must on no account appear to solicitors to be putting Politics before my Profession. I am convinced that the pursuit of both at the same time is possible; but the mind of the attorney hasn't yet seised on the idea, & it is essential that I do nothing to give a colour to his prejudice against political lawyers', B.R. Wise to H. Parkes, n.d., ibid., p. 330.
18 For a sketch of Bruce Smith's career, see Martin and Wardle, op. cit., pp. 195-96.
Buchanan, Robert Wisdom and Edmund Barton appear to have been more concerned with political issues than their profession. This compatibility between advocacy and political service brought the role of some colonial barristers quite near the traditional image of an English barrister as a gentleman who worked because he chose to, not for a living, and who engaged in politics as a natural consequence of his liberal education and station. In reality, few colonial barristers enjoyed financial independence but they seem to have accepted readily this wider view of their professional role.

This latter quality was particularly evident among the retired judges and more senior barristers who were nominated to serve on the Legislative Council and who did not display the strong ambition and political partisanship frequently evident in the Assembly. Frederick Matthew Darley insisted, when offered the Chief Justiceship in 1886, that he could render his best service to the colony in the Council. He was, as asserted by his biographer, a legislator and parliamentarian and only nominally a politician. He blended 'the outlook of a reformer with the habits of a conservative' and refused to become involved in faction or party politics. Julian Salomons, who served as Solicitor General between 1868 and 1870 and as Vice-President of the Executive Council from 1887 to 1889, was similarly reluctant to become involved in the turmoils of politics. When asked by Parkes in 1872 whether

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21 F.M. Darley to A. Oliver, 30.11.1886, Alexander Oliver Papers, Box K.

22 J.M. Bennett, 'The Life and Influence of Sir Frederick Matthew Darley', pp. 142 ff.
he would take a seat in the Assembly, Salomons replied that he would do so only if a constituency voluntarily elected him as its representative. 23 Retired judges Sir Alfred Stephen, Sir William Manning and Peter Faucett saw their parliamentary roles in the same light. When he accepted Parkes' offer of a seat in the Council in 1874, Stephen observed that 'the duties of a legislator have always appeared to me to be of the highest character; & it would be a great pleasure to assist in the work of useful legislation - for which my studies and habits have probably qualified me'. 24 This image of non-political public service, together with the conservative yet respected character of most lawyers who served in the Council, gave weight and credibility to the reforms proposed by them.

Except for James Norton, the 'father' of the Sydney profession, all the solicitors who were nominated to the Council had served an apprenticeship in the Assembly. They included Pigott, Trickett, Burdett Smith, Robert Palmer Abbott, Louis Francis Heydon and William Walker. All were noted for their wide involvement in public affairs. 25 Norton himself was associated with Sydney University, the Free Public Library and Australian Museum, served as trustee to the major city parks and was the director of several companies. His only direct political involvement was as Postmaster-General in Stuart's 1884 ministry but he was not comfortable in that office. 26 As a

23 J. Salomons to H. Parkes, 20.2.1872, Parkes Correspondence, Vol. 58, ML A 928, pp. 403-403A.
group, these solicitors had been among the front rank of lawyers in the Assembly, being noted for both the length and the energy of their services. They indicated, by their acceptance of seats in the Council, a desire to continue these efforts in more peaceful and secure surroundings. In general, they helped to consolidate the image of lawyers within the Council as men of experience and reputation and entitled to the public confidence.

Despite this personal calibre, however, the task which lawyers faced to reassert their influence and promote law reform was very formidable. The main obstacle continued to be the impotence of the crown law officers. At the root of the problem lay Parkes' decision to abolish the Solicitor Generalship in 1873. Though that resolution, carried only by the Assembly, did not have the force of law, the Constitution Act Amendment Act of 1884 omitted the Solicitor Generalship from 'the various offices under the Crown mentioned in that Act as capable of being held in conjunction with a seat in Parliament' and the position then legally ceased to exist. While many realised that law reform must suffer from the lack of a Solicitor General, the full significance of the abolition of the office was not spelled out until the 1891 report of the Public Service Inquiry Commission into the Attorney General's Department. Even then, Parkes never tabled the report and continued to insist that his decision to abolish the office remained popular with all except the legal profession.

The 1891 report pointed out that the functions of the Attorney

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27 See Chapter 2, pp. 80-82.
28 Weekly Notes Covers, 29.6.1899, p. xvii.
General's Department were two-fold. It was required to pronounce upon the legality of steps which other departments proposed to take as well as to carry out the detailed administration of justice in certain respects. It was far more a professional than a clerical department and, unlike other departments, was closely dependent upon its minister. The Attorney General himself had numerous responsibilities. As well as being legal adviser to the executive and all its departments, he was required to scrutinise and introduce legislation and to provide legal advice upon such matters to the governor. His duties as Grand Jury were 'most onerous and responsible' despite the relief afforded by the crown prosecutors at Quarter Sessions. His court appearances were restricted, particularly after the Assembly resolved in January 1875 that he should cease to appear in court on behalf of the crown. This lightened the Attorney General's official load but also denied him a large and lucrative field of professional practice.

Since the abolition of the Solicitor Generalship, the report asserted, these duties had become particularly burdensome. Every Attorney General had been 'compelled to delegate to other persons a portion of his duties', including the obtaining of legal assistance in dealing with cases submitted for his opinion. Further, the report questioned 'whether, if he is a member of the Lower House, and takes part in the debates, it is possible for him, in addition to his political duties, to perform even the whole of the

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30 A large section of the Report, which was never published, is reprinted as Appendix XIV of R. Parsons, 'Lawyers in the New South Wales Parliament, 1870-1890', pp. 548-56.
32 Ibid., p. 551.
work of advising Ministers upon questions referred to him for his opinion'. 33
In consequence, it recommended either that a Solicitor General should be
reappointed or some similar professional assistance be given to the Attorney
General. It envisaged that the Parliamentary Draftsman's duties would be
added to in several significant areas but that he would be helped by an
Assistant Parliamentary Draftsman in the future. 34

Contemporary evidence supports these conclusions that the crown law
officers were overworked and without adequate assistance. Edward Butler
considered that his duties were 'almost overwhelming' even in the first
Parkes ministry when he had the assistance of a Solicitor General. 35 William
Bede Dalley, who held the office on several occasions, argued before the
Assembly in 1884 that the government, overwhelmed with other public
business, could not be expected to bring in every piece of legislation to
reform the law, especially when there were so many other lawyers in the house.

33 Ibid.
34 Ibid., pp. 151-54.
35 Butler made this comment during debate on a resolution, brought forward
by Sir Alfred Stephen in 1879, which called for the revival of the
Solicitor Generalship so that the Attorney General would have time
to introduce 'useful legislative measures of reform'. Butler, in
support of Stephen, pointed out that 'it was an utter mistake to
say that it was not part of the Attorney General's duty to look after
the amendments and improvements of the law. What on earth could his
duties as Minister be, if he neglected such a duty as that? ... he
(Butler) ceased to be Attorney General (in 1873), and no Solicitor
General had been appointed, and from that time not only had there
not been any new legislation, but the legislation then partly passed
had been allowed to drop ... Without the assistance a Solicitor
General could give, nothing of the kind could possibly be done by the
Attorney General', S.M.H., 14.3.1879, p. 3.
capable of fulfilling that duty. Similarly, William John Foster suggested that the Attorney General could only attend to issues of law reform if relieved of some of his other duties. In November 1888 barrister Thomas O'Mara reproached the Assembly for taunting the Attorney General over his failure to bring in law reform as his official duties left him no opportunity to do so. Until 1875 the Attorney General did not even have the assistance of a lay secretary.

The position of Minister of Justice, which Parkes had substituted for the Solicitor Generalship in 1873, was of virtually no assistance to the Attorney General before the late 1880s. It was primarily an administrative post from which all legal questions were referred to the Attorney General.

36 Dalley made this comment in rejecting Alexander Gordon's claim that it was the government and not independent solicitor John McLaughlin who should have been responsible for the Supreme Court Appellate Jurisdiction Bill, R.S.W.P.D., Vol. 13, 1883-84, p. 4143. On another occasion, Dalley apologised to Manning for only notifying him officially the day before the Bar was giving Manning a dinner to celebrate his elevation to the bench. He excused himself saying 'I am really so overwhelmed with work that I sometimes forget my pleasures as well as my duties', W.B. Dalley to W.M. Manning, 10.5.1876, Sir William Montagu Manning - Papers, Vol. 4, ML MSS.246/4, pp. 219-220.

37 S.H.N., 26.9.1878, p. 3.

38 O'Mara made these remarks during the second reading of the Prosecutions for Perjury Amendment Bill, R.S.W.P.D., Vol. 35, 1888, p. 517.

39 Parsons, op. cit., pp. 269-70.

40 Joseph Docker, reflecting in June 1880 upon his two years (1875-77) as Minister of Justice, observed that 'having filled the office of Minister of Justice, although not a lawyer, (he) was able to speak as to the nature of the duties which that minister had to discharge. The office was not a legal one. The Minister had to control the various Courts of Justice, to deal with the establishment of Petty Sessions and District Courts. He had also to deal with various matters arising in connection with the administration of justice in the various Courts in reference to which he always had the benefit of the Attorney-General's advice', R.S.W.P.D., Vol. 3, 1879-80, p. 2695.
An individual lawyer who held that office, such as Sir George Innes, might have taken some initiatives but, prior to 1881, the portfolio also included Public Instruction at a time when the issue of education was of particular importance. Like the Attorney General, the Minister of Justice was not supported by staff with legal training until the late 1880s.

The other officer who might have assisted the Attorney General was the Parliamentary Draftsman. His duties included watching the course of English legislation and advising the Attorney General upon suitable amendments in colonial laws. Until 1878 it was a part-time position held by two barristers who retained the right to private practice and to hold other official positions. In that year, however, the government altered this arrangement and appointed Alexander Oliver as a new salaried Parliamentary Draftsman. He was to receive £1,000 per annum and the assistance of a clerk and messenger but was deprived of the right of private practice. His tasks included drafting bills ordered by ministers, watching the effects of both private members' bills and alterations made to bills by parliament, similarly preparing and scrutinising regulations and by-laws.

41 Parsons, op. cit., p. 272, claims that Innes displayed interest in comprehensive evidence law reform while Minister of Justice in 1880.

42 The important changes being made in the colony's education system during these years and in particular the Public Instruction Act of 1880 are considered by A. Barcan, A Short History of Education in New South Wales, Sydney, 1965, pp. 165 ff.


44 Ibid., p. 274.

45 The office had been in existence since 1856 but the duties attached to it were not clearly defined. C.K. Murray and F.W. Meymott were the first draftsmen, but by 1865 they had been replaced by W.H. Wilkinson and Alexander Oliver. In January 1870 C.J. Manning replaced Wilkinson. Oliver resigned in July 1874 to become Examiner of Land Titles and Manning resigned during 1875. G.M. Stephen then served as acting Parliamentary Draftsman until 1878, ibid., pp. 275-76.
and keeping track of imperial legislation possibly applicable in the colony.\textsuperscript{46} There was clearly considerable potential for the Parliamentary Draftsman to become involved in law reform,\textsuperscript{47} but any chance of this aspect of his work receiving priority was lost among numerous other politically important measures. Though nominally attached to the Attorney General, Oliver spent nine-tenths of his time working for the Colonial Secretary or the Department of Works and Finance.\textsuperscript{48} Any pleas which Oliver did make on behalf of law reform apparently carried little weight with ministries otherwise preoccupied.\textsuperscript{49}

Besides facing these difficulties, some barristers who acted as Attorney General must have found that the duties of the office were affecting their private practices. A graphic example was B.R. Wise who resigned as Attorney General in November 1887 only six months after he had assumed that office. Wise had been aware of the risk he was taking and had only accepted Parkes' offer on the advice of Salomons and M.H. Stephen that 'it would be to (his) advantage professionally'.\textsuperscript{50} Once in office, Wise made an important contribution to law reform by introducing both the Bankruptcy and

\textsuperscript{46} Ibid., pp. 277-78.
\textsuperscript{47} In line with his own blueprint for the office, Oliver's duties included 'making himself acquainted with the alterations from time to time in Imperial Statute Law and reporting thereupon (to the Attorney General) where any seem adapted to the requirements of this Colony', \textit{ibid.}, p. 278.
\textsuperscript{49} Parsons, \textit{op. cit.}, pp. 280-84, gives a detailed account of Oliver's unsuccessful attempts to reform the law of real property following the Real Property Act Inquiry Commission which reported in August 1879.
\textsuperscript{50} B.R. Wise to H. Parkes, 27.5.1887, \textit{Parkes Correspondence}, Vol. 60, ML A 930, pp. 147-48. Wise admitted that 'of course its a risk, but risks must be run; & I don't like shirking a responsibility, while I certainly rejoice at the opportunity of having a hand in Law Reform'.
Bills of Exchange Acts but his personal satisfaction in this regard was quickly offset by the loss in his professional income which was much greater than he had anticipated. Further, the disadvantage was:

- not in income only - but (in what is of great importance to a barrister, who has no private means), - in professional position. I find that other men are taking my place, & that every month that I am out of practice brings up some new competitor, who will make it more difficult for me to resume my old position.

Wise calculated that he would lose several years' seniority in point of practice if he remained out of active professional work for much longer. His situation was made more difficult by both the number of new appointments to the bench and the rapid expansion in the size of the Bar. There was occurring 'a complete redistribution of barristerial work, which, when it is once made, is not likely to be altered for many years'. Under such circumstances, a barrister might have been excused for devoting less than full attention to the heavy responsibilities of his office.

Another obstacle to renewed professional influence, and one closely related to the impotence of the crown law officers, was the political climate which worked strongly against much attention being given to law reform either by the government or private members. At least until the late 1880s law reform was politically unattractive. The *Sydney Morning Herald* pointed out, in response to certain law reform resolutions moved by Sir Alfred Stephen in

51 B.R. Wise to H. Parkes, 27.5.1887, *Parkes Correspondence*, Vol. 60, ML A 930, pp. 146-47. Wise said that in accepting office he had been 'guided mainly by the desire to enable the Govt. to have their law officer in the Assembly, in view not only of the desirability of this at all times, but of the special necessity for it at a time when large measures of law reform are being introduced'.


the Council in 1876, that governments were 'naturally disposed to leave on
one side' such issues. Questions of law reform neither made nor marred
the political prospects of a ministry. Stephen and other lawyers were
aware that it was 'a duty that created no enthusiasm in any party'.
Sometimes even to attempt law reform was decried as bad government because
it meant favouring the politically unimportant to the detriment of more
pressing issues. Charles Cowper, for example, faced this charge when he
attempted to bring in a lunacy bill at the recommendation of the 1870 Law
Reform Commission. Lawyers who wished to bring about reform were
constantly exasperated by governments engrossed in 'roads and bridges'
measures despite promises that particular reforms would receive attention.

As Robyn Parsons has demonstrated, governments only brought in
measures of law reform when they were urgent and unavoidable. Before the

54 S.M.H., 25.4.1876, p. 4.
55 Stephen made this comment during the second reading debate on Darley's
Equity Bill, N.S.W.P.D., Vol. 1, 1879-80, p. 474. In 1878 District
Court Judge Alfred McFarland had pointed out that law reforms were
neglected because 'no political end would have been gained, no
capital would have been made by their adoption ... no government cared
to trouble itself any further with such bills', A. McFarland, 'Law
offered another explanation in 1882 during the second reading of the
Criminal Law Amendment Act. It was not difficult, he suggested, to
understand why it took so long to pass since it was 'not very likely
that honourable members would take home the ... Bill (which had 464
clauses) and hug it to their bosoms as a species of light reading to
enjoy on an evening before going to bed', N.S.W.P.D., Vol. 7, 1882, p. 397.
56 Parkes, for instance, complained that 'other measures which had been
promised time after time, and which bore a more immediate relation to
the general affairs of the country were postponed, while we were asked
to devote our attention to bills of this kind', S.M.H., 16.9.1870, p. 3.
57 For a detailed analysis of the political priorities of these years, see
generally P. Loveday and A.W. Martin, Parliament Factions and Parties,
Melbourne, 1966.
late 1880s the chances of passing any comprehensive changes through the Assembly were compromised by the time that would be necessary for debating them and the little political advantage to be gained from such an exercise. Reforms, if at all, could only be piecemeal. When George Reid introduced his law reform resolutions in December 1890, he referred pointedly to a conversation being held on the ministerial bench while he spoke. It was, he insisted, about a series of roads and bridges to be built in some remote districts in the interior.59 Amid such priorities, the Articled Clerks' Journal appeared rather naive when it observed that, with the large number of lawyers in parliament, 'it is surprising that more strenuous efforts are not being made to bring the statute law of this colony abreast of those of her sisters and of the mother country'.60

Even when a proposal for law reform did attract attention, its chances of success were greatly restricted by popular prejudices against the profession. According to those radical politicians who wished to reform the law, the legal system was devised to rob the public for the benefit of lawyers through its unnecessary technicalities and monopolistic practices. They considered that the legal profession was a barrier standing in the way of meaningful reform and that any proposals by lawyers would not give priority to the public interest. Laymen, wrote de Salis, 'have a right to transparent and real justice'. He compared the relationship between lawyer and layman to that between Mexican priests and peasants, where the former should have 'taught and advanced religion instead of slaughtering their credulous flocks'.61 On another occasion, he complained in the press that

59 N.S.W.P.D., Vol. 50, 1890, p. 5814.
61 L.F. de Salis to A. Oliver, 2.3.1887, Alexander Oliver Papers, Box K.
'it is cruel and impolitic that a dangerously protected corporation should
fatten on the glorious uncertainty of the law'.

Many others echoed this refrain. In 1881 Angus Cameron, the first
working man's representative in the Assembly, expressed his suspicion of law
reform measures introduced by lawyers. During debate on the Metropolitan
Magistrates Bill of the same year, W.F. Martin, a commission agent and
produce merchant, said that he viewed the strength of lawyers' support for
the bill 'with great suspicion'. He feared that solicitors were anxious to
fill the new positions of stipendiary magistrates with which the legislation
intended to replace the justices of the peace. Michael Fitzpatrick and
Daniel O'Connor took up this cry. The former tried to have the third
reading rejected by pointing out the 'significant' solidarity of lawyers in
favour of it. Two years later Thomas Garrett attacked the Judges' Salaries
and Pensions Bill as a demand by the legal profession not approved by the
public and rejected previously by the Assembly. John Stewart argued that
'the whole arrangement looks as if it were devised for the convenience of


During the second reading of the Justices Appeal Bill, Cameron
pointed out that 'I am somewhat disinclined to give my support to
measures of this character, introduced by members of the legal
profession, because I always recognise the fact that in most of the
measures which they introduce they generally do something or other
to produce more litigation', N.S.W.P.D., Vol. 5, 1881, pp. 1035-36.

64 N.S.W.P.D., Vol. 6, 1881, pp. 2233-34. Martin also asked from whom
can a poor man expect to get justice if not from justices of the
peace. He could not expect it 'from the legal gentlemen who have
no idea of what sort of creature a poor man is', ibid., p. 2234.

65 Ibid., pp. 2309-10. O'Connor dubbed it a 'miserable bill to suit
the whims and caprices of a few half-educated lawyers', ibid.,
p. 2304.

the judges and the profit of lawyers'. In June 1884 A.G. Taylor pointed out in support of the Petty Sessions Jurisdiction Extension Bill that it would benefit the public by lessening legal expenses and would 'not damnify anyone except lawyers'. Even the great bankruptcy legislation of 1887 was not immune from such criticisms. George Dibbs, the Protectionist leader, attempted to counteract the strength and unity of lawyers' speeches in that debate by demonstrating how the legal profession would benefit financially from the measure.

The real difficulty was not that the ultimate objects sought by the lawyers and their critics were so different, but that their approaches to questions of law reform varied. Lawyers were far more aware of the difficulties and technical problems associated with law reform. In 1870 country solicitor Albert Gorrick lodged 'a humble protect against a wholesale, undeserved, and somewhat bitter attack upon colonial law and lawyers, and to show in a poor way how much easier it is to theorise upon law reform than to suggest or carry out a scheme of practical improvement'.

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68 The bill itself sought to extend the jurisdiction of Small Debts Courts from £10 to £30. This change, Taylor believed, would mean that 'people will not have to pay £60 to recover £30 as in the District Courts. The bill will give the poorer classes an opportunity to get justice without paying professional men, who, being employed to prevent clients from being robbed, had a monopoly of robbing them themselves', *H.S.W.P.D.*, Vol. 13, 1883-84, pp. 4096-97.

69 Dibbs observed that 'we know that the bulk of the assets which go into the Insolvency Court are spent in litigation which is brought about by the legal fraternity, numbers of whom have spoken approvingly of this bill. I venture to think that this bill will give an enormous amount of occupation to a certain section of the legal community', *H.S.W.P.D.*, Vol. 28, 1887, pp. 268-69.

70 *S.M.H.*, 31.5.1870, p. 3.
Abbott candidly acknowledged that whatever course political lawyers adopted, they would be sure 'to have improper motives attributed to them'.

Certainly the cautious and apparently unimaginative approach of the profession, though it aimed ultimately to promote cheaper, simpler and more expedient law, would have appeared quite inadequate to those visionary radicals who had witnessed the enormous strides taken by the recent Judicature Acts in England. That legislation had swept away the old divisions between law and equity and abolished many of the technicalities which frequently hindered as much as helped the course of justice. The radicals, who saw no reason for delaying similar changes in the colony, did not understand the lawyers' reticence and it was upon this issue above all that they completely lost contact with reformers inside the profession.

Lawyers were not totally opposed to following the English example but they were divided among themselves on the legal virtues and practical utility of the Judicature Acts. The 1870 Law Reform Commission had sidestepped the question of the fusion of law and equity despite wide public consensus that this was one of its primary objects. When Darley introduced his Equity Bill late in the 1870s, he stressed that its object was simply to make good certain defects in practice and procedure. It would simplify proceedings allow evidence to be given in court instead of at an elaborate pre-trial before the Master, and abolish certain technical objections which had previously caused injustice. At the same time Darley rejected the introduction of the English judicature system which he considered to be

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71 N.S.W.P.D., Vol. 6, 1881, p. 2310.
73 S.M.H., 7.6.1871, p. 4.
'mistakenly conceived and clumsy in operation'. Sir Alfred Stephen shared this distrust although he did believe that equal relief should be available in either branch. William Owen and A.T. Holroyd, the Master in Equity, also supported Darley's proposals, but Owen made clear that he hoped the judicature system might be introduced in the near future. Similarly, W.J. Foster had no doubt that the substantive difference between common law and equity should be broken down as far as possible. Darley's bill was finally agreed to as an immediate necessity and the potential

75 Stephen believed that the English reformers had made 'a great bungle' in amalgamating the courts themselves, ibid., pp. 474-75.
76 Owen, the colony's leading equity barrister, was asked by the Select Committee which considered the bill whether he would advise them 'to proceed with Mr. Darley's Bill or to adopt the English Act'. He replied that 'if there was any chance of the Judicature Act passing in its entirety I would very much prefer seeing it adopted; but if we are to wait a number of years before that is introduced I should like to see this bill of Mr. Darley's passed as soon as possible', V. & P. (L.A., N.S.W.), 1879-80, Vol. 3, p. 60. Holroyd's support for Darley's bill was also given in evidence before the Select Committee, ibid., p. 42.
77 Foster pointed out that 'if a suit were entered in the common law jurisdiction, and a question arose which required a reference to equity, the suit on the common law side of the Court must be stopped altogether, and a suit entered in equity, or there must be two suits entered before the principles of equity could be applied to the suit at common law. The effect of the Judicature Act was to avoid all that routine ... He quite agreed with ... Darley, that absolute fusion would be very difficult, if not impossible, but he did not admit that they could not be fused to a certain extent so that we should no longer have two Courts guided by wholly different principles, one Court interfering to prevent the other from carrying out the law'. Foster's main concern with Darley's bill was that by creating a separate equity judgeship it might tend to produce the opposite effect to what was intended, N.S.W.P.D., Vol. 1, 1879-80, pp. 476-77.
benefits of the judicature system were left open for further discussion. 78 One section of the Equity Act, which apparently took a large step towards fusion by permitting the determination in equity of legal titles and rights, was soon limited by judicial interpretation to the granting of relief at common law only when incidental to an equity suit. 79

Such differences of opinion were not quickly resolved. When Sir Alfred Stephen asked Augustus Nash, a barrister recently arrived from England, to peruse his draft bill to amalgamate and harmonise the complexity of laws governing the Supreme and Circuit Courts, the latter suggested that such a bill should form 'part of a complete (and) all-embracing reform of our judicature system'. 80 Nash admitted that he had been suckled on the British reforms and that he believed New South Wales needed a Judicature Act under which 'the anomalies of the titles good in Equity (and) bad in Law should no longer exist'. 81 At the same time he was forced to admit that they lived in 'a conservative colony' and that perhaps Stephen's bill was all that they

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78 The Select Committee concluded that 'the present system should be supplanted by the introduction of a Bill embodying the principles of the Judicature Act of England, so far as they may be found to be applicable to the circumstances of this Colony...'. As it would take considerable time to pass 'a bill of so comprehensive a character as the Judicature Act' and as 'an urgent necessity exists for legislation on this subject of Equity reform', the Committee recommended that Darley's bill should be passed immediately. V. & P. (L.A., N.S.W.), 1879-80, Vol. 3, p. 15.

79 These events are considered in detail by Bennett, *A History of the Supreme Court of New South Wales*, pp. 102-03. This did not, however, mean that the judges were all opposed to the introduction of the judicature system in New South Wales. Sir William Manning had specifically called for the introduction of the recent English reforms, including the Judicature Acts, when he accepted his seat on the bench in 1876, W. N. Manning to the Attorney General, 26.4.1876, Sir William Montagu Manning - Papers, Vol. 4, MSS.246/4, p. 127.

80 A. Nash to Sir A. Stephen, 24.11.1884, Sir Alfred Stephen - Papers, ML uncat. MSS.211/2.

81 Ibid.
could expect to pass. By 1884 Stephen himself had been converted to
favouring the fusion of law and equity but other influential lawyers
continued to doubt the advantage of reform in this direction. When George
Reid introduced his famous call for law reform in 1890, he argued that the
English system swept away all mystical and expensive technicalities. In
reply, Bruce Smith made clear that while he agreed with Reid's view of the
'utterly chaotic condition' of colonial law, he was by no means convinced
that the English example was the magical solution it was alleged to be.
Several years earlier, during debate on the District Courts Act Further
Amendment Bill, Burdett Smith and Pigott had spoken out strongly against a
provision to permit equitable defences to be pleaded in the District Courts.
They argued that without the strict controls possible in the Supreme Court

82  Ibid.

During debate on the Appellate Jurisdiction Bill, Stephen acknowledged
that 'what, years ago, he had opposed, but what he was now in favour
of... was called a fusion of law and equity', N.S.W.P.D., Vol. 14,
1884, p. 4571.

83  Reid referred to 'our double jurisdiction of a court of common law
in one part of King-street and a court of equity 200 or 300 yards
further off. There you have before you the work of this ancient
system which sprang up centuries ago. You have two buildings staring
you in the face. You have to go to one of those buildings if you want
your case considered in one way; you have to go to the other building
if you want your case considered in the other way; and the rules of
the two courts are conflicting. What is law in one court is not law
in the other court ... (even) poor old conservative England has swept
away all those venerable legal cobwebs', N.S.W.P.D., Vol. 50, 1890,

85  Bruce Smith, who had received his legal training in England, said
that he 'should require very substantial evidence to induce me to
change from our present system', ibid., p. 5821. Even in England,
Smith suggested, there were 'very grave doubts... as to whether it
has really simplified matters, because, although the language in which
the pleadings were framed was of a highly technical character, under
the old system introduced in 1851 by the common law procedure acts,
this new system introduced under the judicature acts seventeen years
ago, although marked by very homely phraseology, is liable to exactly
the same points being taken as under the old system', ibid., p. 5825.
such a clause would be useless and lead only to further injustice. As late as September 1894 Trickett could suggest to Attorney General Simpson in the Legislative Council that, while a proposed clause might be in the English Judicature Act, that legislation was not generally considered to be a success in comparison to the Common Law Procedure Act which had preceded it. These disagreements between leading lawyers upon the virtues of the most immediate and logical model for comprehensive law reform greatly restricted the chances of concerted professional initiatives on more than piecemeal measures.

Even piecemeal law reform itself occasionally provoked rifts in professional consensus. Gould introduced his District Courts Act amendments in 1883 to meet several immediate difficulties but he did not pretend that they would solve all the problems with that legislation. That, he considered, was the task of a comprehensive government measure. Attorney General Cohen, whose opposition would almost certainly have brought the bill's defeat, gave it his support because there was little hope of the government bringing in a comprehensive measure in the near future. Burdett Smith, on the other hand, though in full agreement with the object sought, opposed the legislation because it would take pressure off the government to

86 N.S.W.P.D., Vol. 11, 1893-94, pp. 1341-43. On the other hand, A.J. Gould pointed out that Judge Forbes' draft bill had allowed for equitable defences before the District Courts similar to those proposed here and S.A. Stephen, another solicitor, wanted to make an amendment to enable the plaintiff as well as the defendant to use an equitable counter claim, ibid.

87 The occasion was the second reading of Simpson's Supreme Court Bill which sought to introduce several procedural changes modelled upon the English Judicature Act, N.S.W.P.D., Vol. 72, 1894-95, p. 727.


89 Ibid., pp. 631-32.
introduce comprehensive reform in that area of the law. A similar though less dogmatic approach was taken by Sir William Manning during debate on the 1874 Insolvency Laws Amendment Bill. He argued that if there had been any likelihood of comprehensive insolvency reform he would not have supported this piecemeal legislation, but, as things were, 'anything that cheapened and expedited the law would be an advantage'.

With little assistance from the crown law officers, an unfavourable political climate, and disagreements with others and among themselves as to how best to reform the law, the legal profession thus faced an extremely difficult task to restore its own influence and to promote many needed changes in the substantive law and the administration of justice. To succeed lawyers needed not only high personal standing but a strong commitment to the cause of law reform and harmonious relations among themselves so that their energies might be concentrated towards specific ends. By the 1880s these qualities were, as we have seen, becoming evident among lawyers as they realised their colonial identity and common interests and increasingly these strengths were flowing through into the profession's political performance. Though they were not by themselves sufficient to restore law reform to the forefront of political priorities, these qualities did allow lawyers either by pressure on the government or through their own initiatives to rectify some of the most glaring faults and inadequacies in the colony's laws and legal system. When law reform assumed renewed political importance in the late 1880s,

90 Ibid., p. 635. Burdett Smith's opposition was provoked by the fact that the government had possessed a comprehensive draft bill to amend the District Courts Act since 1880. It had been drafted by District Court Judge Forbes and the government had already laid it aside on several occasions to give attention to other more pressing business, Parsons, op. cit., pp. 235-38.
91 S.M.H., 26.3.1874, p. 2.
lawyers were well placed to seize the opportunity and they quickly demonstrated their ability both to initiate law reform measures and to secure their passage through the parliament. The extent to which the legal profession had regained its political influence by the late 1880s and the link between this renewed authority and the changes which had taken place within the profession is best appreciated in the context of the fortunes of law reform between 1870 and 1893.

In general between 1870 and 1887 governments tended to introduce measures of law reform only when a mistake or an inadequacy became apparent in either the substantive law or the administration of justice. The Promissory Oaths Declaratory Act of 1873, for instance, rectified a situation whereby Dalley and Salomons, because of confusion as to the proper procedure, had been sworn illegally as members of the Legislative Council and were thus liable to severe penalties. Another example was the Felons’ Apprehension Act of 1879 which aimed, particularly through its provision of punishment for those who harboured felons, to help capture the Kelly gang.

Similarly in 1884, Attorney General Dalley introduced his Matrimonial Causes Act Amendment Act to remove an anomaly shown up in the protracted and expensive law suit Horvitz v. Horvitz. That trial had revealed that while the principal act required a jury to ascertain the damages sought from a co-respondent, it did not provide the co-respondent with the right to take part in the striking of that jury. There were many other similar instances.

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93 42 Vic. No. 9; S.M.H., 21.2.1879, p. 3.
94 48 Vic. No. 3; N.S.W.P.D., Vol. 12, 1883-84, pp. 2144 ff.
95 Robyn Parsons (op. cit., pp. 118-90) provides a detailed analysis of all 'professional interest' legislation introduced by governments, lawyers and laymen between 1870 and 1890. She demonstrates clearly that at least until the late 1880s most measures of law reform proposed by governments were simply to overcome deficiencies which had become obvious in either the substantive law or the administration of justice.
Ministries would clearly have been irresponsible if they had not taken steps to correct such errors or omissions, but at the same time they showed little interest or initiative in rooting out the fundamental causes which were presenting ever increasing difficulties to the smooth and efficient administration of justice.

While most government initiatives in law reform were thus matters of urgency, ministries did introduce and pass several measures of greater substance even before the revival of political interest in law reform in the late 1880s. There was certainly no wholesale adoption of the recommendations of the 1870 Law Reform Commission but gradually several of its proposals did reach the statute book, particularly during the 1880s. Significantly, however, the initial responsibility for these innovations lay not with the government but with individual lawyers in either the Assembly or Council whose persistence and foresight kept the measures before the public until the government was prepared to lend its support. This point is well illustrated by several of the most important pieces of law reform passed by governments during these years.

The first major contribution by a government to the cause of law reform was the passage of the Metropolitan Magistrates Act of 1881. That act abolished the existing practice of using unpaid and untrained justices of the peace in magistrates' courts within the metropolitan area. In their place, it authorised the appointment of skilled stipendiary magistrates.96 The legislation was in one sense a necessary complement to the new Licensing Act but, at the same time, the growth of business in the Small Debts Courts was forcing the government to recognise the practical necessity of appointing

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96 45 Vic. No. 17.
permanent trained officers to adjudicate in these inferior tribunals. 97

On this issue it was above all Trickett who stirred the ministry's conscience. He began his campaign during the debate on the Address in Reply at the opening of the session. Trickett proposed that the government should undertake a wide variety of reforms, including the long-awaited consolidation of the criminal law, amendment of the insolvency law, and the Real Property Act. 98 In particular he saw a need to appoint stipendiary magistrates in the police courts and he pressed for the introduction of this scheme on several occasions until the government brought in its own bill. Trickett's speech during the second reading of that bill in the Assembly was perhaps even more convincing than that of Foster, the Minister of Justice, whom he followed. 99 Trickett, who was not a member of the government, did not need, of course, to consider the state of the factions within the house or to placate the strong opposition from the many honorary magistrates who served there. One member of the Assembly at least considered that the bill was primarily the result of Trickett's perseverance. 100 Without doubt, a ministry dependent upon the support of factions could easily have been tempted to lay aside such a measure if its omission would have passed without comment. 101

Two years later came the great Criminal Law Amendment Act first drawn

97 The second reading debate on the Metropolitan Magistrates Bill is considered in detail by Parsons, op. cit., pp. 192-210.

98 N.S.W.P.D., Vol. 6, 1881, p. 22.

99 Trickett's speech is recorded in N.S.W.P.D., Vol. 6, 1881, pp. 2209-12. It should be compared with that of Attorney General Foster who went to great lengths to placate the honorary magistrates in the Assembly, ibid., pp. 2203-06.

100 The member was A.H. Jacob, ibid., pp. 2220-21.

101 The resentment of honorary magistrates towards the bill can be seen clearly in the speeches of M. Fitzpatrick (ibid., pp. 2212-13) and J. Dillon (ibid., pp. 2206-09).
up by the 1870 Commission and now introduced by Attorney General Dalley. The driving force behind the bill from first to last remained, however, Sir Alfred Stephen, who had first taken it in hand as President of the Law Reform Commission. In 1872 and 1873 Edward Butler, then Attorney General, had twice tried unsuccessfully to pass this enormous measure of 464 clauses, many of which were based on the English consolidated Criminal Law Statutes of 1861. Upon his retirement from the bench in 1873, Stephen threw all his energies behind the bill and kept up a constant stream of correspondence both in the press and privately with members of government. Attorney General Innes again introduced the measure in November 1874 but it lapsed in the committee stages due to the lack of enthusiasm among members. Dalley also tried to pass the bill in 1876 when he was Attorney General but on this occasion it foundered amid controversy over the new definition of murder.

The potential benefits of such a reform were continually submerged by either indifference or uninformed petty objections. Such difficulties infuriated Stephen but he persisted and the bill, after being introduced again

102 Bennett, op. cit., pp. 73-74.
103 According to Stephen, 'for about thirty years he had kept a book at his side, in which book he had noted down difficulties arising in the administration of the law. That book was laid before the law commission, and upon that and upon reference to the codes of other countries this bill had been framed', S.M.H., 18.1.1877, p. 2.
104 Bennett, op. cit., pp. 73-74.
107 Ibid., pp. 210-11.
in 1881 and 1882, passed into law in Dalley's hands in 1883.\textsuperscript{108}

Not until 1887 did governments begin to give priority to matters of law reform and to take important initiatives on their own behalf. In that year the Bills of Exchange legislation signalled renewed interest in this much neglected area. Attorney General Wise, introducing that bill, expressed his hope that this was the beginning of 'a long series of measures intended to improve the practice and substance of our law'.\textsuperscript{109} He cited the unnecessary complexity, delay and expense of the law as support for his belief that the colony's legal system was 'probably more behind the times than that of any large community of the English speaking people'.\textsuperscript{110} This reform and its companion, the Bankruptcy Act, had received considerable attention from reformers within the profession since the passage of the 1869 Bankruptcy Act in England, but during the intervening years ministries had refused to support the introduction of more than piecemeal changes in this direction.\textsuperscript{111} Their change of attitude, in combination with support from lawyers and the Chamber of Commerce, assured not only the introduction but

\textsuperscript{108} The Bill was introduced into the Council again in 1881 by Innes, then Minister of Justice, but it became bogged down in a discussion of appropriate punishments, \textit{N.S.W. P.D.}, Vol. 5, 1881, pp. 221 ff. It passed in the Council but lapsed in the Assembly when parliament was dissolved. Attorney General Wisdom reintroduced the bill into the Assembly the following year with a number of changes and improvements. These included a reduction in the number of offences subject to the death penalty and in the punishments awarded to juvenile offenders, \textit{N.S.W. P.D.}, Vol. 7, 1882, pp. 388 ff. The Assembly passed the bill with some amendments and, guided by Stephen, it was progressing well in the Council when the session ended. When the new session opened in January 1883 the Criminal Law Amendment Bill quickly passed into law as 46 Vic. No. 17. In these later years Stephen worked closely with W.C. Windeyer on perfecting the bill, cf. entry for 4.11.1882, \textit{Sir Alfred Stephen's Diary}, Part 19, 1882, ML MSS. 777/2, p. 176. See also entries for January 1883, \textit{Ibid.}, Part 20A, pp. 1 ff, which show the vigour with which Stephen continued to promote the Criminal Law Amendment Bill.

\textsuperscript{109} \textit{N.S.W. P.D.}, Vol. 27, 1887, p. 2392.

\textsuperscript{110} \textit{Ibid.}, pp. 2393 ff.

\textsuperscript{111} Bennett, \textit{A History of the Supreme Court of New South Wales}, pp. 119-21.
the relatively easy passage of these measures.\textsuperscript{112}

The Bills of Exchange Act was an almost exact copy of English legislation passed in 1882. It codified the entire law relating to bills of exchange, cheques and promissory notes, both the statute and the common law.\textsuperscript{113}

Most surprisingly, at the request of Attorney General Wise, the Assembly allowed the bill to pass through the committee stages without a single amendment. This, Wise contended, was necessary if English judicial decisions on the code were to be applicable.\textsuperscript{114} The success of this unusual course was made possible by the unanimous support of the leading lawyers in the Protectionist opposition, J.P. Abbott and Burdett Smith. They fully endorsed the utility of the new code and successfully overcame the scepticism of Protectionist leader George Dibbs.\textsuperscript{115} The Bankruptcy Bill witnessed a similar triumph of professional over party interest. It was perhaps even more significant because the bill, which essentially amended and consolidated the law relating to insolvency and bankruptcy along the lines of 1883 English measures, also provided for the appointment of an additional Supreme Court judge.\textsuperscript{116} This Judge in Bankruptcy was to succeed the Chief

\textsuperscript{112} The interest of the Chamber of Commerce in commercial law reform during these years is discussed by Parsons, \textit{op. cit.}, pp. 244 ff.

\textsuperscript{113} 51 Vic. No. 2.

\textsuperscript{114} Wise gave his assurance that the bill was 'really only a codification of the existing law, and further, that the codification is in such a form as is really likely to lessen disputes instead of aggravating them', \textit{N.S.W.P.D.}, Vol. 27, 1887, p. 2394.

\textsuperscript{115} Burdett Smith assured Dibbs that he had compared the bill line by line with the English statute, \textit{ibid.}, p. 2395. Abbott, who was at that time the elected leader of the Protectionist party, stated that the measure was so perfect that it could be allowed to pass without amendment, \textit{ibid.}, p. 2396.

\textsuperscript{116} 51 Vic. No. 19, s. 127(1). The judge received full power (s. 130) to decide all questions of priorities, and all questions whatsoever, whether at law or in equity or of fact, in any case of bankruptcy within his cognizance.
Commissioner of Insolvent Estates, thus making bankruptcy matters the direct responsibility of the Supreme Court and not simply of 'a ministerial officer as the court's delegate'. Once again Abbott and Smith gave unqualified support to the Freetrade Attorney General and clashed with their recalcitrant leader. Dibbs, in a vain endeavour to halt the bill, was forced to point out the cohesion of the profession in support of it. Law reform was once again taking a front seat among political priorities and it was doing so largely through the influence of a united approach by those lawyers serving in the parliament.

In the meantime, the legal profession had not been content to sit back and wait for the government's lead. Apart from the pressure which, as we have seen, was placed upon the government to introduce several large measures of law reform, individual lawyers had been doing their best, despite the unfavourable conditions, to fill the legislative gap neglected by the government. Frequently their measures resembled those of the government in their piecemeal solutions to immediate difficulties. However, the perseverance and notable cohesion of the profession upon many questions of law reform also enabled the passage of several more comprehensive bills. Early among these was Darley's Companies Act of 1874. Darley had first

117 Bennett, op. cit., p. 121.
118 Burdett Smith moved that the second reading be adjourned for a week to give members an opportunity to study the bill more closely. Wise agreed to this but rejected an amendment moved by Dibbs to postpone the debate for three weeks. Both Abbott and Smith supported Wise to defeat Dibbs' motion, N.S.W.P.D., Vol. 28, 1887, pp. 206-08. When the debate resumed, they strongly commended both the principles of the bill and its clarity of expression, ibid., pp. 258-61.
119 Ibid., pp. 268-69.
120 37 Vic. No. 19. Alexander Campbell, in fact, was responsible for guiding the bill through the Council but he emphasised in moving the second reading that it was Darley who was responsible for putting the bill into its present form, S.M.H., 12.2.1874, p. 2.
introduced the bill in 1870 to provide more efficient and straightforward guidelines for the incorporation, regulation and, if necessary, winding up of companies. He was influenced by the English reforms of 1867 which had been copied in Victoria and Queensland and by 'the large number of joint stock companies which had been lately called into existence'. The act's 250 clauses were to prove a great boon to industrial expansion and in particular to the building industry. During the same parliament, David Buchanan's Matrimonial Causes Act laid the foundation of the colony's divorce law. It gave the Supreme Court a jurisdiction in matrimonial causes exercisable 'in like manner as the other powers jurisdictions and authorities given to or vested in the Supreme Court'. These powers were to be exercised by the Chief Justice or a designated puisne judge. Other reforms of significance sponsored by lawyers during the 1870s were George Innes' Innkeepers' Liability Act of 1875 and his Further Evidence Amendment Act of 1876. The former regulated the liability of innkeepers for the property of guests left with them for safekeeping, and the latter removed several defects in the provisions regulating who was liable to give evidence and the nature of the evidence which they might give.

In 1880 Darley pushed through another major reform with the successful passage of his Equity Act. This measure had begun with the Law Reform

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121 Ibid.
124 39 Vic. No. 9; S.M.H., 20.5.1875, p. 2.
125 40 Vic. No. 8. Its main aims were to allow specific evidence to be given about the character of an accused person, to enable parties to actions for breach of promise to give evidence, and to abolish the procedure of asking witnesses whether they would believe other witnesses upon their oath, S.M.H., 10.3.1876, p. 2.
Commission ten years earlier, had been introduced unsuccessfully by Attorney General Butler in a revised form in 1873 and taken in hand by Darley in 1879. As already noted the question of the fusion of law and equity was a major point of disagreement among law reformers within the profession but Darley's immediate solution to a jurisdiction which was 'dilatory, expensive, ruinous to suitors and not in accord with the judicial progress of the age' received support as a step in the right direction.

Before the act, no new claims had been lodged in the Equity Court for four years. After its passage, the number of claims jumped from 35 in 1880 to 224 in 1890, and orders and decrees also went up dramatically. Sir William Manning found the work far more than a single judge could cope with without assistance. Just prior to Darley's bill, Andrew Hardie McCulloch, a solicitor, sponsored the Partition Act which enabled the court to order the sale rather than the partition of jointly owned properties. In addition, William Charles Windeyer, before he became Attorney General, successfully proposed legislation affecting both common carriers and married women's property. The first regulated the position and liabilities of carrier of goods in line with English precedents, while the second, also based on English statutes, entitled married women to have control over

126 Bennett, op. cit., pp. 101-03.
127 See pp. 343 ff.
128 The number of orders and decrees rose from 93 in 1881 to 712 in 1891. These changes can be seen clearly in the Statistical Registers of New South Wales, 1875-1890.
129 W.H. Manning to the Minister of Justice, 22.12.1886, Papers re Supreme Court Judges, 1876-1884, A.O.N.S.W., 7724.
130 41 Vic. No. 17; S.M.H., 16.3.1878, p. 3.
131 41 Vic. No. 21; S.M.H., 4.5.1878, p. 3.
property which was either their own by right or gained by their own
exertions. All these measures proved of considerable benefit to the
expansion and commercial prosperity of the colony. Other substantive
measures introduced by lawyers during the early 1880s echoed these same
priorities and were generally drawn from tried British examples. By this
time also the government was beginning to be more amenable to professional
pressure as witnessed by the Metropolitan Magistrates and Criminal Law
Amendment Acts.

Considering the need which clearly existed, but which was seldom
officially acknowledged, for the simplification, consolidation and updating
of most areas of colonial law, the total number of measures passed before
the late 1880s was not enormous. However, within the constraints which were
operating against law reform, the success of the legal profession both on its
own behalf and through pressure on the government was considerable,
particularly in the 1880s. Despite the accusations of their critics, the
measures which the lawyers put forward did seek in general to facilitate the
law in its application to a commercially based society, cutting down on
expense and delay and simplifying procedure. Though there were other
factors which by the late 1880s helped to push law reform back into the
political spotlight, the persistence and the cohesion of political lawyers

132 42 Vic. No. 11. Darley, supporting Windeyer, pointed out that the
bill would avoid the situation where 'a worthless dissolute husband
lived on his family until he abandoned them; then his wife became
the bread-winner ... She became able to put by money for the future,
or opened a shop, and, by industry, was able to support her family.
The husband, hearing that she was in a better position than that in
which he left her, again deprived her of all that she had', S.M.H.,
31.1.1879, p. 3.

133 This is the conclusion reached by Robyn Parsons, op. cit., pp. 187-88,
after her exhaustive investigation of professional interest legislation
during these years.
was fundamental to this process.

Between 1887 and 1893 the movement for law reform made even further headway. During the election campaign of February 1889, Dibbs committed his Protectionist party to considering measures designed 'to make legal procedure more speedy and less costly'. The following year George Reid, Parkes' rival for leadership of the Free-trade party, moved resolutions in the Assembly to impress upon the government the urgent need for reform of the Supreme Court's civil jurisdiction. The proceedings in that branch, he asserted, were 'antiquated in form, complicated and uncertain in ... operation, and unnecessarily expensive to all persons seeking justice, whether at law or in equity'. In Reid's view, there was a need not only to consolidate colonial statute law but to remove the ambiguity which existed as to which imperial legislation applied to New South Wales under 9 Geo. IV, c. 83. Many other colonies had followed the English example in sweeping away the technicalities, the 'mystical forms of expression' - 'this sort of legal freemasonry.' It was parliament's duty, Reid argued, to take similar steps for the benefit of New South Wales. His resolutions received unanimous support and were strongly approved by the other lawyers who spoke

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134 S.M.H., 23.2.1889, p. 4.
135 Reid's resolutions called for the appointment of a commission to consolidate and, 'when expedient', amend the colony's statute law. He was especially concerned to clarify which British statutes applied to New South Wales by virtue of 9 Geo. IV, c. 83, N.S.W.P.D., Vol. 50, 1890, p. 5809.
136 Ibid., pp. 5810-17. Reid argued that 'surely it is bad enough that our laws should be so expressed that they are difficult of being understood, but it is worse still that many of these ancient statutes to which I have referred are in this position: that whether they are law or not is a circumstance which can only be discovered at the end of a case'.
to the motion. No one pretended that the solution would be easy but the proposals went some way towards dispelling the lethargy of a parliament 'plagued as it is by a peculiar sort of statesmanship which revels in talk, and in the art of busily doing nothing'.

Even the Parkes ministry, which was by no means known for its sympathy with law reform, was beginning to display more interest in the issue. It passed the Probate Act of 1890 which was one of the most significant changes of the period. Gould, the Minister of Justice who moved the second reading of the bill in the Assembly, referred pointedly to the fact that ecclesiastical procedure was perhaps the most antiquated of all and thus the proposed legislation was an important step in the directions suggested by Reid's notice of motion. 'Although the bill makes several important changes', he said, 'it has also the great advantage of consolidating and putting the law in an intelligible form'. The bill had originally been drawn up at the instance and under the supervision of Sir William Manning, then Primary Judge in Equity, but had not been included in the government's programme.

Manning, who had by then retired from the bench, tried to carry the measure

J.H. Want pointed out that more was needed than a royal commission which would inquire into the question but was unlikely to produce positive results. He wanted certain people appointed directly to carry out the consolidation, ibid., pp. 5818-19. Bruce Smith suggested that the commission should consist of the judges and three or four members of each branch of the profession. He urged that the object should be purely to consolidate the existing statute law without amendments, because this was the only chance to get the necessary new legislation through parliament, ibid., pp. 5819-26.


Bennett, A History of the Supreme Court of New South Wales, p. 139.
as a private member's bill in 1888 but was unsuccessful. The following year Charles James Manning, a relative of Sir William's and the bill's original draftsman, had taken up the matter upon his elevation to the bench. He complained to Gould that 'not a week passes without my having to express publicly in court my hope that the Probate Bill now in your hands may speedily become law'.

Manning's arguments, together with several requests from the Chamber of Commerce and the introduction of two smaller bills to alleviate the most pressing difficulties, convinced the government that a comprehensive measure was necessary. The Probate Act, as a result, consolidated and amended the law relating to probates and letters of administration, the succession of real estate in cases of intestacy, and the preservation and management of the estates of deceased persons.

The early 1890s produced intense activity in law reform. Both lawyers and government gave their attention to a wide variety of matters all aimed to improve the law and facilitate the administration of justice. These ranged from Reid's Partnership Act which codified the law upon


142 Bennett, op. cit., p. 140. One of the two piecemeal measures, introduced by L.F. Heydon, mainly concerned foreign probates and administration, while the other, moved by Thomas Walker, aimed to abolish the need to approach the court by motion.

143 54 Vic. No. 25 established a probate jurisdiction to replace the Supreme Court's former 'ecclesiastical' jurisdiction. It was to be exercised by a Probate Judge who could sit with the assistance of any one or more Supreme Court judges and could hear matters in chambers, there exercising the same powers and jurisdiction as if sitting in open court. His authority extended to cover all real and personal property within the colony. A Registrar took over the duties formerly carried out by the Prothonotary under the court's ecclesiastical jurisdiction.
English lines, Pigott's Married Women's Property Act and O'Connor's Joint Stock Companies Arrangement Act to a considerable number of important amendments in existing statutes, such as G.B. Simpson's Criminal Law and Evidence Amendment Act and amendments by O'Connor to the 1890 Probate Act to make the law cheaper and simpler, and to the lunacy law which had inadequate provision for the care of the estates of the insane. At the same time there was strong lay lobbying in favour of cheapening and expediting the legal process. These attempts included proposals to abolish

144 55 Vic. No. 11. For Reid's speech outlining the purpose of the bill, see N.S.W.P.D., Vol. 54, 1891-92, pp. 2349 ff.

145 56 Vic No. 11. In this Act, Pigott copied recent English legislation which enabled married women to hold property and to sue and be sued in their own names, N.S.W.P.D., Vol. 53, 1891-92, p. 1236.

146 55 Vic. No. 9. This measure sought to facilitate arrangements between joint stock companies which were liable to be wound up and their creditors. It applied the same conditions to compulsory winding up - agreement of three-quarters of the creditors to prevail - that governed voluntary windings up; gave the court power to stay a winding up order and call a meeting of creditors; and sought to avoid commercial panic by preventing one out of hundreds of creditors putting a company into liquidation, N.S.W.P.D., Vol. 55, 1891-92, pp. 3800-04.

147 55 Vic. No. 5. Simpson's Bill introduced a large number of small, but important, reforms. It gave the judges more far reaching discretion upon sentencing; made children and spouses competent to give evidence in certain cases; rationalised the criminal jurisdiction of magistrates and enabled the Quarter Sessions to alter and not simply confirm or reverse their decisions; and made offences which had previously to be committed by more than one person also offences if committed by anyone alone, N.S.W.P.D., Vol. 52, 1891-92, pp. 600-10.

148 56 Vic. No. 30. O'Connor's aim was to reduce the oppressive costs in small estates in particular and to remove the unnecessary difficulties in the way of distributing those estates, N.S.W.P.D., Vol. 65, 1892-93, p. 6827.

149 56 Vic. No. 23. The act gave the Master greater powers in managing the estates of lunatics (s. 23), enabled him to claim reimbursement for the time and expenses involved in that duty (ss. 18-20), and set strict controls upon the entry of mentally ill persons into the colony. For O'Connor's speech in moving the bill's second reading, see N.S.W.P.D., Vol. 64, 1892-93, pp. 5366-68.
court vacations, to break down the divided profession which was considered to be a most important factor in the high cost of law, and to throw open legal practice to a greater or lesser extent. Their only success was in the extension of solicitors' rights of audience to the Supreme Court and this, as we have seen, was due largely to the concurrence of the profession. Barristers and solicitors, whose united approach to law reform had occasionally been disturbed in the past when questions arose as to their respective rights, were by the early 1890s sinking their differences and thus increasing even further their effective influence.

This revived interest in law reform and corresponding renewal of professional influence culminated in 1893 when O'Connor, as Minister of Justice, moved for the appointment of a royal commission to inquire into, consolidate and, where necessary, amend the statute law of New South Wales. In consequence, the government issued some fifty commissions to the judges, crown law officers and leaders of both branches of the profession. To the disappointment of some observers, they decided to confine their work to the consolidation of the local statutes and simply to append all imperial

150 The strongest advocate of abolishing court vacations was Thomas Walker who argued that the closure of the courts for weeks at a time made it impossible for the administration of justice to be speedy and efficient. He suggested that the judges should take their vacations in rotation so that the courts never had to be closed completely. Three times Walker introduced a bill to this effect in the Assembly, but only once, in 1893, did it pass the second reading. It then lapsed in the Council. Predictably, lawyers strongly opposed these bills. They pointed out that the judges needed these vacations to prepare important judgments and to keep abreast of changes in the law. The debates on Walker's Law Vacations Abolition Bill may be found in N.S.W.P.D., Vol. 45, 1890, pp. 1554-61; Vol. 61, 1892-93, pp. 2027-30; and Vol. 68, 1893, pp. 862-67.

151 'Consolidation of the Statute Law', Department of Justice, Minute of 21.9.1893, enclosed in letter, R.E. O'Connor to Mr Justice Manning, 17.11.1893, Mr. Justice Manning - Semi-Official Letters Received, 1890-1898, A.O.N.S.W., 2/8561.2.

statutes in force and bearing upon the particular subject. Others, however, were more realistic and agreed with Chief Justice Darley that the magnitude of even this task was sufficiently great and that to attempt to go further would have rendered the commission's work almost impossible to accomplish. 'The utmost than can be hoped for', Darley believed, 'is to deal with the Imperial statutes binding on the colony (otherwise than by virtue of 9 Geo. IV, c. 83), and with our own statute law'. With respect to colonial statutes, the commission aimed to remove all obsolete acts and provisions, and to rearrange those still in force in an orderly and systematic fashion with such amendments as were deemed necessary. To this end the work was divided among eight committees, each with a draftsman and charged with a specific section of the statute book. It was a huge undertaking, but an essential one if the colony was to remove much of the confusion and uncertainty from its laws. The project was not carried

153 O'Connor's original plan was 'the arrangement, in a clear, logical form, of the substance of existing enactments, both colonial and imperial, in force in New South Wales'. He envisaged that 'after consolidation the Statute Law upon any subject should be found within the four corners of one concise, clearly worded, well arranged Statute', R.E. O'Connor to Mr Justice Manning, 17.11.1893 (enclosure), Mr Justice Manning - Semi-Official Letters Received, 1890-1898, A.O.N.S.W., 2/8561.2. When a sub-committee of the Commission suggested that its scope should be confined to consolidation of local statutes the Law Chronicle (Vol. III, No. 2, 16.9.1894, p. 10) hoped that this idea would not be adopted. If it was, it believed that 'the work of the Commission will be largely nullified, and the difficulty of ascertaining what laws prevail in the colony will not be diminished to a sensible extent'.

154 Weekly Notes Covers, Vol. III, No. 13, 10.3.1894, p. L

through without some major difficulties, but two decades earlier even the thought of tackling a project of this size would have been inconceivable.

The appointment of the Statute Law Consolidation Commission in 1893 confirmed the new standing and influence of the legal profession in New South Wales. With colonial politics increasingly organised along party and ideological lines, lawyers as a group had little chance of re-establishing the same independent political authority which they had enjoyed in the 1850s. At the same time the profession had succeeded in developing a strong influence in relation to questions of law and the legal system which was not dependent upon political combinations but upon the reputation and unity of those lawyers who served in parliament. Most importantly, this revival in the profession's authority and standing reflected not simply the personal stature of a few leading lawyers at the pinnacle of their careers but also the significant changes which had occurred in the character of the colonial legal profession as a whole. Lawyers in New South Wales had clearly overcome

In June 1896 the Commission recommended that 'the completion of the work placed in its hands would be more efficiently, expeditiously, and economically effected if transferred to a smaller body of Commissioners'. They also suggested that the reformed Commission should have power 'to make such amendments as may be deemed necessary for the proper consolidation of the Statutes. Unless such power be given, the errors and ambiguities of the present Statutes must be perpetuated, and it will be impossible to make the consolidated Statutes clear and harmonious, as they ought to be'. Charles Gilbert Heydon, a barrister of twenty years' standing, accepted the challenge and was appointed as sole Commissioner. Heydon set an initial target of four years to complete his task, but his progress was interrupted by his appointment as District Court Judge on the Northern Circuit, the other demands placed upon his staff by the government, the inability of the Government Printing Office to cope with the volume of type, and the frequency with which amending acts were introduced into parliament. The consolidation was not completed until 1902, *ibid.*, pp. 40 ff. See also Attorney General's Department: Papers re Statute Law Consolidation, 1893-1938, R.O.N.S.W., 7/7186.
the major weaknesses which had undermined their position in the 1860s and left them powerless to protect their own interests and to promote law reform and the more efficient administration of justice. The increased size and experience of the profession were undoubtedly important elements in this change but their impact would have been far less if they had not been accompanied by the emergence of a profession which was strongly colonial in composition and sentiment. It was this colonialisation above all which was by the 1880s making lawyers in New South Wales break away from their English origins, recognise their common interests and take responsibility not only for the standards of the profession but also for the state of the law and the legal system. The legal profession thus appeared to have a sound foundation for the maintenance and even further improvement of its renewed standing and influence.
PART IV

THE 1890s AND 1900s: ANOTHER CHALLENGE FOR THE LEGAL PROFESSION

The new strengths and influence which the legal profession had begun to display by the late 1880s were severely tested during the following two decades. Not only did economic depression cause a dramatic slump in the level of legal business but the development of formal political parties left lawyers far less scope for exercising an independent influence in parliament. Unless lawyers were united and firmly committed to promoting the interests of the profession, they had little chance of being able to respond effectively to these events. Chapter Ten studies the fortunes of the Incorporated Law Institute during these years and shows how, in contrast to the 1860s, solicitors closed ranks to answer these challenges. The Institute became, in consequence, the means by which solicitors both protected their interests and encouraged improvements in the administration of justice. For the Bar, the difficulties were made particularly acute by the changes taking place in its own composition and the new sphere of practice opened up by the High Court. Ultimately barristers too were forced to develop a formal organisation which, as Chapter Eleven points out, helped to resolve tensions within the Bar as well as serve as a spokesman for its interests. The existence of these two associations representing the individual branches in turn made it possible for the legal profession as a whole to take united initiatives upon questions of law reform and the administration of justice.
CHAPTER 10

A UNITED RESPONSE BY SOLICITORS

Though the profession's new strengths and influence sprang primarily from changes in its own composition and outlook, they also owed much to the economic and political conditions which prevailed in New South Wales during the 1880s. Lawyers did not have to struggle to make a living and the system of faction politics allowed individual members of parliament considerable independence and influence. This favourable environment deteriorated rapidly, however, in the following decade. The prosperous colonial economy, stretched beyond its true capacity upon borrowed funds from overseas, collapsed as British investors lost confidence, export prices fell, public works were cut back, and land and building companies failed. Many banks, caught without sufficient reserves, closed their doors; little money remained in circulation to pay for wages, goods and services; and the number of unemployed and bankrupt mounted quickly. There was no quick solution and it was not until the early 1900s that New South Wales overcame the worst effects of the depression.¹ The change in the nature of colonial politics during those years was no less significant. The growing tensions between employers and employees, evident in a widespread series of strikes between 1891 and 1894 and fostered by the economic difficulties, confirmed the belief of working class leaders that they needed an independent political party to represent their interests in parliament. The creation of a Labour Party with a formal structure and organisation in turn forced the free-trade and protection movements which had emerged in the late 1880s to regularise their activities and refine their policies. There was far less scope

¹ A brief outline of events during the 1890s may be found in B.K. de Garis' chapter in F.K. Crowley (ed.), A New History of Australia, Melbourne, 1974, pp. 216-59.
for individual members to unite upon specific issues across party lines.  

Clearly the legal profession enjoyed no special immunity from these events.

The depression of the 1890s had severe effects upon the lawyers of New South Wales. Legal business, which had increased steadily throughout the 1880s, began to decline sharply after 1892. The number of writs issued by the Supreme Court fell from over 6,200 in 1892 to 2,690 in 1901. Similarly, the total amount for which that court signed judgment dropped from £739,419 in 1892 to £296,841 in 1900. The state of litigation in the District Courts offered lawyers even less encouragement. Between 1892 and 1902 the number of summonses issued by these inferior courts dwindled from more than 13,400 to a mere 4,265, while the amount of plaintiff's costs awarded to be paid by the defendants shrank from £28,855 to £9,020. The general business of solicitors, apart from litigation, was no more immune. Considerations paid upon transfers of real estate in 1897 amounted to only £3,251,379, far below the total of £6,166,367 in 1891. Perhaps the one encouraging sign, at least for solicitors, was that while conveyancing business collapsed more rapidly than the number of court actions it was beginning to pick up again by the end of the 1890s. The level of litigation continued to decline, however, for some years after 1900.

This slump in legal business, significant as it was in its own right, had even greater importance because the profession continued to grow rapidly throughout the 1890s. The Bar, 93 strong in 1887, increased to 150 within the decade. The number of practising solicitors rose similarly from

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2 Ibid.
3 The following statistics are drawn from the 'Law and Crime' tables in the Statistical Registers of New South Wales from 1892 to 1908.
4 See the Law Almanacs of New South Wales, 1887-1900.
580 in 1890 to 892 in 1900.⁵ There was clearly not sufficient business to sustain this enlarged profession and it was solicitors who first began to experience difficulties.

Even in January 1892 when the courts, working at full capacity, could not keep pace with the volume of litigation, a survey conducted by the *Sydney Morning Herald* singled out solicitors as the most overcrowded of the professions. The problem was exacerbated, the *Herald* considered, by the tendency of solicitors to settle in Sydney. Established firms with a reputation and a good clientele remained secure but the latest recruits to the profession were bound to suffer, particularly when almost sixty new solicitors were being admitted each year. Many young solicitors who could not make a living now tended, the *Herald* observed, to accept positions as clerks with established firms and not to try their luck in the increasingly populous country areas.⁶ One solicitors objected to the *Herald*’s survey because he believed that it did not put the position with sufficient force. The large offices, he claimed, with a background of support from banks, public institutions, and well-to-do clients were 'eating up the small practitioners'.⁷ There was scarcely a large or leading office in Sydney without two or three solicitors employed as clerks and managing the different branches. The solicitor dismissed the idea of turning to the country districts. These were, he asserted, already fully supplied.⁸

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⁵ The proportions of city and country practitioners changed very little as a result of this increase. In 1900 city solicitors made up 57.8% (516/892) of the profession compared to 59.1% (343/580) in 1890.

⁶ *S.M.H.*, 1.4.1892, p. 3; 5.1.1892, p. 4.

⁷ *S.M.H.*, 5.1.1892, p. 3.

The position of many solicitors thus by no means secure at the start of the 1890s, deteriorated rapidly as the decade progressed. Between 1892 and 1899 fifty-one solicitors in New South Wales were registered as bankrupts and many more before the courts on charges of professional misconduct for actions in which they had attempted to avoid a similar fate. Others only managed to escape Bankruptcy Court by seeking alternative occupations. One English solicitor, unable to find a position as a law clerk in Sydney, was obliged to engage in manual labour in the Bush and to work at the mines at Captain’s Flat near Bungendore. An Irish attorney, who came to the colony in August 1891 but could not obtain a place in a solicitor’s office, subsequently found employment teaching English, Latin, French, Music and Singing to the families of large landowners. Most adventurous of all was a colonial solicitor who, after being admitted in 1897, spent several years visiting Manila, Hong Kong, Yokohama and Shanghai. He sustained himself during that time by legal work and journalism and only resumed practice in New South Wales in 1904 when legal business was improving.

9 The numbers of solicitors whose estates were sequestrated in each of these years were 1892 (7), 1893 (7), 1894 (8), 1895 (5), 1896 (12), 1897 (4), 1898 (4) and 1899 (4). These figures are drawn from the Statistical Registers of New South Wales for those years.

10 The senior police constable at Bungendore, to whom this solicitor had been given an introduction by a friend, described the Englishman’s arrival in the Monaro in these terms: ‘He was utterly destitute and had barely sufficient clothes to cover him. Being sorry to see an educated man and presumably a gentleman in such a condition I took an interest in him and provided him with clothes and gave him a few shillings. I also endeavoured to find him some employment’, Admission Papers of A.M. Millard, B.A.B. and S.A.B. Files, Supreme Court of New South Wales.

11 The solicitor was Alexander O’Rorke who was admitted in Ireland in July 1879 but did not gain conditional admission in N.S.W. until March 1910, Admission Papers of A. O’Rorke, B.A.B. and S.A.B. Files, Supreme Court of New South Wales.

12 Admission Papers of H.C. Royle, B.A.B. and S.A.B. Files, Supreme Court of New South Wales.
Nowhere, however, were the difficulties solicitors faced more obvious than in the number of disciplinary cases appearing before the courts. They generally involved the misappropriation of moneys by a solicitor who could not meet all his commitments. At first the judges took a lenient approach towards such offenders in the hope that this would be sufficient to deter other solicitors from mixing trust moneys with their own accounts; but their attitude hardened as both the frequency of this kind of misconduct and the amounts of money involved grew rapidly. One solicitor who came before the Supreme Court in October 1892 was charged with retaining part of the sale price of a certain property, a sum of £63. The judges did not accept his defence that he had been suffering from a ‘very severe indisposition – so much so that he was affected mentally and ... had foolishly placed the amount of the trust fund to his own account’. At the same time, the court did take into account his otherwise unblemished record after fifteen years of practice and the fact that he had made satisfactory arrangements to repay the sum in question. They resolved not to suspend him but ordered him to pay costs and a fine of £20. A year later the judges’ attitude was far stricter. Another solicitor who had placed £20 of a client’s money with his own and then was unable to repay that amount came before the court. Though he had repaid the balance together with costs, charges and expenses when the rule nisi was granted, the judges considered the case to be very serious and suspended him for one year. Chief Justice Darley thought this a ‘minor

14 The court’s action did not even serve, however, as a deterrent to the solicitor whom they punished. In May 1893 the court was forced to strike him from the roll for misappropriating £160 which he had received from a client to pay off a mortgage debt on some property, S.M.H., 13.5.1893, p. 13.
punishment' and personally favoured his being struck from the roll.\textsuperscript{15} By 1894 cases of professional misconduct were so prevalent that the Chief Justice announced in court that in future the judges would punish any solicitor who mixed his clients' moneys with his own, no matter whether a loss was discovered or not.\textsuperscript{16}

Even this warning did not have the desired effect. The wave of misconduct by solicitors reached its peak in 1895 and early 1896 with the judges striking at least ten solicitors from the roll and suspending several others.\textsuperscript{17} Country solicitors in particular were by then feeling the pinch. Goulburn solicitor Henry Gannon absconded, under the pretence of taking a holiday to Fiji via New Zealand, when in financial difficulties to the extent of £1,700.\textsuperscript{18} John Davidson, also practising in Goulburn, was not so fortunate and was sentenced to three and a half years' penal servitude for stealing £1,461 which had come to him on behalf of a client from an English estate. Davidson apparently received the money directly into his own private bank account and deceived its rightful owner for some

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\item \textsuperscript{15} \textit{S.M.H.}, 12.8.1893, p. 13. In the interval, the court had frequently been called upon to act against solicitors for the misuse of trust funds, cf. \textit{S.M.H.}, 9.11.1892, p. 4; 16.11.1892, p. 3; 4.3.1893, p. 5. Mr Justice Innes, suspending a solicitor for this reason in May 1893, observed that 'unfortunately within the last 12 months there had been several cases in which applications had been made arising out of somewhat similar misconduct on the part of solicitors, and it was incumbent upon the Court, much as it disliked such things, to inflict a punishment which must be severe upon officers of the Court so offending', \textit{S.M.H.}, 13.5.1893, p. 13.
\item \textsuperscript{16} \textit{S.M.H.}, 7.11.1894, p. 3. Other cases which illustrate the hardening of the judges' attitude may be found in the \textit{S.M.H.}, 74.2.1894, p. 5; 7.3.1894, p. 3; 11.5.1894, p. 3; 27.10.1894, p. 13.
\item \textsuperscript{17} The \textit{Law Chronicle}, disturbed by the large number of solicitors either struck off or suspended, observed that 'probably the present year's seeming epidemic of dishonesty is largely attributable to the financial straits that the Banking Crisis and Boom Bubbles of one kind or another have left behind them ...', \textit{Law Chronicle}, Vol. IV, No. 6, 20.11.1895, p. 41.
\item \textsuperscript{18} The court struck Gannon's name from the roll in August 1897, \textit{S.M.H.}, 19.8.1897, p. 3.
\end{itemize}
fifteen months before he was discovered. Solicitors in Broken Hill, Cooma, Moruya and Wollongong were struck from the roll for retaining clients' moneys which they had received as either investments or judgment debts and not applied for their intended purpose. The court, clearly frustrated by its inability to control the profession's behaviour, showed little favour for explanations. One solicitor who had received £5 in settlement of a slander action had paid that amount into court for the maintenance of his wife in order to avoid arrest. The court found this no excuse and suspended him for twelve months and until the £5 and costs were paid.

The effect of these cases upon the profession's reputation was heightened by two widely publicised trials in which solicitors were charged with attempting to pervert the proper course of justice. The first, which came before the Central Criminal Court in October 1895, involved a young solicitor, Thomas Ernest Rofe, who had been in practice only two years.

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19 Davidson's partner, E.W. Johnson, was acquitted because he had no knowledge of the financial side of their legal business, S.M.H., 21.1.1896, p. 5; 3.3.1896, pp. 3-4. Subsequent bankruptcy proceedings revealed a deficiency in the firm's trust moneys to the extent of £15,000, S.M.H., 10.3.1896, p. 4.

20 S.M.H., 10.8.1895, p. 6; 17.9.1895, p. 12; 30.5.1896, p. 7; 22.8.1896, p. 7.

21 S.M.H., 16.5.1895, p. 3. The judges also made a rule that 'No Solicitor of the Court shall employ as a clerk, assistant, or writer, or in any other capacity in or about his business as a Solicitor, any person who has been or who shall be struck off the roll of Solicitors of the Court, or suspended by order of the Court from practice as a Solicitor, so long as the said person shall remain struck off the said roll or suspended as aforesaid', Law Chronicle, Vol. IV, No. 12, 30.5.1896, p. 93. Mr Justice Windeyer warned that 'attorneys must understand that if they, in defiance of instructions from their clients, used money for their purpose, they would be held responsible by the Court, and that striking off the rolls would be a necessary consequence of such conduct', S.M.H., 9.11.1895, p. 7.
The case related to divorce proceedings in which a husband had conspired with two others either to create or to fabricate adultery by his wife. When this conspiracy was uncovered, the question also arose whether Rafe, the husband's solicitor, had been implicated. The Crown argued that once Rafe knew that the detective hired by the husband and the alleged co-respondent in the proceedings were one and the same person he should have become suspicious that his client's case was not genuine; his failure then to take any action suggested either complicity in the plot or at least an awareness of the husband's connivance in the attempt to bring about adultery by his wife. Rafe denied this but the jury accepted the Crown's interpretation and found Rafe guilty on all counts, though they recommended mercy due to his youth and previous good conduct. Acting Judge Backhouse sentenced Rafe to five years' hard labour at Darlinghurst Gaol but, in a surprise decision, suspended that sentence under the provisions of the First Offenders Act. He believed that Rafe had not informed the court of the conspiracy when he became aware of it because he was afraid of bringing ridicule upon himself. Whatever the reasons behind Rafe's conduct, his conviction cast a large blot upon the profession's already tarnished reputation.

The celebrated Dean Case which resulted in Sydney solicitor Richard Denis Meagher being struck from the roll focused greater attention still upon misconduct within the legal profession. The case concerned a popular Sydney Harbour ferry captain charged with attempting to poison his wife. At the trial, Dean was convicted and sentenced to death upon the evidence of

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22 On Rafe's case generally and his subsequent attempts to gain readmission as a solicitor, see Department of Justice - T.E. Rofe, Conviction for Conspiracy, 1895-1934, A.O.N.S.W., 7810-12.
23 S.M.H., 23.10.1895, p. 4; 24.10.1895, p. 7; 25.10.1895, p. 3.
24 S.M.H., 29.10.1895, p. 3.
a witness of doubtful repute, but subsequent criticism of Mr Justice
Windeyer's handling of the case led to the appointment of a royal commission
to review the evidence. The commission, by a majority, concluded that
Dean's guilt was 'not proven' and he was released from custody.

Subsequently Meagher, partner of the notorious William Patrick Crick who had
instructed Salomons in Dean's defence, told Salomons that he knew Dean to be
guilty having obtained a confession from him in prison by a trick. Unable
to persuade Meagher to make his knowledge public, Salomons finally resolved
that the traditional secrecy of communications between barrister and
solicitor could not 'make any man by an unsought confidence a co-conspirator
with him in a felonious silence and make him a depository of other men's
infamies'. Salomons made public his knowledge in a statement to the
Legislative Council. His charges were denied by Meagher and ridiculed by
Crick, who apparently was not privy to his partner's information. As a
result of Salomons' statement, however, the chemist who had supplied Dean
with poison confessed and Meagher was forced to do likewise. The court wasted

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For detailed evidence about the Dean Case, see Department of Attorney
General and Justice - Dean Royal Commission, 1895-1904, A.O.N.S.W.,
7745, and the newspaper cuttings in Windeyer Family Records and
Papers, Mitchell Library D 159, pp. 109-76. See also the discussion
of the Dean Case by C.K. Allen in Law Quarterly Review, Vol. 57, 1941,
pp. 85-111.

The members of the Commission, which held 39 sittings and called 113
witnesses, were F.E. Rogers, Q.C., P.S. Jones, M.D., and P.N. Manning,
M.D. The two doctors considered that it was just as possible for
Mrs Dean to have poisoned herself, but Rogers disagreed. 'Report of
the Royal Commission Regina versus George Dean, appointed 7.5.1895'.
pp. 13-16 in Department of Attorney General and Justice - Dean Royal
Commission, 1895-1904, A.O.N.S.W., 7745.

It was in fact Attorney General J.H. Want who first read Salomons' statement to the Council, but Salomons himself later defended his character and conduct against the counter-attack by Crick and Meagher, N.S.W.P.D., Vol. 80, 1895, pp. 1151-54, 1266-1324.

Ibid., pp. 1242-53.
no time in striking his name from the roll. Even the *Law Chronicle*,
normally a staunch defender of the profession's reputation, admitted that
'when one sees solicitors being struck off the roll or suspended from day to
day, one is almost driven to the popular conclusion, not only that solicitors
are a bad lot, but that they are gradually becoming worse'.

After 1896 the number of cases of professional misconduct coming
before the courts lessened, although they continued to occur far more
regularly than the profession would have desired. At the same time, public
confidence in the profession was being undermined even further, and the amicable
relationship between individual solicitors endangered, by the emergence of
certain sharp practices by which some solicitors were seeking to offset the
worst effects of the depression. One such practice had come to light as
early as June 1892 when the court suspended for twelve months an attorney
who had himself set up a trade protective society to attract a large amount
of debt collecting business which he would not otherwise have obtained.
Though the company had been properly registered under the Companies Act
and there had been no impropriety in the solicitor's actual handling of the
debt collections, which had realised him personally between £2,000 and £3,000
per year, the judges took a very serious view of this conduct. They

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1895, the journal had attempted to defend the reputation of
solicitors by pointing out that for a solicitor to be struck off
the roll or suspended, and thus deprived of his livelihood, was a
summary punishment in addition to, and not substituting for, the
normal sanctions of the law, *Law Chronicle*, Vol. IV, No. 6,
20.11.1895, p. 41.
31 Cf. *Annual Reports of the Incorporated Law Institute (Annual Reports
of I.L.I.*), July 1897, p. 8; July 1898, p. 8; July 1899, p. 7.
32 *S.N.W.*, 30.5.1891, p. 13; 1.6.1892, p. 7; 3.6.1892, p. 3; 4.6.1892,
p. 13.
considered that his actions were calculated to induce the public by a fraudulent and false pretence to entrust him with business in the belief that there was a company behind him which would be responsible to them but which did not in fact exist. The judges would have suspended him for longer except that he had also to pay the very substantial costs of the proceedings which included those incurred by the Prothonotary in an investigation into the affair. 33

Another dubious practice, which seems to have gained popularity by the late 1890s, was that of profit sharing or commission taking between solicitors, even when those involved represented conflicting interests at law. The Supreme Court strongly condemned this practice in 1900 in consequence of a suit which involved difficult questions arising from the construction of a will. The plaintiff's solicitor in that case had referred five of the nine defendants to other solicitors, 'at the same time arranging with such solicitors that he should receive a percentage of their profit costs'. The enormous costs of £5,068 for the action left nothing in the estate to be administered. 34 When the court investigated the arrangement between the six lawyers, the original solicitor argued that the practice was well accepted by the profession and was 'not confined in any way to minor or unprofessional practitioners'. 35 The Incorporated Law Institute denied this and asserted that solicitors pursued such a course only on rare occasions. The judges agreed that the practice was quite improper and ordered that the solicitor refund to the estate £977 of the costs, pay the costs of the present

33 S.M.H., 12.6.1892, p. 13.
34 State Reports, New South Wales, Vol. 1. 1901, pp. 82-83.
35 Ibid., p. 83.
proceedings and a fine of £50. The solicitor's personal reputation stopped them imposing a more severe punishment but could hardly have increased public confidence in even the most respectable of solicitors.

The plight of solicitors in the 1890s, characterised as it was by depressed business and incomes, overcrowding and a deteriorating reputation, was made even worse by competition from large corporations or cooperatives and from unauthorised agencies. In this respect, the primary danger, according to the Law Chronicle, was the rapid growth of so-called Trade Protection Societies which threatened to reduce the majority of lawyers 'to mere underpaid servants of wealthy corporations'. Their more immediate challenge was, however, to the individual solicitor's share of dwindling legal business. One such society advertised that for a fee of one guinea members were entitled 'to twelve months legal advice and attendance at Court, to conduct cases, from the Society's solicitors'. Another, which went under the title of the Scottish Trade Advocate and Fidelity Society, issued a certificate setting out the benefits offered to members. These included 'Free Legal Advice from a duly qualified Solicitor' and 'Free solicitor's services at any Court, Petty Debts, District or Supreme'. In addition, members were assured that special rates could be secured for the preparation of all kinds of legal documents. To obtain these and other services, a member had simply to contribute five shillings per annum.

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36 Ibid., pp. 85-88.
38 Ibid.
Exactly how large the clientele of any of these quasi-legal societies was and how much business they stole from independent solicitors, I do not know; but the threat which they posed to the profession's livelihood was compounded by the activities of debt-collecting societies and other unqualified individuals prepared to do legal work for a fee. One person who had previously been employed in a Grafton solicitor's office set himself up as a law and general accountant advising upon all matters 'temporal, spiritual, medical, legal, financial, commercial, matrimonial, controversial, theoretical, actual, past, present, and to come'.

His conduct eventually came under the notice of the Incorporated Law Institute when he made a charge for drawing a conveyance. The court fined him the minimum penalty of £20 and ordered him to pay costs. Another case which the Institute brought before the Supreme Court related to the actions of a Sydney wholesale wine and spirit merchant who had apparently represented himself as a solicitor, under an assumed name, and subtracted a fee for the collection of accounts. A third matter concerned the manager of a particular finance company which was providing a loan. He had charged a fee for drawing up and subsequently discharging a mortgage but the judges did not punish him because the sum had gone into the company's revenues and not into his own pocket. Generally the amounts involved were only a few pounds and the court required the accused to pay costs as a warning not to transgress in the future.

41 S.M.H., 30.5.1895, p. 6. For other similar cases, see S.M.H., 6.8.1892, p. 13; 13.8.1892, p. 13; 27.8.1892, p. 3; 19.11.1892, p. 7; 23.1.1893, p. 5; 27.7.1895, p. 5.
42 S.M.H., 25.8.1896, p. 3; 27.8.1896, p. 3.
43 S.M.H., 15.11.1898, p. 3.
A less immediate but still very real challenge to the interests of solicitors were the attempts by certificated conveyancers and law clerks to gain some form of privileged access to the profession, an object which they pursued through both petitions to the judges and legislation in parliament. Certificated conveyancers had been in existence since 1848 when there had been insufficient solicitors in the colony to cope with general legal business and especially property transactions. The Legislative Council hoped by creating this class of practitioners to reduce the number of persons practising improperly as lawyers. The number of conveyancers had, however, never been very large and with the rapid expansion of the legal profession in the 1880s the question arose of whether they were still needed. In November 1888 several conveyancers, possibly fearing that their office would be abolished, petitioned the judges to allow them to be admitted as solicitors upon passing the final examination but without the need to serve articles. The judges refused. Two years later Edmund Barton introduced a bill into the Legislative Council which would have given them this privilege but prevented the enrolment of any further conveyancers. Every solicitor who spoke in the Council opposed this measure, claiming that it would lead to the admission of improperly qualified persons to the profession, and the bill

44 See Chapter 1, p. 30.
45 The Law Almanac for 1885 (p. 36) listed only 16 certificated conveyancers currently in practice in New South Wales. By 1891 this number had increased to 28, influenced largely, it would appear, by rumours that conveyancers would be granted privileged conditions for admission as solicitors, Law Almanac for 1891, p. 57.
47 N.S.W.P.D., Vol. 50, 1890, pp. 6163-64.
was amended simply to guarantee the rights of existing conveyancers.\textsuperscript{48} It later lapsed with the session.

The question of giving concessions to clerks who had served for ten years in a solicitor's office and desired to enter the profession was first raised by certain clerks in Victoria. On the basis of English precedent they asked the New South Wales bench whether if the Victorian Supreme Court passed a rule allowing clerks of ten years' standing to enter articles for three years without a preliminary examination, this action would be considered a breach of reciprocity between the colonies. The judges indicated that they would be prepared to make such a rule, but only with the concurrence of Victoria, South Australia and Tasmania.\textsuperscript{49} Nothing further was done until May 1893 when maverick solicitor W.P. Crick took up the cause of these clerks and introduced a bill into the Assembly along these lines but limiting the required term of articles to one year.\textsuperscript{50} The bill passed the Assembly but received a hostile reception from solicitors in the Council. James Norton claimed that the profession was overcrowded, refuted the suggestion that clerks or conveyancers were entitled to concessions, and argued that the bill would only weaken the effectiveness of the admission rules which, as it was, were proving insufficient.\textsuperscript{51} The other solicitors

\textsuperscript{48} James Norton claimed that 'men who have never gone through a legal training, but who, somehow, by hook or by crook, have learned to draw up a conveyance, have, to my knowledge, done a vast amount of mischief. People have given work to such persons, thinking that it would be done cheaper than by attorneys, but they have been charged more and been landed in difficulties', \textit{ibid.}, pp. 6164-65. See also Robert Burdett Smith's comments, \textit{ibid.}, pp. 6165.


\textsuperscript{50} \textit{N.S.W.P.D.}, Vol. 65, 1892-93, pp. 6704-05.

\textsuperscript{51} \textit{N.S.W.P.D.}, Vol. 70, 1894, pp. 1201-02.
strongly supported Norton and the bill finally lapsed in committee. 52

Radical Daniel O'Connor made a similar attempt in the Council in July 1897 but his bill was defeated without a division on the second reading. 53

Faced with such a complex series of challenges to their interests and reputation, solicitors needed urgently to close ranks and to develop an effective organisation to control their activities and to stand up for their rights. While there were clearly strong reasons for solicitors to appreciate the advantages of corporate action, there was no certainty that they would do so. The situation was very reminiscent of the 1860s with legal business declining but the profession itself continuing to grow rapidly. Not only was the renewed standing and influence which lawyers were enjoying by this time thrown into question by the spate of cases of professional misconduct but the harmony and awareness of common interests which formed the basis of the profession's standards and effectiveness were endangered by the difficulties solicitors were experiencing in making a living. In the 1860s similar external pressures had, in combination with divisions inside the profession, condemned lawyers to disunity and impotence for two decades. Whether or not the legal profession could avoid a similar fate in the 1890s depended largely upon the strength of the cohesion and of the concern for standards and status which lawyers had begun to display during the 1880s. Only if these qualities were soundly based and shared in some degree by the majority of practitioners would solicitors in particular have the ability to ride out the storm.

The fortunes of the Incorporated Law Institute as the depression

52 For the speeches of Heydon and Pigott, see ibid., pp. 1203–09.
deepened soon confirmed how markedly the character of colonial solicitors had changed by the 1890s. Although the Institute's Council cancelled the memberships of many who had fees in arrears during 1894, thereby reducing the total number of registered subscribers to 151 in July 1895, this action only temporarily concealed the growing trend among solicitors to close ranks under the umbrella of the Institute. The membership figure of 223 in July 1896 created a record for the Institute and it continued to rise quickly to 351 in 1897, 440 in 1898, 485 in 1899, and a pre-war peak of 520 in July 1900. The Institute claimed the support of 85% of city solicitors in independent practice and half of those practising in the country. Though Sydney practitioners were more likely than their country counterparts to belong to the Institute, probably due to the greater level of available benefits, in terms of professional experience the association drew its support evenly, as table 13 shows, from all sections of the profession. Neither the most experienced solicitors nor those admitted during the 1890s were represented in the Institute out of proportion to their share of the profession as a whole.

The size and representativeness of the Institute's membership, significant as it was in its own right, was of even greater importance because the association was not simply a defensive reaction to the difficult circumstances of the 1890s. Undoubtedly the depression made many more solicitors aware of their common interests and the need for united action.

55 Annual Reports of I.L.I., July 1896, pp. 8-9; July 1897, p. 7; July 1898, p. 6; July 1899, p. 5; July 1900, p. 5.
56 Ibid., July 1900, p. 5.
57 Table 13 appears on p. 385.
TABLE 13: Solicitors Belonging to the Incorporated Law Institute in 1900 Compared to All Solicitors Practising in New South Wales in 1900 - Experience and Present Place of Practice

A. Solicitors in the Institute:

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>s</th>
<th>c</th>
<th>s+c</th>
<th>s+c (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>From 1864</td>
<td>9</td>
<td>7</td>
<td>16</td>
<td>3.1</td>
</tr>
<tr>
<td>1865-69</td>
<td>15</td>
<td>5</td>
<td>20</td>
<td>3.9</td>
</tr>
<tr>
<td>1870-74</td>
<td>23</td>
<td>9</td>
<td>32</td>
<td>6.2</td>
</tr>
<tr>
<td>1875-79</td>
<td>22</td>
<td>11</td>
<td>33</td>
<td>6.4</td>
</tr>
<tr>
<td>1880-84</td>
<td>42</td>
<td>17</td>
<td>59</td>
<td>11.5</td>
</tr>
<tr>
<td>1885-89</td>
<td>54</td>
<td>24</td>
<td>78</td>
<td>15.2</td>
</tr>
<tr>
<td>1890-94</td>
<td>97</td>
<td>57</td>
<td>154</td>
<td>30.0</td>
</tr>
<tr>
<td>1895-99</td>
<td>76</td>
<td>36</td>
<td>112</td>
<td>21.8</td>
</tr>
<tr>
<td>1900</td>
<td>8</td>
<td>2</td>
<td>10</td>
<td>1.9</td>
</tr>
<tr>
<td>Total No.</td>
<td>346</td>
<td>168</td>
<td>514</td>
<td></td>
</tr>
<tr>
<td>Total %</td>
<td>67.3</td>
<td>32.7</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

B. All Solicitors in New South Wales:

<table>
<thead>
<tr>
<th>Practising in:</th>
<th>s</th>
<th>c</th>
<th>s+c</th>
<th>s+c (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>From 1864</td>
<td>18</td>
<td>14</td>
<td>32</td>
<td>3.6</td>
</tr>
<tr>
<td>1865-69</td>
<td>24</td>
<td>9</td>
<td>33</td>
<td>3.7</td>
</tr>
<tr>
<td>1870-74</td>
<td>30</td>
<td>16</td>
<td>46</td>
<td>5.2</td>
</tr>
<tr>
<td>1875-79</td>
<td>31</td>
<td>25</td>
<td>56</td>
<td>6.3</td>
</tr>
<tr>
<td>1880-84</td>
<td>59</td>
<td>35</td>
<td>94</td>
<td>10.5</td>
</tr>
<tr>
<td>1885-89</td>
<td>78</td>
<td>59</td>
<td>137</td>
<td>15.4</td>
</tr>
<tr>
<td>1890-94</td>
<td>122</td>
<td>111</td>
<td>233</td>
<td>26.1</td>
</tr>
<tr>
<td>1895-99</td>
<td>117</td>
<td>90</td>
<td>207</td>
<td>23.2</td>
</tr>
<tr>
<td>1900</td>
<td>37</td>
<td>17</td>
<td>54</td>
<td>6.1</td>
</tr>
<tr>
<td>Total No.</td>
<td>516</td>
<td>376</td>
<td>892</td>
<td></td>
</tr>
<tr>
<td>Total %</td>
<td>57.8</td>
<td>42.2</td>
<td>100.0</td>
<td>100.1</td>
</tr>
</tbody>
</table>

s = Sydney, c = Country.

This table is based upon information available in the *Law Almanac* for 1899, the *Admission Rolls*, and the *B.A.B. and S.A.B. Files*. 
but the activities which the Institute did pursue and which the membership appears to have wholeheartedly endorsed took a wide variety of forms, only some of which related specifically to the immediate condition of the profession. Further, in contrast to the prevailing atmosphere of caution and retrenchment, the Institute was prepared to take dynamic and hard-headed initiatives to achieve its ends even when failure might have ruined the association financially. Its overall performance left no doubt that colonial solicitors, besides being aware of their common interests and needs, were as a group determined to take positive steps both to protect and to promote their rights and reputation.

The largest project undertaken by the Institute and its major attraction for many solicitors was the creation of a comprehensive law library. This was particularly necessary because the Supreme Court's own library was small, disorganised, in a poor state of repair and almost totally inaccessible. Sir William Manning had urged his fellow judges to introduce an admission fee for barristers to cover the costs of remediying this situation but nothing had been done. The Institute's own chances of developing a full library had been greatly boosted by the rule of September 1888 by which the admission fees received from overseas and intercolonial solicitors seeking to practise in New South Wales were donated to the Institute's Library Fund. Progress remained slow, however, until the Council announced in July 1892 that 'measures will shortly be taken to make some valuable

58 F.H. Darley to the Minister of Justice, 17.3.1887, Chief Justice's Letter Book, A.O.N.S.W., COD 89A, pp. 73-75.


60 Rule 26.9.1888.
additions to the Library of the Institute'.

This brief announcement ushered in several years of rapid expansion for the library. By July 1896 the Institute had expended in excess of £700 on new volumes of law reports and legal textbooks and the library catalogue listed over 1,400 books. Further, when the Institute moved to new premises in Castlereagh Street in 1895, general library facilities were much improved. The Council engaged a salaried librarian, prepared rules for the proper conduct of the library, and made liberal provision for loans of limited duration. Even when funds became short during 1897, the Council refused to starve the library, arguing that the high proportion of city solicitors belonging to the Institute 'amply justifies the policy of the Institute in forming and perfecting our valuable Law Library'. To make the benefits of the library more readily available, it successfully proposed the abolition of the Institute's one guinea entrance fee. At the same time the Council proposed that a loan of £300, secured against the membership, be obtained to overcome the deficiencies that still existed in the library's holdings. By July 1899, with the assistance of this loan, the Institute

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63 Annual Report of I.L.I., July 1895, pp. 5-6. The library was open from 9.30 a.m. to 4.30 p.m. during the week and from 9.30 a.m. to 1.00 p.m. on Saturday. The Council considered that its 'crowning work ... during the past year has been the great extension of the Library of the Institute'.
64 Ibid., July 1898, p. 6.
65 Ibid., July 1898, p. 6. The decision to abolish the entrance fee was taken at a Special General Meeting held on 17 August 1897.
66 Ibid. The Treasurer estimated 'that the Institute will be in a position to pay off the full amount within five years' and although the Council was 'confident that it will never be necessary to make any such call' the bank still required this additional security before it would advance the required money.
possessed 'an almost complete Library of Text Books and books of reference for practical purposes, numbering over 2,000 volumes'. It had installed a telephone for the use of members, expended £70 on a borrowing scheme for country members, and made plans to publish a quarterly *Legal Digest and Journal*. The total value of the books purchased stood at £1,077. It was a collection of great value and utility and a convincing demonstration of the benefits of corporate professional action.

The Institute was equally vigorous in pursuing a wide variety of issues relating to law reform and the administration of justice, promoting the interests of solicitors and protecting them from unauthorised competition. The Council approached the judges and the Prothonotary about the need to

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68 The Council pointed out that 'the advantages afforded by the Lending Library have been so fully appreciated by city members that your Council regrets its inability, hitherto, to confer similar benefits on country members. It has, however, a hope that before the end of the year it will be able to extend the privilege of borrowing certain books to country members under suitable conditions. And with the object, principally, of further meeting the requirements of country members, it has also under consideration a suggestion to sanction the publication of a quarterly *Legal Digest and Journal* dealing especially with matters of interest to solicitors, points of practice and a digest of the authorised and newspaper reports, and giving also Orders and Rules of Court, and Regulations under various Acts as they appear', *Annual Report of I.L.I.*, July 1898, p. 7. Plans to publish the *Legal Digest and Journal* were well advanced by December 1898. J.P. Creed, the journal's editor, asked Mr Justice Walker if he could forward the judge a copy of the first issue on approval. The new publication had 'already been subscribed to by a large number of the members of the Institute, and by a few barristers', J.P. Creed to Mr Justice Walker, 7.12.1898, *Mr Justice Walker: Semi-Official Letters Received, 1898-1902*, A.O.N.S.W., 2/8562.1. The first volume of the *Legal Digest of N.S.W.* appeared in 1899 but there is no record of subsequent issues. Almost certainly the fragile financial position of the Institute in these years was responsible for the project being abandoned.
codify the Supreme Court rules. There had been so many additions and amendments made to them since 1881 that it was often difficult to ascertain what rules were or were not in force. The Council hoped that the government might be persuaded to appoint three or more lawyers, duly remunerated, to carry out this task. It also requested that the Prothonotary, as head of the Common Law department, take stringent measures to prevent trade protection societies and irresponsible persons from making demands for 'legal expenses'. The tenor of the letters issued by such agencies frequently trapped the unwary into complying with their illegal demands. The Institute approached the Chief Justice to urge both the convenience of time running in vacations, except during two weeks at Christmas, and the desirability of the Supreme Court office being open during the usual hours in vacation, except Saturdays. The judges promptly accepted the first of these recommendations but it was several years before satisfactory arrangements were made to open the court offices during court vacations. On the other hand, they were

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69 Half Yearly Reports of I.L.I., February 1892, pp. 5-6; July 1892, p. 6. The judges advised the Institute that they had the matter under consideration, Meeting of 17.2.1892, Judges' Minutes, p. 28. The task was not completed quickly, however, and the consolidated rules were still being drafted in 1900, Meeting of 14.2.1900, ibid., p. 121.


72 After considerable discussion, the judges resolved to make a rule providing that time should run throughout both vacations in all cases where the claim was for goods sold and delivered, or for money lent, or for work and labour done, Meeting of 5.6.1894, Judges' Minutes, p. 55. The Institute did not realise its second object, to open the Supreme Court Office during court vacations, until 1902. Then, after two conferences between the Institute and the Prothonotary on the desirability of allowing conveyancing searches on court holidays other than public holidays, the judges agreed to open the Bankruptcy and Sheriff's Offices on those days. An officer would be in attendance between 10 a.m. and 3.30 p.m. and an additional fee of 5/- would be payable on top of the ordinary search fees in the Bankruptcy Office, Meeting of 10.12.1902, ibid., pp. 163-64.
unable to offer any means of speeding up the hearing of Common Law chamber business. They were hampered by lack of room in the courthouse which prevented one of the judges sitting to try causes but they hoped that with the additions being made to the building it would soon be possible to make better arrangements. 73

Even in the late 1890s, which were the most difficult years for solicitors and for the Institute financially, the Council did not slacken its efforts on behalf of the Institute's members. It made arrangements with the Registrar of Notarial Faculties in London to ensure that such faculties would only be issued in future to members of the profession. 74 It also established a mutual exchange of information with the Law Institutes of the other British colonies and Great Britain to prevent the possible admission of solicitors struck off the roll by other courts. 75 At a more parochial level, a sub-committee of the Council and the Prothonotary drew up a new scale of Common Law costs to propose to the judges. 76 In consequence of the Supreme Court's decision in Dowling and another v. Burt, the Council then appointed a second sub-committee to prepare three scales of Common Law costs which aimed to 'obviate the injustice that a strict adherence to the rules of

74 Ibid., July 1895, p. 7.
75 Ibid., p. 8. This complemented the endeavours of the Institute to obtain from the court the fullest possible details upon those articled clerks and solicitors seeking admission in New South Wales, Meetings of 9.5.1896 and 26.10.1896, Judges' Minutes, pp. 85, 87.
76 Annual Report of I.L.I., July 1896, pp. 7-8; Meeting of 17.9.1895, Judges' Minutes, p. 70.
taxation as laid down in this case would entail on Solicitors'.

Similarly, the Institute made suggestions to the Master and the judges upon the new Equity rules and scale of fees. During these years it also made numerous recommendations upon other matters to various public departments including the Attorney General's Department, the Department of Justice, the Public Service Board, the Stamp Office and the Commissioners of Taxation. Examples were the appointment of a Chief Clerk of the Supreme Court, the practice relating to certificates of costs, the accommodation provided for solicitors in the courts, the appearance of Victorian solicitors in New South Wales courts, the right to search the Land Tax Assessment Books, the scale of costs allowed to witnesses at Common Law and the insufficiency of time allowed for the disposal of Common Law chamber business.

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77 Annual Report of I.L.I., July 1898, p. 8. In the case in question the Supreme Court decided that, contrary to established practice, a judge had no power under s.101 of the District Courts Act to direct that costs should be taxed on a particular scale. This meant that instead of it being virtually automatic that the highest of the three scales of costs would apply, unless the judge directed otherwise, the decision as to which scale was appropriate rested with the taxing officer, New South Wales Law Reports, Vol. XIX, 1898, pp. 55-58. The judges agreed to the three new scales of costs in July 1898, Meeting of 28.7.1898, Judges' Minutes, p. 104.

78 Annual Reports of I.L.I., July 1897, p. 8; July 1898, p. 8.

79 Frequently the Institute's Annual Reports did not specify all these initiatives but simply referred to them in general terms. The Annual Report for 1899, for instance, noted that 'the Council has made representations to several Public Departments on various matters during the year - to their Honors; the Judges, to the Public Service Board, to the Department of Justice, and to the Equity Department; and the views of the profession, as represented by the Institute, have in all cases received careful attention, and in most cases were adopted by the Departments referred to. The Institute has also been referred to on certain matters by the Department of Justice, and his Honor, the Chief Judge in Equity, and in each case the Council appointed a sub-committee to consider the subjects submitted to it, and did all in its power to render the assistance courteously asked for', ibid., July 1899, p. 6.

80 Annual Reports of I.L.I., July 1897, p. 8; July 1898, p. 8.
The Institute responded quickly to any attempts to provide privileged admission to legal practice. During 1897 and 1898 it petitioned the Legislative Council against certain bills which purported to allow laymen additional facilities for practising in the courts. In June 1898 when the judges, at the instance of the Public Service Board, provided that certain clerks in the Crown Law Office could sit for the solicitors' final examination without articles or other examination, the Council drew up a petition asking for an amendment of this rule. The petition was extensively signed but did not persuade the judges to make the proposed changes. On a similar note, the Institute opposed the application of certain managing clerks of ten years' standing to be admitted to the final examination for solicitors without other conditions. It believed that they 'should be placed upon the same footing in respect of examinations as clerks under Articles'. As a result, the judges required that such clerks should also

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81 *Ibid.*, July 1898, p. 7. The bill in question was J.C. Neild's Law Practitioners Bill which sought to enable persons to practise in the courts simply by passing an examination in law. There were to be no articles, no literary requirement, and no heavy fees, *N.S.W.P.D.*, Vol. 88, 1897, pp. 2071 ff.

82 The Rule laid down that any person who had completed the term of five years of clerkship in the offices of the Supreme Court or the Office of the Crown Solicitor and had for at least two years been the Chief Clerk or a Clerk in Charge of any branch of those offices was eligible for admission as a solicitor provided he passed the final examination for articled clerks, Meetings of 16.2.1898, 21.2.1898 and 7.6.1898, *Judges' Minutes*, pp. 96-99, 102-03.

83 The Prothonotary informed the Institute that 'the rule referred to was made advisedly, and their Honors see no special reason to vary it', *Annual Report of I.L.I.*, July 1899, p. 6; see also Meeting of 26.5.1899, *Judges' Minutes*, p. 114. The Law Chronicle, Vol. VI, No. 12, 30.8.1898, pp. 89-90, was very critical of the new rule, claiming that it would undermine admission standards.


pass the intermediate law examination. The Institute, however, remained dissatisfied with the new rule and campaigned vigorously in the early 1900s to limit its application.

Not surprisingly in the prevailing circumstances, the Institute was particularly active in its endeavours 'to maintain and preserve the high standing, honour (and) integrity' of the profession. Many of the complaints which it received were found upon investigation to be vague, trivial or groundless but, as already noted, cases of professional misconduct had frequently to be brought before the court. According to its annual reports, the Institute drew the attention of the court to the conduct of some forty-four attorneys between 1894 and 1902, eighteen of whom were struck from the roll and another dozen received either suspensions or fines. Many other suits against solicitors were brought by private parties. But, although this supervision of professional conduct was apparently effective, the Institute's Council constantly regretted its lack of authority in such matters.

The rule laid down that any person who had completed ten years of clerkship 'in the office or offices of some one or more Solicitors practising in the Colony ... and who has for at least five of such ten years been a Managing Clerk' would be entitled to admission as a solicitor if he passed the intermediate law and final law examinations and lodged satisfactory certificates as to his service, fitness and character, Meeting of 8.3.1900, Judges' Minutes, pp. 122-24.


Ibid., February 1892, p. 5; July 1898, p. 8.

In 1897 it pointed out that 'in two cases of alleged misconduct by Solicitors, in which the Institute applied to the Court for a rule nisi, the applications were refused, upon grounds which emphasise the urgent necessity that exists for formally empowering the Institute authoritatively to enquire into and investigate complaints brought before it', ibid., July 1897, p. 8. At the same time the Institute was wary that 'its powers and position' should not be used 'as it would appear some persons try to use them, for the mere purpose of obtaining payment of a client's money; and more especially so when the charges complained of have been submitted to the Council by a professional man on behalf of his client', ibid., July 1895, p. 8.
primary reason behind the drafting of a bill to incorporate the Institute in 1896 was to give it greater powers in this regard. The Institute also took action where possible, under s. 13 of the Attorneys' Act, against unqualified people doing legal work for gain, but it was frequently hampered by lack of conclusive evidence. It hoped that the actions which it did take would deter others who might be tempted to act similarly.

With the political climate unfavourable to the chances of an incorporation act, the Institute was forced to rely on the punitive powers of the Supreme Court, though it did not always share its views.

In addition to promoting the library and the interests of solicitors generally, the Institute tried by various means to render itself both more attractive and more indispensable to solicitors. It reduced country subscriptions to half a guinea, suspended and then abolished the entrance fee.

90 The Council explained that 'a growing sense of the extreme difficulty of satisfactorily dealing with complaints made to the Institute, as at present constituted, has been emphasised by the events of the past year. Matters of complaint are constantly referred to the Institute by persons who have been advised to this course by various Government Departments - the Department of Justice, the Attorney General's Department - or by the Judges and Magistrates, in which, with its present very limited powers of investigation, it is impossible for the Institute to do justice either to the complainant or the practitioner concerned; who should, if possible in every case, be afforded an opportunity of answering and refuting prejudicial charges', ibid., July 1896, pp. 6-7.


92 Ibid.

93 'In deference to representations made by Country Solicitors - members of the Institute and others who had expressed their willingness to become members, if the annual subscription of country members was reduced - it was resolved at an Extraordinary General Meeting of the Institute, held on October 27th, 1896, that from the 1st July, 1897, the Annual Subscription of Country Members be reduced to half-a-guineas; and ... to suspend the Entrance Fee ... for a period of three months. The Entrance Fee was again suspended ... on May 11th, 1897, ... to the present day', ibid., July 1897, pp. 7-8. The motion to abolish the entrance fee was carried unanimously, ibid., p. 5.
and allowed members of the Articled Clerks’ Association to use its library for reading, reference and meetings. The Institute’s endeavours to extend its authority with the sanction of either the judges or parliament were not, however, successful. In 1894 a deputation from the Institute suggested to the judges that they should appoint the association to examine articled clerks but no action was taken as a result. Two years later, when the high number of complaints it was receiving about solicitors was making the Institute’s lack of authority in such questions obvious, the Council moved ‘to expand the working and sphere of the Institute into fuller accord with the intentions of its founders’. A sub-committee drafted a bill to incorporate the Institute by act of parliament and to confer upon the Council powers of investigation similar to those given to its English counterpart by the Solicitors’ Act of 1888. The Council revised this draft but deferred its introduction into

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94 The Council admitted that it hoped ‘to see that Members of the Association, on being admitted to practice, will, knowing the advantages of the Institute, lose no time in becoming members’, ibid., July 1895, pp. 5-6. The Association’s committee strongly recommended that this offer be accepted, Law Chronicle, Vol. III, No. 4, 15.9.1894, p. 26. The only subsequent complaints which the articled clerks made about this arrangement, under which the Association contributed the bulk of its annual subscriptions to the Institute, were that the library did not contain the books prescribed for the LL.B. examinations and that its closure at lunchtimes and in the evenings greatly restricted the use which articled clerks could make of its facilities, ibid., Vol. IV, No. 2, 15.7.1895, p. 11.

95 Annual Report of I.L.I., July 1894, p. 6. The Institute intended, if it gained this authority, to channel the fees from those examinations into its library fund. The judges were doubtful, however, whether they had power to comply with the wishes of the Institute under the provisions of the Constitution Act.


97 Ibid., p. 7. Under the Solicitors’ Act, 51 & 52 Vict. Ch. 65, ss. 12-15, the Master of the Rolls was required, when hearing applications to strike solicitors off the roll or allegations of misconduct, to appoint a committee of between three and seven members of the Council of the Incorporated Law Society to investigate that matter. If this committee believed that a prima facie case had been made out it was to bring its report before the court. The court was to treat the report as the report of the Master of the Rolls.
the legislature because it was unlikely to be favourably received. In these circumstances, the Institute's authority continued to rest on the strength of its membership and the recognition it received from the courts and government departments.

Financially too, the Institute's performance during the 1890s was less satisfactory than its Council desired. Before 1895 the Institute had few worries in this regard, but when it began to expand its field of operations, particularly with the development of the library, expenses quickly mounted. To offset this new burden, which included the librarian's salary, the Council suggested to the judges 'that Solicitors, admitted for the first time in the Colony, should pay an admission fee of Ten Guineas, which shall go to the funds of the Institute; and that every practising Solicitor should take out an annual Certificate of practice, at a fee of One Guinea, which should go to the Library Fund of the Institute'. At the same time it moved to cancel the membership of those with subscriptions in arrears and to recover the amounts due from those defaulting. When the judges refused to introduce the proposed fees, the Institute was left with barely

98 Annual Reports of I.L.I., July 1897, p. 9; July 1898, pp. 7-8. This decision must have been influenced by the Assembly's willingness to agree to Neild's Law Practitioners Bill in July 1897, N.S.W.P.D., Vol. 88, 1897, pp. 2071-79.


100 Ibid., p. 7.

101 The judges' decision was influenced by petitions from country solicitors who opposed the introduction of these fees, Meeting of 9.5.1896, Judges' Minutes, p. 83; The Secretary, S.A.B., to the Secretary, I.L.I., 5.6.1896, Letter Book of Attorneys' Admission Board, 29 April 1893 to 29 July 1897, A.O.N.S.W., 3/4831, p. 718. The Institute's proposals were also strongly objected to by the Articled Clerks' Association which petitioned both the judges and the Institute against their introduction, Law Chronicle, Vol. IV, No. 3, 15.8.1895, p. 19; Vol. IV, No. 4, 16.9.1895, p. 28.
sufficient income to cover its current working expenses. Determined that its new initiatives must not be curtailed, the Council then, as we have seen, obtained a loan of £300 to complete the library. This did not, however, improve the Institute's general finances and by July 1901 it was operating on a bank overdraft, a situation not helped by the failure of some members to forward their subscriptions. The Institute gained temporary relief by authorising a call of £1 per member, but it was clear that only increased subscriptions would provide a long-term solution.

The progress of the Incorporated Law Institute during the depressed circumstances of the 1890s was not, therefore, without significant obstacles. In financial terms, its performance was not impressive and, despite the cooperation it had received from the judges and the crown law officers, the Institute had been unable to gain formal authority for its actions either by rule of court or act of parliament. At the same time, the Institute's ability to succeed in the face of such drawbacks served to underline its strengths in other directions. It enjoyed a degree of support and displayed a strong sense of purpose which were in marked contrast to the fortunes of its predecessor in the 1860s. Both the difficult times and the Institute's own positive initiatives were clearly important factors behind the rapid increase in its membership in the 1890s but, as previous experience had shown, their effect would not have been so dramatic if colonial solicitors

102 The Council regretted to report 'that in its opinion the amount of the present subscription is totally inadequate to carry out the objects of the Institute considering the proportions that they have now attained. The present income barely suffices to meet the ordinary expenses of management', Annual Report of I.L.I., July 1901, p. 5. The balance sheet attached to that report reveals that the Institute owed the Commercial Bank of Australia £8.10.6 and that its overall expenditure for the year was £496.13.4.

103 Ibid., July 1901, p. 5. The new scale of subscriptions was introduced on 1 July 1903, Ibid., July 1903, p. 6.
as a group had been less aware of their common interests and less concerned
with the need to preserve the rights and reputation of their profession.
The increasing similarities of background and training among solicitors
practising in New South Wales which had become apparent in the 1880s thus
placed the profession in a much stronger position to defend its status and
interests than that of the rather motley group of practitioners who succumbed
to a like challenge in the 1860s.

How far the Institute's new-found strength reflected the important
changes which had taken place in the character of the profession and to
what extent it was not simply a short-term response to the depression was
confirmed by its continued success in the early years of the twentieth
century. As conditions began to improve for solicitors there was a
predictable decline in the Institute's membership and a slackening of
interest in its work and objects but these factors only temporarily
delayed the Institute's progress. The Council continued to give priority
to improving the library and added considerably to its usefulness by
acquiring sets of law reports from the neighbouring colonies and the United
States and duplicates of the most valuable local and English texts.
Members strongly endorsed this emphasis by borrowing heavily and making

104 The Institute's membership declined gradually to be around 400 in
1909, but it then began to pick up again and had reached 470 by July 1914. At the same time, however, there was a marked drop in the
number of new solicitors seeking admission and by January 1914 there
were 1,037 practising solicitors in New South Wales, only 20% more than
in 1899. 43% (449/1,037) of these solicitors belonged to the Institute,
representing 53% (321/607) of city practitioners and 30% (128/430) of
those in country areas.

105 The Council attributed the Institute's unsatisfactory financial
position 'in a great measure to want of interest by the Profession
in the work and objects of the Institute, as well as the failure of
members to recognise their obligations as Subscribers', Annual Report
of I.L.I., July 1901, p. 5.
increasing use of the library for reference purposes.\textsuperscript{106} When the Council proposed to increase subscriptions and re-introduce an entrance fee in 1911, it justified these steps as 'a moderate return for the material benefits derived by members who make use of the library ...'.\textsuperscript{107}

Even more significant, however, was the concerted effort which the Institute made to regularise, streamline and expedite the due process of law now that less of its time and energy was absorbed by cases of professional misconduct. The Institute made several attempts to have greater powers conferred upon the Registrar of Probates. That officer, it argued, should be able to grant probates and letters of administration in all except difficult cases, which would continue to be referred to the Probate Judge.\textsuperscript{108} The Attorney General viewed the proposal favourably but it was only the Institute's persistence which finally led to its enactment in the Administration Amending Act of 1906.\textsuperscript{109} The Institute also campaigned successfully for the re-introduction of receipts in place of duty stamps at the court offices. The practice of 'affixing duty stamps to the requests for search and documents filed' raised several problems.\textsuperscript{110} Not only was it 'impossible for solicitors

\textsuperscript{106} The number of volumes borrowed each year increased from 4,786 in 1903 to 7,224 in 1908. The development of the library during these years may be traced in the Annual Reports of I.L.I., July 1903, p. 6; July 1904, pp. 4-5; July 1906, pp. 5-6; July 1907, pp. 4-5; July 1908, p. 4; July 1909, p. 4; July 1910, p. 4; July 1911, p. 4; July 1912, p. 4; and July 1913, p. 4.

\textsuperscript{107} Ibid., July 1911, p. 5.

\textsuperscript{108} Ibid., July 1904, p. 6.

\textsuperscript{109} Attorney General Wise had drawn up a bill to realise this object in 1903 but it was not introduced. The Institute raised the matter again, however, and it became law as Act No. XIV, 1906, s. 2, ibid., July 1906, p. 6; Bennett, A History of the Supreme Court of New South Wales, p. 142.

\textsuperscript{110} Annual Report of I.L.I., July 1907, pp. 6-7.
to properly check payments made by their clerks but there were 'no official receipts to produce to the Taxing Officer for payments so made.' At first the Attorney General rejected the idea because of the extra clerical work involved, but by 1911 the Institute's Council recorded with satisfaction 'that the old system of collecting such fees in cases has now been reverted to in all Court Offices with the exception of the District Court Office'.

The Institute also strove hard to overcome the most glaring defects in both substantive and procedural law. When the decision in Buckingham v. Inclermano Shipping Company revealed that an action could not be sustained under the Common Law Procedure Act 'when a contract for the shipment of goods had been made in England, though the delivery of the goods was to be made in this state', the Institute urged the Attorney General to make a suitable amendment. He did this in the Supreme Court Procedure Act of 1900.

In 1903, recognising the need to facilitate the assignment of debts and choses in action, the Institute drafted a bill to this effect and

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111 Ibid.
112 In 1909 the Attorney General 'decided to permit the sale of stamps at the various Court Offices to be again introduced. At the same time he refused the Institute's request that receipts should be given for the fees paid by stamps, stating as his reason that the giving of such receipts would greatly lessen the saving in clerical labour, which resulted from the practice of collecting fees in stamps instead of cash', ibid., July 1909, p. 5. See also Meeting of 15.4.1909, Incorporated Law Institute: Minute Book, January 1904 to December 1912, (I.L.I. Minute Book (1)), Law Society of New South Wales Archives, pp. 283-84.
115 Act No. 49, 1900, s. 9. The second reading and committee debates on this legislation may be found in N.S.W.P.D., Vol. 105, 1900, pp. 2774-2804; and Vol. 107, pp. 4272-75, 4563-64.
forwarded it to the Attorney General who introduced it into the Legislative Council. The following year, it pointed out the anomalous position of the Vice-Admiralty Court whose jurisdiction had not been transferred to the Supreme Court under the terms of an imperial statute passed in 1891. This campaign to bring New South Wales 'into line' with the rest of the Empire succeeded in 1911. The Institute also sought to obtain special legislation for enforcing judgments throughout the British Empire but these plans foundered on the apathy of other law societies. In addition, the Institute made numerous suggestions on bills referred to it by the Attorney General. These included the Companies Act Amendment Bill, the Real Property Act, The Commonwealth Bankruptcy Bill and the Supreme Court

118 Bennett, op. cit., pp. 163-64.
119 In 1903 the Institute drafted a bill along similar lines to the Federal Service and Execution of Process Act, 1901, and forwarded copies of it to the Attorney General with a request to consider it with a view to obtaining the necessary legislation upon the subject both in New South Wales and in other parts of the Empire. It also advised the law societies of the Australian States, New Zealand, South Africa and Canada of the steps which it had taken and urged them to request their governments to introduce similar measures. The response which they received from these other societies was not enthusiastic, Annual Reports of I.L.I., July 1903, p. 5; July 1904, p. 6.
120 This bill itself was the result of the Institute's campaign to bring the Companies Act into line with English statutes passed since 1862, ibid., July 1905, pp. 4-5. It became law as Act No. 22 of 1906.
121 Ibid., July 1910, pp. 7-8; July 1913, pp. 7-8.
122 Ibid., July 1913, p. 6. Though the Institute acknowledged that it would be virtually impossible to gain a uniform Bankruptcy Law throughout Australia by parallel state legislation, it did believe that the Commonwealth bill 'should be carefully considered by a committee of specialists in this branch of the Law from each State'.

Procedure Bill of 1912. Two bills which the Institute singled out for special attention were the Commonwealth's Land Tax Assessment Act of 1910 and the Stamp Duties (Amendment) Act of 1914. In the former case, it enlisted the support of law societies in the other states to try and remove 'very grave objections (to the bill) on legal and constitutional grounds'.

Another major target for the Institute was the Registrar General's Department and, in particular, its Land Titles Office. In 1907, after an exhaustive investigation, the Institute made detailed submissions to the Attorney General recommending the appointment of additional officers 'to enable the staff to successfully cope with the pressure of business found to be existing at present in that Department'. It followed this up with suggestions on the best methods of recording and preserving the registers of births, deaths and marriages and objected to the contemplated dismissal.

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123 Ibid., pp. 6-7. In particular the Institute wanted to ensure that no claim or defence would be defeated or disallowed as the result of a purely technical defect, Meeting of 8.8.1912, I.L.I. Minute Book (1), pp. 528-29.

124 The amendments which the Institute considered necessary in this legislation are set out in the Annual Report of I.L.I., July 1914, pp. 10-15. The speed with which the measure passed the Assembly made it difficult for the Institute to point out the major defects which it saw in the bill before it became law. It subsequently approached the Attorney General to urge the need for amending legislation.

125 Ibid., July 1911, pp. 5-6. The Institute was particularly alarmed by section 65 of the proposed legislation which provided that anyone who understated in their return the unimproved value of any land by 25% would be 'deemed to have ... understated with intent to defraud' until the contrary was proved. This provision, the Institute argued, violated 'the fundamental principle which underlies the administration of our criminal law, namely, that a man charged with a criminal offence is to be presumed to be innocent until his guilt has been proven', Cuttings from S.H.H. and Daily Telegraph, 3.10.1910, Incorporated Law Institute - Newsclippings, Law Society of New South Wales Archives, pp. 72-73. Prime Minister Hughes denied, however, that this was the effect of the bill and it became law as Act No. 22 of 1910.

of certain 'temporary' officers in the department who were considerably more competent than their likely successors. In December 1908 the Council sent a circular to all members seeking comments upon the operation of the Real Property Act and of the Land Titles Office. Based on this information, it then made even more comprehensive proposals for reform within the Registrar General's Department. It urged the need to provide increased accommodation and improved clerical assistance to searchers and made numerous suggestions for amending sections of the act to simplify and facilitate the practical implementation of the land law. The Council had already made arrangements with the Prothonotary to allow searches in the court offices relative to conveyancing matters on those court holidays which were not public holidays.

Other court offices and departments, rules and regulations were not immune. In 1904 the Institute submitted draft rules to the Chief Judge in Equity covering special allowances to solicitors who personally conducted proceedings either in court or in chambers. The following year it gained changes in the practice pursued in the Master's office when settling Minutes of Orders and Decrees for the payment of costs. These had operated prejudicially to the interests of solicitors, sometimes depriving them of

127 'The Council emphasised its opinion that a change of the kind contemplated should not be made at all, if it involved the removal of officers, who though designated "temporary" had been employed in the Department for years, and were still discharging their duties with satisfaction to their Chief, and the substitution for them of officers taken from another Department who have had no special training in the work of the Registrar General's Department, but for whom it was considered necessary to find employment by reason of their being on the permanent staff of the Civil Service', Annual Report of I.L.I., July 1909, pp. 4-5, 8.

130 Ibid., July 1903, p. 5.
131 Ibid., July 1904, p. 6.
their lien for costs on the Judgment or Decree. The Institute opposed plans to move the Bankruptcy Offices and Registrar's Court away from the other courts and it reduced the expenses incurred by litigants in the District Courts by pressing upon the judges the need for the cost of the Bailiff delivering a summons to be recoverable in an action.

While pursuing these wider initiatives, the Institute did not lose sight of the more practical problems facing the individual solicitor. To ensure that solicitors received adequate remuneration for their services, its Council reviewed, with the assistance of the judges and the crown law officers, the various scales of costs applicable in the courts. The Council also continued to oppose the judges' decision in March 1900 to make managing clerks of ten years' standing eligible for admission as solicitors provided they passed the intermediate and final law examinations.

132 Ibid., July 1905, p. 6.
133 Ibid., pp. 6-7.
134 Ibid., July 1912, p. 5.
135 Cf. ibid., July 1900, p. 7; July 1909, p. 7; July 1912, p. 6; July 1914, pp. 7-8; Meeting of 14.8.1913, Incorporated Law Institute: Minute Book, December 1912 to October 1920, (L.I.L. Minute Book (2)), Law Society of New South Wales Archives, p. 46.
It succeeded in having the rule modified in certain respects but not repealed. Further, the Institute strove constantly to prevent unqualified persons performing legal work either incorrectly or for a fee. It pointed out to many bank managers and commissioners for affidavits the illegality of their witnessing signatures and taking affidavits in matters in which they were concerned or had drawn up and in 1914 advised real estate agents that

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136 The Institute, as we have seen (p. 392), had objected from the start to managing clerks not having to fulfil the same requirements as articled clerks to gain admission, both in examinations and the service of articles. They believed that the rule would allow the admission of improperly qualified persons and it had been their suggestion initially that these clerks should pass the intermediate as well as the final law examination. In March 1903 the Institute successfully petitioned the judges to amend the rule to the effect that no one should be considered a managing clerk within the meaning of the rules until he had reached twenty-five years of age. Meetings of 4.3.1903 and 25.3.1903, Judges' Minutes, pp. 165-67. Further, the Institute arranged with the Bar Council for the rule to be altered so that the Institute, and not two barristers as had originally been the case, should issue the certificate that a person was in fact a managing clerk. Annual Report of I.L.I., July 1903, p. 5. Even these changes were not, however, sufficient to satisfy the Institute and it clashed with the judges several times during the next decade upon the need to either repeal the rule completely or to modify the definition of a 'managing clerk'. The Institute believed that a 'managing clerk' within the meaning of the rule should be 'such a clerk as has had large experience in, and is capable of taking complete control of the whole work of such office in every department; not one who is conversant only with some particular branch of legal work'. The judges, on the other hand, refused to alter their definition that 'a clerk who is entrusted with the management and control of a legal branch of a Solicitor's office, subject to the Solicitor's supervision, who is authorised to direct the work of the clerks in that branch, and who acts with a general discretion in the management of that branch, is a managing clerk within the meaning of the rule, subject, of course, to the proviso that there are some other clerks in the same branch and that he is not a clerk who simply carries out his master's instructions'. Admission Papers of T.P. Bowdren, B.A.B. and S.A.B. Files, Supreme Court of New South Wales. For details of the exchanges between the Institute and the judges on this issue, see Meetings of 26.10.1904, 16.11.1904, 13.3.1912, 16.3.1912, and 28.8.1912, Judges' Minutes, pp. 131, 183-84, 263, 268-270; and Meetings of 7.12.1904, 29.11.1905, 31.10.1907, 31.3.1910, 14.9.1911, 7.3.1912, and 21.3.1912, I.L.I. Minute Book (1), pp. 40, 90, 207, 350, 460, 491, 496.

their practice of preparing and registering real property transfers for a fee was improper. 138

On a more positive note the Institute gave every assistance to the establishment of a Solicitors' Benevolent Association which would render 'relief to poor and necessitous members of the Profession and certain of their dependents', 139 and in May 1913 set up a Registry to record 'the names of Solicitors requiring Clerks, of Clerks wanting positions, and of Solicitors wishing to arrange partnerships'. 140 This Registry proved very popular. After only twelve months it held 116 names and had been expanded to include particulars of practices for sale and of solicitors wanting to purchase practices. 141 The Institute also took steps to ensure that solicitors were promptly notified of any changes or additions to the rules

138 Ibid., July 1914, p. 9; Meetings of 19.3.1914 and 30.4.1914, I.L.I. Minute Book (2), pp. 90, 97-98.
139 Annual Report of I.L.I., July 1908, pp. 4-5. The Solicitors' Benevolent Association was open to all solicitors practising in New South Wales upon payment of either an annual subscription of one guinea or of a ten guinea life membership. It was controlled by a Board of Directors, elected annually, with power to invest and distribute its funds. The rules laid down that no relief was to be granted until £1,000 had been raised, The Solicitors' Benevolent Association: Rules and Regulations, Sydney, 1908, pp. 2-4. The Association did not prove, however, to be an immediate success and by May 1914 it had a credit of only £351 and was not yet in a position to grant relief, Meeting of 29.5.1914, Solicitors' Benevolent Association: Minute Book, 11 March 1908 to 8 April 1952, Law Society of New South Wales Archives, p. 30.
The assistance which the Institute gave to the Articled Clerks' Association and the increasing interest which it showed in the welfare of articled clerks generally consolidated even further the total role which it was rapidly assuming with respect to professional matters. Despite its success in introducing important reforms in legal education and solicitors' admission requirements during the early 1890s, the Articled Clerks' Association had run into difficulties as the depression deepened. In an endeavour to sustain attendances at its fortnightly meetings, it had been forced to devote its lectures and discussions largely to legal subjects and to stress their practical benefit to every articled clerk and student at law soon to enter a profession where competition was strong. Any gains

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142 In 1900 'the Council, recognising the great inconvenience to the profession consequent on the fact that the new Rules of Court were not published in any convenient form, made certain representations to the Acting-Prothonotary, with the result that the Prothonotary's Department has arranged with the publisher of the Legal Digest and Journal to forward gratis, each quarter, to all members of the Profession, a copy of such Regulae Generales of general legal interest, as have been promulgated during the previous three months', ibid., July 1900, p. 8. These plans appear to have collapsed with the discontinuance of the Legal Digest and Journal but by 1905 the Council had 'made arrangements with the Government Printer for a supply of all Court Rules immediately they are printed' which it would forward upon receipt to all members of the Institute, ibid., July 1905, p. 7. In 1909 the Institute arranged with the Attorney General that it was 'to be supplied with copies of all District Court and Small Debts Courts Rules as they are published in the Government Gazette, and also that the morning papers be furnished with copies ... with a view to publication', ibid., July 1909, p. 6.

143 The Law Chronicle observed in February 1894 that 'the Association has of late devoted its attention to the consideration of strictly legal subjects. Its meetings are, therefore, of practical benefit to every articled clerk or student-at-law. It is strange that more men have not been moved, even by the very selfishness which is innate in every son of Adam, to attend the meetings of this Association. There are advantages to be gained in a general discussion of questions of law which cannot possibly be derived from private study. Competition is becoming keen in the legal profession ... and a man who expects to obtain the confidence of clients must have something more than a desultory acquaintance of law. The average attendance at the meetings of the Association is about 15, but it would not be unreasonable to expect an average attendance of double that number', Law Chronicle, Vol. II, No. 9, 15.2.1894, p. 72. See also Law Chronicle, Vol. IV, No. 3, 15.8.1895, p. 17.
which this new emphasis might have brought were quickly offset, however, by
the loss of older members who had supported the Association for its literary
and political, as well as legal, discussions, for its stress upon developing
intellect and personality, and for its belief that law was a science, not
just an examination subject. 144 By the late 1890s only social occasions
such as smoke concerts attracted large gatherings and even outshone an
important address by Professor Cobbett on the Sources of English Law in New
South Wales. 145 Attendances at lectures became so poor that the Association's
committee had to cancel its programme of addresses by barristers and

144 The Law Chronicle warned that 'the sole end of the Association
is not development into a gigantic lecturing and coaching concern ...
... The fact that some few live in dread of the examiners is no
reason that the other should be debarred from meeting to discuss
matters of more public and general interest', Law Chronicle,

145 In July 1895 the Committee pointed out that the readiness with
which lawyers accepted the opportunity to lecture to members of
the Association indicated that they considered it to be a very high
compliment but questioned 'very much whether the lecturer feels
the compliment to be quite so overwhelming as he first thought it,
when, on arriving at the rooms of the Association, he finds himself
confronted with an attendance of some fifteen members, to whom he
is expected to deliver a lecture that has cost him much time and
thought in preparation', Law Chronicle, Vol. IV, No. 2, 15.7.1895,
p. 9. After Professor Cobbett's lecture, they suggested that 'we
should be sorry to come to the conclusion that the attitude of the
Articled Clerks is to be judged by the occurrences of two consecutive
Thursdays, but at the same time it is hard to avoid drawing
conclusions ... The Smoke Concert was a brilliant success - the
programme was excellent, the attendance equally excellent, and the
whole reflects the greatest credit on the energy of the committee ...
But what was the first impression conveyed to the spectator
at [Pitt Cobbett's lecture]? One saw, on looking round, an attendance
certainly large by comparison with the number usually present, but
ridiculously small considering the attractions. Further, the
audience was composed not mainly of Articled Clerks, who have most to
gain by these addresses, but of already admitted practitioners of
both branches ...', ibid., Vol. IV, No. 5, 15.10.1895, p. 33.
solicitors to prevent embarrassment to both the lecturers and the Association. 146

Neither a revised form of meeting along the lines of a committee debate in parliament, a circular letter which sought to stir the conscience of articled clerks, nor a reduction in the annual subscription from half a guinea to five shillings produced any substantial change. 147 Between July 1898 and July 1899 the Association held only seven meetings with an average attendance of eleven members and it had to cancel many others due to insufficient attendance. 148 The Law Chronicle attempted on several occasions to promote greater involvement by articled clerks in its activities 149 but as early as January 1896 admitted that it was hard to pretend any more that it was an articled clerks' paper. 150 It relied heavily upon contributions from barristers and solicitors and during 1898 and 1899 resorted to reprinting articles from other legal journals in place of its editorials. 151 Most clerks, the Association concluded, preferred

146 Law Chronicle, Vol. IV, No. 5, 5.10.1895, p. 33. In June 1897, the journal noted that 'during the past year there were no lectures delivered to the members of the Association: your Committee feeling some delicacy in asking members of the profession to give their time and services when there was no likelihood of even a quorum of members being present', ibid., Vol. V, No. 12, 30.6.1897, p. 85.


148 Law Chronicle, Vol. VII, No. 12, 16.9.1899, pp. 90-91. Even between July 1896 and June 1897 this lack of interest had been apparent. During those twelve months the Association also held only seven general meetings with an average attendance of 13 members. The annual report pointed out, however, that interesting discussions had been held at other meetings which were informal for want of a quorum, Law Chronicle, Vol. V, No. 12, 30.6.1897, pp. 84-85.


150 Ibid.

151 For instance, in the Law Chronicle, Vol. VI, No. 2, 26.8.1897, five of the eight pages were taken up with an article on 'The Administration of Justice in Japan' reprinted from the American Law Register and Review and two other pages were devoted to copies of recent examination papers.
both sporting and social events to its own activities and were too engrossed in passing their examinations to be interested in obtaining a broader legal culture. The Law Chronicle suggested that if a Law Association Rowing Club were established it would 'very soon be one of the strongest in Sydney'.

Far from being put off by this decline in the fortunes of the Articled Clerks' Association, the Institute continued to help the student body and began to assume primary responsibility itself for the interests of articled clerks. Members of the Association retained the use of the Institute's library and meeting rooms which they had enjoyed since 1894 and when the Institute made plans in 1899 to publish a quarterly Legal Digest and Journal it agreed to incorporate the Law Chronicle as a section of that publication. The Institute also campaigned for improvements in the training and examination of articled clerks. It asked the judges to assimilate the rules governing the Law Matriculation Examination for

153 Ibid., Vol. V, No. 8, 18.2.1897, p. 51.
154 The Institute's Annual Report for July 1906 (p. 8) noted that 'the Articled Clerks' Association has continued to hold its Fortnightly Meetings in the Library Room of the Institute and members of the Association have largely availed themselves of the privilege of using the Library for reference'.
155 The terms of this merger were to be 'very advantageous' to the Association. They were 'to devote four pages of the Journal, to have to be supplied by the Association editors, to publish in each issue a reprint of all examination papers for articled clerks during the preceding term, also to offer for the next three years, to members of the Association, two prizes annually of £5 and £2 respectively for the best article on a legal subject, not to exceed 4,000 words, also to forward the Journal free of charge to all members of the Association, and to pay by quarterly instalments the sum of £10 for one year to the Association', Law Chronicle, Vol. VII, No. 12, 16.9.1899, p. 90.
articled clerks to those for the Bar's Preliminary Examination\footnote{Annual Report of I.L.I., July 1900, p. 7. The Judges decided, however, 'after considering the difference in the nature and standard of the respective examinations' that it was not desirable to alter the preliminary examination for articled clerks, Meeting of 15.8.1900, Judges' Minutes, p. 131.} and arranged with Sydney University to deliver a series of lectures for the benefit of articled clerks.\footnote{Meeting of 2.12.1901, Sydney University Senate Minutes, Book 11, December 1898-July 1904, p. 236; Meeting of 6.12.1901, Law Faculty Minutes (1), p. 57; Meeting of 8.10.1905, I.L.I. Minute Book (1), p. 86.} This, the Institute hoped, would 'lay the foundation for a more extended and thorough scheme of education for articled clerks'.\footnote{The Institute's Council urged members 'to bring under the notice of their articled clerks the advantages offered to them by these lectures', Annual Report of I.L.I., July 1905, p. 8.} Further, the Institute sought fare concessions from the Railway Commissioners for articled clerks coming to Sydney from country areas for their examinations,\footnote{This initiative, if it had succeeded, would have been a great boon to articled clerks in many country areas. As the Law Chronicle, Vol. V, No. 5, 11.11.1896, p. 31, pointed out: 'the Intermediate Law Examination is held only in Sydney, to the great and unnecessary expense of country clerks. A clerk from Bourke must pay about nine pounds, exclusive of hotel expenses, to come to Sydney to enjoy his five pound ten and six worth of "Williams on Real and Personal". A man from Broken Hill must lay out about fifteen pounds before coming to the banquet'.} but these representations were unsuccessful.\footnote{Annual Report of the I.L.I., July 1906, p. 8; Meetings of 31.1.1906 and 28.2.1906, I.L.I. Minute Book (1), pp. 97, 99.} The Articled Clerks' Association, it appears, ceased to function in 1909 due perhaps to the lesser number of clerks then under...
articles and the absence of an immediate goal for it to achieve. Its collapse was clearly not caused, however, by any lack of support and encouragement from the Institute.

Thus the activities of the Incorporated Law Institute between 1900 and 1914 left no doubt that the unity and sense of purpose among solicitors during the 1890s was not simply a reaction to the depression but reflected a fundamental change in the character of the profession. The roots of this change lay in the increasingly similar origins of solicitors and, by implication, in their common attitudes towards their profession. The first indication that these factors were leading many solicitors to view their role in a new light was the emergence of professional associations during the 1880s but it was the response of solicitors in general to the difficult circumstances of the 1890s that made clear how determined they were to take positive steps to protect and promote their common interests. This unity, as events after 1900 confirmed, was not restricted to the protection of professional interests but was accompanied by a positive commitment to improve the administration of justice as well as the lot of each practitioner.

Where self-interest ends and public service starts can seldom be

161 In October 1910 a new body, the Articled Clerks and Law Students Association, wrote to the Institute requesting similar privileges to those which the Articled Clerks' Association had enjoyed and in particular the use of its library rooms for regular meetings and for reference purposes. The Institute's Council did not, however, grant this request, but it did point out that under the new library rules clerks of members would be able to use the library, Meetings of 13.10.1910, 27.10.1910 and 24.11.1910, *ibid.*, pp. 398, 401, 406, 408. Later the Institute agreed to hand over the books which had belonged to the Articled Clerks' Association to the new body, Meeting of 11.5.1911, *ibid.*, p. 431. Otherwise the Articled Clerks and Law Students Association appears to have won no recognition.
distinguished easily in such cases but, as a whole, those solicitors practising in New South Wales in the 1890s and 1900s clearly had a stronger sense of the profession's responsibilities to the public and the legal system than their counterparts in the 1860s. They did not take their position for granted and appreciated that their reputation and their privileges depended upon the maintenance of high professional standards and satisfactory service to their clients. These sentiments were the driving force behind the active involvement of the Institute in almost every area of professional life. They were also vital to the continuance of the profession's influence at a time when parties were rapidly displacing individuals as the dominant elements in political life. In the 1860s the profession, deprived of its formal political influence, had no strengths of its own to fall back upon; but solicitors now had the standing, the unity and the sense of purpose to continue exercising an important role in law reform and the administration of justice regardless of the prevailing political climate.
Colonial barristers faced a somewhat different but no less searching challenge during the 1890s and early 1900s. Two distinct issues arose which fully tested the qualities they had begun to display in the 1880s. These were the protracted decline in legal business and the creation of the federal High Court. The first promoted tensions between barristers and threw into question some of those informal practices which ordered conduct at the Bar, while the second introduced a much wider sphere within which barristers had to protect and promote their interests. Clearly, the Bar needed to respond effectively to these new events if it was to maintain the unity, the reputation and the influence which it had re-established by the 1880s. There was, however, no certainty that it would be able to do so. The Bar itself was expanding rapidly and changing in terms of its social composition, thus rendering the informal methods by which it had previously ordered its affairs increasingly inadequate. Further, the experience of the 1860s had shown that if barristers were not attuned to a common set of values then external pressures of this kind would tend to divide rather than unite the profession. In consequence, the Bar needed to develop a more formal organisation which would enable it to resolve the tensions arising from depressed litigation and to stand up for its rights.

Before the 1890s the number of practising barristers was not large, they were concentrated in a small area of Sydney, and their paths crossed
daily in the street and in court. There were established ladders of seniority and hierarchy under the Attorney General and the judges respectively, reinforced, it would appear, by informal social networks and the affinities born of liberal education and, for many, English training. Together these factors fostered the colonial Bar's esprit de corps and ordered the relationships between barristers. That the Bar believed it was performing a role of special importance was evident in the attitudes of barristers who served in parliament. In July 1890 R.E. O'Connor claimed that the Bar was not 'the aristocratic kind of institution' which its critics portrayed it to be but it was exclusive in that 'no man can obtain a position at the Bar unless he possesses the three qualifications of ability, honor, and

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1 Even in 1846, Colonel Mundy, the deputy adjutant general whose first residence in Sydney was near the Supreme Court in Elizabeth Street, observed that he 'had fallen by accident into the legal quarter of the city ... the doorposts of nearly all my neighbours were scored with the names of barristers, attorneys, solicitors, notaries-public, and other limbs of the law, who, albeit rivals in the trade, contrive to play into each other's hands to the detriment of the public pocket. My street abutted upon the Supreme Court, and I was perfectly astonished to see the number of sleek and spruce and bewigged personages, who soon after breakfast came swooping down from their rookery upon the field of their daily labours', Bennett, A History of the New South Wales Bar, pp. 68-69.

2 J.M. Bennett in his biography of Frederick Matthew Darley observed that 'the habits and demeanour of a gentleman were probably the most important of all attainments of any contemporary barrister. Training for the Bar, with its heavy emphasis on the classics and its prohibitive fees, ensured that the Bar was, until almost the turn of the century, the preserve of men of an exclusive stamp and class', Bennett, 'The Life and Influence of Sir Frederick Matthew Darley', p. 134. As late as 1895 Daniel O'Connor could claim in the Legislative Council that barristers had no chance whatever to exercise their ability unless they possessed a social status as well, N.S.W.P.D., Vol. 81, 1895, p. 3281.
conduct'. Six years earlier, in April 1884, W.B. Dalley has used similar arguments to rebuff charges that there was any monopoly of professional advantages aimed at excluding 'honorable ambition and culture, and intellectual competency from the profession'. To enter the Bar, he asserted, was simpler and less expensive in New South Wales than anywhere else in the world. The qualifications were 'an unblemished character, a reasonable education, and an ascertained familiarity with legal subjects'. Such a Bar, Dalley insisted, acted as a safeguard against the danger of suitors employing less experienced men only to discover 'that the object of winning their cause had been subordinated to the gratification of a low ambition'.

Attendances at the formal occasions when the Bar acknowledged the achievements of its individual members were an eloquent expression of professional solidarity. When the Bar presented a portrait to Sir James Martin in May 1885 to recognise his services to the law and to the profession, sixty-one of the eighty-five practising barristers attended and

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3 *N.S.W.P.D.*, Vol. 47, 1890, pp. 2978-79. O'Connor claimed that 'it is impossible from the nature of the case that there can be among the attorneys that high general sense of honor and responsibility in dealing with the courts before whom they practise, as there is in the case of a barrister. The reason of that is that the solicitors are brought directly into contact with the clients, some of them not of a very high class, and the kind of work which they have to do is not of a very high order. Altogether there is not the same possibility for them to have that esprit de corps and feeling of exclusiveness which are engendered in a body constituted as the Bar is'.


5 In Dalley's view, 'the men who come to the Bar and who succeed ... are not the sons of men of fortune or position or influence, but young men who have to make their own way in the world, and who chose to make it in one of the noblest of intellectual professions', *ibid.*, p. 2671.

Attorney General Dalley presided. Similarly large gatherings paid tribute to F.M. Darley, M.H. Stephen and W. Owen upon their elevations to the bench between 1886 and 1888. In March 1888 the Bar held a 'banquet & water party' in honour of Mr Justice Faucett who was retiring from the bench and of two new judges G.H. Deffell and W.J. Foster.

Over seventy barristers sat down at that dinner and, as usual on such occasions, all the Supreme Court judges were in attendance. A photograph of a Bar picnic at Clontarf around 1890 includes over forty barristers as well as eight judges. The detailed attendance lists which survive for the 1885 presentation and the 1890 picnic suggest that the barristers present on such occasions came from a broad cross-section of the Bar. They reinforced the impression, which had begun to emerge in the 1880s, that the Bar as a whole was relatively cohesive and attuned to a common set of values. Those younger members of the Bar who spoke in parliament upon issues affecting the rights of the profession were frequently more

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7 'Report of Presentation of the Portrait of Sir James Martin' in Martin Family Papers - Sir James Martin, 1830-1886, Mitchell Library MSS. 2425/1, Item 9. The Freeman's Journal, 30.5.1885, reviewing this occasion, observed that 'the days of the Bar as a separate branch of the legal profession are possibly numbered, but if anything might tend to prolong them, it should be such meetings as that of last week, so rich in its record of bright names past and present, of great services and glorious memories', ibid., Item 4, Newscuttings 1852-1885, p. 53.


9 Entry for 10.3.1888, Sir Alfred Stephen's Diary, Pt. 23, 1887-88, KL MSS. 777/2, p. 81.

10 Bennett (ed.), A History of the New South Wales Bar, Plate VII, p. 95 and p. 245.

11 A comparison of the barristers who attended these functions and the Bar as a whole is provided in table 14 which appears on page 418.
TABLE 14: Attendances at Bar Gatherings Compared to All Barristers - Experience

<table>
<thead>
<tr>
<th>Practising from:</th>
<th>1885 Presentation No. %</th>
<th>1885 Bar No. %</th>
<th>1890 Picnic No. %</th>
<th>1890 Bar No. %</th>
</tr>
</thead>
<tbody>
<tr>
<td>- 1864</td>
<td>11 18.0</td>
<td>11 12.9</td>
<td>3 6.5</td>
<td>4 4.0</td>
</tr>
<tr>
<td>1865-69</td>
<td>8 13.1</td>
<td>11 12.9</td>
<td>3 6.5</td>
<td>10 10.0</td>
</tr>
<tr>
<td>1870-74</td>
<td>7 11.5</td>
<td>7 8.2</td>
<td>3 6.5</td>
<td>5 5.0</td>
</tr>
<tr>
<td>1875-79</td>
<td>10 16.4</td>
<td>20 23.6</td>
<td>9 19.6</td>
<td>15 15.0</td>
</tr>
<tr>
<td>1880-84</td>
<td>25 41.0</td>
<td>27 31.8</td>
<td>12 26.1</td>
<td>26 26.0</td>
</tr>
<tr>
<td>1885-90</td>
<td>-</td>
<td>-</td>
<td>9 10.6</td>
<td>16 34.8</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals:</td>
<td>61 100.0</td>
<td>85 100.0</td>
<td>46 100.0</td>
<td>100 100.0</td>
</tr>
</tbody>
</table>

This table is based upon the *Law Almanacs*, the *B.A.B. and S.A.B. Files*, the 'Report of Presentation of the Portrait of Sir James Martin' in *Martin Family Papers - Sir James Martin, 1830-1886, ML MSS. 2425/1*, Item 9, and the Appendix in Bennett, *A History of the New South Wales Bar*, p. 245.
vigorous in the defence of their position than their senior brethren.\textsuperscript{12}

While the Bar remained relatively small and united in sentiment, there was little need for barristers to develop a formal organisation to represent their interests and to regulate the operation of the Bar itself. Whenever the Bar's voice did need to be heard, either the Attorney General or a leading counsel like Darley or M.H. Stephen acted as its spokesman.\textsuperscript{13}

By the late 1880s, however, these circumstances were changing. The rapidly increasing size of the Bar, from 93 in 1887 to 150 in 1900,\textsuperscript{14} meant that barristers were less likely to be on terms of close personal friendship. Moreover, the new colonial character of the Bar was introducing, as we have seen, a wider range of social backgrounds which would have tended to break down the informal social connections which had previously reinforced the Bar's \textit{esprit de corps}. Although almost half (18/37) the barristers practising in New South Wales had belonged to one or other of Sydney's two leading clubs - the Australian and the Union - in 1866, by 1890 only a third (33/100) of the Bar either were or had been members of those clubs.\textsuperscript{15}

The Bar thus faced a growing need to develop a new form of organisation if


\textsuperscript{13} Bennett, 'The Life and Influence of Sir Frederick Matthew Darley', p. 101.

\textsuperscript{14} The Bar grew from 93 in 1887, to 102 in 1891, 137 in 1895 and 150 in 1900, \textit{Law Almanacs of New South Wales}, 1887-1900.

\textsuperscript{15} J.A. Ryan, in his biography of B.R. Wise, referred to the Australian and Union Clubs as the real aristocratic centre of Sydney where 'the style of the gentleman was kept up, and members did their best to emulate English social life and manners with formality of dress and rituals, and membership was kept exclusive as it was strictly by nomination and selection', Ryan, 'B.R. Wise. An Oxford Liberal in the Freetrade Party of New South Wales', p. 91. A list of barristers known to have belonged to either or both clubs between 1866 and 1890 is set out in Appendix D, pp. 468-69.
it was to maintain its cohesion and its influence.

For a time, however, this issue did not assume major importance. Not only did legal business remain plentiful until 1892, thus minimising the possible frictions between individual barristers, but during the late 1880s and early 1890s barristers were tending to concentrate their chambers in only a few buildings, mostly in Elizabeth and Phillip Streets and in close proximity to the courts. In 1870 the largest number of barristers with chambers at a common address was four, a total shared by two adjoining buildings in Elizabeth Street.\(^\text{16}\) By 1885 the signs of change were apparent. Of seventy chambers registered in the *Law Almanac*, thirteen were in Wentworth Court in Elizabeth Street while between four and six barristers were registered as sharing half a dozen other addresses.\(^\text{17}\) By 1890 thirty barristers had chambers in Wentworth Court, twelve in Denman Chambers and eleven in Lyndon Chambers, both of which were in Phillip Street, and eight other buildings boasted between four and six members of the Bar.\(^\text{18}\) Within each set of chambers there was a wide variety of professional backgrounds and experience. Men trained overseas at the Inns of Court shared corridors with men of colonial origins while Queen's Counsel and other longstanding members of the Bar were as widely dispersed as those most recently admitted.\(^\text{19}\) There were undoubtedly distinctions, influenced

\(^{16}\) Bennett (ed.), *A History of the New South Wales Bar*, p. 197.


\(^{19}\) In Denman Chambers, for example, Julian Salomons, Q.C. (admitted Gray's Inn 1857, N.S.W. 1861) and Edmund Barton, Q.C. (N.S.W. 1871) shared corridors with J. Armstrong (England 1864, N.S.W. 1882), P.J. Healy (N.S.W. 1865), C.A. Irving (N.S.W. (?) 1871), A.R. Butterworth (Inner Temple 1877, N.S.W. 1883), H. Harris (N.S.W. 1880), A.N. Robertson (Middle Temple 1881, N.S.W. 1886), G.R. Campbell (N.S.W. 1892), A.P. Canaway (N.S.W. 1885), A. Newham (N.S.W. 1888) and G.H.C. Simpson (N.S.W. 1886). At No. 89 Elizabeth Street, Edward Bennett (England 1867, N.S.W. 1868) and Cecil Bedford Stephen (N.S.W. 1870) practised alongside J.T. Lingen (Middle Temple 1872, N.S.W. 1880), P.W. Street (N.S.W. 1886) and C.R. Tice (N.S.W. 1889).
mainly by the type of chambers which a barrister could afford, but these groupings of rooms within a tight radius of the court helped to ensure correct conduct and conformity with established Bar practices. It was thus not until the difficult circumstances of the 1890s that colonial barristers were forced to take a new look at the means by which they regulated their activities and protected their interests.

Although the economic depression did not strike the Bar as suddenly as it did solicitors, the prolonged slump in litigation which lasted from 1892 until well into the 1900s had an equally serious impact upon the fortunes of barristers. In 1892 the Herald, which so gloomily reviewed the overcrowding among solicitors, considered that the position of the Bar was not nearly so bad. The main problem was that juniors enjoyed only limited opportunities due to the frequency with which solicitors engaged senior counsel. This meant, as Dr Garran pointed out in the Legislative Council, that many inexperienced barristers had 'to spend the best hours of the day in playing dominoes'. After 1892, however, conditions at the Bar deteriorated quickly. Bruce Smith apologised to Parkes in June 1893 because he had not been able to give all his time to politics as he had

20 Bennett, op. cit., p. 200.
21 Blacket, op. cit., p. 171, remembered that Wentworth Court was "noted as the home of many juniors. They, it was thought, used to meet daily - at least, when professional engagements permitted - and discuss recent decisions and discover many judicial errors. Salomons recognized the proceedings of this voluntary Appeal Court when he stated in Banco during his argument that a case he had cited was of the highest authority and had "never been questioned in any Court in the world - not even in Wentworth Court". A.B. Piddington later recalled that 'Denman (Chambers) was a hive of industry, but also a club of friends', Worshipful Masters, Sydney, 1929, pp. 38-39.
22 S.M.H., 4.1.1892, p. 3.
23 N.S.W.P.D., Vol. 47, 1890, p. 2964.
intended. Like many others, Bruce Smith explained, he had suffered severely in 'the general shrinkage' and found himself 'in duty to my family, bound to devote myself vigorously to my profession, and, consequently, to avoid even the appearance of an active political life'.

His profession would 'not admit of half measures'. Late in 1894 the Bar held a meeting to consider a proposal to permit barristers to act directly on behalf of their clients in non-contentious matters. The suggestion sought to strengthen the precarious position of the junior Bar but the meeting rejected it due to the strong opposition of a distinguished senior. This decision was calculated to preserve Bar traditions but must have created mixed feelings among the most recently admitted barristers, a number of whom had already taken, or would soon take, advantage of the Legal Practitioners Act of 1892 and become solicitors. Some later returned to the Bar, but others did not.

The depressed circumstances also brought an end to the Bar's former attractiveness to barristers from England and Ireland. In July 1895 the

25 Ibid.
27 Barristers who were disbarred and admitted as solicitors during the 1890s included J. Meillon (admitted barrister 1891, solicitor 1898, re-admitted to Bar 1905); R.C. Close (barrister 1882, solicitor 1899, barrister 1900); A.H.W. Conroy (barrister 1893, solicitor June 1898, barrister November 1898); A.C. Gill (barrister 1895, solicitor 1900); J. Montgomery (barrister 1891, solicitor 1897); J.G. O'Ryan (barrister 1876, solicitor 1894); C.J. Passmore (barrister 1888, solicitor 1897); J. Perry (barrister 1882, solicitor 1893); W.J. Forbes (barrister 1892, solicitor 1897); and P.B. Bourke (barrister 1889, solicitor 1894). Alfred de Lissa, the solicitor, tried his hand as a barrister in 1893 but he found the Bar too crowded and the following year was re-admitted as a solicitor, S.M.H., 25.7.1894, pp. 5-6.
Herald reprinted an article from the Pall Mall Gazette entitled 'The Colonial Bar as a Career'. The article claimed that in New South Wales 'not one of the last 60 barristers on the roll is in decent practice, or in anything approaching thereto, and the members thereof - if without private means - eke out a most precarious existence as literary hacks'.

Since the passage of the Legal Practitioners Act in 1892, it pointed out, the junior Bar had been deprived of the small formal matters, the 'scraps' of professional business, which they had previously relied upon when times were difficult. The practice of going on circuit in the hope of picking up briefs had come to a standstill due to the competition from country solicitors. To those considering a career at the colonial Bar, the article's advice was 'don't!' The correctness of this advice was confirmed by the experiences of at least one barrister, George Chatfield King. An English barrister, King had arrived in New South Wales late in 1891 and practised at the Bar until September 1895. He then switched his attention to mercantile pursuits and did not resume legal practice until January 1904.

A vivid example of the Bar's difficulties, though exceptional, was the striking of one barrister from the roll in March 1894. The barrister had received £200 from a client to prosecute a suit but had paid only a small proportion of this sum to the solicitor whom he had engaged to prepare the case. He apparently misappropriated the remainder although he claimed before the court that all the money had been used for the purposes of the

28 S.M.H., 31.7.1895, p. 7.
29 Ibid.
30 Admission Papers of G.C. King, B.A.B. and S.A.B. Files, Supreme Court of New South Wales.
suit. The barrister declined, however, to give details of what he had
done with the money because he insisted that barristers were not accountable
for their actions in this way. The court was not impressed by these
arguments. It considered that he had 'not only acted as a solicitor, but
a dishonest solicitor'.
Further, the financial vulnerability of the Bar
was underlined in 1896 by the court's decision in *Re Neville, ex. p. Pike*.
The case concerned a solicitor who had received moneys from a client,
including those to pay counsel, but had failed to pay them to the barrister
and had subsequently become bankrupt. The Supreme Court held that it could
not admit as evidence proof by the counsel of the fees he was owed. In
times of economic depression, a barrister's lack of accountability clearly
gave him little additional protection with respect to his conduct while
leaving him relatively insecure in financial terms.

The first sign that some barristers in New South Wales were
beginning to recognise the need for a formal Bar organisation to cope
with the depressed circumstances came in November 1893 when the Attorney
General called a meeting to elect two barristers to the Barristers'
Admission Board and four to the Council of Law Reporting. That meeting,
the *Law Chronicle* reported, was 'an unusually full one' in contrast to
previous years when it had been common 'to see Mr. John Conerty scurrying
around at the hour appointed for the meeting to beat up a quorum'. The

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31 *S.M.H.*, 14.3.1894, p. 7; 23.3.1894, p. 4.
Law Reporting had been established in 1888 following a petition
from forty practising barristers which urged that law reporting
should be placed upon a proper basis in the colony; F.M. Darley to
the Minister of Justice, 18.5.1888; and F.M. Darley to the Attorney
General, 12.12.1888, *Chief Justice's Letter Book (1)*, A.O.N.S.W.,
COD 89A, pp. 261-2, 388.
following month the *Weekly Notes Covers*, a small legal journal which accompanied the *Weekly Notes* law reports and which was initially edited by Professor Pitt Cobbett of the Law School, called for the formation of a Bar Association in New South Wales. 34 That article, and two subsequent articles, were influenced, however, primarily by the recent activities of the English Bar and not by the immediate problems facing colonial barristers. 35 They emphasised the political importance of the Bar, and lawyers in general, having a formal organisation which could contribute to law reform and the administration of justice. They did not refer to either the possible need for or utility of such a body to preserve professional standards and unity, although that aspect was of considerable importance when the Bar took steps in this direction a few years later. 36

In July 1896 barristers in New South Wales established their first

34 The journal pointed out that 'although the organisation of trade and labour has been carried to a high degree of perfection, yet ... the Bar, as a body, has remained voiceless ... there is not even a Bar Committee. And yet ... on such matters as the consolidation of the law, the fusion of the two professions, alterations in procedure, official appointments and patronage, legal education, as well as many matters of general legislation, it is of great consequence that the view of so important a body should be ascertained and expressed', *Weekly Notes Covers*, Vol. III, No. 8, 9.12.1893, p. xxix.

35 In May 1894, the *Weekly Notes Covers* urged that 'every member ought to take enough pride in his profession to spare some little time at least towards the effort to improve it. A union of all members of the profession for the purpose of improving the law and its administration would not only conduce to their own prosperity, but would probably facilitate the removal of many of those reproaches which are now so freely cast on the law and lawyers', *Weekly Notes Covers*, Vol. III, No. 18, 19.5.1894, p. lxx.

36 See also *ibid.*, Vol. III, No. 8, 9.12.1893, pp. xxix-xxx and Vol. IV, No. 6, 1.11.1894, pp. cxiv-cxv.
Bar Association. Possibly they were encouraged by the recent English moves to set up such a body, but the main impetus was clearly the increasing difficulties which barristers were facing due to the economic depression. The Association's objects were 'to consider and report upon all matters of current legislation and rules of practice affecting the Bar; to enunciate and enforce rules of professional discipline and custom; to foster social and professional liaison amongst barristers and generally to deal with all matters affecting the Bar'. One of its earliest resolutions was to hold a Bar dinner each term and regular smoke concerts. These, the Bar Association hoped, would promote social intercourse between barristers and thus help to foster the Bar's esprit de corps.

The emphasis was thus not upon the wider and less immediate questions of professional interest raised by the Weekly Notes Covers but upon maintaining ordered relationships within the Bar itself. This was a particularly difficult task because, as the Law Chronicle warned, the Association had to wield 'the sanction of unanimous professional opinion' if it was 'either to speak on matters affecting the Bar with any great authority, or to legislate concerning professional discipline and custom with any binding

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37 The Weekly Notes Covers, Vol. V, No. 17, 14.5.1896, pp. lxv-1xvi, first acknowledged that practical steps were being taken to establish some kind of representative organisation for the Bar in May 1896.

38 It was about this time that the English Bar was taking steps to replace its Bar Committee with a General Council of the Bar whose function was 'to consider all matters which directly affect the interests of the profession, including the maintenance of its rights and privileges, the enforcement of professional discipline and custom, the examination of proposed legislation and of the rules of practice brought into force from time to time; and to take such action thereon as may be thought necessary', ibid.


40 Ibid.
Unfortunately for the Bar Association, it did not attract the necessary support. The Law Almanac did not acknowledge its existence and no record remains of its activities. Its only credit when barristers established a new organisation in 1902 was £53 in the bank.

The reasons why the Bar Association of 1896 languished so quickly can only be established indirectly. In 1902 Attorney General B.R. Wise suggested that an important factor in the Association's collapse was its failure to obtain rooms where it could transact its business and members could meet. By itself, this explanation is certainly inadequate. As had recently been the case in England, colonial barristers were undecided upon the proper form and functions of such a body. Some considered it vital that the association should be able 'to interfere on matters of professional discipline and customs' but others thought that it would be both difficult and dangerous for it to do so. Though there is no direct evidence as to which barristers held these particular views, it seems likely

41 The Law Chronicle, Vol. V, No. 2, 1.8.1896, p. 1, queried whether, 'if the Association is to enforce the rules of professional etiquette, and this seems to be its most important object, what colour of right, and what chance of success has it so to do, unless it represents a unanimous profession and wields the sanction of unanimous professional opinion?'

42 The Weekly Notes Covers, Vol. X, No. 38, 3.7.1902, p. cxlix, later observed that 'it was the lack of such interest and support which rendered previous attempts of the same kind abortive'.

43 A meeting of the 'late Association' held in February 1902 'resolved that the funds at its disposal, amounting to about £53, should be handed over to the new Association on formation', Circular Letter from B.R. Wise, Attorney General, 13.3.1902, The Council of the Bar of New South Wales, Minute Book No. 1, 20 March 1902 to 3 April 1903 (Bar Council Minutes (1)), New South Wales Bar Association Archives, p. 1.

44 Ibid.

that the division would have been one between the junior Bar and the more senior counsel. The former, who were bearing the brunt of the decline in litigation, were in 'an unenviable and precarious' position. They were beginning to question the usefulness of Bar customs, in particular the need for an attorney to intervene between client and counsel, which greatly restricted their chances of earning a living from their new profession. Leading barristers, on the other hand, were far less affected by the depression at this stage. They would have been reluctant either to relinquish the traditional safeguard of a barrister's independence from his client at a time when the dangers of doing so were being made obvious by misconduct among colonial solicitors or to abandon the Bar's informal hierarchical structure without sufficient cause. There were apparently no Queen's Counsel among the office-bearers of the Bar Association. While the Bar Association offered some hope to the junior Bar, it appears equally to have challenged the authority and customs of their more senior colleagues. The failure to resolve this conflict of interests was, it would seem, the primary reason why the Bar Association did not succeed.

By 1902 the situation was far different. In March that year Attorney General Wise called a meeting of barristers to consider proposals to form a new Bar Association. This body, Wise envisaged, would 'enable

47 The Weekly Notes Covers, Vol. V, No. 17, 14.5.1896, p. lxvi, had suggested in May 1896 that to establish a Bar Association 'it would be necessary to constitute an executive committee, consisting of the Attorney-General for the time being, and a certain number of elective members, representing, if possible, the senior and junior sections of the Bar'. Among the members of the Bar Association's first Council, R.M. Sly had been in practice in New South Wales since 1875 but the others had been only recently admitted - L.M.L. Owen (1888), L. Whitfeld (1888), F.H. Salusbury (1887) and W.D. McIntyre (1891), Bennett, op. cit., pp. 142-44.
the Bar as a body to express their views upon matters of professional and
public interest' including legislation and rules of court, to handle
questions of professional conduct and etiquette, and to 'encourage closer
intimacy amongst members of the Bar'.

The meeting resolved to establish
a General Council of the Bar. Every barrister would be eligible for
membership upon paying the annual subscription. To realise this end,
the meeting appointed a provisional committee to draw up rules and these
were agreed to by the First Annual Meeting of the Bar held on 9 June 1902.
The new organisation, to be known as the Council of the Bar of New South
Wales, consisted of the Attorney General (ex-officio), three King's Counsel
and eleven other barristers, all elected annually at the meeting of the Bar.
The rules empowered the Council to make suggestions relating to law reform
and the administration of justice; to handle questions about law reporting,
printing and publishing; to control professional conduct and etiquette;
to arrange social gatherings; to established a Bar library and reading
room; and to confer with the Council of the Incorporated Law Institute
upon matters affecting the interests of both branches of the profession.
The Council could call a special meeting of the Bar whenever it considered
such action necessary and had to do so if requested by fifteen or more
members.

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48 Circular Letter from B.R. Wise, Attorney General, 13.3.1902, Bar
49 Meeting of 20.3.1902, ibid., pp. 1-2.
50 The provisional committee consisted of G.E. Rich, G.T. Martin,
D. Maughan, F.H. Salusbury, S.A. Thompson, E.M. Brisenden and
51 Rule 18, The Council of the Bar of N.S.W.: Regulations, Sydney,
1903, pp. 6-7.
Fears that this new organisation, like its predecessor, might fail to generate sufficient support were quickly dispelled by its early activities. From the beginning, the Bar displayed a strong determination to make the Council useful and effective. The meeting of barristers which considered the draft regulations drawn up by the provisional committee made important changes to those rules. It decided that voting rights should be confined to practising barristers, gave the Council power 'to decide upon questions of' as well as lay down rules for professional conduct and etiquette, and provided that a barrister who felt aggrieved by a decision of the Council could appeal to a special meeting of the Bar. At this meeting also, the Bar gave formal recognition to the need to cooperate with the Incorporated Law Institute upon matters of general interest to the profession. The same enthusiasm carried over into the first election of members to the Council in June. Six King's Counsel contested the three positions reserved for the Inner Bar and thirty-three barristers stood for the other eleven vacancies. Charles Edward Pilcher, K.C., topped the numerical poll with eighty-seven votes, a figure which suggests that at least sixty or seventy per cent of barristers took part in the election. Such a response must have been encouraging, particularly in the light of

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54 Meetings of 12.5.1902, 13.5.1902, Bar Council Minutes (1), pp. 3-10e. Later, in February 1903, the Council passed a by-law to the effect that 'the seat of any member of the Council who is absent without leave for more than three consecutive meetings may be declared vacant', Meeting of 20.2.1903, ibid., pp. 37-38.
55 The Weekly Notes Covers, Vol. X, No. 38, 3.7.1902, p. cl, welcomed this cooperation, pointing out that 'sectional organization alone is not sufficient; at least all that of the Bar'.
the Bar Association's failure to create either interest or support just a few years earlier. It was with confidence that the first Bar Council could inform the judges, the court officers and the Institute of its existence.

The reasons for this new enthusiasm among barristers for a professional organisation are not difficult to find. By 1900 the amount of civil litigation coming before the Supreme and District Courts had slumped to less than half the level of the early 1890s. All barristers were experiencing difficulties and the competition for legal business was placing great strains upon many of the informal customs which regulated practice at the Bar. Unless the customs relating to matters such as retainers and circuit court practice were clearly defined and laid down for the guidance of barristers, there was a danger that they would break down altogether. In addition, the coming of federation and the establishment of the High Court of Australia and its federal jurisdiction raised important challenges which the New South Wales Bar could not ignore. Not only was there a new dimension to both the substantive law and the administration of justice but the Bar needed to be able to protect its interests before a court in which both divided and fused professions had rights of audience. With the growth of the party system in colonial politics, and in particular the important position held by the Labor Party which showed little concern for the interests of the profession, barristers could clearly not hope to

57 Meeting of 7.6.1902, ibid., p. 15.
58 See Chapter 10, pp. 368-69.
59 The provisions of the Judicature Act of 1903 which established the High Court are discussed in detail in Weekly Notes Covers, Vol. XI, No. 18, 14.11.1903, pp. lxix-lxx and Vol. XI, No. 19, 28.11.1903, pp. lxviii-lxxv.
achieve this by the same means that they had used to promote issues of law reform in parliament in the 1880s. The need for some form of professional association was too urgent to be ignored. With a structure which acknowledged the hierarchical nature of the Bar, and an equivalent English body which ensured its respectability even among those barristers steeped in the traditions of the Inns of Court, the Bar Council was ideally suited to fulfil this role.

The activities of the Bar Council after 1902 soon confirmed that the need to respond to the problems raised by the depression and the High Court was indeed the principal factor behind its formation. Among its earliest activities, the Council drafted rules both to govern retainers and to regulate practice at the circuit courts. By 1902 there was apparently no settled practice in New South Wales upon the functioning of professional retainers. To remedy this deficiency, a sub-committee of the Bar Council drew up a comprehensive set of retainer rules based upon those in force in England. The Council adopted these in November 1904. The rules laid down the terms under which general and special retainers might be accepted by the Bar, overruled by another retainer, and terminated. They attempted to clarify the duties of a barrister whenever his services were sought by different parties and specified the fees payable by a client.

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60 During the 1890s the Labor Party's strength in the Legislative Assembly was 'nothing like enough to form a government but sufficient to decide which of the other parties should be in power', de Garis in Crowley, op. cit., pp. 235-37.


62 Ibid.

for each type of retainer. The few questions subsequently referred to the Bar Council in relation to retainers bore ample witness to the sufficiency of the new rules. The only point which caused it any indecision was the question of whether a retainer was binding upon a barrister when the company giving that retainer was not strictly a party on the record of a particular case. The Council ruled that a retainer did have utility in these circumstances but it later reversed its decision after seeking advice from the General Council of the Bar of England.

That firm guidelines were necessary to ensure a fair distribution of circuit and District Court practice also became obvious in 1904 when the Bar Council drew up new circuit court rules and presented them to the Annual Meeting of the Bar. Consideration of the draft rules extended over three days and the amendments which barristers did propose suggest that some at least believed the Council's plans provided insufficient protection for the barristers on a particular circuit. In their final form, the circuit court rules took effect from 1 July 1904. They laid down the towns within each circuit and required that any barrister who wished to be attached to a circuit register his name with the Secretary of the Bar


Annual Statement of the Bar Council, 1913-1914, p. 2. On another occasion, when proceedings arose out of a shipping accident, the Council was asked whether a barrister could hold briefs for different parties in actions arising out of the same incident in different courts. It answered that in these circumstances he would not be justified in accepting the second brief unless he was satisfied that he would not be embarrassed within the meaning of Retainer Rules XIV and XV, ibid., 1914, p. 2.

Meetings of 16.5.1904, 19.5.1904, 20.5.1904, Bar Council Minutes (2), pp. 29-33. At these meetings, an attempt was made to raise the fees necessary before a barrister could appear before the Supreme Court on a circuit for which he was not registered from twenty to twenty-five guineas. For a King's Counsel, it was proposed, the amount should have been forty or fifty guineas instead of thirty.
To change from one circuit to another, a barrister had to give three months' notice to the Council. A barrister who was not registered on a particular circuit could not accept briefs there before the Supreme Court unless the fee exceeded twenty guineas and before the District Court or Quarter Sessions unless it exceeded fifteen guineas. The attempt by some barristers to side-step these restrictions by simply not registering at all confirmed the need for the rules. The Attorney General gave his support by providing that where possible crown prosecutors should be chosen from those barristers belonging to the same circuit. This action, the Bar Council hoped, would encourage barristers to register, but oversights by the Attorney General's Department in making those appointments weakened its impact.

To overcome the legal incapacity of barristers to sue for the value of their services, the Bar Council appointed a sub-committee in August 1904 to investigate the whole question of unpaid counsel's fees.

68 Rules 5-9, ibid.
70 Annual Statements of the Bar Council, 1905-1906, p. 2; 1906-1907, p. 2; Meeting of 1.9.1905, Bar Council Minutes (2), p. 75.
71 Annual Statement of the Bar Council, 1906-1907, p. 2. In 1909 the Bar Council informed the Attorney General that in its opinion 'the spirit of the Circuit Rules can only be carried out when commissions to prosecute are given to members of the Bar duly registered on some Circuit before any intimation of the intended appointment is given, except under special circumstances', Meeting of 11.6.1909, The Council of the Bar of New South Wales, Minute Book No. 4, 28 May 1909 to 18 December 1913 (Bar Council Minutes (4)), New South Wales Bar Association Archives, p. 3. See also Meeting of 26.10.1906, Bar Council Minutes (3), pp. 7-8.
sub-committee recommended that the Bar adopt a procedure similar to that recently agreed upon by the Victorian Committee of Counsel. The Council agreed to this suggestion in September and its decision was endorsed by the Annual Meeting of the Bar in July 1905. As a result, the Council was empowered to inform the Incorporated Law Institute of the facts of any case where the circumstances of the non-payment made it in the interests of the profession to expose the defaulting client. Further, if a solicitor failed to pay a barrister's fee within a reasonable period of time, and the barrister satisfied the Council of this, the Council was, after a certain period of grace, to enter the offending solicitor's name onto a private list kept for that purpose. Once a solicitor's name appeared on that list, no barrister was to accept a brief from, or hand over any document drafted or settled to that solicitor unless his fee was paid in advance. Any five members of the Council could remove a solicitor's name from the list at any time. Only one solicitor's name reached this private list before 1914 and his subsequent settlement of accounts rendered further action unnecessary. The numerical growth of the Bar and its changing social composition would almost certainly have forced colonial barristers to move towards a more formal structure to regulate their own affairs in the near future even without the additional strains produced by the depression, but the tensions and problems shown up by the economic

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74 Meeting of 9.9.1904 and printed resolutions adopted at that meeting re 'Non-Payment of Counsel's Fees', Bar Council Minutes (2), p. 50.
75 Ibid.
76 Ibid.
crisis were clearly vital elements behind the enthusiastic reception which the Bar Council received in 1902.

Similarly, the activities of the Bar Council reflected the sensitivity of the New South Wales Bar to the threat which the High Court's federal jurisdiction posed to its interests. To settle the question of how divided and fused professions would operate together within the one jurisdiction, the Bar Council resolved in August 1904 to adopt certain suggestions put forward by the Committee of Counsel in Victoria. These were that where federal courts were sitting in South Australia, Western Australia or Tasmania, or hearing appeals from cases initially heard in those states, members of the New South Wales, Victorian and Queensland Bars were at liberty to appear with lawyers practising in those states, even though the latter did not practise exclusively as counsel. Otherwise members of these three Bars were not to appear in any federal court with any person except a member of those Bars. Though the Barristers' Board of Western Australia and the Northern and Southern Law Societies of Tasmania objected to these rules, the Bar Council refused to make any concessions to lawyers from those states until 1914. In March that year it accepted a recommendation from the Victorian Committee that their barristers should also be able to appear with practitioners from South Australia, Western Australia and Tasmania in appeals to the High Court from decisions of State Courts of the said states, wherever such appeals

78 Dean, op. cit., pp. 105-107.
be heard'. The Council remained determined, however, that in all federal cases originating in New South Wales the Bar should not compromise its identity as an independent branch of a divided profession.

A further demonstration of the need for the Bar to have a formal spokesman to protect its interests before the federal courts came in 1905. An argument between the High Court judges and the federal Attorney General, Sir Josiah Symon, over the judges' travelling expenses developed into a bitter confrontation as to whether all appeals to the High Court should be heard in Melbourne unless exceptional circumstances made this undesirable. Barristers in New South Wales had already become concerned with the possibility that the sittings of the High Court would be restricted to only Sydney and Melbourne and the Bar Council promptly called a meeting to respond to this new challenge. Seventy-two barristers attended the meeting which was held on 6 June and chaired by Attorney General C.G. Wade. The Bar's primary object was to protest against any interference by the executive with the judiciary, or any alteration to the federal Judiciary Act, particularly s.86(2) which gave the court discretion to appoint and regulate

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81 Annual Statement of the Bar Council, 1913-1914, p. 2.
82 These were the same motives which determined the attitude of the Victorian Bar to this question, Dean, op. cit., pp. 105-07.
83 The whole sequence of events which led to this controversy is set out in the Daily Telegraph, 25.6.1905, a copy of which appears in Bar Council Minutes (2), p. 70. Symon believed that Melbourne was the seat of the High Court, that the judges should live there, and that the Court's excursions to other capitals should be strictly limited and regarded as a favour, S.M.H., 12.6.1905, ibid., p. 68.
84 Meeting of 30.5.1905, ibid., p. 65. In July 1903 the Bar Council had taken up the suggestion of J. Garland, a barrister, that it should try to have the headquarters of the High Court established in Sydney until the federal capital was created. It discussed the idea with the Incorporated Law Institute and the Chamber of Commerce and apparently followed this up with a deputation to the Prime Minister, Meetings of 31.7.1903 and 19.8.1903, Bar Council Minutes (2), pp. 10, 11.
its own sittings. New South Wales, barristers believed, had lost out to Victoria in many respects under the federal system and they were determined that the Judiciary Act should not suffer a similar fate. The meeting passed a resolution claiming that:

> any alteration of the Judiciary Act tending to restrict or control the power of the Judges of the High Court to hold sittings in all Federal States at such times as they should consider necessary for the disposal of business, would be detrimental to the interests of suitors in the several states, and to the administration of the law in the Commonwealth generally.

The Bar Council forwarded copies of this resolution to the Prime Minister, to Symon, and to all members of the federal parliament but failed to stop the proposed amendments being introduced into parliament. What further action the Council might have taken never became clear because the Reid-McLean coalition government lost office before the bill was passed.

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85 Wade argued that 'they had had the unfortunate experience in the past of having all the plums and pickings taken to Victoria and centred in Melbourne, New South Wales being gradually stripped of her rights under the scheme of federation'. The meeting concentrated upon the proposed alterations in the Act, believing that this would place the Bar's case on stronger grounds than if it tried to unravel the dispute between the judges and the executive. J.H. Want, A.G. Ralston and C.E. Pilcher all emphasised that the original idea behind establishing the High Court had been to bring the final court of appeal to every state's door, Newsclippings, ibid., pp. 66-70.


87 Meeting of 9.6.1905 and Associated Newsclippings, Bar Council Minutes (2), pp. 67-70. Prime Minister G.H. Reid denied that the intention was to deprive Sydney of sittings of the High Court but his Government did introduce new scales of judicial travelling expenses based on Melbourne as the 'principal seat' of the Court and he also indicated that Symon would bring in a bill upon the question of whether the High Court would in future sit in Melbourne or go on circuit, ibid.
into law and the measure was not revived by the new Deakin ministry. 88

The actions of the federal government again brought protests from the New South Wales Bar in March 1913 when Attorney General W.M. Hughes announced the appointment of two new judges to the High Court. Fisher's Labor government had been experiencing difficulty in implementing its social and economic policies due to the conservative and legalistic interpretations handed down by the High Court bench under Chief Justice Sir Samuel Griffith. 89 Late in 1912 the death of Mr Justice O'Connor and the creation of two new appointments by the Judiciary Act gave Hughes an ideal opportunity to swing the judicial balance more in the Commonwealth's favour by appointing judges of more liberal dispositions. 90 His first appointment, that of leading Victorian barrister F. Gavan Duffy, K.C., was well received 91 but his other nominations — C. Powers, the Commonwealth

88 The new Attorney General, Isaac Isaacs, specifically revoked Symon's order. He said that his government was 'distinctly of opinion that the intention of Parliament in enacting the Judiciary Act was that the High Court, not only in original jurisdiction but also in appellate jurisdiction, should sit in each State capital, as may be required, that is if legal business in the opinion of the justices so requires'. The government, Isaacs asserted, had 'full confidence in their Honors' wisdom in this regard to select in the future as in the past, their homes with reasonable regard to the volume of the business of the court, so as to lighten as far as possible travelling expenditure, as well as expedite the transaction of business', Newscuttings from Daily Telegraph, 25.8.1905, at ibid., p. 70.


90 Ibid., pp. 272-73. Hughes' determination to secure a favourable bench can be seen in his efforts to contact Piddington who was then returning to Australia by ship from England. Hughes wrote to Dowell O'Reilly in Sydney asking him to try and reach Piddington who was then between Port Said and Suez. He explained that 'the matter is at once very urgent & very important & I'll tell you what it is - I want to put Piddington on the High Court Bench. But before doing so I must be satisfied that he is not a rabid State Rights champion', W.M. Hughes to D. O'Reilly, 1.2.1913, Dowell O'Reilly Papers - Correspondence, 1905-1923, Mitchell Library, MSS. 231/8, p. 399.

91 Fitzhardinge, op. cit., p. 275.
Crown Solicitor, and A.B. Piddington of the New South Wales Bar - provoked controversy. Powers was a solicitor and government official and Piddington, though a man of ability, was by no means a leading barrister.\(^\text{92}\) In consequence, the Bar Council called a meeting of the Bar at the request of thirty barristers to consider what action might be taken.\(^\text{93}\) Those who attended condemned the government's choice as dangerous to the prestige and public confidence enjoyed by the High Court and resolved that the New South Wales Attorney General and Solicitor General should not offer the Bar's congratulations to the new appointees.\(^\text{94}\) The Council forwarded copies of these resolutions to the Prime Minister and the press.\(^\text{95}\) In the face of this criticism and a similar attack by the Victorian Bar, Piddington resigned his position but Powers remained in office.\(^\text{96}\) The extent to which the Bar Council could hope to influence the federal government was undoubtedly limited, but this must not be allowed to obscure the very real concern among barristers in New South Wales to preserve as far as possible their rights and reputation in the new fields of practice opened up by the High Court.

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\(^{92}\) Ibid., pp. 275 ff.

\(^{93}\) Meeting of 26.2.1913, Bar Council Minutes (4), p. 68.

\(^{94}\) The meeting resolved that 'in order to maintain the prestige of the High Court as the principal Appellate Court of the Commonwealth and to secure the public confidence in its decisions it is essential that positions on that Bench should be offered only to men pre-eminent in the legal profession. (2) This meeting of the Bar of N.S.W. regrets that this course was not adopted with respect to the two most recent appointments to the Bench of the High Court', Meeting of 10.3.1913, Ibid., pp. 69-71.

\(^{95}\) Annual Statement of the Bar Council, 1913, p. 2; Meetings of 12.3.1913 and 17.3.1913, Bar Council Minutes (4), pp. 72, 74.

While the effects of the depression and the High Court thus gave particular impetus to the formation of the Bar Council, the other initiatives which the Council pursued showed that it was not simply a reaction to those events but a continuation of the new awareness of common interests and responsibilities which barristers in New South Wales had begun to display in the 1880s. Apart from these steps to regulate and protect professional practice, the Bar Council gave considerable attention to issues of seniority and the role of the Inner Bar. When the Law Almanac for 1902 placed the new Solicitor General, Hugh Pollock, immediately after the Attorney General in order of seniority, five King's Counsel protested to the Bar Council that this was incorrect. The Council held that, though Pollock was called the Solicitor General, he did not hold that office under the terms of the constitution and should not therefore have been given precedence. It asked the judges to confirm this opinion but the court believed such a distinction to be incorrect. In 1904, this time with judicial approval, the Council ruled that 'as long as reciprocity as at present exists, a Queensland barrister admitted here takes priority according to the date of his call in Queensland'. It was less favourably disposed towards the claims of a barrister who had become a solicitor and later returned to the Bar. His precedence, the Council held, dated from his last call and not from the original one.

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99 The judges held that 'among the privileges conferred (upon Pollock) is the right of precedence attached to the office of Solicitor-General', ibid. See also Special Meeting of 12.12.1902, Bar Council Minutes (1), p. 36.
100 Meeting of 10.6.1904, Bar Council Minutes (8), p. 38; Meeting of 19.8.1904, Judges' Minutes, p. 178.
The Council also forestalled future difficulties when it resolved in 1906 that rank among New South Wales barristers admitted on the same day was determined by the order of their admission in court and not by their date of entry as a student at law or by the order in which they signed the roll.102

In accordance with English practice, the Bar Council insisted that a King’s Counsel could not appear without a junior except when undertaking the defence in a case which did not require the reading of pleadings, judges’ notes or other documents.103 Should he wish to appear for the defendant in a criminal matter before the Police Court, he had, in the opinion of the Council, to obtain a licence to do so from the crown.104

Further, the Bar Council sought to establish guidelines for the appointment of King’s Counsel through submissions to the Attorney General in December 1904. It urged that applicants for silk should be required to notify all practising members of the Inner Bar and other barristers senior to them that they were applying and that they should not give this notice during any vacation. As the title was a dignity which ought only to be conferred as a mark of professional eminence, the Bar Council wanted appointments to be confined to practising barristers.105 The Attorney General accepted

102 Meeting of 24.8.1906, Bar Council Minutes (3), p. 4; Annual Statements of the Bar Council, 1906-1907, p. 1. Earlier the Bar Council had ruled that the precedence of gentlemen called to the Bar on the same day by the same Inn of Court and by different Inns of Court on the same day was determined by the order of their call in England and not by their admission in New South Wales. This decision coincided with the opinion of the General Council of the Bar of England, Annual Statement of the Bar Council, 1902-1903, p. 2.

103 Ibid., p. 1.


these recommendations as an authoritative expression of professional opinion and indicated his agreement with the procedures they laid down.

He refused, however, to limit the rights of the crown as to who should be chosen.\footnote{106} In 1911, when the Victorian Committee of Counsel suggested reciprocal admission for members of the Inner Bar, the Bar Council held firm to its belief that 'the title of King's Counsel should only be conferred in respect of work in the Courts of this State or on appeal from those Courts'.\footnote{107}

On a wider plane, the Bar Council gave considerable attention to law reform and the administration of justice. It set up a permanent sub-committee to scrutinise all professional interest legislation and rules of court,\footnote{108} asked the Attorney General to forward copies of bills at the earliest possible moment so that they might be fully considered,\footnote{109} and suggested such amendments as it considered necessary.\footnote{110} When the Official

\footnote{106} Annual Statement of the Bar Council, 1903-1904, pp. 1-2.

\footnote{107} Meeting of 29.7.1910, Bar Council Minutes (4), pp. 25-26; Annual Statement of the Bar Council, 1910-1911, p. 1. The Council agreed to confer with members of the Victorian Bar upon this question in mid-1911 but after that conference reaffirmed its belief that the reciprocal admission of King's Counsel was not desirable, Meetings of 2.6.1911 and 8.12.1911, Bar Council Minutes (4), pp. 42-43, 51; Annual Statement of the Bar Council, 1911-1912, p. 1.

\footnote{108} Meetings of 20.2.1903 and 27.2.1903, Bar Council Minutes (1), pp. 37-40. There were three other standing committees on professional conduct and etiquette, law reporting, and general purposes.


\footnote{110} For example, in 1905 the Bar Council asked the committee to report upon a number of bills presently before the legislature and it forwarded this report to the Attorney General, Meetings of 18.8.1905 and 1.9.1905, Bar Council Minutes (2), pp. 74-75. The following year it suggested amendments to the Attorney General in the Testator's Family Maintenance Bill and in 1908 appointed a special sub-committee to consider the Matrimonial Causes Act, Meetings of 7.9.1906 and 16.10.1908, Bar Council Minutes (3), pp. 5, 43.
Shorthand Writers Bill was under discussion in 1903, the Bar Council recommended that shorthand writers paid by the state should be employed in every case heard before the Supreme Court in Sydney. This service, it pointed out, would provide litigants with transcripts of proceedings both cheaply and quickly. The Council was particularly concerned with 'simplifying the procedure of the Supreme Court, and expediting litigation' and it urged both the government and the judges to introduce reforms along the lines of the English Judicature Acts. It succeeded in having the use of Rules Nisi discontinued with respect to new trials and suggested that common law chamber business could be expedited either by appointing a second judge to that duty or by allowing the judge hearing these matters to sit longer than the half hour daily then allotted. When the government introduced the Supreme Court Procedure Bill in 1912, the Bar Council criticised it for not providing for a full implementation of the judicature system. In addition, the Council promoted changes in the District Courts Act and informed the Attorney General of its grave concern about the practice of appointing acting judges in those courts. The other important initiatives which the Bar Council undertook depended upon close cooperation with the Incorporated Law Institute.

111 Meeting of 22.8.1902, Bar Council Minutes (1), p. 22; Annual Statement of the Bar Council, 1902-1903, p. 2. As late as 1910 the Bar Council was continuing to support the desirability of copies of shorthand notes being supplied to litigants at as near as possible to cost price, Meeting of 29.7.1910, Bar Council Minutes (4), p. 26.

112 Meeting of 5.12.1902, Bar Council Minutes (1), p. 34; Meetings of 10.2.1914 and 24.2.1914, The Council of the Bar of New South Wales, Minute Book No. 5, 10 February 1914 to 9 July 1923 (Bar Council Minutes (5)), New South Wales Bar Association Archives, pp. 4, 12.


114 Meeting of 6.8.1912, Bar Council Minutes (4), pp. 60a, 61.

When the Bar Association was established in 1896, the Institute
had not even acknowledged its existence in its annual report. The Bar
council received a quite different response. The Institute welcomed its
formation and hoped that the power to confer upon matters of common concern
'when exercised, may result in benefit to both branches of the Profession'.
This was not simply a courteous platitude. During the following year the
two bodies combined with the Chamber of Commerce to campaign successfully
for the passing of the Commercial Causes Act, which became law in December
1903, and the setting up of a Commercial Court. They also appointed a
joint committee to study the present system of law reporting and to suggest
changes which would make the reports 'more fully supply the wants of the
profession'. The committee brought forward a number of proposals.
These included the issuing of the reports in parts at least every two
months and the need for better and more regular indexes to the cases.
The publishers expressed their willingness to comply. Two years later,

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117 Bennett (ed.), A History of the New South Wales Bar, p. 149. The
idea came initially from barrister E.M. Brissenden who moved that
the Bar Council appoint a committee 'to consider whether the
establishment of a commercial court is desirable and possible'.
The Council resolved, in consequence, to invite the Chamber of
Commerce and the Institute to a conference upon the issue, Meeting
of 14.8.1903, Bar Council Minutes (2), p. 11. The Act, No. XIX of
1903, set up the commercial court and empowered the judges in
dealing with commercial matters to expedite proceedings by dispensing
with pleadings, certain technical rules of evidence, and other
formal requirements.

119 Other proposals were that all reportable cases in the Supreme Court
should be included in the Law Reports, that each volume should contain
a 'Table of Cases Cited' and that regular records and digests of all
cases in all reports ought to be supplied to subscribers to the Law
Reports without an increase in price, Annual Statement of the Bar
Council, 1902-1903, p. 2.

120 Annual Statement of the Bar Council, 1903-1904, p. 2.
encouraged by the Attorney General, the two societies established a permanent Joint Committee on Law Reporting which was to maintain a constant surveillance over the reporting, editing and publishing of law reports.  

How far barristers and solicitors were prepared to cooperate by this time became clear in 1904 and 1905 when the Bar Council sought the opinion of the Institute on its new retainer rules and agreed to form a joint sub-committee to seek a rule of court providing that a barrister should not charge a refresher for any day on which he was not available for court work or consultation. There were, predictably, some differences of opinion. The Institute believed that no refresher should be charged on any day when the barrister was not available for court work, and that if he was available for consultation but not court work, the refresher should only be payable if the consultation was actually held. Similarly, the Institute argued that Rule 9 of the Circuit Court Rules, which together with Rule 6 restricted the opportunities of a barrister who was not registered on a particular circuit to appear there, unduly limited the freedom of action of a client and his counsel. In neither case, however, 

121 Annual Statements of the Bar Council, 1904-1905, p. 2, 1905-1906, p. 2; Annual Report of I.L.I., July 1905, p. 7; Meetings of 30.3.1905 and 30.6.1905, Bar Council Minutes (2), pp. 61, 72. This Joint Committee appears to have been quite effective. The Institute's Annual Report for July 1907 (p. 5), recorded that though the publishers had not conceded all the reforms asked for, they had agreed to make a number of improvements. Abridged reports of High Court appeals were to be inserted in the State Reports, cases on appeal to the High Court were to be reported in the court below, and the Weekly Notes were to be issued more in the form of a 'record of the week whose price was not to exceed 15/- per annum to subscribers to the State Reports'.  


123 Ibid., p. 8.  

124 Ibid.
was the Bar Council willing to give way. At the same time, these quibbles were of only minor importance in comparison with the mutual recognition being shown by the Institute and the Council for their respective positions and their desire to cooperate where possible for the improvement of professional practice. When the Institute became concerned that the rules relating to the admission of managing clerks were inadequate, the Bar Council agreed to a change in the rules to allow the Institute to issue the certificates of competency and character which had previously been given by two barristers.

Apart from these initiatives which related to specifically professional matters, the Institute and the Council continued to work together to reform the administration of justice in general. In 1907 they united again with the Chamber of Commerce to try and overcome difficulties being experienced in the equity jurisdiction of the Supreme Court. They wanted to recommend to the Attorney General that either the Equity Court's jurisdiction over the winding up of companies should be transferred to the Bankruptcy Court or, alternatively, the Master in Equity should be granted powers similar to those possessed by the Registrar in Bankruptcy. When the prospect arose of federal legislation on company and bankruptcy law, they quickly realised that these amendments would be unwise and asked the Prime Minister if they might be represented at the official discussions on

125 Ibid.; see also Meeting of 10.11.1904, Bar Council Minutes (2), p. 58.
the new legislation.\textsuperscript{128} Even though he refused this request, they did not give up and forwarded a series of suggestions to the federal government for its consideration. These urged the need to take advantage of current British inquiries upon similar subjects, the desirability of introducing parallel state acts which could take account of varying local conditions instead of a single federal measure, and the potential benefits to the business community of keeping the administration of these laws decentralised.\textsuperscript{129} The two societies also combined to consider a memorandum from the Master in Equity upon the setting down of references for taking accounts or holding inquiries\textsuperscript{130} and strove successfully to alter the system of providing specific days in the Term List for the hearing of special matters.\textsuperscript{131} They wanted the Term List to be a continuous one, similar to that of the High Court, where each case came on for hearing in the order set down and could be advanced or retarded only if special cause was shown.\textsuperscript{132}

Barristers and solicitors in New South Wales cooperated similarly through their associations on many other questions. They jointly raised funds to acquire Percy Spence's portrait of the late Mr Justice O'Connor to hang in the High Court\textsuperscript{133} and opposed both the re-admission of R.D.

\textsuperscript{129} Annual Report of I.L.I., July 1907, p. 6.
\textsuperscript{130} Annual Statement of the Bar Council, 1906-1907, p. 2; Meeting of 30.5.1907, I.L.I. Minute Book (1), p. 170.
\textsuperscript{131} Annual Statement of the Bar Council, 1909-1910, p. 2; Meeting of 18.3.1910, Bar Council Minutes (4), p. 15.
\textsuperscript{133} Annual Report of I.L.I., July 1913, pp. 5-6; Meetings of 2.4.1913 and 18.4.1913, Bar Council Minutes (4), pp. 77-78.
Meagher as a solicitor in 1912\textsuperscript{134} and the appointments which Fisher's government made to the High Court in 1913.\textsuperscript{135} The Incorporated Law Institute extended the use of its library to the judges,\textsuperscript{136} and to barristers upon payment of an annual fee,\textsuperscript{137} while the Bar Council resolved in 1909 that barristers should accept briefs on behalf of the Institute without fee in cases where Solicitors are called upon to show cause why they should not be struck off the Rolls or suspended from practice, and in all opposed applications for admission to practice as a solicitor'.\textsuperscript{138} There continued to be some issues, including certain proposed amendments to solicitors' rights of audience,\textsuperscript{139} upon which the

\textsuperscript{134} In 1912 Meagher, whose re-admission by the Supreme Court had been overruled on appeal to the High Court in 1909, sought to return to practice by an act of parliament. The Bar Council and the Institute objected vigorously to this course of action 'on the ground that the nomination of any individual by the Legislature to act as a qualified member of either branch of the legal profession is irreconcilable with the interests of the legal profession and of the Public, particularly in a case where the fitness of the individual to practise in that profession and deal with the public has been pronounced upon by the Court which has held that he is not a fit and proper person to be admitted as an attorney, solicitor and proctor', Meeting of 16.9.1912, Bar Council Minutes (4), p. 63. See also Special Meeting of 16.9.1912, I.L.I. Minute Book (1), p. 538. The bill passed in the Assembly but was rejected by the Council, Bennett, op. cit., pp. 149-50.

\textsuperscript{135} Meeting of 13.3.1913, I.L.I. Minute Book (2), p. 16.

\textsuperscript{136} Annual Report of I.L.I., July 1907, p. 5.

\textsuperscript{137} Meeting of 9.5.1907, I.L.I. Minute Book (1), pp. 173-74. The subscription for barristers was £2.2.0 per annum.

\textsuperscript{138} Meeting of 26.5.1909, Bar Council Minutes (4), pp. 1-2.

\textsuperscript{139} The Institute supported a proposal to amend the Legal Practitioners Act 'so as to allow Solicitors' partners and their clerks, who are themselves Solicitors, to appear in all matters in which the partner or principal is the Solicitor on the record', Annual Report of I.L.I., July 1909, p. 7. The Bar Council, on the other hand, opposed the amendment because 'it would tend to reduce the effective control by the Court over the conduct of cases, and would limit the responsibility of attorneys to their clients', Annual Statement of the Bar Council, 1909-1910, p. 3.
two branches differed but in general barristers and solicitors were realizing the full potential for cooperation and influence which had first become apparent in the 1880s. As late as 1894 the *Weekly Notes Covers* had accused both branches of the profession of being indifferent to any interests excepting their own. A decade and a half later that charge had no foundation.

The breadth of the Bar Council's activities and its willingness to cooperate with the Incorporated Law Institute thus confirmed that barristers, like solicitors, had changed markedly since the 1860s. As a group, they were clearly much more aware of their common interests and responsibilities and consequently were prepared to take positive steps to keep their own house in order and to preserve their reputation and their influence.

At the same time, the Bar's new strengths and their expression through the Bar Council had even greater significance because they made it possible for barristers and solicitors to combine forces upon many issues relating to law reform, the administration of justice and even the operation of the profession itself. Once again the first signs of this cooperation had been evident by the late 1880s but it was only when economic depression and political change forced both branches to re-evaluate their individual and their respective positions that it came to fruition. There was no question of either barristers or solicitors accepting new similarities between their functions. Indeed, the basis for their cooperation was the acceptance that they were performing essentially different roles within the administration of justice. The important change was that their relationship was no longer marred by the exaggerated

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comparisons of learning and responsibility, conduct and partisanship which had characterised it to a greater or lesser extent since the division of the profession in 1834. In part this was due to the breaking down of the rigid legal criteria separating barristers and solicitors but above all it reflected a narrowing of the traditional distinction between a barrister as a man of liberal education knowledgeable in the science of the law and a solicitor as a man with essentially practical training who handled the routine and largely clerical aspects of the legal process.

Similarly to the unity evident within each branch, the cooperation between barristers and solicitors also had its roots in the new colonial character of the profession. Many of the young men flooding into the ranks of solicitors by the late 1880s had made considerable sacrifices to achieve that goal and were frequently taking a step up in the world. They were determined, as the activities of the Articled Clerks' Association showed, to maintain the status of their future profession and to ensure that their legal training and education should be as broad and as effective as possible. During the 1890s they campaigned vigorously to bring the examinations for solicitors more into line with those for the Bar and to gain recognition of Sydney University's law degree as a suitable qualification for admission. Their success meant that solicitors were assuming some of the attributes of a learned and cultured profession which had previously been restricted to the Bar. Barristers, on the other hand, were moving in the opposite direction. In the same manner that the increasing size and social composition of the Bar necessitated a change in the Bar's organisation, those factors were also forcing the Barristers' Admission Board to adopt admission rules whose emphasis was more upon technical expertise in the law and less upon social standing and a liberal
education. This change, which had first received recognition in the late 1880s with the breaking down of the restrictions upon the occupations which a student at law might undertake, culminated in September 1903 when the Board divided the final law examination for barristers into two enlarged sections.141 The new rules gave practical legal subjects, aimed to promote technically excellent lawyers, a decided priority over the requirements for a liberal education. With the Law School providing a common training ground for an increasing number of both barristers and solicitors,142 the legal profession of New South Wales as a whole thus had a sound basis for the continuing protection of its interests and the exercise of an effective voice upon wider questions of law reform and the administration of justice.

141 Rules 1-5 and Appendix C, 22.9.1903.
142 Between 1892 and 1914, 191 lawyers graduated from the University's Law School. 124 subsequently entered the Bar, 53 became solicitors and 14 do not appear to have entered legal practice. These figures are drawn from Bavin, The Jubilee Book of the Law School of the University of Sydney, pp. 234-36, the Admission Rolls and the B.A.B. and S.A.B. Files.
CONCLUSION

Between 1856 and 1914 the legal profession of New South Wales had thus undergone a marked transformation. It had evolved from being a largely 'imported' group of British practitioners into an independent colonial profession controlling its own admission standards and legal education, promoting its own professional associations, and administering an individual system of laws. The change had not been easy. Despite its apparent buoyancy in the early 1850s, the legal profession had been unable to adjust to the social and political changes introduced by the gold rushes and responsible government or to respond effectively to the difficult economic circumstances of the following decade. Lawyers as a group suddenly appeared inexperienced, lacking in leadership and cohesion, and without any sense of commitment to the general interests of the profession or to improving the administration of justice. The legal profession's reputation and influence declined accordingly and it was not until the 1880s that barristers and solicitors in New South Wales began to demonstrate that they had largely overcome the weaknesses of earlier years. Though the greater size and experience of the profession were factors in this revival, the most important change was in the character of the individual lawyer. The increasingly homogeneous origins and training of barristers and solicitors meant that lawyers were becoming strongly aware of their identity as a colonial profession, of the position they had won by entering the profession, and of the need to preserve its standing. In consequence, the legal profession displayed a new commitment to law reform, a concern to make both legal education and admission rules as effective as possible, and a desire to close ranks for the pursuit of common objects. Just how far lawyers had changed was confirmed by the events of the 1890s.
In contrast to the 1860s when a similar challenge had left lawyers divided and impotent, the legal profession by then had the strength and the unity necessary to ride out the storm.

The studies which have appeared upon various aspects of lawyers and the law in New South Wales between 1856 and 1914 have not done justice, however, as I suggested in the introduction, to the complex changes taking place in the character of the legal profession during those years. Historians have continued to attribute the decline in the fortunes of law reform after 1861 to a shift in political priorities.\(^1\) That explanation, though not perhaps totally incorrect, completely ignores the dramatic collapse at that time of the political influence of those lawyers who had been the most active promoters of reform. Similarly, the paradox which the Bar Association's history sees between the interest of barristers in law reform in the early 1870s and the enthusiasm of laymen to reform the profession itself\(^2\) is far less confusing when we appreciate that lawyers then possessed little influence, that there had been no law reform for almost a decade, and that most lawyers were preoccupied with simply earning a living and furthering their individual positions. John Molony explains Plunkett's acceptance of the Attorney Generalship in 1865 and the refusal of the other leading barristers in terms of the relative sizes of their professional practices. He notes that Governor Young 'gave another possible reason for their refusal when he said that they were all "opposed to the policy of the liberal party"'.\(^3\) Otherwise, Molony shows no


\(^2\) Bennett (ed.), A History of the New South Wales Bar, p. 90.

\(^3\) Molony, An Architect of Freedom, pp. 275-76.
understanding of the previous nine years of bitter confrontation between liberal governments and the conservative Bar and of the significance of Plunkett's action as an attempt to restore the dignity and the independence of the crown law officers.

The failure to identify the problems which the profession experienced and the weaknesses in its composition during the 1860s has in turn made it easier for scholars to overlook the significant changes in the character and attitudes of lawyers by the late 1880s. Robyn Parsons, in her otherwise perceptive analysis of the role of lawyer-politicians in the Legislative Assembly between 1870 and 1890, displays little awareness that the nature and standing of the legal profession changed greatly during those years. Her interpretation of the resurgence of interest in law reform in the late 1880s and of the part which lawyers played in that revival is based solely upon political criteria. There is no suggestion that the vigour and the unity with which barristers and solicitors of diverse political outlooks pursued law reform after 1887 may have had its roots in the new character of the profession itself. Possibly the difficulties of promoting measures of law reform amid the 'roads and bridges' priorities of faction politics may have limited lawyers' influence in earlier years even if the profession as a whole had been more committed than it was to improving the substantive law and the administration of justice. At the same time, it appears more than coincidental that law reform returned to the forefront of political priorities and lawyers enjoyed renewed influence at the very moment that the profession was beginning to realise its colonial identity, appreciate the individuality of the laws with which it was dealing, and organise itself for the promotion of common objects.

4 Parsons, op. cit., pp. 84-117.
Even the Bar Association's own history which does identify the shift towards a more colonial and less socially exclusive Bar fails to appreciate the effect of these changes upon the character and attitudes of the profession. It highlights the appointment of the Statute Law Consolidation Commission in 1893 but does not recognise the importance of that event as the culmination of a new commitment to law reform among lawyers who were rapidly becoming aware of their position as an independent colonial profession. Similarly, the Bar Association's history portrays the changes in the admission rules and legal education after 1886 simply as logical steps towards improved standards. It conveys little sense of how the increasing number of colonial youth seeking to become barristers was in fact forcing the Barristers' Admission Board to revise completely the bases for admission to the Bar and to substitute technical for social criteria. To dismiss the alterations to the Bar admission rules between 1887 and 1890 as a 'rapid succession of small amendments' and to suggest that the Board agreed to recognise the University's law degree because the future of the academic course would otherwise have been limited is clearly not an adequate explanation for those decisions. It completely overlooks the resistance of many senior barristers to the changes and the struggles of more liberal members of the Bar to gain their acceptance.

Without this insight, the Bar Association's analysis accepts the moves towards a formal organisation for the Bar as a straightforward expression of growing professional unity. It does not take into account the utility of such a body as a substitute for the social ties which had formerly

5 Bennett, op. cit., pp. 105-08.
6 Ibid., pp. 228-30.
7 Ibid., pp. 139 ff.
reinforced the *esprit de corps* of a smaller and more exclusive Bar.

I do not mean to belittle the value of these studies by making such observations. Each of the works discussed has made a significant contribution to our understanding of the law and lawyers during those years and my own thesis could neither have encompassed the same timespan nor gained many of its insights without their assistance. At the same time, those studies would have benefited from a fuller appreciation of the changing character of the legal profession as a whole. This thesis, by providing a comprehensive analysis of the legal profession in New South Wales between 1856 and 1914, is an attempt to fulfil that need.
ARTICLES OF AGREEMENT OF FRANK HENRY AARONS - A TYPICAL EXAMPLE OF
THE FORM AND CONTENT OF ARTICLES OF CLERKSHIP

(These articles may be found in the Admission Papers of F.H. Aarons,
B.A.B. and S.A.B. Files, Supreme Court of New South Wales).

ARTICLES OF AGREEMENT

intended [sic] made and concluded upon the twenty ninth day of May in the
year of our Lord one thousand eight hundred and eighty nine Between Herbert
Salwey of the City of Sydney in the Colony of New South Wales an Attorney
Solicitor and Proctor of the Supreme Court of the said Colony of the first
part Lewis Aarons of Randwick near Sydney in the said Colony Esquire of the
second part and Frank Henry Aarons of Randwick aforesaid son of the said
Lewis Aarons of the third part Witness that the said Frank Henry Aarons of
his own free will and by and with the consent and approbation of the said
Lewis Aarons hath placed and bound himself and doth by these presents place
and bind himself Clerk to the said Herbert Salwey to serve him from the day
of the date hereof for and during and until the full end and term of Five
Years from hence next ensuing and fully to be complete and ended This the
said Lewis Aarons doth hereby for himself his heirs executors and
administrators covenant promise and agree and with the said Herbert Salwey
his executors administrators and assigns that the said Frank Henry Aarons
shall and will well and faithfully and diligently serve the said Herbert
Salwey as his clerk in the business practice and employment of an Attorney
at Law Solicitor and Proctor from the day of the date hereof for and during
and until the full end of the said term of Five Years And that the said
Frank Henry Aarons shall not at any time during such term cancel obliterate
spoil destroy waste embezzle spend or make away with any of the papers
books writings monies stamps chattels or other property of the said Herbert
Salwey his executors administrators and assigns or of his partner or
partners or any of his or their clients or employees which shall be
deposited in his hands or entrusted to his custody or possession or which
shall come or be entrusted to the care custody or possession of the said
Frank Henry Aarons And in case the said Frank Henry Aarons shall act contrary
to the last mentioned covenants or if the said Herbert Salwey or his partner
or partners or his or their executors administrators or assigns shall
sustain any loss damage or prejudice by the misbehaviour neglect or
improper conduct of the said Frank Henry Aarons the said Lewis Aarons his
executors and administrators shall indemnify the said Herbert Salwey and
his said partner or partners and make good and reimburse the said Henry
Salwey and his said partner or partners the amount and value thereof And
further that the said Frank Henry Aarons shall and will from time to time
and at all times during the said term keep the secrets of the said Herbert
Salwey and of his partner or partners and readily and cheerfully obey and
execute his lawful and reasonable commands and shall not depart or absent
himself from the service or employ of the said Herbert Salwey at any time
during the said term without his consent first obtained but shall from
time to time and at all times during the said term conduct himself with all
due diligence honesty and propriety And that the said Lewis Aarons his
executors and administrators shall and will from time to time and at all
times during the said term at his and their proper costs and charges
maintain and support the said Frank Henry Aarons and find and provide the
said Frank Henry Aarons with all and all manner of necessary and becoming
apparel And the said Frank Henry Aarons doth hereby for himself covenant
promise and agree to with the said Herbert Salwey his executors
administrators and assigns that he the said Frank Henry Aarons shall and
will truly honestly and diligently serve the said Herbert Salwey and his
partner or partners at all times during the said term as a faithful clerk
ought to do in all things whatsoever in the manner above specified
In consideration whereof and of the sum of two hundred pounds by the said
Lewis Aarons to the said Herbert Salwey in hand well and truly paid at or
before the sealing and delivery of these presents (the receipt whereof the
said Herbert Salwey doth hereby acknowledge and of the same and every part
thereof doth acquit release and discharge the said Lewis Aarons his
executors administrators and every of them for ever by these presents) He
the said Herbert Salwey for himself and his heirs executors and
administrators doth hereby covenant promise and agree to and with the said
Lewis Aarons his executors and administrators and to and with the said
Frank Henry Aarons that he the said Herbert Salwey shall and will by the
best ways and means he may or can and to the utmost of his skill and
knowledge teach and instruct or cause to be taught and instructed the said
Frank Henry Aarons in the said practice and profession of an Attorney at
Law Solicitor and Proctor which he the said Herbert Salwey now doth or shall
at any time hereafter during the said term use and practise And also
shall and will at the expiration of the said term use his best means and
endeavours at the requests costs and charges of the said Lewis Aarons and
Frank Henry Aarons or either of them to cause and procure him the said
Frank Henry Aarons to be admitted and sworn an Attorney Solicitor and
Proctor of the Supreme Court of New South Wales Provided that the said
Frank Henry Aarons shall have well and faithfully and diligently served
his said Clerkship In witness whereof the parties aforesaid have hereunto
set their hands and seals the day and year first above mentioned.
### APPENDIX B:

**SOCIAL BACKGROUNDS OF SOLICITORS IN PRACTICE IN NEW SOUTH WALES - REDEFINITIONS OF 'GENTLEMEN' AND 'ESQUIRES' FROM SANDS' POST OFFICE DIRECTORIES**

<table>
<thead>
<tr>
<th>Original Designation</th>
<th>Gentleman no.</th>
<th>Gentleman %</th>
<th>Esquire no.</th>
<th>Esquire %</th>
<th>Gentleman &amp; Esquire no.</th>
<th>Gentleman &amp; Esquire %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Redefined as:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lawyers</td>
<td>4</td>
<td>4.3</td>
<td>8</td>
<td>12.9</td>
<td>12</td>
<td>7.7</td>
</tr>
<tr>
<td>Other Professions</td>
<td>5</td>
<td>5.3</td>
<td>6</td>
<td>9.7</td>
<td>11</td>
<td>7.1</td>
</tr>
<tr>
<td>Landed-Farmers/Graziers</td>
<td>11</td>
<td>11.7</td>
<td>8</td>
<td>12.9</td>
<td>19</td>
<td>12.2</td>
</tr>
<tr>
<td>Civil Service</td>
<td>16</td>
<td>17.0</td>
<td>8</td>
<td>12.9</td>
<td>24</td>
<td>15.4</td>
</tr>
<tr>
<td>Commercial</td>
<td>43</td>
<td>45.7</td>
<td>29</td>
<td>46.8</td>
<td>72</td>
<td>46.2</td>
</tr>
<tr>
<td>Skilled/Semi-Skilled</td>
<td>11</td>
<td>11.7</td>
<td>1</td>
<td>1.6</td>
<td>12</td>
<td>7.7</td>
</tr>
<tr>
<td>Others</td>
<td>4</td>
<td>4.3</td>
<td>2</td>
<td>3.2</td>
<td>6</td>
<td>3.8</td>
</tr>
<tr>
<td><strong>Totals:</strong></td>
<td><strong>94</strong></td>
<td><strong>100.0</strong></td>
<td><strong>62</strong></td>
<td><strong>100.0</strong></td>
<td><strong>156</strong></td>
<td><strong>100.1</strong></td>
</tr>
</tbody>
</table>

**Total Numbers of Gentleman and Esquires:** 181 108 289
APPENDIX C:

LAWYERS IN THE LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL
OF NEW SOUTH WALES, 1856-1900


B = Barrister, S = Solicitor, J = Judge or former Judge

<table>
<thead>
<tr>
<th>Name</th>
<th>Admitted as Lawyer in N.S.W.</th>
<th>Member of the Legislative Assembly</th>
<th>Member of the Legislative Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abbott, J.P. (S)</td>
<td>1.7.1865</td>
<td>29.11.80 - 19.6.1901</td>
<td></td>
</tr>
</tbody>
</table>
| Abbott, R.P. (S) | 29.4.1854                    | 12.3.72 - 12.10.77
                              |                               | 26.11.80 - 23.11.82               | 9.10.83 - 29.2.88                 |
| Allen, G. (S)    | 1822                         |                                    | 22.5.56 - 13.5.61                 |
| Barton, E. (B)   | 21.12.1871                   | 26.8.79 - 25.6.94
                              |                               | 23.9.98 - 7.2.1900
                              |                               | 8.3.87 - 12.6.91                  | 12.5.97 - 22.7.98                 |
| Bayley, L.H. (B) | 2.11.1858                    | 18.6.59 - 26.10.59                 | 19.1.59 - 28.4.59                 |
| Blake, I.J. (B)  | 29.3.1854                    | 25.4.60 - 9.7.61                   | 7.4.58 - 7.11.59                  |
| Bligh, J.W. (S)  | 13.11.1841                   |                                    | 22.5.56 - 23.3.59                 |
| Booth, R. (S)    | 25.9.1875                    | 29.6.91 - 25.6.94                 |                                   |
| Brennan, J.R. (S)| 31.10.1834                   | 21.8.56 - 28.10.56                |                                   |
| Broadhurst, E. (B)| 5.2.1838                    |                                    | 22.5.56 - 10.5.61                 |
| Brown, A. (S)    | 27.9.1873                    | 2.2.39 - 6.6.91                   | 30.8.92 - 28.3.1976               |
| Brown, S.C. (S)  | 1.5.1852                     | 6.12.64 - 15.11.81
                              |                               | 16.11.81 - 16.10.82               |                                   |
| Buchanan, D. (B) | 17.11.1869                   | 14.12.60 - 2.9.62
                              |                               | 6.10.64 - 1.8.67                  | 27.2.89 - 4.4.90                  |
                              |                               | 3.12.69 - 7.10.85
<pre><code>                          |                               | 15.5.88 - 19.1.89                 |                                   |
</code></pre>
<p>| Bull, C. (S)     | 22.12.1870                   | 24.7.95 - 6.7.98                  |                                   |</p>
<table>
<thead>
<tr>
<th>Name</th>
<th>Admitted as Lawyer in N.S.W.</th>
<th>Member of the Legislative Assembly</th>
<th>Member of the Legislative Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burdekin, M. (B)</td>
<td>6.6.1059</td>
<td>29.1.63 - 15.11.69</td>
<td></td>
</tr>
<tr>
<td>Burton, W.W. (J)</td>
<td>1832-1844</td>
<td></td>
<td>11.8.57 - 10.5.61</td>
</tr>
<tr>
<td>Butler, E. (B)</td>
<td>16.10.1855</td>
<td>13.12.69 - 12.10.77</td>
<td>3.9.61 - 24.11.63</td>
</tr>
<tr>
<td>Campbell, C. (B)</td>
<td>8.3.1864</td>
<td></td>
<td>5.12.77 - 9.6.79</td>
</tr>
<tr>
<td>Carruthers, J.H. (S)</td>
<td>28.6.1879</td>
<td>12.2.87 - 25.6.94</td>
<td>1.2.70 - 23.10.88</td>
</tr>
<tr>
<td>Chambers, J. (S)</td>
<td>12.2.1842</td>
<td>18.6.59 - 31.8.59</td>
<td></td>
</tr>
<tr>
<td>Cohen, H.E. (B)</td>
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<td>13.11.1869</td>
<td>22.10.85 - 19.1.89</td>
<td>18.12.94 - 22.11.1905</td>
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<td></td>
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<td>2.2.89 - 25.6.94</td>
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<td>Want, R.J. (S)</td>
<td>25.2.1837</td>
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<td>22.5.56 - 10.5.61</td>
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<td>Wild, W.V. (B)</td>
<td>5.6.1858</td>
<td>21.1.58 - 10.11.60</td>
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<td>Wilkinson, J. (S)</td>
<td>1881</td>
<td>2.2.89 - 5.7.95</td>
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<td>Windsor, W.C. (B)</td>
<td>7.3.1857</td>
<td>29.6.59 - 22.12.62</td>
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<td></td>
<td></td>
<td>17.1.66 - 3.2.72</td>
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<td>8.9.76 - 20.12.78</td>
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<td>28.12.78 - 10.6.79</td>
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<tr>
<td>Wisdom, R. (B)</td>
<td>26.10.1861</td>
<td>13.6.59 - 26.1.87</td>
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<td>Wise, E. (B)</td>
<td>16.6.1855</td>
<td></td>
<td>25.2.57 - 17.2.60</td>
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<tr>
<td>Wise, B.R. (B)</td>
<td>28.8.1883</td>
<td>5.2.87 - 17.1.89</td>
<td>30.10.1900 - 10.3.1908</td>
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<tr>
<td></td>
<td></td>
<td>17.6.91 - 25.6.94</td>
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<td>17.7.94 - 5.7.95</td>
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<td></td>
<td></td>
<td>27.7.98 - 30.10.1900</td>
<td></td>
</tr>
<tr>
<td>Woodward, F. (S)</td>
<td>23.12.1869</td>
<td>18.2.87 - 6.6.91</td>
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</tr>
</tbody>
</table>
APPENDIX D:

BARRISTERS PRACTISING IN NEW SOUTH WALES, 1865-1890 - MEMBERSHIP OF AUSTRALIAN AND UNION CLUBS


Australian Club:

Armstrong, L. (joined 1890)  Long, W.A. (1865)
Barton, H.F. (1884)        MacNaughton, A.W. (1884)
Brenan, J. O’N. (1865)     Manning, C.J. (1877)
Broadhurst, E. (1865)      Manning, W.M. (1865)
Butler, E. (1865)          Martin, J. (1865)
Campbell, G.R. (1884)      Mitchell, D.S. (1865)
Canaway, A.P. (1890)       Murray, C.K. (1865)
Croasdil, W. (1879)        Nash, A. (1884)
Dalley, W.B. (1867)        O’Connor, R.E. (1890)
Dangar, H.C. (1865)        Owen, H.P. (1885)
Darley, P.M. (1865)        Owen, L.M.L. (1889)
Darvall, J.B. (1865)       Owen, W. (1880)
Dunaresq, W.A. (1865)      Pell, M.B. (1869)
Faithfull, W.P. (1870)     Rogers, F.E. (1883)
Faucett, P. (1865)         Salomons, J.E. (1869)
Fisher, T.J. (1873)        Salusbury, F.H. (1887)
Flood, J.W. (1889)         Scholes, E. (1886)
Forbes, D.G. (1865)        Sheppard, E. (1886)
Foster, W.J. (1865)        Simpson, A.H. (1883)
Gibson, F.W. (1885)        Simpson, G.B. (1869)
Gordon, A. Jnr. (1890)     Simpson, G.H.C. (1887)
Hamilton, H.M. (1890)      Smith, A.B. (1887)
Isaacs, R.M. (1865)
Josephson, J.F. (1867)

Union Club:

Armstrong, J. (1882)       Fitzgerald, R.M. (1866)
Backhouse, A.P. (1890)     Holroyd, A.T. (1852)
Barton, E. (1874)          Innes, J.G.L. (1872)
Brown, A. (1872)           Isaacs, R.M. (1865)
Brown, J.L. (1868)         Knox, A. (1885)
Browning, R.J. (1882)      Knox, G. (1873)
Close, R.C. (1868)         Larb, S.E. (1886)
Cockshott, H.M. (1885)     Lee, E. (1857)
Darley, P.M. (1865)        Manning, C.J. (1867)
Darvall, J.B. (1857)       Miller, G.G. (1871)
<table>
<thead>
<tr>
<th>Name</th>
<th>Year</th>
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<tbody>
<tr>
<td>Nash, A.</td>
<td>1885</td>
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<tr>
<td>Norton, W.</td>
<td>1860</td>
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<tr>
<td>Pilcher, C.E.</td>
<td>1870</td>
</tr>
<tr>
<td>Purves, W.A.</td>
<td>1872</td>
</tr>
<tr>
<td>Reid, G.H.</td>
<td>1882</td>
</tr>
<tr>
<td>Smyth, F.</td>
<td>1870</td>
</tr>
<tr>
<td>Street, P.W.</td>
<td>1886</td>
</tr>
<tr>
<td>Wade, C.G.</td>
<td>1886</td>
</tr>
<tr>
<td>Walker, W.G.</td>
<td>1882</td>
</tr>
<tr>
<td>Want, J.H.</td>
<td>1880</td>
</tr>
<tr>
<td>Windeyer, W.C.</td>
<td>1860</td>
</tr>
</tbody>
</table>
BIBLIOGRAPHY

MANUSCRIPTS

(i) Mitchell Library, Sydney:

J.P. Abbott Papers, A 3808.
George Allen Papers, MSS. 477.
Autograph Letters of Notable Australians, A 62, 69, 70.
Autograph Letters of Public Men of Australia, A 68.
Sir Edmund Barton Papers, Uncat. MSS. 249, 378.
T. Callaghan, Diary, MSS. 2112.
J.H. Carruthers Papers, MSS. 1638.
Sir Frederick Matthew Darley Papers, MSS. 2157, Uncat. MSS. 497.
J.B. Darvall Papers, A 5436.
Judge Dowling's Reminiscences, Cl94.
H.W.H. Huntington, 'Lives of the Chief Justices of the Supreme Court of
New South Wales', B 372-374.
Sir William Montagu Manning Papers, MSS. 246, 1107.
Sir James Martin Papers, Uncat. MSS. 240.
Martin Family Papers, MSS. 2425.
Alexander Oliver Papers, MSS. A 027.
Dowell O'Reilly Papers, MSS. 231/8.
Sir Henry Parkes Correspondence.
Peden Family Papers, MSS. 1663.
A.B. Piddington, Letters, Doc. 2562.
R. Burdett Smith Miscellaneous Papers, AS 14/1.
Sir Alfred Stephen's Diary, MSS 777/2.
Sir Alfred Stephen Papers, Uncat. MSS 211.
Stephen Family Correspondence, MSS. 777/5.
Windeyer Family Papers, MSS. 186.
Sir W.C. Windeyer Papers, Letters to his Mother, AW 77/11.
Windeyer Family Records and Papers, D159.
B.R. Wise Correspondence, A 2646.
B.R. Wise Papers, MSS. 1327.

(ii) New South Wales State Archives:

Departments of Attorney General and Justice - Special Bundles:
Granting of Leave of Absence to Supreme Court Judges, 1848-1875. 7701.3.
Removal from Office of District Court Judge F.W. Meymott, 1867-1883. 7707-8.
Appointment of Supreme Court Judges and Administration of Justice, 1876-1894. 7724.
Publication of Judges' Reports on Convicted Persons and Judges' Authority  
over Supreme Court Officials, 1882-1884. 7710.
Proposed Royal Commission to Inquire into the Supreme Court, 1886-1887. 7718.3.
Papers re Statute Law Consolidation, 1893-1939. 7/7186, 7/7187.2.
Prosecution of W.P. Crick and Others for Conspiracy, 1895. 4702.
Dean Royal Commission, 1895-1904. 7745.
Establishment of N.S.W. Branch of Society of Comparative Legislation, 1895-1914. 7781.

Supreme Court:
3/4829-32.
2/8340-41, 3/4768-68A.
Barristers' and Solicitors' Admission Board Files, Boxes 1-16, 1B-3B. Uncat.
Semi-official Correspondence of Mr Justice Manning, 1889-1898. 2/8561.
Semi-official Correspondence of Mr Justice Walker, 1898-1903. 2/8562.

(iii) Supreme Court of New South Wales:
Articled Clerks' Register.
Attorneys' Admission Board, Minutes, 19.3.1878 - 29.4.1913, 4 Vols.
Barristers' Roll, 15.6.1876 - 1.12.1926.
Barristers' and Solicitors' Admission Board Files.
Meetings of the Judges, Minutes, 13.2.1889 - 20.6.1916.
Secretary of the Examination Board, Minute Book, 10.8.1880 - 25.2.1884.

(iv) Bar Association of New South Wales Archives:
The Council of the Bar of New South Wales, Annual Statements, 1902-1914.

(v) Law Society of New South Wales Archives:
Incorporated Law Institute, Minute Books, January 1904 - October 1920, 2 Vols.
Incorporated Law Institute, Minutes of Sub-committee on Complaints, 16.12.1902 - 22.7.1915.
Incorporated Law Institute, Newsclippings, 1907-1914.
Solicitors' Benevolent Association, Minutes, 11.3.1908 - 8.4.1952.
(vi) Sydney University Archives:

Alexander Oliver Papers.
Professor Pitt Cobbett Papers.
Sydney University, Law Faculty Minutes, 1890-1941.
Sydney University, Minutes of Standing and Special Committees appointed by Senate, Vol. 2, 1888-1890.
Sydney University Senate Minutes, Books 1-14, 1851-1914.

(vii) Sydney University, Fisher Library:

Law Institute Papers (W.H. and Elizabeth M. Deane Collection).

OFFICIAL PRINTED SOURCES:

Historical Records of Australia.
Historical Records of New South Wales.
Journals of the Legislative Council of New South Wales, 1856-1914.
Law Almanacs of New South Wales, 1864-1914.
New South Wales Government Gazettes, 1830-1914.
New South Wales Law Reports, 1880-1900.
New South Wales Parliamentary Debates, 1856-1914.
Public General Statutes of New South Wales, 1823-1914.
State Reports, New South Wales, 1901-1914.
Statistical Registers of New South Wales, 1848-1914.
Supreme Court Reports, 1862-1879.
Votes and Proceedings of the Legislative Assembly of New South Wales, 1856-1914.
Weekly Notes.

OTHER PRINTED PRIMARY SOURCES:

Council of the Bar of New South Wales, Regulations, 1902 and n.d.
Half-Yearly and Annual Reports of the Council of the Incorporated Law Institute, Sydney, 1884-1914.
Hargrave, J.F., Inaugural Address to the Law Institute of New South Wales, Sydney, 1872.
Hargrave, J.F., Introductory Lecture in General Jurisprudence, Sydney University, Sydney, 1860.
Incorporated Law Institute of New South Wales Library Catalogues, Sydney, 1895, 1902, 1911.
Incorporated Law Institute of New South Wales Memorandum and Articles of Association, Sydney, 1884, 1901, 1912.
Legal Digest of New South Wales, Sydney, 1899.
Oliver, A., Collection of Statutes of Practical Utility, Colonial and Imperial, in Force 1824-79, Sydney, 1879 and Chronological Table and Index, Sydney, 1881.
Plunkett, J.H., The Australian Magistrate (N.S.W.), Sydney, 1835.
Rules of the Law Institute of New South Wales, Sydney, 1862.
Rules of the Law Institute of Victoria, Melbourne, 1859.
Stephen, A., Thoughts on the Constitution of a Second Legislative Chamber for New South Wales, Sydney, 1853.
Stephen, A., Introduction to the Practice of the Supreme Court of New South Wales, Sydney, 1843.
Stephen, M.H., Supplement to the Supreme Court Practice, Sydney, 1851.
Sydney Law Library - Rules, Sydney, 1842.
Sydney University Calendars, 1852-1914.
Walker, W., Reminiscences, Sydney, 1890.

NEWSPAPERS AND JOURNALS:

Articled Clerks' Journal.
Australian.
Bulletin.
Daily Telegraph.
Empire.
Evening News.
Hermes.
Law Chronicle.
Sydney Gazette.
Sydney Morning Herald.
Weekly Notes Covers.
BIOGRAPHICAL DICTIONARIES AND DIRECTORIES:

Australian Men of Mark, Vol. 1, Series 1, Set 2.
The Cyclopaedia of New South Wales, Sydney, 1907.
Johns, F., John's Notable Australians, Adelaide, 1908.
Sands' Sydney Directories.

SECONDARY PUBLICATIONS:

Barff, H.E., A Short Historical Account of the University of Sydney, Sydney, 1902.
Bavin, T. (ed.), The Jubilee Book of the Law School of the University of Sydney, 1880-1940, Sydney, 1940.
Blacket, W., May It Please Your Honour, Sydney, 1927.

Clark, C.M.H., A Short History of Australia, Sydney, 1969.
Dean, A., A Multitude of Counsellors, Melbourne, 1968.


Grainger, E., Martin of Martin Place, Sydney, 1970.


Napier, S.E. and Daly, E.N., The Genesis and Growth of Solicitors' Associations in New South Wales, Sydney, 1937.

Pearl, C., Brilliant Dan Deniehy - A Forgotten Genius, Melbourne, 1972.

Piddington, A.B., Worshipful Masters, Sydney, 1929.


Roe, M., Quest for Authority in Eastern Australia, 1835-1851, Melbourne, 1965.


Street, Sir K., Annals of the Street Family of Birtley, Sydney, 1941.


UNPUBLISHED THESES:

