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Session 2

An independent referral Bar in Papua New Guinea?

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The Honourable Justice J A Logan, RFD [1]

Present position

The *Lawyers Act 1986* (PNG) permits the National Court to admit a suitably qualified person to practise as a "lawyer".[2] A "lawyer" is defined as a person so admitted.[3] Upon admission, a lawyer must sign the roll of practitioners kept by the court for the purposes of that Act.[4] Entitlement to practise as a lawyer, in accordance with that Act is conditioned upon both admission by the court and the signing of this roll.[5]

The stipulation "in accordance with this Act" introduces two further requirements. One is the holding of a current practising certificate;[6] the other is membership of the Law Society constituted under the Lawyers Act.[7]

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[1] A Judge of the Federal Court of Australia and of the Supreme and National Courts of Papua New Guinea; President, Defence Force Discipline Appeal Tribunal (Australia).
I record my appreciation in respect of research assistance provided by my 2024 Associate, Mr Isaac Gill. Responsibility for errors and omissions is mine alone.

[2] s 28, Lawyers Act.
[3] s 1, Lawyers Act.
[4] s 31, Lawyers Act.
[5] s 33, Lawyers Act.
[6] s 35, Lawyers Act.
[7] s 9, Lawyers Act.

Practice as a lawyer contrary to the provisions of the Act is prohibited under pain of penal sanction.[8]

The effect of the Lawyers Act is that Papua New Guinea has what is termed a "fused" legal profession. There is no provision for the separate admission of persons as a barrister or a solicitor. A "lawyer" admitted under the Act who holds a current practising certificate may perform tasks traditionally performed by either a barrister or a solicitor. Thus, a lawyer may both appear in court as an advocate and conduct the whole range of other legal work, be that litigious or non-litigious. On a given day, a lawyer might, for example, appear in court in the morning and see clients in the afternoon to the end of preparing conveyancing documents or a will for them.

Pre-Independence position

Before Independence and until the repeal by the Lawyers Act of the *Legal Practitioners Act 1954* (PNG) (termed the *Lawyers Act (Chapter 91*) in the definition of the "repealed Act" in the Lawyers Act 1986), persons were admitted as barristers and solicitors. The prior position, too, was that the profession was "fused".

Purpose of this paper

The primary purpose of the paper is to provoke thinking in Papua New Guinea as to the question of whether, at this stage of national development, the time has come for a separate, referral Bar to come into existence?

Related to this, a further purpose of this paper is to highlight the experience of other jurisdictions where the formal position is that the legal profession is fused but where, nonetheless, a separate referral bar has developed.

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8 s 35, Lawyers Act.

Whether an independent referral bar should be established is a decision to be made in Papua New Guinea by those practising in Papua New Guinea.

Is it lawfully possible?

For a serving judge, the expression of any view as to whether it is lawfully possible in Papua New Guinea just to practise as a barrister must, and in my case does, have a provisional quality about it. It must, and is, subject to the reservation that the view expressed is subject to change if so persuaded if a controversy raising the subject comes before the court.

Subject to that caveat, it is possible in my view for a lawyer duly admitted and holding a current practising certificate to choose to practise just as a barrister. The person concerned would, because as already indicated, the Lawyers Act requires it for all "lawyers", have to retain membership of the Law Society. There is nothing in that Act which prevents a "lawyer" from choosing to practise solely as a barrister, i.e. as a specialist advocate in conjunction with undertaking advisory work. Nor is there anything in that Act which would prevent two or more persons choosing so to practise forming a voluntary association known as the "Bar Association of Papua New Guinea", comprised of lawyers who have chosen to practise in this way.

Care would need to be taken that the rules or practices of any such Association or its members did not violate practices prohibited by the *Independent Consumer and Competition Commission Act 2002* (PNG). Thus an interrogative note might be sounded about whether those who chose to practise only as barristers could adopt practices which once prevailed in the Bars of other jurisdictions such as a senior barrister not appearing without a junior or that the junior's fee had to be two-thirds of the leader's fee. However, nothing in that Act compels a lawyer to undertake all of the professional duties which might lawfully be undertaken by a lawyer. That Act does not prevent a lawyer choosing only to practise in the

manner of a barrister. To the contrary, to the extent that a purpose of that Act might be thought to promote competition in a market, offering a consumer of legal services an ability to choose a specialist advocate might be thought to promote competition.

That certain lawyers chose to practise in this way could not, given that s 107 of the Lawyers Act provides that precedence is governed by the order in which a lawyer's name appears on the roll of lawyers kept for the purposes of that Act, confer on them any greater precedence on those who chose to practise as barristers. For that reason, those lawyers who chose to practise only in the manner of barristers could not, as in other jurisdictions, claim to be members of the senior branch of the profession. But that has nothing to do with the ability lawfully to make that choice.

Nor, save for the offering of a lawful competitive choice, would the fact that some lawyers chose to practise only as a barrister, prevent a lawyer who did not from still appearing as an advocate. The Lawyers Act would continue to authorise that.

What has changed in PNG?

It is hardly surprising that no separate referral Bar developed in Papua New Guinea during the 20th century. The volume of civil and even more so commercial and public law jurisdiction work either in the National Court or the Supreme Court, reflected the then size and composition of PNG's economy and wealth in the general population as well as the then sophistication of government. But on and from the turn of the century and ever increasingly these factors are changing.

For example, when I was first appointed to the PNG Judiciary in 2011 there was a busy port area adjacent to the Central Business District in Port Moresby. Now that is vacant, prime waterfront land awaiting redevelopment with port facilities transferred to the other side of the harbour. Since then also, massive liquified

natural gas plant and terminal projects have either been completed[9] or are at an advanced planning stage.[10]

At Independence, there were seven judges of the newly constituted National Court of Papua New Guinea, including the Chief Justice and Deputy Chief Justice.[11] As at the start of the 2025 Law Year, there were 41, including the Chief Justice, the Deputy Chief Justice and Acting Justices. [12] At Independence and over the ensuing 50 years, PNG had a two-tier higher court system. Now there is a proposal, as yet not implemented, to amend the PNG Constitution and enact related legislation to provide for a three-tier higher court system, which would establish an intermediate appellate court, to be known as the Court of Appeal, between the National Court and the Supeme Court in the judicial hierarchy.[13]

The number graduating from the Legal Training Institute (LTI) annually offers another measure of the change which has occurred since Independence.

In the decade which passed from when the LTI commenced operations on 19 February 1973, it produced a total of 144 new admittees (including 5 women) for admission to the PNG legal profession with a further 23 graduates drawn from Solomon Islands, Kiribati, Vanuatu, Fiji, Nauru, the United States, the United Kingdom and Australia.[14] By way of comparison, in 2023 alone, 91 graduates of the LTI were admitted to practise In 2024, a further 127 LTI graduates were

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[9] Global energy Monitor-Papua New Guinea LNG Terminal in the National Capital District, owned by a coalition of companies led by ExxonMobil: Papua New Guinea LNG Terminal: https://www.gem.wiki/Papua_New_Guinea_LNG_Terminal Accessed 20 August 2025.
[10] Global Energy Monitor-Papua LNG Terminal at Caution Bay, Central Province, owned by a coalition of companies led by TotalEnergies: Papua LNG Terminal: https://www.gem.wiki/Papua_LNG_Terminal Accessed 20 August 2025.
[11] List of judges, 1975 PNGLR.
[12] National and Supreme Courts, 2025 Calendar, List of Judges.
[13] Announcement by Attorney-General and Justice Minister, The Hon Pila Niningi, as reported in The National, 17 July 2025: https://www.thenational.com.pg/changes-to-higher-court-structure-cleared-by-parliament/ Accessed, 17 August 2025.
[14] L Keith Young, The Legal Training Institute, Port Moresby, Papua New Guinea The Foundation & Development of the Australian & Papua New Guinea Practical Legal Training Courses (1983) Journal of Professional Legal Education 17, Hein Online: https://heinonline.org/HOL/Page?handle=hein.journals/proleged1&id=35&collection=journals&index= Accessed 20 August 2025.c

admitted to practise.[15] At least half of these LTI graduating classes were women. The demand for places at the LTI by graduates of the University of Papua New Guinea Law School exceeded in each of these years and does again this year the capacity of the LTI to enrol them as students.[16]

What is the experience of other jurisdictions with a "fused" profession?

I suggest that a useful predictor of the prospect that an independent referral Bar might develop in PNG is offered by the experience of several smaller Australian jurisdictions, Western Australia, South Australia, the Northern Territory, the Australian Capital Territory and Tasmania and by New Zealand. In each of these places, although there was and is a "fused" legal profession, an independent referral Bar developed as practitioners chose to practise only as barristers.

Of these, it is sufficient to look in detail just at the histories of the development of an independent referral Bar in South Australia and New Zealand respectively.

South Australia

In his *History of the Independent Bar of South Australia*,[17] John Emerson relates that Christopher Legoe[18] was the first in South Australia to commence his private practice legal career by practising solely as an independent barrister, commencing on 15 September 1955.[19]

Legoe had been preceded by in 1937 by Geoffrey Reed, but Reed had commenced practice as an amalgam not just in form but in substance and mainly as a solicitor. Reed served as an Acting Justice of the Supreme Court from April 1935 to July 1937 during successive absences of permanent appointees. Emerson comments,

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[15] PNG Bulletin, The Sunday, Facebook: https://www.facebook.com/photo.php?fbid=912079947594290&id=100063768801735&set=a.475513111250978 Accessed, 20 August 2025; P Kassman, Ninety-one new Counsels Admitted to the bar, Post Courier, 25 April 2023: https://www.postcourier.com.pg/91-new-counsels-admitted-to-the-bar/ Accessed 20 August 2025.
[16] Informal personal discussions between the author and the Acting director of the LTI, Mrs Angelyn Paranda.
[17] University of Adelaide Barr Smith Press, 2006 (Emerson).
[18] Later QC and then judge of the Supreme Court of South Australia: Bar Chambers Adelaide website, Past members: https://www.barchambers.com.au/about-us/ Accessed 20 August 2025.
[19] Emerson, p 3.

"he must have noticed while sitting on the cases before him how much more efficiently they were conducted by those lawyers who concentrated on court work" because "A month after stepping back down from the bench in July 1937, Geoffrey Reed was appointed King's Counsel. He decided to practice from then on independently as a barrister, and he set up chambers in the Bowman Buildings in King William Street."[20] By this time, however, standard practice in Adelaide legal firms had "evolved to allow for one partner to concentrate on advocacy and another to stay present in the office and attend to the rest of legal work".[21] Emerson relates that, it was by this division of labour within law firms that successive Chief Justices of South Australia, Way, Murray, Napier, Bray and King "were able to gain their reputations as exceptional barristers."[22]

It was Reed who encouraged Legoe to practise solely as a barrister when, at age 27, and after study at Cambridge, Legoe decided to leave his employment at the State Crown Law Office.[23]

By 1964, the number of barristers had reached four.[24] In that year also, the Bar Association of South Australia was formed.[25] It was in that year that Bar Chambers was established as the first Barristers' Chambers at the South Australian Independent Bar.[26]

According to Emerson, Legoe soon obtained work from many law firms which, "quickly realised the advantage of briefing out to a specialist who freed them from appearing in court without risk of losing the client". In a similar way, the

[20] Emerson, p 9.
[21] Emerson pp8-9.
[22] Emerson, pp 8-9.
[23] Emerson, pp 10-11.
[24] Emerson, p 3.
[25] Emerson, p 3
[26] Bar Chambers Adelaide website – About Us: https://www.barchambers.com.au/about-us/ Accessed 21 August 2025.

Crown Law Office made use of Legoe's availability when their staff were committed elsewhere.[27]

There was not universal support within the South Australian legal profession of the 1950's and early 1960's for Legoe's move. Emerson relates:

> "Although Christopher Legoe was doing what the legal profession had intended to do from the moment of its establishment in South Australia – eventually divide along the lines of the English profession – there was nevertheless a measure of mixed feelings about the impact a potential separate bar may have on the existing legal profession. Some established firms and their senior practitioners were concerned that their lifetime's work was threatened. Others supported Legoe's example, although no one yet followed it. On 29 September 1959, the Law Society of South Australia held the annual general meeting at Rechabite Hall in Victoria Square. After the meeting, President David Hogarth invited E.W. Palmer to open a general discussion on the division of the profession."[28]

> "Because of the results of the secret ballot indicating that the majority of the legal profession did not want change, the Law Society of South Australia did not hold any more meetings or take any more action. This left the profession the freedom to develop itself in the organic way that it has. Instead of trying to conform to a formalised structure, the profession now had the flexibility to respond to the needs of the South Australian community. This is possibly the most important characteristic of the independent bar in South Australia, as it only grew because it fulfilled a

[27] Emerson, pp 10-11.
[28] Emerson, pp 10-11.

> need, not because people were obliged to use it as in New South Wales and England."[29]

A perusal of the professional biographies of the current members of Legoe's old chambers, Bar Chambers, discloses that it is usual for those who have chosen to practise solely as a barrister in private practice to have commenced their career in the Law either by working within a law firm or a Crown Law Office for a few years.[30] Bar Chambers is now but one of many sets of barrister's chambers in South Australia. The formal position in South Australia remains that the legal profession is fused.[31] This notwithstanding, a well-populated independent Bar and voluntary association of members, the South Australian Bar Association, flourishes.[32]

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[29] Emerson, pp 13-14.
[30] Bar Chambers – Members: https://www.barchambers.com.au/members/members/ Accessed 21 August 2025.
[31] s 6 of the Legal Profession Act 1981 (SA) provides:
"Fusion of the legal profession

(1) It is Parliament's intention that the legal profession should continue to be a fused profession of barristers and solicitors.

(2) The voluntary establishment of a separate bar is not, however, inconsistent with that intention, nor is it inconsistent with that intention for legal practitioners voluntarily to confine themselves to practice as solicitors.

(3) An undertaking by a legal practitioner to practise solely as a barrister or to practise solely as a solicitor is contrary to public policy and void (but this subsection does not extend to an undertaking contained in or implied by a contract or professional engagement to provide legal services of a particular kind for or on behalf of another person).

(3a) Nothing in this section affects the validity of any undertaking given to the Supreme Court by a legal practitioner who receives the title Queen's Counsel relating to the use of that title in the course of legal practice.

(4) Despite this section, an association of legal practitioners may be lawfully constituted on the basis that membership is confined to legal practitioners who practise solely in a particular field of legal practice or in a particular way.

(5) No contractual or other requirement may be lawfully imposed on a legal practitioner to join an association of legal practitioners."
[32] See South Australian Bar Association website: https://sabar.org.au/ Accessed 21 August 2025.

New Zealand

As in South Australia, the formal position is that a person holding the requisite qualifications is admitted as a "barrister and solicitor", not as one or the other.[33] This notwithstanding, a number of practitioners choose to practise solely as barristers. To an extent, this choice is recognised in that, although a practitioner's admission remains as barrister and solicitor, the professional regulator, the New Zealand Law Society, is authorised to issue practising certificates to practitioners either as a "barrister and solicitor" or as a "barrister".[34]

The origins of an independent referral Bar in New Zealand were described by the then Bar President, Raynor Asher QC in 1997 in an article in the New Zealand Law Journal:

> In New Zealand the starting point for the independent Bar was a decision taken by the firms at the offices of Bell Gully that Queens Counsel had to be at the independent Bar. From then through to the 1950s the independent Bar consisted largely of a small number of senior practitioners who had taken silk or who were about to take silk. In the 1950s Robin Cooke, David Beattie and Ronald Davison (as they then were) went to the Bar at a younger age and their success started a slow trend. From the mid 1980s there has been a huge increase in the number of barristers in New Zealand. There are now approximately 700 barristers practising in New Zealand, a threefold increase over the last ten years. These barristers are required by s 11 of the Rules of Professional Conduct to act or advise only on the instructions of a solicitor. This rule has been a feature of our ethical codes for many years and reflects the practice in most other common law jurisdictions. However, antiquity and the fact that some other jurisdictions use it are scant justification for any rule

[33] s 48, Lawyers and Conveyancers Act 2006 (NZ).
[34] s 39(1), Lawyers and Conveyancers Act 2006 (NZ).

> these days. Hence, the rule has come in for a fair share of criticism in the last few years.[35]

The referral rule to which Asher refers is that those who choose to practise as barristers will act only on the instructions of a solicitor. In more recent years, this rule has to an extent been liberalised in New Zealand by permitting the "direct briefing" of barristers.[36] Whether to participate in this practice is left to a matter of individual barrister choice.

Asher details the advantages of the existence of an independent referral Bar:

> The two obvious advantages of having a body of practitioners that work on the basis of referral only are independence and specialisation. Referral, and the ethical notion that the barrister cannot operate without the presence of an instructing solicitor, and cannot bill the client direct as the contract is with the solicitor only, guarantees that the barrister will not pinch the client. This is because barristers cannot operate or sue for their fees without the presence of the instructing solicitor. The presence of that instructing solicitor is an unavoidable part of the mechanism of barristerial practice, assuming the rule is observed. The advantages of this independence are obvious. It gives the solicitor the assurance that the client will not be stolen. As a matter of fact the barrister cannot take the client because the barrister is dependent upon the continued presence of the instructing solicitor for further briefs. Further, the barrister by virtue of the fact that he or she operates on a referral basis, will be independent of the firm itself. The barrister is in a position to fearlessly give independent advice, untrammelled by the need to protect advice previously given by the firm, or a wish to succour the goals of an

[35] Raynor Asher QC, The Referral Rule [1997] NZLJ 149.
[36] New Zealand Bar Association website: Direct Briefing: https://nzbar.org.nz/about-barristers/direct-briefing-of-barristers Accessed 21 August 2025.

> important client. The independent Bar offers a large group of expert and specialised legal practitioners, who are available to all members of the public and who by virtue of the cab rank rule will take briefs from all members of the public. A legal practitioner approached by a client with a particular problem has at his or her disposal over 650 experts. While the referral rule is not essential to the concept of briefing specialist barristers, it undoubtedly helps to underpin the fact that their specialised services are available to all lawyers. The success of the concept is there for all to see. The rise in the numbers of barristers has been entirely market driven. Nobody has to be a barrister or brief a barrister.[37]

These advantages are not unique to New Zealand. They are pervasive and explain the development and continuance of independent referral Bars in many, although not all, common law jurisdictions.

Asher draws upon observations made by a leading New Zealand judge of the modern era, Lord Cooke of Thorndon, who when in practice was a pioneer of the independent Bar in that country, in relating the essential qualities of a barrister and in expanding upon the advantages of an independent referral Bar:

> "At a recent New Zealand Bar Association Conference, Lord Cooke of Thorndon suggested that the following qualities were essential to the independent Bar:
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> • a barrister is a specialist in the conduct of litigation;
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> • a barrister is independent of the client, and of any firm or partnership relationship;
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> • a barrister does not offer services similar to that of solicitors such as conveyancing, advice on investments or establishment of

[37] [1997] NZLJ 149, at 149.

companies and preparation of commercial documents and the like, nor hold funds on behalf of clients nor have a trust account;

• a barrister does not poach clients from solicitors; and

• the services of an independent barrister are available to the clients of all solicitors.

The referral rule is not essential to the maintenance of these qualities. The concepts of independence and specialisation are not necessarily dependent upon the fact of the instructions coming through a solicitor. Nevertheless the concept of referral is sound and market driven. Any changes to the rules must preserve the ability of client, solicitor and barrister to operate at their option on the traditional concept of referral, with all the ethical rules that apply. Rules are needed that enhance the benefits of the independent Bar, while modifying prohibitions that are proving unworkable. The concept of referral should be maintained but there is no reason why it cannot become an option of the client rather than a compulsion driven by professional rules."[38]

As in South Australia, New Zealand these days has a flourishing Bar Association and related membership. According to the latest figures publicly accessible, there were in 2022 1,917 barrister practising certificates on issue, representing 11.7% of practising lawyers. [39]

Is there a need in Papua New Guinea?

Debate about whether there is or is not a public benefit in the existence of an independent referral Bar has surfaced periodically in Australia almost from the very beginning of its transformation from British penal colony to free settlement

[38] 1997] NZLJ 149, at 150.
[39] New Zealand Law Society Snapshot of the Profession 2023: https://www.lawsociety.org.nz › Annual-Reports PDF Accessed 21 August 2025.

in the early 19th century. Often the argument which is made is that a separate Bar is unnecessary, serving only to increase costs to the consumer of legal services. It is put that one practitioner could undertake both the preparatory and advocacy task with there being no need for an instructing solicitor. This excerpt from *The Age* in 1882 is typical of the case usually made against the existence of an independent referral Bar:

> "The public interest ought to be the principal question to be considered in dealing with the legal professions. If the division of the profession into two separate and distinct branches is a device to find employment for lawyers at the expense of the public, that system ought not to be retained... The conveyancing branch of a solicitor's business is so lucrative that one does not wonder at the desperate struggle made to prevent the adoption in Victoria of 'Torrens's Act'. All the lawyers in the House fought hard against the evil thing... The great offence given by the act to the lawyers was that it simplified and cheapened conveyancing, and enabled laymen to prepare a transfer. The boon to the public is incalculable...
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> Now... the great law reform most feared is the amalgamation of the professions... It is apparent that simplification of the law follows a simplification of the lawyers. Reduce the two lawyers to one, and it is followed by a reduction of the two systems of [common] law and equity to one. Take away from the lawyer the direct interest in keeping the law complex, by compelling one man to do the work of the public instead of two, and all the other minor reforms will quickly follow. Let us have these two professions welded into one. Take away from them the incentive for procrastinating litigation, or the means of evading responsibility. Make every lawyer, like every doctor, directly responsible to his employer [the public] and an immense reform shall have been

> acquired. Place both branches on an equality, and allow the public freely to choose from among them whoever they may desire to employ, and get rid of the attendances, the scrivening and the delays. Let simplicity replace complexity and moderate charges extortion."[40]

In an article in the *Commonwealth Law Bulletin*, authored when he was Chief Justice of Australia, Sir Anthony Mason observed:

> [The] adversary system can function without the establishment of an independent Bar. Just how well it can function is another question. In the three most populous States of Australia, the legal profession has been divided, in practice at least, into the two separate branches of barristers and solicitors. In the three less populous States and in the Territories, the profession is "fused" so that a legal practitioner is admitted to practise as both barrister and solicitor. In those jurisdictions, before the establishment of an independent Bar in the l960s, the most successful counsel, of necessity partners in firms, would accept briefs to appear, by way of referral, on behalf of clients of other firms. Obviously, the fused profession has some attraction in jurisdictions of limited population and resources which cannot sustain an independent Bar. However, the standard of advocacy in a fused profession does not match that of an independent Bar. My firm conviction on that score is the outcome of hearing arguments presented to the High Court of Australia over many years.[41]

Papua New Guinea's post-Independence system of government with its division of power between the three branches of government with a judicial branch which

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[40] As quoted in P L Yule, Vic Bar: a history of the Victorian Bar – The amalgamation debate, pp 85-87, Australian Scholarly Publishing, 2021. For a polemic against the division of the profession, see also JRS Forbes, The Divided Legal Profession in Australia: History, rationalisation and rationale Law Book Company Ltd, 1979.
[41] Sir Anthony Mason, Independence of the bench; the independence of the bar and the bar's role in the judicial system. (1993) Commonwealth Law Bulletin, 19(2), 753, at 757 (Mason).

did not act as inquisitors was not one imposed by Australia as a previously administering power. It was chosen and adopted by the People of Papua New Guinea, acting through their Constituent Assembly. The system of justice so adopted is adversarial, not inquisitorial.

At the time of Independence, Papua New Guinea was one of those jurisdictions of the kind Sir Anthony Mason had in mind where it was not possible to sustain an independent Bar. The number of persons educated beyond primary schooling was limited and the level of economic activity vastly different to the present.

I have now sat hearing cases at appellate level in Papua New Guinea for almost fourteen years. Of course there are notable exceptions, but my firm conviction is the same as Sir Anthony Mason records in his article. The standard of appellate advocacy in the Supreme Court does not match what I saw in the High Court of Australia, the Full Court of the Federal Court of Australia or the Courts of Appeal of Queensland and New South Wales when practising at the Bar or which I see when sitting on the Full Court of the Federal Court of Australia. Further, my perusal of numerous trial transcripts in the exercise of that appellate jurisdiction in Papua New Guinea leads me to the equally firm conviction that the standard of trial advocacy in the National Court does not match what I saw in practice in Federal and State superior courts when in practice or which I see when exercising original jurisdiction in the Federal Court.

It is not that the raw talent is not present in Papua New Guinea. It most emphatically is. Over a decade's experience of voluntary teaching duty in assisting in the delivery of a commercial litigation workshop at the Legal Training Institute (LTI) by members of the Queensland Bar informs that view. It is just that, after leaving the LTI, most practitioners, if they act as advocates at all in the higher courts, need to divide their time between acting as an advocate and undertaking the myriads of other duties entailed in the delivery of legal services.

South Australia was established as a British colony in 1836; New Zealand slightly later, in 1841. In each of these places, it was not until the 1950's that an independent referral Bar started to emerge. Perhaps it will take that long in Papua New Guinea. But the pace of change here since Independence is truly amazing.

I suspect that, with the impending emergence of a three-tier system of justice, via the establishment of an intermediate appellate court, and the related ability of the Supreme Court to focus on cases of the highest importance in the development of the Underlying Law and the resolution of great constitutional controversies, demand for advocacy of a higher standard than at present will correspondingly increase.

An advantage of an independent referral Bar is that it is possible for a modest law firm to engage for a client with a worthy cause who is at odds with government or a large corporation an advocate of the highest skill and experience. I saw this time and again when in practice and have again when sitting in the Federal Court of Australia.

The most graphic example from practice in my experience and recollection is offered by the case of a private, the lowest rank in the Army, who was, through no fault of his own, injured during his military service. He thought, with some justification, that it was possible to commute his periodic compensation payments into a lump sum. He could see a real advantage in terms of a business opportunity which would maximise his talents in post-military life in having access to a lump sum as start-up capital. The compensation authority did not consider that this commutation was lawfully possible. So it refused his lump sum commutation application. The ex-soldier sought a review of that decision by the Administrative Appeals Tribunal. He could not afford the services of a large law firm. He engaged a small firm of solicitors. The principal of that firm was very experienced in the preparation of cases but not an advocate. I was briefed to appear for the ex-soldier in the tribunal. The tribunal found in favour of the ex-soldier, holding that

the law did permit lump sum commutation. The compensation authority appealed. By majority, the Full Court of Australia, where I also appeared, allowed the appeal. Both the solicitor and I thought that, nonetheless, there was merit in the view that commutation was permissible. Because of the existence in Australia of an independent referral Bar, the solicitor was able to engage the services of Australia's then leading appellate advocate, Mr D F Jackson QC, to lead me in the High Court. The compensation authority, for whom money was no object, was also represented by Queen's Counsel and junior counsel, as it had been in the Full Court. In the subsequent appeal to the High Court the ex-soldier succeeded (4-1).[42] The ex-soldier's claim for commutation was always arguable. But I have no doubt that the quality of the way it was presented in the High Court lent it extra persuasive force. The existence of an independent referral Bar meant that the small firm was able to level the playing field for the ex-soldier.

That was and is the only occasion in which that small firm litigated in a final court of appeal. But even then it was but one of a myriad of cases in which Mr Jackson QC had presented submissions in a case before the High Court, the Judicial Committee of the Privy Council or State and Federal intermediate appellate courts.

To localise the point being made, were an independent referral Bar to exist in Papua New Guinea, a lawyer conducting a small practice at, say, Goroka might engage a specialist advocate, who had appeared many times in the Supreme Court, to advise on prospects. If the advice was that there were reasonable prospects, they might appear together, or that specialist advocate, instructed by that lawyer, might appear before the Supreme Court in a like way to the Australian case I have instanced.

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[42] *Esber v The Commonwealth* (1992) 174 CLR 430.

Also in his article in the Commonwealth Law Bulletin, Sir Anthony Mason cites views expressed by Chief Justice Burger of the United States Supreme Court about the relative abilities of trial lawyers in his country, where there is no independent referral Bar and the United Kingdom, where there is:

> [A]dvocates outside an independent Bar do not attain the level of skill attained by members of an independent Bar. Chief Justice Burger of the Supreme Court of the United States stated, in the most explicit terms, that trial lawyers in the United Kingdom were markedly superior in quality and performance to their United States counterparts. He attributed this difference to the existence of the independent Bar in [the United Kingdom]. The Chief Justice made the important point that here, unlike the United States, the appointment of judges from the independent Bar distinctly enhances the quality of justice. In his words, [t]he technique of advocacy can be learned only by close observation and by participation ... You cannot learn it out of a book. A development which leads to more court appearances by lawyers for whom court work is a part-time activity is likely to result in a loss of efficiency in client representation and in disposition of cases. Furthermore, the existence of counsel in numbers outside the Bar would present a problem in maintaining standards. They would be removed from the collective reservoir of experience, know-how and advice that the Bar makes available to its members.[43]

It is not that an adversarial system cannot function in the absence of an independent referral Bar. In developed country jurisdictions, the United States and also Canada, which perhaps because of its proximity to the United States also has no tradition of an independent referral Bar, are proof perfect such a system can function. Papua New Guinea's existing position is likewise proof perfect that an adversarial system can function in a developing country without the existence

[43] Mason, at 758.

of an independent referral Bar. However, for like reasons to those advanced by Sir Anthony Mason in his article, I respectfully suggest that system would function better were such a Bar to develop.