NSW Law Reform Commission

REPORT 70 (1993) - SCRUTINY OF THE LEGAL PROFESSION: COMPLAINTS AGAINST LAWYERS

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Terms of Reference

To the Honourable John P Hannaford, MLC
Attorney General for New South Wales

Dear Attorney General

Scrutiny of the Legal Profession: Complaints Against Lawyers

We make this final Report pursuant to the reference to this Commission dated 12 November 1991, as amended on 29 January 1992.

The Hon R M Hope AC CMG QC

(Chairman)

Professor David Weisbrot

(Commissioner)

The Hon Justice J Cripps

(Commissioner)

The Hon Justice J E Brownie

(Commissioner)

Terms of Reference

On 12 November 1991, the then Attorney General, the Honourable PEJ Collins QC MP, gave the Commission a reference, which was amended on 29 January, 1992.

(i) The Commission should inquire into the necessity for implementing alternative mechanisms to those presently existing to deal with complaints about the delivery of legal services to the public, such as a complaints unit, a Legal Services Ombudsman, or some other mechanism. In so inquiring the Commission will have regard to the need for accountability external to the legal profession in any such mechanism.

(ii) The Commission should inquire into the means of making the offices of the Director of Public Prosecutions, the Legal Aid Commission, the Crown Solicitor, and other Government Legal Services more open and accountable. In so inquiring, the Commission will have regard for the need for the impartiality and independence of those offices.

(iii) The Commission should consult fully with peak professional bodies of the legal profession in New South Wales, together with other relevant community organisations and other interested individuals and take into account any proposal of those bodies to reform and strengthen their mechanisms for investigating and adjudicating complaints.

Participants

The Commission

The Law Reform Commission is constituted by the *Law Reform Commission Act* 1967 (NSW). For the purpose of the Scrutiny of the Legal Profession Reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

The Hon R M Hope QC (Chairman)

Professor David Weisbrot (Commissioner-in-Charge)

The Hon Justice Jerrold Cripps

The Hon Justice John Brownie

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Executive Summary

The terms of reference for this inquiry asked the Law Reform Commission to consider "the necessity for implementing alternative mechanisms to those presently existing to deal with complaints about the delivery of legal services to the public".
After extensive investigation, the Commission has concluded that the existing system of handling complaints against lawyers does not serve the needs of complainants, the practising profession, or the community at large. In this Report, the Commission recommends major changes to the system, the most important of which is the creation of the Office of Legal Services Ombudsman.

Owing to the largely part-time, voluntary nature of the existing system, the processing of complaints takes too long (especially in the case of the Bar), investigations are often quite inadequate (especially in the case of the Law Society), and complainants feel left out of the process, leading to the dismissal of the vast number of complaints - and promoting the common idea that the legal profession is simply "looking after its own". In particular, there is still a profound gap between what angers clients (and others) sufficiently to go to the trouble of complaining, and what lawyers and their professional associations see as important enough to merit serious attention, disciplinary action or compensation.

The Commission believes that a proper system of complaints handling must recognise that there are *multiple* aims which must be met: (1) there is a consumer dimension, with the consequent need to redress the complaints of dissatisfied users of legal services, but it also is necessary (2) to ensure the diligence and competence of individual practitioners, as well as (3) to set and maintain high standards of ethics and practice for the legal profession generally. One of our central criticisms of the operation of the existing system is that it is geared almost entirely to the second aim, fails to achieve even this adequately, and insufficiently addresses the other two aims.

The Commission has endeavoured to design a new system which is much more consumer-oriented and which actually will deal seriously and effectively with most complaints and disputes. Among other things, this will require educating the public about the nature of legal services and their rights and remedies under the disciplinary system, and educating the legal profession about the standards of practice and common courtesy to which clients should be able to feel entitled.

The other central criticism of the existing system is that it lacks the appearance of independence, and thus does not enjoy public confidence. The centrepiece of the reforms is the establishment of an independent, statutory, office of Legal Services Ombudsman, around which the rest of the proposed new system is designed.

The Legal Services Ombudsman (LSO) should be responsible for providing advice and assistance to all potential complainants, receiving all formal complaints, and monitoring all subsequent stages of the system. In addition, the LSO should have the power to investigate complaints *directly* (where the complaint involves a member of one of the professional Councils or someone else associated with the complaints handling system, or where the LSO believes the public interest so requires) and to take over from the Law Society or Bar Association the investigation of any complaint (at the discretion of the LSO).

The other key features of the recommended new system include:

- ensuring both the perception and the reality of the **independence** of the complaints handling system from the legal profession through the establishment of the office of LSO, as well as changes to the method of appointing lawyer and non-lawyer participants in the disciplinary system;

- strengthening the mechanisms for ensuring the **accountability** of the legal professional associations and the other institutions involved in the complaints handling system, through a more robust, non-lawyer dominated, Legal Services Conduct Review Panel;

- much **better access** to the system for potential complainants, in terms of information, language, physical access and so on;

- a more simple, **streamlined structure**, with the central intake of *all* complaints (including disputes about fees and costs), a central source of advice and assistance, and a single Legal Services Tribunal to conduct hearings with greater and more flexible powers to sanction lawyers and to make compensatory orders in favour of complainants;

- redress of the current imbalance of rights and safeguards between complainants and lawyers, with the creation of a statutory **Complainants' Charter of Rights**;

- a clearer distinction between consumer-type disputes and disciplinary matters, with a much greater **emphasis on consensual dispute resolution**, arbitration **and compensation** in the former cases;

- increased **attention to education and prevention** measures, such as compulsory training in legal ethics and professional responsibility for law students, feedback to the legal profession from the disciplinary system, and the emphasis on "Client Care" principles and practices in solicitors' offices; and

- **funding** these reforms, especially the establishment of the office of LSO, through a modest levy or surcharge on lawyers' practising certificates, which will permit the release of the existing sources of funding for the purposes of legal aid.

In Chapter 2 of this Report, the Commission details the extensive research and consultation program undertaken for the purposes of this reference, which included a survey of the complaint files of the Law Society and the Bar Association, and the commissioning of a public opinion poll on how complaints against lawyers should be handled. In Chapter 3, the Commission identifies a set of "best practice" principles for handling complaints against lawyers. These principles are then used to measure the soundness of the existing system, and to design a new system.

In Chapters 4 and 5, the Commission provides its 77 recommendations for reform, together with supporting commentary. Chapter 4 covers the "core recommendations", covering: the aims of the system; the role and powers of the Legal Services Ombudsman; the rights and position of complainants; the diversion of some complaints for consensual dispute resolution; the continuing role of the professional Councils; the creation of a Legal Services Tribunal; and the mechanism for external review of the complaints handling system. Chapter 5 covers matters of education, prevention, and professional standards; sources of funding for the new system; and other related matters, such as confidentiality and privilege, reciprocal (inter-state) recognition and enforcement of disciplinary orders, the handling of disputes over legal fees and costs, the abolition of solicitors' liens, and the clarification of some statutory provisions.

A summary of all the collected recommendations is contained in Chapter 6.

1. Introduction

THE COMMISSION'S EARLIER WORK ON THE REGULATION OF THE LEGAL PROFESSION

1.1 Since its inception, the Law Reform Commission has had a major role in the monitoring of the laws regulating legal professional practice. Among the very first references to the Commission in March 1966 was one requesting a review of the *Legal Practitioners Act* 1898-1960, which resulted in our Report No 2 (LRC 2) in December 1966 and an Amendment Act in 1967. The Commission received another major reference on the legal profession in September 1976, which led to the production of seven Discussion Papers, five Background Papers, and the following four Reports:

General Regulation and Structure (LRC 31, April 1982);

Complaints, Discipline and Professional Standards (LRC 32, April 1982);

Advertising and Specialisation (LRC 33, July 1982); and

Solicitors' Trust Accounts (LRC 44, December 1984).

1.2 The recommendations contained in these Reports directly led to a completely new legislative scheme regulating the legal profession in this State, the cornerstone being the *Legal Profession Act* 1987 ("the Act"). In particular, the recommendations which shaped the new system included: the participation of lay persons in the work of the professional Councils and their committees; the involvement of lay persons in the disciplinary system; the expansion of the concerns of the disciplinary system to embrace poor professional work (unsatisfactory professional conduct) which does not amount to professional misconduct; the requirement that Councils offer complainants reasonable assistance to make written complaints; the establishment of a two-tier system of hearings before the Legal Profession Standards Board (for unsatisfactory professional conduct) and the Legal Profession Disciplinary Tribunal (for professional misconduct); and the establishment by statute of an external review mechanism (now called the Legal Profession Conduct Review Panel), to review (upon application) those complaints which have been summarily dismissed by the Councils.

THE CURRENT TERMS OF REFERENCE

1.3 On 12 November 1991, the Commission was given a reference by then Attorney General, the Hon P E J Collins QC MP, under s 10 of the *Law Reform Commission Act* 1967 (NSW), to inquire into and report upon the following matters:

> (i) The Commission should inquire into the means of implementing alternative mechanisms to those presently existing to deal with complaints about the delivery of legal services to the public, such as a complaints unit, a Legal Services Ombudsman, or some other mechanism. In so inquiring the Commission will have regard to the need for accountability external to the legal profession in any such mechanism.
>
> (ii) The Commission should inquire into the means of making the offices of the Director of Public Prosecutions, the Legal Aid Commission, the Crown Solicitor, and other Government Legal Services more open and accountable. In so inquiring, the Commission will have regard for the need for the impartiality and independence of those offices.
>
> (iii) The Commission should consult fully with peak professional bodies of the legal profession in New South Wales together with other relevant community organisations and other interested individuals and take into account any proposal of those bodies to reform and strengthen their mechanisms for investigating and adjudicating complaints.

1.4 The reference to the Commission followed the Memorandum of Understanding signed by then Premier, the Hon N F Greiner MP, on behalf of the Liberal/National Party Government, and the Independent Members of

Parliament Mr John Hatton MP, Ms Clover Moore MP, and Dr Peter Macdonald MP. Following Mr Greiner's resignation as Premier on 24 June 1992, the Memorandum of Understanding was re-signed by the new Premier, the Hon John J Fahey MP. Part 6 of the Memorandum deals with "Rights of Citizens", and Section C of this Part contains a Statement of Principle that "The Government and the Independent Members agree that a system of external accountability of the legal profession is desirable." It is then agreed that the matter should be "referred to the NSW Law Reform Commission for prompt report". The Timetable for Implementation asks the Commission to report by February 1992, with any resultant legislation to be released in the first half of 1992 for enactment in the 1992 Budget Session. Annexure F of the Memorandum contains the terms of reference set out in the preceding paragraph.

1.5 The Commission had some concerns about the terms of reference, principally that the wording of the first term seemed to presuppose the need for implementing alternative mechanisms, and that the deadline for reporting was unrealistic given the breadth and importance of the issues, and the need for a program of research (including empirical and comparative research) and consultation. Following discussions in December 1991 with the Attorney General, and with Mr Hatton on behalf of the Independents, it was agreed to alter the terms of reference to meet the Commission's concerns.

1.6 On 29 January 1992, the Attorney General wrote to the Commission again, noting that agreement had been reached to amend the timetable set out in Annexure F of the Memorandum of Understanding, requesting the Commission now to report by 28 May 1992. Further, the Attorney amended the first term of reference to now read:

> (i) The Commission should inquire into *the necessity for implementing* alternative mechanisms to those presently existing to deal with complaints about the delivery of legal services to the public, such as a complaints unit, a Legal Service Ombudsman, or some other mechanism. In so inquiring the Commission will have regard to the need for accountability external to the legal profession in any such mechanism. [altered wording indicated in italics]

THE ORGANISATION OF THE CURRENT INQUIRY

1.7 While there is an obvious link, the first and second terms of reference in this inquiry are aimed at different systems. The first term relates to the adequacy of the existing means of handling complaints about lawyers. Under the Act, the governing Councils of the peak professional associations - the New South Wales Bar Association and the Law Society of New South Wales - are given statutory powers (which may be delegated to committees) to receive, investigate, assess, and dismiss complaints, reprimand legal practitioners, and refer matters to the Standards Board and the Disciplinary Tribunal for determination. The Councils also have power over the conduct of legal practitioners through their control of the system of issuing (and suspending, cancelling or placing conditions on) practising certificates. While the regulation of the legal profession is thus largely placed in the hands of the private profession, the disciplinary system also may deal with complaints against lawyers who are employed in the public sector, such as those who work for the Legal Aid Commission or the Director of Public Prosecutions.

1.8 The second term of reference is addressed to the openness and accountability of the major public agencies which provide legal services, such as the Legal Aid Commission, the office of the Director of Public Prosecutions, and the Crown Solicitor's Office. The issues here do not relate so much to the competence and ethical standards of individual practitioners employed in these offices as they do to the legislative framework and administrative structures which are necessary to ensure a high level of public accountability while at the same time protecting the independence and integrity of those offices.

1.9 For reasons of policy as well as pragmatism, the Commission decided to deal with these topics separately. The second term of the reference will be dealt with in a discussion paper entitled *Accountability of Public Legal Services* which the Commission hopes to release early in 1993. The Commission will then examine any submissions commenting on the issues raised in the discussion paper and then release its report before the end of 1993.

DISCUSSION PAPER 26

1.10 In May 1992, the Commission released its Discussion Paper No 26: *Scrutiny of the Legal Profession*, which deals only with the first head of the reference. The Discussion Paper (referred to hereafter as "DP 26") received considerable media attention, and over 1000 copies were distributed throughout the community.

1.11 In DP 26, the Commission reviewed the current system of handling complaints in New South Wales (and elsewhere), made a number of proposals of wide application for general improvement of the system, and posed three potential options for basic reform: (1) retention of the existing system, in which the legal professional Councils are central, but with some significant refinements; (2) replacement of the present system with one based around an independent Legal Services Complaints Commission, modelled somewhat on the system for dealing with health care complaints in NSW; and (3) replacement of the present system with one based around an independent Legal Services Ombudsman. (DP 26 is discussed in more detail in Chapter 2.) This Report follows upon DP 26.

1.12 As we noted in DP 26, the Commission considers it appropriate to review and reform the law and practice in relation to the handling of complaints against lawyers. Although the *Legal Profession Act* 1987 only has been in force for five years, and it is not long since the Commission's earlier inquiry into the legal profession, there are good reasons for the Commission to look at this area again:[1]

> First, the legal profession has changed considerably in the past decade. The number of lawyers and the lawyer-population ratio have increased greatly in a short time, with the average age and experience of the profession declining accordingly.[2] The decade also has seen the rise of the "mega-firm" of solicitors, and substantial increases in inter-state and international practice.[3] Small firms are coming under economic pressure, with the challenges to the traditional solicitors' monopoly over conveyancing work and changes to the system for compensating personal injury victims. Increased emphasis is being placed upon the advertising and marketing of legal services, and law firms of all sizes are enjoined to operate in a more "business-like" fashion, despite the traditional distinction between a "service-oriented profession" and other occupations and commercial ventures. Lawyers are now commonly asked to practise outside of the traditional narrow role, serving as tax and commercial advisers, directors, and mediators, among other things.
>
> Secondly, social expectations have changed considerably in the past decade. There is an increased awareness of the rights of consumers, and an extension of these principles into the public sector, with calls for increased openness, fairness and accountability of public institutions and officials. The recent emphasis on "micro-economic reform" has reached the professions, with the attendant concerns about the elimination of restrictive trade practices and the promotion of increased competition within and between markets for professional services.

1.13 The Commission is now in a position to add a third reason: that the actual day-to-day operation of the complaints handling system has changed quite a bit less than the Commission recommended a decade ago and the 1987 legislation seems to mandate. The current system is still rather unsatisfactory from the point of view of complainants, and needs reform to meet the important public interest in the proper and effective regulation of the legal profession.

THE ORGANISATION OF THIS REPORT

1.14 Chapter 2 details the Commission's research and consultation program for this inquiry. This includes, among other things: a precis of DP 26 and the submissions received in response to that Paper; a report on the Commission's survey of the complaints files of the Law Society and the Bar Association (for the year 1991); a summary of the comparative research undertaken; the results of the Omnibus Survey (public opinion poll) on handling complaints about lawyers which we commissioned from the Roy Morgan Research Centre; and the proposed survey of the views and levels of satisfaction of complainants and respondent lawyers with the existing

system, which the Commission was unable to proceed with owing to the inability of the Commission to gain the cooperation of the Law Society Council.

1.15 In the Chapter 3, the Commission identifies a set of "best practice" principles for handling complaints against lawyers. These principles are then used to measure the soundness of the existing system, and to design a new system. At the end of this Chapter, the Commission provides its reasons for choosing to recommend the establishment of an office of Legal Services Ombudsman as the basis for the proposed reforms.

1.16 In Chapters 4 and 5, the Commission provides its 77 recommendations for reform, together with extensive supporting commentary. Chapter 4 covers the "core recommendations", covering: the aims of the system; the role and powers of the Legal Services Ombudsman; the rights and position of complainants; the diversion of some complaints for consensual dispute resolution; the continuing role of the professional Councils; the creation of a Legal Services Tribunal; and the mechanism for external review of the complaints handling system.

1.17 Chapter 5 covers matters of education, prevention, and professional standards; sources of funding for the new system; and other related matters, such as confidentiality and privilege, reciprocal (inter-state) recognition and enforcement of disciplinary orders, the handling of disputes over legal fees and costs, the abolition of solicitors' liens, and the clarification of some statutory provisions.

1.18 For reasons of convenience, a summary of all the collected recommendations is contained in Chapter 6.

FOOTNOTES

1. DP 26, at paras 1.7-1.8.

2. See D Weisbrot *Australian Lawyers* (1990) Ch 3.

3. See Weisbrot, Ch 7 generally.

2. The Commission's Research and Consultation Program

PRELIMINARY SUBMISSIONS AND CONSULTATIONS

Notice of the reference given to interested parties

2.1 The reference from the Attorney General was received by the Commission in November 1991. As is the Commission's usual practice upon receipt of a new reference, the Commission contacted a number of bodies, organisations and individuals believed to have an interest in the reference, advised them of the inquiry, and invited them to make preliminary submissions by the end of January 1992. These included the Law Society of New South Wales and the New South Wales Bar Association; various NSW government departments and instrumentalities, such as the Legal Aid Commission, the Crown Solicitor, the Crown Prosecutors, the Director of Public Prosecutions, the Ombudsman, the Ethnic Affairs Commission, the Independent Commission Against Corruption, and the Department of Consumer Affairs; Members of Parliament; academics with an interest in legal ethics and professional regulation and discipline; community legal centres; other law reform agencies in Australia and overseas; and consumer organisations such as the Australian Consumers' Association and the Law Consumers' Association.

2.2 The Commission also advertised the terms of reference in the two main metropolitan newspapers and called for submissions. In addition, the Commission contacted various members of the press and advised them that we had commenced an inquiry into the handling of complaints against lawyers. Members of the Commission participated in a number press and radio interviews (both metropolitan and country), which helped to publicise the reference.

Preliminary submissions received

2.3 The Commission received preliminary written submissions from the following organisations and individuals: the Australian Consumers' Association; the NSW Council for Civil Liberties; the Combined Community Legal Centres; the Crown Prosecutors; the Public Defenders; the Department of Consumer Affairs; the Director of Public Prosecutions; the Law Society of New South Wales; the Lawyers Reform Association; the Legal Profession Disciplinary Tribunal; and the New South Wales Bar Association.

2.4 Prior to the release of the Discussion Paper, submissions were also received from the following individuals: Mr Chris Caley, Mr Gerry Caldwell, Mrs M Chaldecott, Ms Judith Currie, Ms Janet Coombs, Mr David Daws, Mrs A M Duncam, Mr Colin Ellis, Mr John Ferrugia, Professor Joseph Forgas, Mr Don Fraser, Ms Pat Geary, Ms Margaret Geary, Mr D Graham, Mr Barry Hart, Mrs Joan Kelloway, Mrs Maree Lau, Mr Noel McAuliffe, Ms Rose Makaresz, Mr E Mignon, Mr Desmond Miller, Mr C Millman, Ms Elfrida Morcom, Ms Irene Onorati (on behalf of the Building Action Review Group or "BARG"), Mr Keith Peck, Ms Jennifer Ann Rees, Mr Mark Stevens, Ms Erica Studer, Mr Lotfi Towadros, Mr George Taylor, Mrs Patricia Thirup, Mrs V E Troldahl-Weise, Mrs Dorothy White, Mrs Beverley White, Ms Pamela Williams, and Mrs Cheryl Winstanley.

2.5 As noted in Chapter 1, the Commission's reference followed the Memorandum of Understanding between the Government and the Independents. Prior to the Commission receiving the reference, Mr John Hatton MP gave a number of media interviews in which he discussed the present complaints system. The Commission understands that following these interviews, a number of people wrote directly to Mr Hatton to advise him of their own experiences with the legal profession and the complaints system. Mr Hatton kindly forwarded to the Commission copies of these submissions, from the following individuals: Ms Judith Currie, Ms Margaret Geary, Mr A G Hale (on behalf of the Committee representing former depositors of Bridgeland Securities Limited), Mrs Joan Hales, Mr David Hebden, Mr Roger Ibbotson, Mr R O Kent, Mr Alexander MacDonald, Mr Bryan J Milner, Mr Ian Mitchell, Mr J B Mund, Ms Irene Onorati (on behalf of the Building Action Review Group), Mr Alfred Sauer, and Mr Michael Seymour.

2.6 As the Discussion Paper was not yet available to respond to, those who made preliminary submissions, with the exception of the Law Society and the Bar Association, were generally reacting to the terms of reference. Submissions tended towards a simple statement in favour of either retaining the current system or replacing the current system with a Complaints Unit or an Ombudsman. Both the Law Society of New South Wales and the New South Wales Bar Association were in favour of retaining the current system. However, suggestions were

made by both professional associations about the way in which the current system could be improved. Many of the preliminary submissions were considered and cited throughout DP 26.

The Law Society's preliminary submission

2.7 The Law Society submitted that the current system of resolving complaints was fundamentally sound, subject to the following qualifications:

> The system should be strengthened in terms of accountability and lay review.
>
> The system should place less emphasis on the adversarial system, and the statutory framework should be amended to allow for more flexibility in achieving redress for complainants.[1]

2.8 The Law Society submitted that the deficiencies in the current system could be corrected by:

> replacing the Legal Profession Conduct Review Panel with a full-time and adequately resourced Lay Observer, who would be involved in the complaints and disciplinary process from the outset and certainly at an earlier stage than the Panel;
>
> fully implementing the scheme which the Law Society had developed for informal dispute resolution; and
>
> clarifying the powers of the Legal Profession Disciplinary Tribunal, when it makes a finding of professional misconduct, to ensure that it may make the same remedial orders currently available to the Legal Profession Standards Board (in addition to its further, specified powers).[2]

2.9 The Law Society also submitted that:

> a number of "micro-reforms" within the existing framework would also bring about improvement, particularly in the areas of quicker disposition of complaints without compromising the right and legitimate expectations of complainants and solicitors.[3]

These "micro-reforms" were not discussed in detail by the Law Society in its preliminary submission, however, as the Law Society concluded that they were "outside the Terms of Reference of the Commission". The Law Society advised the Commission that it would be making detailed recommendations to the Attorney General in the future for legislative amendments which would further enhance the performance of the present complaints procedures.[4]

The Bar Association's preliminary submission

2.10 The Bar Association also submitted that the current system of resolving complaints against barristers was working well. Suggestions were made by the Bar Association about a number of areas within the current system which it believed required change. These suggestions included:

> providing the Bar Council with statutory powers to counsel and fine barristers in certain circumstances;
>
> providing the Bar Council with statutory power summarily to find against a barrister and make appropriate remedial orders;
>
> increasing the powers of the Standards Board and the Disciplinary Tribunal, including giving greater flexibility to make protective orders and to deal with matters arising during the course of a hearing;

> merging the Standards Board and the Disciplinary Tribunal or, alternatively, providing that a complaint involving both unsatisfactory professional conduct and professional misconduct may be referred to the Disciplinary Tribunal alone;
>
> providing the Council with identical powers to make remedial orders regardless of whether the investigation commenced upon the complaint of an individual or on the Bar Council's own initiative; and
>
> setting a limitation period on the lodgment of complaints of six months from the time when the complainant first became aware of the conduct complained about.[5]

2.11 The Bar Association also commented upon alternative complaints mechanisms and submitted that:

> The establishment of additional structures which are separate and apart from the professional bodies creates tension between the profession and those organisations. They may give an appearance of accountability, but they do so at the expense of quick, effective. protective regulation and dispute resolution.
>
> Whilst it is recognised and accepted that the legal profession must be accountable to the public, the most important consideration must be the effective maintenance and/or improvement of professional standards.[6]

Preliminary submissions received from other interested organisations

2.12 Both the Lawyers Reform Association, the New South Wales Council for Civil Liberties and the Combined Community Legal Centres Group (CCLCG) submitted that there was a need for a complaints body independent of the professional associations.[7] The Lawyers Reform Association emphasised what it saw as an inherent conflict of interest in the Law Society and the Bar Association simultaneously maintaining representative and (both statutory and non-statutory) regulatory functions.[8] The Lawyers Reform Association submitted that an independent statutory body based upon the model provided by the Department of Health's Complaints Unit should be established to investigate complaints against lawyers.[9] Both the New South Wales Council for Civil Liberties and the CCLCG supported the establishment of a complaints agency or board, entirely independent of the professional associations with appropriately broad powers of investigation.[10]

2.13 The Australian Consumers Association also pointed to what it saw as the inherent conflict of interest in the Law Society and Bar Association handling complaints against lawyers:

> In trying to protect consumers and regulate the industry, whilst at the same time being the trade association for lawyers, an obvious conflict of interest arises. This has resulted in many consumers lacking confidence in the complaints procedure.[11]

Preliminary submissions from other members of the public

2.14 As noted above, the Commission received 36 submissions from members of the public in response to the initial publicity given to the Commission's new inquiry, and the Commission's call for interested parties to make submissions. In addition, the Commission received 14 submissions passed on by Mr John Hatton MP. Just over a third of the submissions received by the Commission specifically called for the establishment of a body independent of the Law Society and the Bar Association, to investigate complaints made against lawyers. A common theme running through these submissions was the belief that the Law Society and Bar Association failed to investigate complaints properly and were biased in favour of legal practitioners. Many commented that they felt their own complaint had received little recognition from the professional association and that the solicitor's version of events was accepted over their own without question. Many specifically stated their preference for a Complaints Unit or an Ombudsman.

2.15 Many of the submissions made by members of the public simply drew attention to their dissatisfaction with the handling of their own complaint, or took the opportunity to make a fresh complaint about a lawyer, or criticised the legal profession or legal institutions generally.

DISCUSSION PAPER 26

Purpose of the Discussion Paper

2.16 In May 1992, the Commission released its Discussion Paper *Complaints Against Lawyers.* This paper dealt only with the first term of the Commission's reference, principally being the necessity or otherwise for implementing alternative complaint mechanisms.

2.17 The Commission's purpose in publishing and distributing the Discussion Paper was to provide sufficient background and structure to the issues in order to promote informed debate about the best mechanism for handling complaints about the professional conduct of lawyers. The alternatives expressed in the Paper were presented for the purpose of discussion and did not represent the final views of the Commission. The Commission hoped to elicit submissions from the professional associations, community groups and other interested individuals.

Summary of the Discussion Paper

Chapter 1: Background to the reference

2.18 Chapter 1 of DP 26 provided information on the terms of the reference, the Commission's previous work on the legal profession, the organisation of the current inquiry, the purpose of the Paper and the outline of the Paper.[12]

Chapter 2: The current system

2.19 In Chapter 2, the Commission described the existing systems in New South Wales for handling complaints against barristers and solicitors under the *Legal Profession Act* 1987 (NSW). Under this Act, the governing Councils of the peak professional associations - the Law Society of New South Wales and the New South Wales Bar Association - have been given wide statutory powers (some of which have been delegated to committees) to: receive, investigate, and assess complaints (to decide whether they raise a question of unsatisfactory professional conduct or professional misconduct); to dismiss complaints (fully or with an attached reprimand); and to refer appropriate complaints for hearing before the Legal Profession Standards Board or the Legal Profession Disciplinary Tribunal.[13]

2.20 The Standards Board hears matters involving allegations of "unsatisfactory professional conduct", while the Disciplinary Tribunal hears more serious allegations of "professional misconduct"[14], for which a legal practitioner may be struck off the Roll.[15] Where a Council dismisses a complaint, the complainant has a right under the Act to have the decision reviewed by the Legal Profession Conduct Review Panel, which has a majority of non-lawyers.[16] The role and functions of other bodies which deal with complaints about lawyers, such as the Consumer Claims Tribunal, also are discussed.[17]

Chapter 3: Comparative perspectives

2.21 As part of its research program, the Commission also examined other complaints handling systems operating with respect to lawyers in the other Australian states and territories.[18] Special attention was focused

on the lawyers' complaints system operating in Victoria. Although the Victorian system is broadly similar to the one in New South Wales in so far as the professional associations have wide statutory powers to receive and investigate complaints, the actual procedures in Victoria differ in two main respects.[19]

2.22 First, the professional bodies in Victoria (the Law Institute and the Bar Council) have the statutory power to examine not only *complaints* about professional conduct but also *disputes* between client and lawyer. This is not the case in New South Wales, where the legislation directs the Law Society and Bar Association to examine and deal with only those complaints that raise issues of professional conduct. Secondly, the Victorian legislation provides for the office of Lay Observer. The Lay Observer's functions and powers are broader than the external monitor in New South Wales - the Legal Profession Conduct Review Panel - in that the Lay Observer may, upon request, examine and investigate the manner in which any complaint has been investigated by the professional association. Unlike the Panel, the Lay Observer is not limited to reviewing only Council decisions to dismiss a complaint.

2.23 The Commission also studied (and described in Chapter 3) the disciplinary systems operating in respect of barristers and solicitors in England and Wales.[20] In the past two decades the regulation and discipline of the legal profession has received close attention in the United Kingdom, with a succession of official inquiries leading to major legislative reforms in 1990.[21] In January 1991, the Office of the Legal Services Ombudsman was established. The main function of the Office is to review the way in which complaints have been handled by the professional associations. Chapter 3 also examined recent initiatives of the Law Society of England and Wales, including the administrative segregation of its complaints-handling function through the establishment of the Solicitors' Complaints Bureau, the markedly increased use of conciliation, and efforts at restructuring legal practices to prevent disputes through the "Client Care" program.

2.24 Lawyer discipline in the United States has been the recent subject of a major study and report by the American Bar Association's Commission on the Evaluation of Disciplinary Enforcement, and the American Bar Association has developed a set of Model Rules for disciplinary systems. In Chapter 3 of DP 26, the Commission briefly examined the American position, with particular focus on the system operating in the State of California.[22]

2.25 As part of its comparative analysis the Commission also considered the operation and structure of the New South Wales Department of Health's Complaints Unit.[23] In 1984, the Complaints Unit was set up administratively within the Department of Health in response to pressure from consumer and community organisations. This Unit has the power to investigate complaints against health care service providers (including doctors) in New South Wales. The Commission was especially interested in the Complaints Unit as a model because, in contrast to most of the other complaints handling systems studied, the Unit is quite independent of the practising profession and the main professional association (the Australian Medical Association).

Chapter 4: Common issues and proposals

2.26 In Chapter 4, the Commission examined common issues and problems in the handling of complaints against lawyers, and suggested a number of possible improvements.[24] These proposals were made on the basis that they were not necessarily contingent upon the retention or adoption of any particular regulatory model, but rather were generally applicable to all complaints-handling systems. Among the key questions which the Commission considered were:

> the introduction of a Complainant's Charter of Rights[25], which would include guarantees about effective access to the complaints-handling system,[26] immunity from civil liability,[27] the right to appear before any hearing of the complaint,[28] and the right to be kept fully informed of the status and progress of the investigation of the complaint;[29]
>
> the encouragement of the consensual resolution of disputes between lawyers and clients, including fees and costs disputes[30] (while remaining sensitive to the likely imbalance of power between the parties and the need for independent, qualified mediators);[31]

the nature, composition and operations of the Standards Board and the Disciplinary Tribunal;[32]

issues of confidentiality and the protection of communications made in the course of lodging or processing a complaint;[33]

the prevention of misconduct and impropriety through education and other methods aimed at the enhancement of professional standards;[34] and

the most appropriate methods for funding an effective complaints system.[35]

Chapter 5: Three options for regulatory reform

2.27 In Chapter 5, the Commission put forward three competing options for the regulation of the legal profession, with the aim of focusing debate. **Option One** involved **retention of the existing complaints system** (that is, the principal responsibilities of the complaints system would remain with the Councils of the Law Society and Bar Association), **but with a range of important improvements.** These included:

segregation of the regulatory responsibilities from the membership responsibilities of the professional associations, in order to increase the actual and perceived independence of the complaints-handling system;[36]

requiring the professional associations to provide more advice and assistance to complainants (and potential complainants), including the provision of explanatory brochures and other material in plain English, and the provision of greater assistance to those from non-English speaking backgrounds;[37]

requiring the professional associations to undertake a much more active and thorough investigation of complaints;[38]

the imposition of a time discipline on the system, in order to reduce substantially the time between the lodgment of complaints and their final disposition;[39]

narrowing the gap between the type of conduct by lawyers which is regularly complained about (negligence, incompetence, delay, poor communication, discourtesy and over-charging) and the matters which the legal profession takes seriously enough to require a disciplinary hearing (such as trust account defalcations and other acts of dishonesty);[40] and

strengthening the external (lay) review mechanisms (the Conduct Review Panel) to provide more independent oversight of the activities of the professional Councils in this area.[41]

2.28 The preliminary submissions of both the Law Society and the Bar Association themselves pointed out a considerable number of flaws and problems in the current system of handling complaints. The Commission commented in the Discussion Paper, on the basis of these preliminary submissions and the Commission's own research, that these widely acknowledged problems meant that leaving the system completely unchanged could not be an option.[42]

2.29 **Option Two** represented a major departure from the current system in that **an independent Legal Services Complaints Commission** would take over the functions and powers currently exercised by the Law Society and the Bar Association Councils in respect of the handling of complaints. In framing this Option, the Commission used the structure and operation of the Department of Health's Complaints Unit (and the plans to turn the Unit into an independent statutory authority) as a model. Under this Option, the Complaints Commission would be responsible for receiving and investigating all complaints relating to the provision of legal services. At the conclusion of its investigation, the Complaints Commission would itself determine whether or not to dismiss the complaint, refer a matter for mediation, or send the matter to one of the statutory disciplinary bodies for a formal hearing.

2.30 **Option Three** provided for the establishment of **an independent Legal Services Ombudsman**. Although the Ombudsman would handle the receipt and investigation of complaints, the Councils of the Law Society and Bar Association still would have the responsibility for deciding whether particular complaints should be dismissed, result in a reprimand or be referred to one of the disciplinary bodies for a hearing. Under this model, the Ombudsman also would play a key role in the external monitoring of the professional Councils, in that the Ombudsman would be free to attend any Council or complaints committee meeting. In addition, the Ombudsman would have the responsibility for generally raising public awareness of the complaints mechanism.

SUBMISSIONS RECEIVED IN RESPONSE TO DP 26

The range of submissions

2.31 Following the release of the Discussion Paper, submissions were received from the following: the Australian Consumers' Association; the Centre for Legal Education; the Chelmsford Victims Action Group; the Chief Magistrate of New South Wales, Mr Ian Pike; the Commissioner for Consumer Affairs, Mr John Holloway; the Director of the Community Justice Centres, Ms Wendy Faulkes; the Kingsford Legal Centre; the Law Society of New South Wales; the Legal Profession Conduct Review Panel; the New South Wales Attorney General's Department; the New South Wales Bar Association; the Foundation Dean of the School of Law at the University of Wollongong, Professor Jack Goldring; and the Registrar of the Legal Profession Disciplinary Tribunal, Mr Robert Bennett. In addition, submissions were received from the following individuals: Mr A Bond-Hughes, Ms Janet Coombs, Mrs Judith Currie, Mr David Daws, Ms Genevieve Dennis, Mr Jo Fagan, Ms Pat Geary, Mr Paul J Kellahan, Mr Robert O Kent, Mr W A Kuestler, Mr D Miller, Mr Grant MacDonald, Ms Rose Makaresz, Mr Gordon Palmer, Ms Lorraine Smith, Mr Douglas & Miss Daphne Taylor, Mr George Taylor, Mr Michael Winter, Mr Peter Wolfe, and Mr Peter Wood.

The Law Society's submission

2.32 The Law Society of NSW stated in its submission that the dual objectives of a complaints system, being the protection of consumer interests and maintenance of professional standards, would best be achieved by retaining the current complaints system. In its submission, the Law Society claimed that DP 26 did not contain evidence indicating the need for any substantial change to the present system, and that in proposing:

> changes of substance, the Commission [had] relied on speculation as to the public perception of bias echoed in the political pact which originated the inquiry[43]

The Law Society also submitted that:

> proposals for radical change of a system which, generally, is working well are an unnecessarily severe reaction to a situation defined only by reference to intuitively based perceptions.[44]

2.33 The Law Society's reasons for defending the current arrangements could be summarised as follows:

> an independent legal profession is an essential safeguard of our constitutional system. Regulation of its members' professional conduct is a necessary element of this independence as well as being an inherent characteristic of one of the great professions serving the community;
>
> the Law Society's disciplinary functions are part of, and at the same time shape and influence, the Society's other functions;
>
> because of its other functions, the Society has an interest in dealing directly and promptly with complaints affecting solicitors' practising certificates;

> the Law Society's disciplinary function is exercised in the joint interests of the community and the profession;
>
> the current system has demonstrated its general soundness and efficiency since it came into effect in January 1988; and
>
> it has substantial participation from non-lawyers, and thus external or public accountability.[45]

2.34 In its submission in response to DP 26, the Law Society reiterated many of the comments it had made in its preliminary submission. The Society supported greater use of mediation of disputes; it sought discretion to refrain from referring a complaint to the Standards Board where the complaint had been withdrawn. With respect to the Legal Profession Conduct Review Panel, the Law Society restated its previous proposal that the Panel should be replaced with a Lay Observer.[46]

2.35 Unfortunately, the Law Society's submission failed to deal with a large number of the issues and proposals raised in DP 26. However, four days after the Law Society made its submission to the Commission in response to DP 26, the Law Society wrote to the Attorney General directly, making a number of specific proposals for amendments to the *Legal Profession Act* 1987. The Attorney General forwarded a copy of the Law Society's proposed reforms to the Commission, and the Commission has treated these proposed reforms as being in the nature of a further submission from the Law Society.

The Bar Association's submission

2.36 The NSW Bar Association advised the Commission that it was in favour of retaining the current system but with a number of improvements, including:

> effecting the merger of the Standards Board and Disciplinary Tribunal;
>
> providing the complainant with the right to attend all hearings;
>
> expanding the powers of the Bar Council in relation to the issuing, placing conditions upon, and the withdrawal of, barristers' practising certificates;
>
> providing for the possibility of joint sittings of the Board and the Tribunal (if these bodies are not merged) in cases where the complaint relates to both a solicitor and a barrister;
>
> clarifying the standards for referral of complaints for hearing; and
>
> providing the Review Panel with more adequate resources to review fully the handling of dismissed complaints.[47]

2.37 The Bar Association submitted that the introduction of a Complaints Commission would be unwise and inappropriate.[48] One of the reasons given by the Bar Association for its view was that "external policing of the profession by a complaints unit would be incompatible with achieving the high standards of behaviour that are obtained through successful regulation".[49] In addition, the Bar Association submitted that a Complaints Commission for lawyers could not function as effectively as the existing system, and that it would be more costly, less accountable and less open to public scrutiny than the current system.[50] Similarly, the Bar Association submitted that a Legal Services Ombudsman would be likely to encounter many of the difficulties experienced by a Lay Observer (as raised by the Commission in DP 26 when discussing the Law Society's proposal).[51]

Submissions received from other interested parties

2.38 Common among many of those organisations that made submissions to the Commission was the concern over the dual roles of the professional associations and what they saw as the resulting conflict of interest. Many called for the establishment of a complaints system entirely independent of the Law Society and the Bar Association. For example, the Kingsford Legal Centre noted in their submission that:

> There is a very real danger of a failure of impartiality in the present self-regulating, peer-review system. The legal profession, like the medical profession, is collegiate in nature. This may result in a reluctance to investigate or censure a colleague or a potential colleague.[52]

and further:

> We **disagree** that mere separation of the disciplinary function from the membership function and physical separation of the complaints handling unit from the professional body, as suggested [in DP 26, at 146], is sufficient to allay public disquiet. We **agree** that the "most effective way to ensure actual and perceived independence and integrity of the disciplinary process is to remove the responsibility for reception, investigation and assessment of complaints from the legal professional association, and to place that responsibility in the hands of an independent commission." (in DP 26, at 170).[53] [Emphasis in the original]

2.39 Similarly, the Chief Magistrate of New South Wales, Mr Pike, was critical of the dual functions of the Law Society and the Bar Association and called for the establishment of an independent body:

> generally speaking, bodies which investigate their own members, even if the investigating authority has a token "outsider", fail to respond as effectively as some independent body or person.[54]

2.40 The issue of mediation featured prominently in many submissions, including those of the Registrar of the Disciplinary Tribunal, Mr Bennett,[55] and the Chairperson and members of the Conduct Review Panel.[56] The Commissioner for Consumer Affairs, Mr Holloway, submitted that any dispute resolution process should address the fact that the average consumer of legal services feels intimidated by the legal profession and the court system.[57] Kingsford Legal Centre agreed with the Commission that there was a role for mediation in appropriate cases, such as those in which a complaint relates to a failure in communication or to some aspect of the quality of the service provided. The Centre maintained, however, that care should be taken to pursue all cases involving professional misconduct or unsatisfactory professional conduct, even when an individual complainant regards his or her complaint as settled.[58]

2.41 Submissions critical of an independent legal services complaints commission being modelled on the Department of Health's Complaints Unit were received from Mr Barry Hart, representing the Chelmsford Victims Action Group, and from Mr Tom Benjamin, representing the Medical Consumers' Association. Both organisations have made submissions to the Law Reform Commission outlining what they believe are deficiencies in the current operations of the Complaints Unit and the Bill which provides for the establishment of an independent Health Care Complaints Commission.

Submissions from other members of the general public

2.42 Common concerns expressed in the submissions made by individuals were about:

- the degree and quality of assistance provided to complainants by the professional associations;
- the need for the complaints system to be re-oriented towards the needs of the complainant;
- the need for a higher public profile for the system through increased publicity;
- the need for the use of plain English in the literature and correspondence, as well as greater assistance for persons from non-English speaking backgrounds; and

the perceived bias in favour of the lawyer in the complaints handling system.

2.43 Support commonly was expressed for the Commission's proposal of a "Complainants' Charter of Rights" and a "Code of Conduct" for lawyers. Of those who specifically mentioned a preference for one of the Options described in DP 26, three were in favour of an independent Legal Services Complaints Commission and one favoured the Legal Services Ombudsman. All those who made submissions clearly desired the system to be changed in some way.

INTERVIEWS AND CONSULTATIONS

2.44 In addition to the submissions received by the Commission, material and assistance was provided to the Commission by the following organisations and individuals: Ms Merrilyn Walton, Director of the NSW Department of Health's Complaints Unit; Mr Gerry Glennan, Director of Professional Standards of the Law Institute of Victoria; Mr Justin O'Bryan QC, Secretary of the Ethics Committee of the Victorian Bar Council; Mr John Hatton MP; Mr Brian Pezzutti MP; Mr Malcolm Kerr MP; Mr Max Burgess, of the Law Consumer's Association; Ms Wendy Faulkes, Director of the NSW Community Justice Centres and member of the Insurance Industry Complaints Council; the New South Wales Ombudsman's Office; the NSW Independent Commission Against Corruption; the Office of the Commonwealth Ombudsman; Mr Graham McDonald, the Australian Banking Industry Ombudsman; Mr Robert Funke, of Standards Australia; the federal Trade Practices Commission; Ms Jan King, the Lay Observer in Victoria; Ms Catherine Weaver, Registrar of the NSW Consumer Claims Tribunal; the Public Interest Advocacy Centre (PIAC); the Chairperson and members of the Conduct Review Panel; the Commonwealth Attorney General's Department's Practice Development Support Group; Mr Mark Paterson, of the NSW Retail Traders Association; Ms Clare Petre, then of the Intellectual Disability Rights Service, Redfern Legal Centre, now of PIAC; Mr Lindsay Ford, of the firm Juliano Ford & Co in Victoria; Mr Phillip Kirby, Senior Registry Officer, NSW Prothonotary's Office; Professor David Flint, Dean of Law of the University of Technology, Sydney; Mr Gill Boehringer, Head of the School of Law, Macquarie University; Professor Jack Goldring, Foundation Dean of Law, University of Wollongong; Professor Neil Rees, Foundation Dean of Law, University of Newcastle; Professor Michael Chesterman, Dean of Law, University of New South Wales; Mr Christopher Roper, Director of the Centre for Legal Education; Mr Peter Wilmshurst, formerly of the NSW Department of Consumer Affairs, now at Macquarie University Law School; Mr Keith Taylor, of the NSW College of Law; the various Law Societies and Bar Associations in each Australian State and Territory; Mr Raymond R Trombadore, Chairman of the American Bar Association's Commission on the Evaluation of Disciplinary Enforcement; the Law Society of England and Wales; Ms Sue Wrigley, the Policy Adviser to the Solicitors Complaints Bureau (England and Wales); the office of the Legal Services Ombudsman (England and Wales); and senior officials of the English Bar, including Mr Williams QC, the Chairman of the Bar Council, Mr Carlisle QC, the Chairman of the Professional Conduct Committee, and Mr James, the Secretary of Committee.

OTHER CONSULTATION EFFORTS

2.45 Early on in the life of this reference, the Commission made applications to the Attorney General and to the NSW Law Foundation for funding grants which would enable[59] the Commission to: (1) undertake inter-state and overseas travel for the purposes of consulting about new disciplinary systems in place in other similar jurisdictions, and (2) retain as a consultant an expert in management and organisational behaviour, with particular expertise in the assessment and design of complaints systems. Unfortunately, these applications were unsuccessful.

2.46 However, one of the members of the Division, Mr Justice Brownie, made a private visit to the United Kingdom in July 1992, and kindly undertook to make inquiries and collect material on the Commission's behalf, so that we could better understand the new system in place in England and Wales since the enactment of the *Courts and Legal Services Act* 1990 (UK). Justice Brownie had the opportunity to meet with many of the key officials in the disciplinary systems operated by the Law Society of England and Wales and the Professional Conduct Committee of the Bar Council as well as collecting a considerable amount of relevant literature.

THE UNSUCCESSFUL ATTEMPT TO SURVEY THE SATISFACTION OF COMPLAINANTS AND RESPONDENT LAWYERS WITH THE CURRENT COMPLAINTS HANDLING SYSTEM

2.47 The terms of reference for this inquiry require the Commission to inquire into "the necessity for implementing alternative mechanisms to those presently existing to deal with complaints about the delivery of legal services to the public". The Commission considered that in determining whether or not this "necessity" exists, it would be very helpful to have the benefit of the attitudes, perceptions and experiences of people - both complainants and respondent lawyers - who actually had been through the complaints handling process in recent times. The Commission was fortified in this view by the fact that the Solicitors' Board in Victoria (with the cooperation of the Law Institute of Victoria and the Victorian Lay Observer) and the Solicitors Complaints Bureau of the Law Society of England and Wales had themselves recently initiated and publicised similar surveys,[60] and that this also occurs in the North American legal professions.

2.48 After some informal discussions, the Commission first wrote to the then President of the Law Society, Mr John Marsden, on 15 June 1992, formally proposing that a survey be undertaken to assess the level of satisfaction of complainants and respondent lawyers (for the year 1991) with the Law Society's complaint handling system, and asking for the Law Society's cooperation in such a project. (The names and addresses of complainants and respondent lawyers are held by the Law Society, and are otherwise unavailable to the Commission,) A similar letter was written to the President of the Bar Association, Mr John Coombs QC.

2.49 The Bar Association quickly acceded to the Commission's proposal, subject to later confirmation of the details and logistics of the survey. The Commission's dealings with the Law Society, however, were quite protracted and, to the Commission's grave disappointment, ultimately unsuccessful.

2.50 The Law Society initially rejected the survey out of hand, on the basis that:

> the communications between complainants, the Society and the solicitors the subject of complaints, should be entitled to immunity from production on the grounds of public interest, and that informants and complainants to the Society may not be so willing to come forward unless their confidence is respected and protected.[61]

2.51 The Commission accepted the need for sensitivity in such matters, but pointed out that: (1) the Commission had attended meetings of the Law Society's Professional Conduct Committee and Council, at the Law Society's invitation, which involved consideration of confidential matters; and (2) the Law Society had readily and without reservation agreed to allow the Commission to conduct a survey of its 1991 complaint files, without expressing similar concerns about confidentiality. In any event, the Commission proposed that the Law Society could handle the mechanics of posting and receipt of the survey forms, which would themselves would not contain or request any identifying material, so that the Commission would not need a list of names and addresses and anonymity could be assured.

2.52 However, over the next five months, the Law Society Council imposed an increasing number of hurdles to be overcome before it would accede to any request for a survey. Among other things, and at various times, the Law Society Council insisted that:

> the Commission retain a specified consultant to help design and carry out the survey;
>
> there be no survey of complainants unless there was also a survey of respondent lawyers;
>
> that the Commission bear all of the costs of the administration of the surveys, including all of the work done by Law Society employees in posting and receiving the survey forms, etc; and
>
> that the Commission simultaneously survey a "control group", which the Council proposed to be the complainants and respondents dealt with by the Department of Health's Complaints Unit during the same period;
>
> the Commission first conduct a "pilot study" before it undertakes the larger survey;

> the particular questionnaire designed by the Commission - and refined with the advice of the nominated consultant - was unacceptable.

2.53 The Commission was happy to accede to the first demand and, as suggested by the Law Society, retained Mr John Schwartzkoff of MSJ Keys Young as the consultant to advise on survey design and administration.[62] The Commission agreed that a survey of respondent lawyers was desirable, but had doubts about our ability to fund this ourselves and proposed that the Law Society might wish to underwrite this survey itself. The Commission noted that the Law Society regularly surveyed its membership on other matters, such as "current trends in management and marketing issues facing the profession in the 1990s",[63] out of its own resources. The Commission was of the opinion that this funding could come out of the Statutory Interest Account, if necessary, as it related to the Law Society's statutory responsibilities for the regulation and discipline of solicitors. In any event, the Commission also offered to support an application by the Law Society to the Attorney General for special funding for this purpose. (The funding issue was rendered moot when the Commission determined that there was no realistic prospect of the survey eventuating. See below.)

2.54 The Commission also had concerns about being asked to provide an undertaking to pay the Law Society for the cost of the routine clerical tasks involved in the administration of the survey of complainants, such as addressing and stuffing envelopes and collecting replies. Mr Schwartzkoff advised the Commission and the Law Society that this work would involve, at the very most, a total of about 2-3 days of one clerk's time.[64] Although it seemed to excite considerable anxiety in the Law Society's officers, the Commission regarded this as a relatively minor issue which could be sorted out if there was general agreement to proceed with the survey. However, the other demands by the Law Society Council represented more significant sticking points.

2.55 The Law Society Council persisted with the demand for a "control group" survey although it seemed to recognise that the organisation of another major survey of complainants and respondents in a different profession's system (under the Health Complaints Unit) presented almost insurmountable practical difficulties. The Commission would have to negotiate a whole new set of permissions with various health care regulatory authorities (at a time when legislation turning the Complaints Unit into an independent, statutory, commission was pending in Parliament[65]), design another questionnaire, come up with funding for this exercise, and so on.

2.56 Mr Schwartzkoff informed the Commission and the Law Society that, in his professional opinion: (1) *there is no control group* in the circumstances of the proposed survey, as the results of a separate questionnaire about perceptions of a different system of complaints handling would yield little in the way of comparability;[66] (2) undertaking a survey of another system would be long and difficult in practice, for little result; and (3) it would be better in any event to spend the time and effort looking for existing comparative research involving other surveys of legal complaints processes. The Council's insistence on this point sits oddly with its own earlier submission to the Commission, that:

> Whether the Medical Complaints Unit is judged to have worked effectively or not, that Unit's experience is not a reliable guide to the anticipated benefits which might be derived from a similar unit applied to the regulation of the legal profession. The two professions are totally different in their functions and in the nature of the roles which they play in the community.[67]

2.57 The Commission also failed to see the need for a "pilot study" to test the questionnaire and the protocol for administration, on the basis that this procedure would lead to unnecessary delay and expense for little benefit. Mr Schwartzkoff expressed the strong view that, while they can sometimes be quite useful, in these particular circumstances a pilot study was not needed, because: (1) the proposed questionnaire was "short and simple", "the issues are well-defined", and no significant problems were anticipated which would necessitate a dry run; (2) a pilot study would add to the administrative requirements and costs of all concerned; (3) pilot studies were more common with face-to-face or telephone surveys, where the study could be done quickly, but would take at least five weeks for a postal survey such as ours; and (4) the main thing we would learn from a pilot would be the response rate (which we would learn from the actual survey anyway), but we would not be likely to learn anything very significant about how people will answer.

2.58 Finally, the Commission had little success in gaining the approval of the Law Society to the particular questionnaire, despite a considerable number of meetings for this purpose. Essentially, the Law Society objected to most of the factual questions (eg whether the person used a complaint form, whether a complaint

was made to another body as well, whether compensation was requested, the disposition of the complaint, whether the person sought review of a dismissal) on the basis that this information could be obtained from a survey of the Society's complaints files, and objected to most of the attitudinal questions (eg was the person satisfied with the level of assistance received, with the reasons provided for the disposition, with the result obtained, etc), apparently on the basis that most complaints are dismissed so that most complainants are likely to register dissatisfaction.

2.59 The "guts" of the proposed questionnaire from the Commission's point of view was a series of 13 propositions (some phrased in the negative, some in the positive) about the complaints procedure and the person's experience of it, with the complainant asked to express a view ranging from strong agreement through to strong disagreement (the standard Guttmann scale used in most attitudinal surveys).[68] To the Commission's amazement, the Law Society over time systematically objected to all of the *negative* propositions (eg, "I felt uneasy in complaining about my solicitor to the Law Society", and "Involving the Law Society in my complaint was a waste of time"), but had no problem at all with the *positive* propositions (eg "Staff at the Law Society generally treated me in a courteous and professional manner", and "On the whole my complaint was handled promptly and efficiently").

2.60 The Commission was willing to make some modifications to gain approval, but there seemed to be little room left for accommodation without destroying the integrity of the survey. Mr Schwartzkoff's advice to the Commission and to the Law Society was that, if anything, this set of propositions was "*not provocative enough or negative enough*. This is as soft and positive as they can possibly be without making it seem to be a complete 'put-up job' ".

2.61 The Law Society also strongly objected to another proposed question in which persons surveyed would be asked to express a view, based on their experience, about the best method for handling complaints against lawyers in future (based on the three options for reform presented in DP 26).[69] The Law Society's position was that such a question was quite inappropriate, and perhaps even improper, as the question was one for the Commission to decide. The Commission's position was that: it was open to us to ask the question; we would be interested in the responses from people with experience of the existing system; the same question has been used in surveys about legal complaints handling processes in other jurisdictions without apparent trauma; and this was no more nor no less than a part of the Commission's general obligation to consult with and ascertain the views of affected parties and persons with special experience or expertise.

2.62 Despite the Commission's clear assurances to the contrary, the Law Society Council apparently took the view that the results of the survey of complainants would be treated as a *referendum* on the future of the complaints handling system, and that this was a referendum that they were certain to "lose". The Commission was disturbed at the attitude of the Law Society Council towards the integrity and intelligence of complainants implicit in its unwillingness to permit the Commission to consult with such persons.

2.63 The Commission's firm conclusion was that it could never hope to gain the cooperation of the Law Society Council to a timely and proper survey, and the Chairman of the Commission wrote to the President of the Law Society on 20 October 1992 that "the Commission, although disappointed that it will not have this valuable information, sees no purpose in pursuing the matter further."

2.64 Although the Bar Association still seemed amenable to a survey of its complainants, the Commission decided not to proceed with this in the absence of a Law Society survey. The number of complaints against barristers annually is so small that, given the typical response rate for postal surveys, the results could not be of any statistical significance and would not warrant a "stand alone" project.

2.65 The final version of the Commission's proposed survey of complainants (in relation to solicitors) prepared by the Commission in consultation with Mr Schwartzkoff is included as Attachment "A" of this Report. (The survey would have to be modified somewhat for the survey of respondent solicitors, and for the survey of the handling of complaints about barristers.) The Commission hopes that this draft may provide the basis for a future survey, and we make a positive recommendation in this Report that participants *should* be surveyed routinely to help ensure the quality of, and public confidence in, the complaints handling system.

THE OMNIBUS (PUBLIC OPINION) SURVEY OF ATTITUDES TOWARD THE REGULATION OF THE LEGAL PROFESSION

2.66 The Commission had considered for some time the benefits of conducting an Omnibus Survey (or public opinion poll) of the state of public knowledge about, and attitudes toward, the handling of complaints against lawyers. After the Commission concluded that the actions of the Law Society would not allow a survey of complainants to go ahead, it was decided definitely to proceed with the Omnibus Survey.

2.67 The Roy Morgan Research Centre was commissioned to conduct the Omnibus Survey, and after some discussion involving the Commission, the Centre and Mr Schwartzkoff, the following three questions were settled upon:

A. To the best of your knowledge, who is mainly responsible for dealing with complaints against lawyers? [Open-ended question]

B. In New South Wales, complaints against lawyers are normally dealt with by the Law Society or Bar Association. As well as helping to regulate the legal profession, the Law Society and the Bar Association are the professional associations which represent solicitors and barristers. Some people have suggested that complaints against lawyers should be handled by the Law Society and Bar Association, as now. Other people have suggested that complaints should be handled in other ways. Looking at the next card, which one line best describes **who** you believe **should** deal with complaints against lawyers? [Circle only once.]

The Law Society and Bar Association	1
A Commission or Ombudsman	2
A Government Body	3
A Body controlled by Judges and the Courts	4
Other (to be named by respondent)	5
Can't say	6

C. Look at the next card. If a new body were established to investigate complaints against lawyers, which one line best describes who you think that body should consist of? [Circle only once]

Lawyers only	1
Mostly lawyers but some non-lawyers	2
Equal numbers of lawyers and non-lawyers	3
Mostly non-lawyers but some lawyers	4
Non lawyers only	5
Can't say	6

2.68 The survey was conducted in New South Wales in mid-November 1992, with a sample of 648 adults (representing a confidence interval of 95 out of 100) asked to respond to the questions. The Morgan Research Centre delivered the report on the results to the Commission in December 1992.

2.69 Only one-third (32.6%) of respondents could correctly identify the Law Society and Bar Association as the bodies with primary responsibility for handling complaints against lawyers. Almost 40% would not venture an answer; 19% thought it was the responsibility of the Ombudsman; and the rest incorrectly identified a number of other agencies, such as the Department of Consumer Affairs (2.7%), the Attorney General's Department (1.5%) and the Independent Commission Against Corruption (1.2%). Older (over-35), male, urban, and tertiary-educated respondents were somewhat more likely to know about the regulation of lawyers, although only affluence (income over $40,000) correlated reasonably highly (55%) with accurate knowledge of the system - probably because of higher levels of social and professional contact with lawyers.

2.70 Only 16% of respondents believed that the Law Society and the Bar Association were the *best bodies* to handle complaints against lawyers. Nearly 80% wanted regulation by a public authority independent of the legal profession: 54% opted for "a Commission or Ombudsman", 16%. supported "a government body", and 9% wanted "a body controlled by judges and the courts".[70]

2.71 Assuming the establishment of a new body to investigate complaints against lawyers, few considered that the body should consist of lawyers only (5%) or mostly lawyers (10%). Over 80% thought that the new body should consist of equal numbers of lawyers and non-lawyers (46%), mostly non-lawyers with some lawyers (25%), or non-lawyers only (10%).[71] Respondents with a tertiary education were most in favour of a Commission or Ombudsman, and most likely to restrict the participation of lawyers in any new body.

THE COMMISSION'S SURVEYS OF THE COMPLAINTS FILES OF THE LAW SOCIETY AND THE BAR ASSOCIATION

The general nature and purpose of the surveys

2.72 The Commission is pleased to say that we enjoyed the full cooperation of the Law Society and the Bar Association in undertaking a survey of complaints files in late October and early November 1992. It was decided that it was most appropriate for the Commission to look at complaints made in 1991, as virtually all of these would have been finalised by the time of the survey. In the case of the Law Society, the Commission requested to see every fourth file, and after two full days of work (by six members and staff of the Commission) we had gone through 144 separate files in detail (and scanned a number of others), which took us through the first six months of 1991. In the case of the Bar Association, the Commission was able in the course of one day's work to get through nearly half (37 out of 80) of all the complaints made in 1991.[72]

2.73 The purpose of the Complaints Files Survey was partly to gain some reliable empirical data about the complaints handling system, but more so to form a general impression of the actual operations and effectiveness of the current system of complaints handling. The Commission recognises that there are some limitations with a survey which does not include *every* file for the relevant and which looks only at the documentary record. However, we believe that the sample size was large enough and the run of matters representative enough to permit us to gain a strong impression of the way complaints are processed - particularly when this survey is taken together with the submissions, the Commission's attendance at meetings of the Law Society's complaints committee and Council, and other research and consultation efforts.

2.74 The Commission's investigators were directed to note such matters as: (1) the time taken to complete the investigation of the complaint; (2) the level of assistance provided to complainants; (3) the nature of the conduct complained about (eg, negligence, discourtesy, failure to account for trust funds); (4) the subject area of the legal services provided (eg, family law, conveyancing, accident compensation); (5) the nature of the respondent lawyer's practice (sole practitioner; small, medium or large firm; or barrister) and its location (Sydney City, Sydney suburban, or country); (6) the method(s) of investigation employed; (7) the disposition of the

complaint (eg, withdrawn, dismissed, referred to the Disciplinary Tribunal); (8) any subsequent action (eg, application for review by the Conduct Review Panel); and (9) any other comments about the handling of the matter. It was not intended that the files be reviewed for the purpose of re-investigating the complaints nor to re-assess matters on the merits.

The survey of Law Society complaints files

Time taken for processing

2.75 Of the 144 files, 32 took more than six months to close (22%), 14 took more than twelve months (10%), and eight (5.5%) were still open. (Some of the open matters had been referred to the Standards Board or the Disciplinary Tribunal for a hearing). Thus well over a third of complaints took more than six months to be dealt with, the period after which complaints are *deemed* to be dismissed (for the purposes of seeking a review by the Conduct Review Panel) under the provisions of the *Legal Profession Act* 1987 ("the Act"). Many other files were closed just inside six months. Although there now appears to be a greater concern to process matters more quickly, some ordinary complaints, which are ultimately dismissed or closed by consent, seem to take an inordinate amount of time to process. Some files contain inexplicable delays or gaps of many months, and a few simply seem to have "got lost in the system".

Assistance to complainants

2.76 *General assistance.* It was difficult to assess the level of assistance provided to complainants from the face of the files, which rarely contained any discussion of this matter. It was noticeable, however, that only 30 of the 144 complaints were made using the Law Society's form designed for this purpose. In most cases complainants wrote directly to the Law Society, and this letter was taken to be the formal complaint. The complainants would routinely be sent the Law Society's Explanatory Brochure, but there did not appear to be a great effort to help complainants re-define their complaints (which tend to be made using general language) using legal concepts or in accordance with the requirements of the Act. In technical terms, these complaints often compare poorly with the carefully crafted responses made by the lawyers complained about.

2.77 For example, in one matter the Law Society's legal officer wrote a File Note saying that "In view of the rather cryptic nature of the complaint, I wrote to the solicitor seeking his general comments in the matter". The legal officer did not write to or phone the complainant in an attempt to decipher the "cryptic" allegations, however.

2.78 Because most complainants start with little or no knowledge of the nature of the disciplinary system, and gain little understanding from their brief dealings with the Law Society, it appears to the Commission that they often have unrealistic expectations of how their complaints will be handled and the results which are likely to be obtained. Most complainants seem to assume that their initial letter is only the point of departure, rather than the final act, for making a formal complaint. Such letters commonly conclude with words to the effect of: "I look forward to being able to discuss the whole matter with you in greater detail". However, further discussions actually are rare, and the initial letter is given a legal significance by the Law Society which was not intended or anticipated by its author.

2.79 *Assistance to non-English speakers.* In about 10 per cent of cases it seemed that the complainant had a poor command of the English language. (The number of *potential* complainants who did not proceed at all because of the lack of interpreter and other services cannot be determined, as no records are kept of inquiries which are not followed up by a formal complaint.) It did not appear that *special* assistance commonly was provided for persons with poor English, but it was difficult in this sort of survey to determine whether further assistance was necessary or would have made any difference in the handling or outcome of the complaint. In one matter, an offer was made by the Law Society's legal officer to receive correspondence from the complainant in Italian, although it was specified that English was preferred.

2.80 *Requests for compensation.* The Act requires that the complainant *specifically* request compensation in the original complaint if this is to be considered later by the Standards Board or the Disciplinary Tribunal. The

Law Society's Complaint Form sets this out (including the four compensatory options) clearly, but only 30 out of 144 complainants (21%) actually used the form. The Explanatory Brochure also discusses the need for the specific request, but there is nothing in the letter back to complainants which alerts them to this issue in particular. It appears that those complainants who happen to use the form are more likely to request compensation than are the others.

2.81 There is also some doubt about what "compensation" means in the circumstances. Where a "third-party" complaint (ie, outside the lawyer-client relationship) alleges that the solicitor hasn't paid his or her bills, is this a request for compensation? The term "compensation" may not be clear to all lay persons, as well, so that direct assistance is required beyond the provision of literature. For example, one complainant wrote to the Law Society stating that he was "*not* making a claim for compensation. My claim is for money I consider I am entitled to."

2.82 Clearly more resources and attention need to be devoted to the early stages (assistance and advice, reception of complaints) of the complaints handling process.

The demography of complaints

2.83 *Types of conduct complained about.* In terms of the type of conduct complained about, the largest categories of complaints were (in order): unreasonable delay (33 complaints); negligence or poor quality of work (31); no or poor communications (29); failure to carry out instructions (28); overcharging (26); conduct or standards breach (23); failure to account (14); failure to transfer documents/solicitor's liens (11); unethical conduct (10); and rudeness or discourtesy (9). Smaller numbers of complaints were received about conflict of interest, failing to comply with an undertaking, and putting client funds at risk.

2.84 This confirms the earlier research and the Commission's view that the vast bulk of complaints relate to conduct which would, at most, amount to unsatisfactory professional conduct. More serious complaints, alleging matters which amount to professional misconduct are relatively rare.

2.85 The Commission's own characterisation of the basis of complaints sometimes differed with that of the Law Society, which often limited its official characterisation of the complaint (in its own files and in the clarifying letter to complainants) to one or two heads. In fact, we noted that the complaint is often about a *cluster* of allegedly unsatisfactory behaviour. Thus it was not unusual for a complainant to refer, for example, to unreasonable delay *and* poor communications, negligence, failing to obey instructions, and overcharging. Some of the more sophisticated complainants *do* write back to the Law Society pointing out that they have raised many more issues than seem to be the subject of investigation.

2.86 *Areas of legal practice.* There was a fairly wide spread of areas of legal practice giving rise to complaints, although conveyancing/sale of property (22 complaints); family law (22), and workers compensation (19), were most represented. These were followed by: non-litigious commercial matters (15); "other litigation" (13); motor vehicle accident compensation (12); wills and probate (7); and debt recovery and other civil claims (6). Surprisingly, given the number of matters and the stakes involved, criminal law gave rise to only four complaints.

The profile of respondent lawyers

2.87 Most of the complaints against solicitors were about sole practitioners (63 complaints) and small partnerships (56), with relatively few against medium-sized (14) or large firms (7). ("Medium-sized firms" were defined as those with four to nine principals, and "large firms" as having ten or more principals.) In terms of location, most of the respondent solicitors were located in the Sydney metropolitan suburbs (51), followed by the Sydney CBD (42) and the country (33). To the Commission's considerable surprise, a very high proportion (92%) of the solicitors complained about had been the subject of at least one prior complaint (in 81 of 88 cases where this information was available and recorded by the Commission's investigators). Some names seemed to adorn a number of the files; and the Commission was informed that one of these solicitors is currently facing 222 complaints.

The poor quality of investigations

2.88 *Tone of the initial correspondence.* The tone of the first letters from the Law Society to the complainant and to the respondent solicitor are different. The letter to the complainant is courteous, but somewhat impersonal. The letter to the solicitor, by contrast, is warmer and more helpful. For example, many of the letters to solicitors concluded with the following paragraph:

> If you would like to discuss the matter before making a reply then I would be pleased to hear from you so that I may give any assistance you require in responding. You may wish to seek independent advice and if so I can give you the names of solicitors who participate in the Senior Solicitors scheme who would be able to help you.

2.89 The Law Society's letter betrays the ambivalence of its position. The Society has statutory responsibility for the investigation of claims of wrongdoing by solicitors, but at the same time it is a professional association which must provide services to its members. Thus, in the initial letter, a solicitor is put on notice that the Law Society has received a complaint about his or her professional conduct which will be investigated and should be taken seriously; on the other hand, the solicitor is then offered a range of services to assist in the preparation of his or her defence.

2.90 Although the Law Society also is under a statutory obligation to provide all necessary advice and assistance to persons making complaints, there is no equivalent offer of "any assistance you require" in the standard letter back to complainants.

2.91 Similarly, after dismissal, the standard letter to solicitors thanks them profusely for their assistance - even in cases where there was in fact very little cooperation, and even where the Law Society had threatened to suspend or cancel the person's practising certificate because they had not supplied information after repeated requests. The letter to unsuccessful complainants simply notifies them of the dismissal, and of the possibility of having the decision reviewed (see below).

2.92 *The passivity and insufficiency of the investigation.* The File Survey strongly confirmed our view, stated in DP 26, that the general approach of the Law Society is to *process* complaints passively rather than to *investigate* them actively.

2.93 In almost all of the files, the investigation consisted of the classic "paper chase", with the Law Society shuttling letters back and forth between complainant and respondent solicitor for comment. In a small number of cases the Law Society summoned files (usually trust account ledgers) and in a few of these an investigator was eventually appointed. In only six per cent of cases (7 out of the 115 files in which this information was available) was there ever a face-to-face meeting between the complainant and the Law Society's legal officer, and most of these were at the initiative of the complainant.

2.94 In only the rare case did the Law Society legal officers: check through the solicitor's files; track down and interview third parties (such as other lawyers) who could shed light on facts in dispute (even where the existence of such valuable evidence was blatantly obvious from the complaint file); call in an independent expert or distinguished specialist for advice on the standards and practices expected of a competent legal practitioner in a particular area of law; or in any other way actively or imaginatively conduct research or use investigative techniques which are regarded as standard and essential by other investigatory or regulatory bodies (eg the police, the Ombudsman, the Australian Tax Office).

2.95 The over-reliance on *pro forma* letters by the Law Society sometimes verges on the surreal. Women solicitors often were referred to in the correspondence as "*Mr* X", and letters sent out on Christmas Eve or to persons residing overseas sternly warn that the recipients must respond within 10 or 14 days. These are not major problems in themselves, but are symptomatic of the central problems.

2.96 The Commission did not feel that the approach was *calculated* to discriminate against complainants. Indeed, one of the problems is that the existing approach is largely *undiscriminating* - silly or bizarre complaints are dealt with in much the same rote fashion as more substantial allegations, with the shuffle of complaint and

reply between the parties, and disposition determined as if it were an adversary system with the onus on the complainant. The most basic questions:

> *What is it the complainant wants from the process?*
>
> *Is some sort of counselling or discipline needed to ensure the fitness of the particular solicitor?* and
>
> *Is there anything we can learn about improving legal practice or the delivery of legal services generally?*

almost never seem to be asked, much less answered.

2.97 *Preference for the solicitor's version of events.* The "paper chase" mode of investigation often results in a position in which the complaint boils down to competing versions of the relevant conversations or events. In only *one* case did the Commission's investigators find that the complainant's version was accepted in preference to the solicitor's account. In every other case the solicitor's version was accepted, either directly or on the basis that the complainant had not adequately supported or documented his or her story.

2.98 Solicitors' responses also tended to be well-structured, coherent, well-presented and attuned to the requirements of the Act, as one would expect from persons with legal training. By way of contrast, many of the complaints are, not surprisingly, emotional, rambling, handwritten, and unpolished. The complaints history of the practitioner involved did not appear to be taken into account in deciding which story to accept.

2.99 Although there is nothing on this in the complaints form, the Explanatory Brochure, or the correspondence with the complainant, the onus of proof is effectively placed on the complainant to identify clearly and sustain with probative evidence the misconduct or unsatisfactory professional conduct complained of. As discussed earlier, few complainants would be in a position to do this without the benefit of legal advice even if they were made aware of the Law Society's expectations.

2.100 This situation clearly angered some complainants, who were moved to write back to the Law Society objecting to the fact that the solicitor's word was "taken as gospel" or stating that it had turned out to be "a waste of time" making a complaint.

2.101 Where the complainant is a lawyer or other professional, the "paper chase" approach to investigation actually seemed to increase the heat in the dispute, as each party is sent the other's letters for comment.

2.102 *Failure to proceed from the specific complaint to the general issue.* The Commission noticed that the investigation into a complaint rarely proceeded from the specific complaint to more general concerns which are raised about the solicitor's practice. For example, in one matter (discussed further below), it was accepted that the solicitor had used an improper method of calculating his bill and had overcharged the client, who subsequently complained to the Law Society. The complaint was dismissed after the solicitor reduced the bill by about half, following a review by independent costs assessors. Whether or not the particular complainant was satisfied, the Commission's investigators were left to wonder whether the solicitor in question might have rendered excessive bills to *other* clients, past and present, on the same erroneous basis. The Law Society did not ask the question, nor did it counsel the solicitor to review his billing practices (generally, or in relation to the particular class of work involved).

2.103 *Failure to pick up related allegations of poor practice.* Similarly, the Law Society's legal officers generally left it to the complainant to make the running on any additional matters which arose in the course of the investigation. For example, in one case a firm of solicitors complained about the conduct of another firm. It seemed to be common ground between the complainants and the respondents, however, that a *third* firm of solicitors, which also was involved in the particular legal proceedings, had acted incompetently. No action was taken against the third firm, however, as no further formal complaint was made.

2.104 In another matter which was dismissed, a solicitor mentioned in passing that he had arranged for an apparently illegal credit check on the complainant. The complainant had not specifically complained about this matter (and probably did not know about it), but the casual admission of impropriety was not picked up by the Law Society's legal officer. These cases are unsatisfactory, and suggest that the general community interest in

the proper regulation and discipline of the legal profession is not being looked after. Where such allegations come to the attention of the Law Society's Professional Conduct Department, they must be acted upon, with the Law Society itself as the complainant if necessary.

2.105 *Attitude toward allegations of negligence.* As the Commission noted in DP 26, there is still noticeable ambivalence on the part of the Law Society about whether to treat a complaint about negligent conduct as a matter requiring disciplinary action. Quite a few of the complaints we surveyed were dismissed - even though it seemed to be agreed that the solicitor had "made a mistake" - on the basis that the complainant was free to sue in the courts for negligence. This presupposes that negligence does not ordinarily amount to unsatisfactory professional negligence, but rather is a matter for civil action.

2.106 *Attitude toward allegations of overcharging.* There appeared to be a similar reluctance to treat complaints about overcharging as raising disciplinary issues, at least where the solicitor's original account "had a relation to the work which was carried out". Although in one matter it was agreed that, given the applicable District Court rules, the solicitor's original account was clearly excessive in the circumstances (and the bill was in fact subsequently reduced by about *half)*, the complaint was nevertheless dismissed. This was done on the basis that when the bill was challenged by the client, the solicitor took steps to have the bill vetted by costs consultants, and when the consultants advised that the bill was excessive, the solicitor reduced his fees accordingly.

The prevalence of the dismissal

2.107 *Disposition of complaints*. Of the 144 complaints surveyed, 3 were dismissed for failure to provide further particulars; 4 were dismissed for being frivolous or vexatious; 90 were dismissed following investigation (one with a reprimand administered); 33 were withdrawn or closed with the "consent" of the complainant (see below); five were still pending; and six (4%) were referred for a hearing before the Standards Board (2 matters) or the Disciplinary Tribunal (4 matters). Of the 90 dismissed matters, 24 led to applications by the complainants for external review by the Conduct Review Panel. In DP 26, the Commission expressed concern that although the *Legal Profession Act* 1987 was meant to signal a new approach, the pattern of the disposition of complaints had actually changed very little, and that little use was made of the Standards Board.[73]

2.108 *Matters closed by "consent".* Nearly a quarter of complaints are marked as being "closed containing no evidence of unsatisfactory professional conduct or professional misconduct". This usually involves the solicitor complained about finally agreeing to do what the complainant had requested some time ago: transfer files, remove a lien, itemise a bill, proceed with an action, advise the client of the status of the case, and so on.

2.109 The Commission had some concerns about many of these matters, as they sometimes seemed to indicate a pattern of poor professional practice. For example, many complaints about delay or poor communications appeared to be *confirmed* by the attitude which the solicitor showed to the Law Society. The respondent solicitors were often very tardy in responding to the Law Society's letters requesting an explanation, even those letters which carried a threat of suspension or cancellation of the person's practising certificate. Then when the solicitor finally did respond and performed the act requested by the complainant, the approach of the Law Society's officer was to write to the complainant saying that he or she was of the opinion that the complaint was now resolved and would be closing the file unless the ciomplainant objected within 10 days. By this time, however, few complainants wish to press the disciplinary aspect of the matter.

2.110 There was nothing in the files which suggested that the legal officers made any *considered* decision about whether or not the facts disclosed unsatisfactory professional conduct. In the view of the Commission's investigators, many of these cases arguably raised an issue of unsatisfactory professional conduct, or at least warranted further investigation. The Commission also was concerned that some of these matters are closed by the Law Society upon notification of an agreement between the solicitor and the complainant, without waiting to see whether the agreement was fulfilled. Presumably a breach of the undertaking by a solicitor in these circumstances would require a fresh complaint.

2.111 *Use of the "first offender" discharge.* Under s134(1A) of the Act, a complaint may be dismissed by the Council notwithstanding a finding of unsatisfactory professional conduct, if "it is satisfied that the legal practitioner

is generally competent and diligent and that no other material complaints have been made against the legal practitioner". The Commission noticed that this method of dismissal was used on a number of occasions in which the solicitors involved had prior complaints against them , although these had been dismissed. The Law Society Council is apparently of the view that such complaints are not "material". The Commission has some concerns about this approach, given our doubts about the sufficiency of most investigations and the reluctance to treat certain kinds of complaints (eg, negligence, delay, overcharging) as raising disciplinary issues.

2.112 *Sufficiency of reasons for dismissal.* It appeared to the Commission that some of the dissatisfaction of complainants stemmed from the brevity of the reasons given, which are, indeed, *reasons* rather more than *explanations.* The approach tends to be narrow and legalistic (closely following the words of the Act). This is compounded by the long period of time which elapses before these reasons are presented to the complainants and the fact that the reasons are technically constructed to address the statutory requirements rather than to engage with the complainant's concerns.

Other observations

2.113 *Notification of the right to review.* The Law Society's letter to a complainant informing him or her that the complaint has been dismissed contains a standard final paragraph notifying the complainant that:

> The Society's file will now be closed. If you wish to have the Society's treatment of your complaint reviewed by the Legal Profession Conduct Review Panel you may write to it at 65 Elizabeth Street Sydney NSW 2000 within two months of the date of this letter.

2.114 Although information about the nature of the review and the composition of the Panel are contained in the Law Society's Explanatory Brochure for complainants, it was not clear whether every complainant was actually sent this publication. In any event, the Commission believes that a further and more detailed explanation of the review process (perhaps in the form of a separate brochure) should accompany the dismissal letter.

2.115 *Use of the complaints system as a collection agency.* A significant number of complaints involved the use of the complaints system by other lawyers, professionals or consultants (accountants, real estate agents, valuers, translators, and others) in the manner of a collection agency. It did not appear to us that the approach of the Law Society was consistent in this area. Some complaints about non-payment were pursued with vigour, while other complainants were curtly informed that "the Law Society is not a debt collector".

2.116 Where the failure to pay bills raises issues of trust account improprieties or a general *pattern* of unsatisfactory communications or office procedures, this is appropriate. For example, in one case a solicitor was offered and accepted a reprimand where he failed to pay the account of a firm of valuers he had retained for 20 months. However, there are some "one-off" or "genuine dispute" cases where the system is being abused. These should be referred to some other inter-professional procedure, or to the small claims courts.

2.117 *Secrecy provisions regarding the appointment of investigators, auditors.* As the Commission noted in DP 26, the provisions of the Act prevent the Law Society from revealing to the complainant that an auditor/investigator has been appointed. In the few files which involved the appointment of an investigator, the unsatisfactory nature of this position is clear. After many months, the Law Society could only write the complainant a bland letter that "investigations are proceeding". Given the seriousness and clarity of the allegations, this message (falsely) made it appear that little action was being taken, or at least would have failed to reassure complainants.

2.118 *(Unlearned) lessons for solicitors' practices.* A significant proportion of the complaints boil down to the competing recollections of the solicitor and the complainant. The Commission was struck by how rarely the solicitor could produce anything in writing to confirm his or her version of events. It seems to us that good practice requires:

- up-front disclosure of all fees and costs, and the method of billing;
- file notes of relevant conversations, etc;

written (and preferably signed) confirmation of instructions, where practicable;

perhaps written confirmation of an outline of basic advice; and

clarity regarding who is responsible for disbursements (doctors' reports, valuers' reports, translators, etc).

2.119 In DP 26, we expressed our concern about the lack of feedback from the disciplinary system to the profession. Few files contained evidence that the Law Society made a suggestion to the solicitor concerned that he or she might want to improve their record keeping in future, nor was there evidence that the Society resolved to make a general plea or reminder to the profession. The tone and content of the typical letter notifying a solicitor that a complaint has been dismissed certainly would not lead a solicitor to believe that the Law Society had any concern about his or her standards of practice.

2.120 No informal "caution" was ever given in the letter back to the solicitor, even where the file disclosed some worrying slackness on the part of the solicitor/firm involved. For example, In one case, the solicitor in question had 11 prior complaints, including complaints lodged by the Family Court, the Prothonotary of the Supreme Court, and one of the Aboriginal Legal Services. The essence of the complaint (undue delay in the lodgment of a civil claim) seemed to be confirmed by a letter from the Attorney General, yet the legal officer in charge simply accepted the solicitor's assurance that the matter was now proceeding properly.

The survey of the Bar Association's complaints files

Time considerations

2.121 *General delays in handling.* Perhaps the biggest internal problem (leaving aside the issue of real and perceived independence from the profession) with the Bar Association's complaints handling process identified by the Commission was its slow speed. Of the 37 complaint files looked at, 9 (24%) took more than six months to complete and 6 (16%) took more than one year. In six cases (generally ones in which the matter was withdrawn or closed by consent) the Commission was unsure about precisely when the file was closed. Thus in half of the matters in which the information was available, the process took longer than the six month ("deemed dismissal") period.

2.122 In some cases, the length of the process was owing to the complexity of the issues and the investigation, or the legitimate unavailability of a key witness or other evidence, or other extenuating circumstances. However, most of the delays were without explanation and without good excuse. As discussed below, the Commission was generally impressed with the *quality* of the Bar Association's investigations and reports. In large part this is because: (1) the relatively small number of complaints permits a substantial degree of devotion to each matter, and (2) the principal responsibility for investigation and analysis is placed with one of the practising barrister members of the relevant Professional Conduct Committee (PCC), who is likely to be a highly competent, experienced lawyer accustomed to producing such "barrister's opinions" in his or her daily work.

2.123 However, there is a negative trade-off for relying almost entirely on part-time volunteer labour - as every voluntary organisation is aware - and that is that this work has to be fitted in among the busy barrister's other professional and personal obligations. The Commission noted matters in which the investigator had gone on circuit, or on holidays, or had become unexpectedly involved in a long or complex trial, and work on the complaints file simply ceased for an unacceptably long period of time. Where the prospect of substantial delay became apparent, efforts sometimes were made by the chairperson of the PCC to transfer the responsibility for investigation to another member. This helped somewhat, but it still takes the second person time to get up to speed on the file and to advance the investigation and prepare the report.

2.124 *The approach to tardy replies.* Unlike the position obtaining regarding complaints against solicitors, the progress of investigations by the Bar Association were not often delayed because of tardy replies from respondent barristers, or the need to make repeated requests (and threats) to secure a proper response. In the relatively small world of the Bar it is more difficult for the lawyer to be uncooperative or to hide. The Commission was interested to see that a pointed letter often was written to a barrister who had not made a timely response to

a complaint or a request for information or an explanation, advising the barrister of the possible repercussions of such a failure (disciplinary action, consequences for the practising certificate) and wondering how (eg) the barrister had found time to appear in a number of (named) courts when he or she apparently did not have the time to respond to the Bar Association.

2.125 The impatience of the Bar Association with barristers who failed to make a timely response was demonstrated in another matter, in which the complaint was withdrawn by the original complainant, but the Bar Council nevertheless proceeded on its own motion to admonish the barrister concerned for unreasonably failing to comply promptly with a Council (or committee of Council) request for information or an explanation of certain conduct.[74]

Assistance to complainants

2.126 *The assumption of sophistication.* The Commission considered that (to the extent discernible from the files) the Bar Association had a helpful, "business-like" approach to providing advice and assistance to complainants. As discussed further below, the profile of complainants to the Bar Association in our survey was dramatically different from the profile of complainants to the Law Society. Nearly half the complaints to the Bar Association (15 out of 37, or 40.5%) came from lawyers or the legal professional associations.

2.127 It appeared to the Commission that quite a sophisticated level of cooperation was expected from some complainants with regard to the Bar Association's requests for the production of evidence. Where the complainant is a lawyer, a professional association, or a corporate client, this is not a problem. However, members of the general public could well find these requests daunting or off-putting.

2.128 *Uncertain supply of explanatory materials.* The Bar's Explanatory Brochure at the time of our inquiry also was geared to the more sophisticated member of the community, and read more like a legal document than a guide for the general community. The Bar has since redrafted the brochure in plain English, and plans to provide explanatory literature in a number of community languages besides English.

2.129 The Commission discusses elsewhere in this Report the danger of relying entirely or largely on written materials to provide the requisite advice and assistance to complainants, and the consequent need for direct help. However, it was unclear from the Bar Association's files whether the existing written materials were even provided - in only two out of 37 complaint files did the file or the correspondence clearly indicate that the Bar's Explanatory Brochure and the Complaint Form had been posted to the complainant, and in only two cases was the official Complaint Form (rather than a letter) used to initiate the investigation. If the explanatory materials are not routinely being supplied, this must disadvantage lay complainants, and it can not be assumed that even lawyer-complainants are fully aware of the disciplinary arrangements and requirements under the *Legal Profession Act* 1987.

2.130 *Need for direct information and advice about the complaints system.* Some effort on the part of the professional associations, and *direct* advice and assistance to complainants at the beginning of the process, will no doubt prevent a lot of disappointment at the later stages. It was apparent to the Commission that many complainants did not understand the nature or purpose of the complaints handling system. Many had unrealistic expectations about what could be achieved. For example, many complainants spoke of "obtaining justice" with respect to their legal problems and seemed to regard the disciplinary system as an appellate procedure or simply another opportunity to re-run their original case. It is unlikely that the written materials alone, even if consulted, will dissuade them from this view. Complainants should be made clearly aware of the nature and limits of the remedies available through the complaints system, and the possibility of pursuing other courses of action outside of this system. As a practical matter, this is best achieved through a face-to-face interview.

2.131 *Failure to keep complainants advised of progress.* There did not seem to be a routine procedure for keeping complainants (especially lay complainants) informed about the progress of their complaints. Given the general problem with delay, the absence of regular communication appeared to be cause of some anxiety for complainants. Such communication as occurred tended to come at the initiative of the complainant.

The demography of complaints

2.132 *Areas of legal practice.* The area of practice which attracted the most complaints was criminal law (with 9 complaints, or 25% of the sample), followed by family law (6), conveyancing/real property (4), commercial litigation (4), arbitration (2), and "other litigation" (2). A range of other types of work attracted single complaints in 1991: non-litigious commercial, motor vehicle accident compensation, traffic, bankruptcy, tenancy, workers' compensation, and "other civil claims". In a number of matters, the area of legal practice was not clear from the file or was irrelevant to the complaint.

2.133 It did not surprise the Commission that areas of legal practice dealing with "personal plight", such as criminal law and family law, with high stakes and the potential for high emotion, drew the most complaints. In the area of criminal law there also may be circumstances in which the barrister's duty to the court overrides or circumscribes his or her duty to the client, increasing the possibility of a complaint. The significant proportion of complaints in the area of conveyancing and real property is probably atypical, owing to some complaints about barristers performing the sort of conveyancing tasks which solicitors believe has been reserved for them by law.

2.134 *Types of conduct complained about.* As with solicitors, many of the complaints related to conduct which arguably amounts to unsatisfactory professional conduct rather than professional misconduct. For example, there were many complaints in relation to: negligence or poor quality of work (9), rudeness or discourtesy (5), overcharging (4), poor communications (3), breach of conduct or standards (2), making direct contact with a represented opposing party (1), and delay (1). There were also potentially more serious complaints about conflict of interest (3), false representations about qualifications (1), and unethical conduct (1).

2.135 However, the special style of practice of barristers - and the restrictive practices which attach to the work of the Bar - give rise to other types of complaints which are not seen (or at least more rarely seen) in respect of solicitors (or amalgam practitioners in other States). In our sample, these included: failure to represent the client's interests (3 complaints); improper behaviour in court (3); late return of a brief or withdrawal from a matter (3); improper invocation of the "no fees, no start" rule[75] (3); acting without the intervention of a briefing solicitor[76] (3); soliciting the payment of fees directly from a client[77] (2); accepting a brief from a solicitor on the "blacklist" (for previous non-payment of barristers' fees)[78] (1); retaining a solicitor on behalf of a client[79] (1); attending a conference with a client without a solicitor in attendance[80] (1); failing to uphold the special duties of fairness of a prosecutor (1); indirect advertising[81] (1); and conduct generally bringing the profession into disrepute[82] (1).

2.136 *Who complains about barristers?* Most complaints (20 out of 37, or 54%) were made by present or former clients. However, a significant proportion of complaints came from solicitors (9, or 24%), other barristers (3), the Bar Council or one of its committees (such as the Fees Committee) (2), and the Law Society (1). Complaints from other lawyers and from the professional associations tended to be mainly about the sort of intra- and inter-*professional* concerns and rules of practice referred to just above, rather than about the effective delivery of legal services to *clients*.

The nature and quality of investigations

2.137 *Tone of the initial correspondence.* We noted above our concern about the disparity in tone and substance between letters sent to complainants and respondent solicitors by the Law Society. The Commission found that this was less of a problem with respect to complaints against barristers. The tone of the correspondence to barristers and complainants appeared to be more even-handed, and there were no mixed signals sent to the barristers.

2.138 *Need for a clarifying letter.* After receiving a complaint, the Law Society writes a "clarifying" letter back to the complainant which seeks to characterise the allegations (eg "Your complaint is that the solicitor did not follow your instructions in settling the compensation claim"). The Commission has some concerns about we see as the Law Society tendency's to ignore or mistakenly characterise some of the allegations (see above), but we believe that this *procedure* has merit. The Bar Association writes back to complainants acknowledging receipt of the complaint and advising them that an investigation will follow. However, there is no attempt to clarify or characterise the nature of the complaint. The Commission believes that this should happen, in order to reassure

the complainant that the complaint has been understood (or to provide the opportunity for correction or addition) and to narrow the issues for investigation.

2.139 The Commission also believes it is important that, in future, the clarifying letter from the Law Society or Bar Association actually should ask the complainant *what outcome they hope to get out of the process*. Apart from being polite and helpful, it would be very useful for the investigating authority to know whether the complainant is mainly seeking some sort of compensation, an apology, sanctions against the lawyer, and so on. This in turn may colour the decision of whether to divert the matter for consensual dispute resolution, for example. It also would alert the investigating authority to the situation in which the complainant does not understand the role of the disciplinary system, or seeks a remedy not available through this system, or otherwise has unrealistic expectations of what will happen.

2.140 *Vigour of the investigation.* The key difference between the Law Society's and the Bar Association's approach to the handling of complaints is the manner of investigation. The Law Society employs solicitors in its Professional Standards Department (as it is now called) to handle the investigation and prepare material for the consideration of the Professional Conduct Committee (PCC). As discussed above, the Commission has been critical of the passivity, "paper chase" orientation, and narrowness of the Law Society's investigations.

2.141 The Commission was considerably more impressed with the quality and vigour of the Bar Association's investigations. (The problem of delay is discussed above.) The Bar Association has one employee who handles much of the paperwork and coordination,[83] but the actual investigations are conducted by an assigned barrister member of one of the Bar's PCCs. This is possible in a system which receives only about 5% the number of complaints received annually by the Law Society.

2.142 The Bar Association's investigations tend to be far more active, with the barrister in charge: often requesting transcripts, files and file notes, personal notes, diaries and so on; interviewing or getting statements from third parties (instructing solicitors, opposing counsel, other barristers and solicitors, judges and so on) who may have relevant information. The investigator actually reacts to the information acquired himself or herself (rather than merely referring it to the complainant and the respondent for *their* reactions), and new leads or new allegations are followed up.

2.143 In a number of matters, the investigator (in conjunction with one of the Bar Council's senior officers) took the initiative to approach a noted expert in a particular field to ask for an opinion about the standards of practice generally expected of a barrister doing work in that area, and about whether the respondent barrister met those standards of practice in the circumstances.

2.144 The thoroughness of the investigations was reflected in the reports written for the consideration of the full PCC (and then for the consideration of the full Council). These reports generally were of a high quality and considerable length: setting out of the facts, carefully comparing and analysing the available evidence, specifying the rules and standards to be applied, and providing a reasoned conclusion and recommendation.[84] This was in contrast with the style and content of the reports prepared by the Law Society's legal officers, which tended only to repeat verbatim the competing versions of the complainant and solicitor.

2.145 *Follow-up of related matters.* As noted above, the Bar Association's investigators tended to be more alive to evidence pointing to related problems or concerns than the Law Society's investigators, who seemed to see as irrelevant any evidence not *directly* related to the particular complaint. It was interesting to see that in two of the Bar Association's complaint files, the barrister involved eventually was disciplined for matters which arose in the course of the investigation, on the Bar Council's own initiative, notwithstanding that the original complaint was dismissed or withdrawn. (See below, regarding the disposition of complaints.)

2.146 *Preference for the barrister's version?* The thoroughness of most investigations by the Bar's PCCs, and especially the availability of and efforts to find independent evidence (documentary and testamentary), means that relatively fewer of the complaints against barristers boiled down simply to the competing versions of complainant and respondent, unlike the position with respect to complaints against solicitors (see above). Thus the reports tended to proceed from a more certain set of facts to analyse the *propriety* of the conduct in question. The Commission did not discern any inherent bias in the system in favour of the barrister, nor any general suspicion of the claims of complainants.

The disposition of complaints

2.147 *Outcomes.* Of the 37 complaint examined, 23 (62%) were dismissed[85] by the Bar Council, three resulted in a reprimand, two were withdrawn, three were still open,[86] one was referred to the Law Society,[87] three were referred to the Standards Board for a hearing on the issue of unsatisfactory professional misconduct, and four were referred to the Disciplinary Tribunal for a hearing on the issue of professional misconduct.[88] Thus, while most complaints are dismissed, the proportion of complaints to the Bar Association which results in a reprimand (8%) or in a hearing before the Board or Tribunal (19%) is considerably higher than is the case for the Law Society.

2.148 However, apart from the small size of the sample, it also must be noted that nearly half (15 out of 37, or 40.5%) of the complaints to the Bar Association came from lawyers or the legal professional associations, so that these already were framed in accordance with the requirements of the legislation, and vetted by a lawyer or lawyers for the prospect of success. Further, most of these complaints related not so much to concerns about basic competence or honesty, or to the service delivery to clients, but rather to intra-professional concerns (as noted above): advertising, professional comity, preservation of the strictures and historic work practices of the divided profession, and so on.

2.149 Complaints from clients, on the other hand, tended to be about matters which related to competence, trial tactics and strategy, style, judgment and so on, which are much harder (and often less appropriate) for the investigating authority to second-guess. As a consequence, the complaints from fellow professionals are somewhat more likely to proceed through the system to at least a reprimand. This in turn may feed the public perception that the Bar Association is more interested in the wording of a barrister's calling card or the fact that a barrister has attended a meeting at a solicitor's office (and not vice versa) than with more important issues of ethics and practice.[89]

2.150 *Sufficiency of reasons.* The Commission has lauded, above, the fact that the Bar Association (unlike the Law Society) normally provides complainants with a copy of the PCC investigation report and the Council's resolution. This practice should be encouraged. However, it also must be remembered that the reports are written by a barrister, from a barrister's perspective, in legal language, for the consideration of (mainly) other barristers. Although the Commission itself found that reports to be clear and well-written, we also can see that many non-lawyers would not find the language, terms and concepts used easily comprehensible. The Council's resolutions generally are terse, one-paragraph, statements geared to the statutory requirements.

2.151 The cover letter to the complainant, at least, should be oriented specifically to the needs of the complainant, in accessible language. The explanations should deal specifically with the issue that the *complainant* is concerned about, rather than the technical reason for the decision. This may sometimes require some explanation of, or correction of a misapprehension about, the role of barristers, the nature of the barrister-client relationship (and the relationship with the instructing solicitor) the organisation of legal work, or other basic matters regarding the delivery of legal services. Most importantly, the letter advising the complainant of a Council's decision should not be presumed to be the last communication with the complainant. Rather, the letter should invite the complainant, if they wish, to contact someone at the Bar Association to discuss the matter. (Precisely the same considerations apply to the Law Society.)

2.152 *Notification of the right of review.* The situation here is the same as that described above in relation to the Law Society. Where the Bar Council has decided to dismiss a complaint, the letter informing the complainant of this also contains a statement that the complainant may have the decision reviewed by the Conduct Review Panel. However, there is no discussion of the nature of the review, the composition of the Panel, and so on. As noted above, it was not clear whether the Bar Association routinely sent their general Explanatory Brochure to all (potential) complainants at the beginning of the process. In any event, the Commission believes that a separate brochure should be included with the dismissal letter, dedicated to the issue of review by the Panel.

Feedback to the profession

2.153 The Commission was pleased to see that the Bar Association's disciplinary process often was alive to the idea that general concerns may flow from individual complaints (and certainly from a pattern of individual complaints), and that there should be feedback from the disciplinary process to the practising profession. For example, a complaint about the behaviour (alleged rudeness and bias) of a barrister who was acting as an arbitrator led to the drafting of guidelines for barrister-arbitrators. Another complaint about the conduct of an individual led to a circular being sent to all barristers reminding them of problems caused by delays in completing chamber work, and the rules in respect of the return of briefs. There were a number of other complaints (particularly in the area of prosecution practice), however, in which the Commission felt that general concerns were overlooked.

Conclusions drawn from the surveys of Law Society and Bar Association complaints files

2.154 Perhaps the over-riding impression gained from the file surveys was that the legal professional associations manage their affairs in much the same way as most other voluntary organisations in the community, with all of the good and bad features this implies.

2.155 The positive aspects are that a number of lawyers devote considerable amounts of their time to serve on the professional Councils and the PCCs without compensation (or even significant recognition). The Commission is aware, from the file survey as well as our attendance at meetings of the Law Society Council and PCC, of the heavy workload this places on the practitioners, who also have to cope with the demands of their busy practices and their personal commitments. The same considerations apply to the lay participants in the disciplinary system, who also juggle these responsibilities with work, family and other commitments.

2.156 It is our observation that the PCCs and the Councils take this work seriously and, as we stated in DP 26, we have no doubts about the "sincerity or integrity of the principal actors".[90] However, it is also the Commission's firm view that the existing system works rather poorly, and serves neither the needs of complainants, the practising profession nor the community at large. In particular, there is still a "profound gap" between what angers clients and others sufficiently to go to the trouble of complaining and what lawyers and their professional associations see as important enough to merit serious attention, disciplinary action or compensation.[91]

2.157 Owing to its largely part-time, amateur nature, the processing of complaints takes too long (especially in the case of the Bar), investigations are often quite inadequate (especially in the case of the Law Society), and complainants feel left out of the process, leading to the dismissal of the vast number of complaints - and promoting the common idea that the legal profession is simply "looking after its own".

2.158 Given the sheer effort involved in getting through the mountain of paperwork at meetings and processing the individual complaints received, there apparently has been little time left for reflection or for thinking more broadly about the aims and role of a professional disciplinary system. As discussed in the next Chapter, the professional associations have not really tried to articulate the various aims of the complaints handling system, or to identify the basic principles which should inform the design and operation of the system. The professional associations have never retained management consultants to assess the existing systems, nor have they undertaken the sort of detailed file survey that the Commission conducted, nor have they surveyed complainants or respondent practitioners to ascertain how the *parties* to the process actually feel about the way the system operates (see above). In the circumstances, it is not surprising that Members of Parliament have asked an independent body - the Law Reform Commission - to do these things.

2.159 Although the Commission is critical of aspects of the professional associations, the file survey did not move us to conclude that the profession must be removed *entirely* from the complaints handling system.[92]

2.160 For one thing, the Commission is aware that some things have changed in the complaints handling systems since 1991, partly at the direct initiative of the professional associations and partly as a reaction to the fact of the Commission's inquiry and the criticisms made by the Commission in DP 26. For example, the Commission saw no 1991 files in which there was an attempt to resolve the problem through the use of

consensual dispute resolution techniques, although there were many matters which appeared suitable for mediation or conciliation. Both of the professional associations have since introduced mediation programs.

2.161 The Commission has been impressed by the efforts over the past year or so of Mr Frank Riley, CEO of the Law Society, Mr Tom Williams, chair of the Law Society's Professional Conduct Committee, and Mr Fred Smith, manager of the Law Society's Professional Standards Department, to effect improvements in the system. This has involved the development of a protocol for the investigation of complaints, the introduction of mediation, the preparation of a draft code of ethics, the development of a program to improve lawyer-client communications and relations, the computerisation of complaints records, and the recruitment of new staff for the Professional Standards Department. Similarly, the Professional Affairs Director of the Bar Association, Ms Helen Barrett, impressed the Commission as being committed to improving the Bar's complaints handling.

2.162 Further, as discussed below,[93] the Commission believes that there is a strong argument that, as long as there is strong external scrutiny which assures the independence and effectiveness of the complaints handling system, the legal profession *should* take significant responsibility for the standards, conduct and practices of its members, and should not be compelled - or allowed - to play a purely passive role.

FOOTNOTES

1. Law Society of New South Wales, Submission of 31 January 1992, at 1. (Hereafter, "Law Society submission".)

2. Law Society submission of 31 January 1992, at 2.

3. Law Society submission of 31 January 1992, at 2.

4. Law Society submission of 31 January 1992, at 2.

5. New South Wales Bar Association, Submission of 20 February 1992, at 1-2. (Hereafter, "Bar Association submission".)

6. Bar Association submission of 20 February 1992, at 16.

7. Lawyers Reform Association Preliminary Submission of 8 April 1992, at 1-3 (hereafter, "Lawyers Reform Association submission"); New South Wales Council for Civil Liberties Submission of 21 February 1992, at 1 (hereafter, CCL submission"); Combined Community Legal Centres Group Submission of 28 February 1992, at 3 (hereafter, CCLCG submission").

8. Lawyers Reform Association submission, at 1.

9. Lawyers Reform Association submission, at 1.

10. CCL submission, at 1; CCLCG submission, at 1.

11. Australian Consumers' Association Submission of 23 December 1991, at 1. (Hereafter, "ACA submission".)

12. See DP 26 at 1-6.

13. For further information on the functions of the Law Society and Bar Association Councils and the operation of the complaints system generally, see DP 26 at 8-27.

14. The terms "unsatisfactory professional conduct" and "professional misconduct" are defined in the *Legal Profession Act* 1987 (NSW) s 123. See also DP 26, at 12-13.

15. For further information on the functions and powers of the Board and the Tribunal, see DP 26 at 31-38.

16. The operation and powers of the Panel are discussed in DP 26, at 27-31.

17. See DP 26, at 11.

18. See generally DP 26, at 43-64.

19. For further information on the complaints system operating in Victoria, see DP 26, at 43-55.

20. DP 26, at 64-75.

21. The *Courts and Legal Services Act* 1990 (UK).

22. See DP 26, at 75-77.

23. See DP 26, at 77-84.

24. DP 26, at 91-141.

25. DP 26, at 98-99.

26. DP 26, at 99-100.

27. DP 26, at 93-95.

28. DP 26, at 96-97.

29. DP 26, at 95-96.

30. DP 26, at 128-130.

31. DP 26, at 100-105.

32. DP 26, at 105-116.

33. DP 26, at 116-118.

34. DP 26, at 119-125.

35. DP 26, at 125-128.

36. DP 26, at 145-146.

37. DP 26, at 143-146.

38. DP 26, at 152-156.

39. DP 26, at 147-148.

40. DP 26, at 149-150.

41. DP 26, at 161-169.

42. DP 26, at 5.

43. Law Society submission of 31 July 1992, at 1.

44. Law Society submission, at 1.

45. Law Society submission, at 1-2.

46. Law Society submission, at 3.

47. Bar Association submission of 31 July 1992, "Summary".

48. Bar Association submission of 7 May 1992, at 1.

49. Bar Association submission, at 1.

50. Bar Association submission, at 1.

51. Bar Association submission, at 33.

52. Kingsford Legal Centre, Submission of 11 August 1992, at 4. (Hereafter, "Kingsford Legal Centre Submission".)

53. Kingsford Legal Centre submission, at 4.

54. Chief Magistrate of the Local Courts, Mr Ian Pike, Submission of 17 August 1992, at 1.

55. Registrar of the Legal Profession Disciplinary Tribunal, Mr Robert Bennett, Submission of 26 June 1992, at 2.

56. Legal Profession Conduct Review Panel, Submission of 12 June 1992, at 1-2.

57. Commissioner for Consumer Affairs, Mr John Holloway, Submission of 10 August 1992, at 1.

58. Kingsford Legal Centre submission, at 6.

59. Such expenses being outside the Commission's normal budget.

60. See the Annual Reports of the Victorian Lay Observer, and E Skordaki and T Dimmock *A Survey of Complainant Satisfaction Among Lay Complainants to the Solicitors' Complaints Bureau* (February 1990).

61. Letter to the Commission from Mr John Marsden, President of the Law Society of New South Wales, 29 June 1992, at 1.

62. Mr Schwartzkoff has worked with the Commission on a number of other projects, including most recently the community consultation program involved in the Commission's review of the *Adoption Information Act* 1990 (NSW).

63. A report on this survey was published by the Law Society in late 1992. See *Caveat* No 117 (December 1992).

64. A similar survey in which Mr Schwartzkoff had been involved recently occupied one secretary for 1.5 days, even though there had been no existing database of names and addresses to proceed from.

65. The *Health Care Complaints Bill* 1992 (NSW).

66. As Mr Schwartzkoff put it at a meeting with Law Society officials, "If you want to learn what it feels like to have pneumonia, there is little value in asking a 'control group' of people who have never suffered from the disease."

67. Submission of 31 July 1992, at para 6.15.

68. See Question 8 of the survey, set out in Attachment "A" of this Report.

69. See Question 9 of the survey, set out in Attachment "A" of this Report.

70. "Other" responses were given by 0.8%, and 4.8% "could not say".

71. 4.3% could not say.

72. See DP 26, at paras 4.123-4.127, under the heading "Why are there so few complaints against barristers?"

73. DP 26, at paras 5.29-5.34.

74. NSW Bar Association Rules, r 67.

75. NSW Bar Association Rules, r 64.

76. NSW Bar Association Rules, r 26.

77. NSW Bar Association Rules, r 29B.

78. NSW Bar Association Rules, r 85.

79. NSW Bar Association Rules, r 30.

80. NSW Bar Association Rules, r 33.

81. NSW Bar Association Rules, rr 72-73.

82. NSW Bar Association Rules, r 21.

83. The Director of Professional Affairs, Ms Helen Barrett.

84. In only one matter examined by the Commission, involving a considerable number of related allegations, did the level of analysis in the report appear to be mechanical and unsatisfactory. In the event, the report - which was prepared by an outside consultant - was only partly accepted by the full Council.

85. One complaint was dismissed for being frivolous and vexatious when the barrister could not be identified from the complaint. The remainder (22) were dismissed after investigation, on the basis that there no unsatisfactory professional conduct or professional misconduct was revealed.

86. At the time of the Commission's survey, two of these matters had been open for 16 months each and one for 18 months.

87. The complaint was adjudged to relate mainly to the conduct of a solicitor.

88. The total number of matters disposed of comes to 39, because of two matters in which the *original* complaint did not proceed beyond investigation (one was dismissed and one withdrawn by the complainant), but the Bar Council acting on its own initiative proceeded on the basis of evidence which arose in the course of the original investigation. In one case, this led to a reprimand of the barrister involved; in the other, the matter was referred to the Disciplinary Tribunal, which suspended the barrister's practising certificate for six months.

89. John Mortimer, characteristically, has captured the flavour of this lack of perspective in *Rumpole on Trial* (London, Viking, 1992) at 225-226:

> "Perhaps I should explain the obscure legal process that has to be gone through in the unfrocking, or should I say unwigging, of a barrister. The Bar Council may be said to be the guardian of our morality, there to see we don't indulge in serious crimes or conduct unbecoming to a legal hack, such as assaulting the officer in charge of the case, dealing in dangerous substances round the corridors of the Old Bailey or speaking to our clients in the lunch-hour."

90. DP 26, at para 5.6.

91. See DP 26, at para 5.29.

92. Rather, we have opted for a system in which the professional Councils retain a role, although under the powerful scrutiny of a Legal Services Ombudsman and a more robust Conduct Review Panel, in order to ensure the independence and efficacy of the system. The reasons for this choice are discussed in the following Chapter, and the details of the proposed new system are set out in Chapters 4-5.

93. See Chapter 3, paras 3.125-3.128.

3. "Best Practice" Principles for Handling Complaints Against Lawyers

INTRODUCTION

3.1 One of the primary tasks for the Commission was to identify the criteria against which a complaints handling system for lawyers could be judged. In DP 26, the Commission noted that:

> All of the Australian jurisdictions share some similar experiences in the area of dealing with complaints against legal practitioners.[1] The same types of complaints predominate and in no State has the profession managed to overcome the general underlying problem of misunderstanding and lack of communication. Several trends are apparent across the jurisdictions, notably participation by lay persons in the complaints process, and the increase in the range of sanctions available against legal practitioners.[2]

3.2 To the Commission's surprise, however, we discovered that there has been little consideration of the broader philosophical questions, rather than merely the operational questions, about complaints handling and discipline in the professions in Australia - apart from the Commission's own earlier inquiry into the regulation of the legal profession in New South Wales, which concluded a decade ago. The (now defunct) Victorian Law Reform Commission (VLRC) recently completed an inquiry into the accountability of the legal profession, but did no go into these matters in the discussion paper[3] or the ensuing report.[4]

3.3 In its response to the VLRC's discussion paper, the Law Institute of Victoria wrote that it had approached Standards Australia (formerly, the Standards Association of Australia) and requested that body's assistance in the development of an objective standard which could be applied to all complaints-handling bodies.[5] It was hoped that this could be used to assess and compare the effectiveness of such bodies. The Law Institute initially was advised by Standards Australia that the cooperation of the other professional bodies was required for the production of national benchmark procedures for handling complaints, and that the other legal professional associations in Australia were not particularly enthusiastic about or supportive of this course of action. However, Standards Australia now "has decided to produce such a standard, beginning with a generic document and followed by guidelines for the legal sector".[6]

3.4 In this Chapter, the Commission specifies the features which it considers constitute "best practice" for a professional complaints handling system, based on the submissions received and our own research and analysis of such systems in New South Wales and elsewhere. As well as enumerating these features, we measure the existing systems operated by the Law Society and the Bar Association against these "best practice principles". In the following chapters, these principles inform the discussion and are applied in the design of the proposed new system.

3.5 In outline form, these "best practice" principles are:

- independence and impartiality;
- recognition of the multiple aims of a professional disciplinary system;
- accessibility;
- efficiency and effectiveness;
- procedural fairness;
- openness and accountability;
- external scrutiny and review;
- contribution to the general enhancement of professional standards; and

proper funding and resources.

3.6 These matters are discussed in turn, below. At the conclusion of this Chapter, the Commission discusses its reasons for preferring the option of establishing an office of Legal Services Ombudsman as the basis for effective reform of the complaints handling system.

INDEPENDENCE AND IMPARTIALITY

> **The complaints handling system must be independent and impartial. Public confidence in the integrity of the system requires that the system must be free from even the appearance of bias, external influence, conflicts of interest or impropriety.**

Commentary

3.7 The most important feature of a disciplinary system - whether professional or otherwise - is its independence and impartiality. Persons with a legitimate grievance must feel that their complaint will be dealt with in a fair and unbiased manner. The worry with a system which is operated entirely by the professional association itself is that it gives rise, as the American Bar Association (ABA) has stated, to "the familiar criticism that the fox is guarding the henhouse", which is likely to be made even where the system may *in fact* be "fair to both respondents and complainants".[7]

3.8 A number of different approaches have been tried to ensure the actual and perceived independence and impartiality of professional complaints systems. In the United States, the ABA has recommended that, because of the "significant distrust of the fairness and impartiality of self-regulation", the:

> disciplinary system must be controlled and managed exclusively by the state's highest court and not by state or local bar associations. This is necessary for two primary reasons. First, the disciplinary process must be directed solely by the disciplinary policy of the Court and its appointees and not influenced by the internal politics of bar associations. Second, the disciplinary system must be free from even the appearance of conflicts of interest or impropriety. When elected bar officials control all or parts of the disciplinary process, these appearances are created, regardless of the actual fairness and impartiality of the system.[8]

3.9 California is the leading example of a State which has moved to a disciplinary system which is controlled by the judiciary and is fully independent of the practising legal profession.[9]

3.10 The 1979 Royal Commission on Legal Services in England and Wales expressed similar concerns to those of the American Bar Association, stating that:

> We had evidence of a general feeling of unease about the Law Society's handling of complaints, a feeling that "lawyers look after their own".[10]

3.11 The publicly-funded National Consumer Council in the United Kingdom (the "NCC") also has been critical of the fact that "impartiality is not visible ... [a]nd it is the impression given to the public which counts."[11] The Council added that:

> It seems unlikely that any solicitor would advise a client to bring a case before a court or tribunal that was dominated by senior members of an association of which the defendant is also a member. More specifically, members of a profession will also have an innate sympathy for a fellow professional. They can imagine the problems of the professional, but may not be able to imagine the problems faced by the client.[12]

3.12 The Law Society of England and Wales has attempted to meet the issue of perceived independence by physically relocating the Solicitors' Complaints Bureau from the Law Society's headquarters in London to premises in the Midlands, and endeavouring to inculcate a "culture of independence" in the Bureau.[13] Added to this now is an independent statutory office of the Legal Services Ombudsman, with powers to review the way complaints have been handled by the professional associations and to make recommendations to the Lord Chancellor for improvement of the system.[14]

3.13 In Victoria, the legal professional associations are largely self-regulating, but there is also the (part-time) statutory office of Lay Observer, with the power to review or re-investigate a dismissed complaint and to report to Parliament on the operation of the system.[15] The Victorian Law Reform Commission recently has recommended replacement of the Office of Lay Observer with a more powerful Office of Legal Services Commissioner.[16]

3.14 In New South Wales, complaints about health care services providers (doctors, nurses and others) are no longer handled by their professional associations, but rather are made to the Complaints Unit of the Department of Health.[17] A Bill to replace the Unit, which was established by administrative act under legislative authority, with an independent statutory body, the Health Care Complaints Commission was recently withdrawn from Parliament to permit further public discussion and consultation.[18]

3.15 Although the legal professional associations in New South Wales prefer to use the term "co-regulation"[19] - since the Law Society and Bar Councils operate under legislative authority and there are statutory tribunals and a degree of external monitoring (through the Conduct Review Panel) - in actual practice the legal profession has effective control of the complaints handling system. Under the *Legal Profession Act* 1987, the Law Society and Bar Association (or their executive Councils) have the statutory authority to:

> deal directly with all (potential) complainants in providing advice and assistance;
>
> receive all complaints;
>
> process and investigate all complaints;
>
> decide which complaints to dismiss (the vast majority) and which to refer for a hearing by the Legal Profession Standards Board or the Legal Profession Disciplinary Tribunal;
>
> nominate the legal members of the Standards Board and Disciplinary Tribunal for appointment by the Attorney General;
>
> nominate the legal members of the Legal Profession Conduct Review Panel for appointment by the Attorney General; and
>
> control the issuing, suspension and cancellation of lawyers' practising certificates, and to prosecute "unqualified practitioners".

3.16 However much the professional associations actually endeavour to exercise these functions in a fair and impartial manner, the *perception* that the system is run by and for lawyers must linger.

3.17 As mentioned in Chapter 2, the Commission asked the Roy Morgan Research Centre to conduct an "Omnibus Survey" (ie, an opinion poll) in New South Wales in November 1992. Only 15.7% of the 648 adults surveyed believed that the Law Society and the Bar Association were the best bodies to handle complaints against lawyers. Nearly 80% wanted regulation by a public authority independent of the legal profession: 54% opted for "a Commission or Ombudsman", 16.2% supported "a government body", and 8.5% wanted "a body controlled by judges and the courts".[20]

3.18 Assuming the establishment of a new body to investigate complaints against lawyers, few considered that the body should consist of lawyers only (5.2%) or mostly lawyers (9.5%); rather, over 80% thought that the new body should consist of equal numbers of lawyers and non-lawyers (46.1%), mostly non-lawyers with some lawyers (24.8%), or non-lawyers only (10.1%).[21] Respondents with a tertiary education were most in favour of a

Commission or Ombudsman, and most likely to limit the participation of lawyers in a new body. Clearly, then, public opinion acknowledges that the legal profession has a role to play in handling complaints against lawyers, but sees self-regulation or professional domination as inappropriate and prefers an independent process with some involvement of lawyers. These results are very similar to those obtained in an NCC-commissioned survey in the United Kingdom in 1984.[22]

3.19 The issue of independence figured very prominently in the submissions received by the Commission, with virtually all of the submissions (expressly or implicitly) supporting Option Two (a Legal Services Complaints Commission) and Option Three (a Legal Services Ombudsman) calling for a complaints handling system which is, and is widely perceived to be, independent of the legal profession. Many of these submissions point to the alleged inherent conflict of interest involved in the Law Society and Bar Association being simultaneously responsible for advancing the interests of their members (the "sectional" or "trade union" function) as well as regulating and disciplining that membership in the public interest (the "regulatory" function). This matter was discussed at some length in DP 26.[23]

3.20 Submissions to this effect were received from, among others: the New South Wales Commissioner for Consumer Affairs, Mr John Holloway;[24] the Chief Magistrate of New South Wales, Mr Ian Pike;[25] the Registrar of the Legal Profession Disciplinary Tribunal, Mr Robert Bennett;[26] the Chairperson and members of the Legal Profession Conduct Review Panel;[27] the New South Wales Council for Civil Liberties;[28] the Combined Community Legal Centres Group;[29] the Kingsford Legal Centre;[30] the Lawyers Reform Association;[31] the Australian Consumers Association;[32] and the Foundation Dean of Law at the University of Wollongong, Professor Jack Goldring.[33]

3.21 The Commonwealth Attorney General's Department has made a submission along similar lines to the Trade Practices Commission's inquiry into regulation of the legal profession, concluding that the handling of complaints against barristers or solicitors should be the responsibility of, or be supervised by, an independent body, such as a legal services ombudsman or a complaints agency, rather than a professional body.[34]

3.22 The *only* submissions received by the Commission favouring the retention and improvement of the current system (Option One in DP 26) were from the Law Society and the Bar Association.

3.23 The Commission believes that the problem of the public *perception* of bias is insuperable unless truly independent mechanisms are put in place. For the reasons discussed at the end of this Chapter, the Commission has concluded that the establishment of an office of Legal Services Ombudsman would best meet the public interest needs for independence *and* accountability, as well as having a number of other important advantages.

RECOGNITION OF THE MULTIPLE AIMS OF A PROFESSIONAL DISCIPLINARY SYSTEM

> **The design and execution of the complaints handling system must recognise that there are multiple aims, including: (1) redressing the consumer complaints of users of legal services, as well as protecting the general public interest by (2) ensuring that individual legal practitioners comply with the necessary standards relating to honesty, diligence and competence, and (3) maintaining the ethical and practice standards of the whole legal profession at a sufficiently high level.**

Commentary

3.24 As part of its research program in this area, the Commission consulted with the Retail Traders Association of New South Wales about the ways in which commercial enterprises handle consumer grievances. The general policy is that "the customer is always right", based on the view that it costs businesses six to ten times more to get new customers than to keep old ones. Thus, the leading retailers believe it is worth going to considerable lengths to resolve customers' grievances, even where the retailers do not necessarily accept that they were at fault . Considerable expenditure also has been put into developing staff training programs for improved customer service, including the handling of complaints about goods and services.

3.25 While much can be learned from the client-centred approach to complaints handling by the leading retail organisations, the position is different in principle in relation to complaints about the provision of professional services, where there are the important added dimensions of public interest on the one hand, and the reputation and rights of practice of professionals on the other.

3.26 As the Commission stated in DP 26:

> The system should be ... more attuned to redressing the grievances of individual complainants, but this should not be at the expense of the general public interest in ensuring that licensed legal practitioners conduct their work with honesty, diligence and competence, and that the standards of practice required of lawyers generally are maintained at a sufficiently high level.[35]

3.27 Thus, the system for handling complaints against lawyers must serve at least three aims: to address promptly the specific concerns of particular complainants; to secure the compliance of individual legal practitioners with the standards of professional practice; and to ensure that the standards of the profession generally are maintained at a high level. At the same time, it must be remembered that rights of practice must not be arbitrarily or capriciously removed or limited, so that a lawyer who has been complained about should be entitled to expect a fair hearing before suffering any penalty.

3.28 In the "one procedure fits all" approach which has applied in NSW, the (first and third) aims of client satisfaction and maintenance of high professional standards have largely been lost sight of. In practice, the traditional approach has had a quasi-criminal flavour, looking at whether the complainant has made sufficiently strong allegations to put into question the lawyer's continued right to practice. Where the allegations relate to dishonesty or trust account irregularities, for example, the professional associations have a reasonable record of vigorous prosecution. Trust account matters account for the large majority of cases in which solicitors have been struck off the Roll in the past decade or so.[36]

3.29 In DP 26, the Commission stated that one of the biggest problems with the existing system has for some time been the "profound gap between what angered clients and what lawyers and their professional associations saw as important enough to merit disciplinary action."[37] While clients overwhelmingly complain about such matters as negligence, incompetence, delay, poor communications, discourtesy and overcharging, these complaints are rarely proceeded with and rarely result in any censure, sanction or compensation. Even where the complainant has achieved the desired result - say, an apology, or the reduction of a bill of costs, or the removal of a solicitor's lien - the cumbersome processes and lengthy delays involved may take the gloss off the successful resolution. It is clear from the submissions received and from the Commission's own research - especially from the survey of Law Society complaint files - that this was fair criticism and that the problems are still pervasive.

3.30 The systems for handling complaints against solicitors in Victoria and in England and Wales have changed in recent years, putting far more emphasis on the prompt resolution of clients' grievances through the use of consensual dispute resolution techniques and the ready award of compensation.[38] The submissions of both the Law Society of NSW and the NSW Bar Association recognise the need to move in this direction and both propose mediation schemes for lawyer-client disputes.

3.31 The Commission generally supports these initiatives and makes recommendations in this area, below. However, the Commission stands by its caveat that a greater orientation towards client concerns must not come at the expense of the other aims of the system. What is needed is a comprehensive system with a number of separate components which, when taken together, meet all of the desired aims.[39] (See also below, regarding efficiency and effectiveness.)

ACCESSIBILITY

> **The complaints handling system must be widely accessible to potential complainants. This involves effective access to information, assistance, officials and institutions relevant to the process, with minimal disincentives imposed by time, cost or complexity.**

Commentary

3.32 In its 1985 review of the legal profession's complaints procedures in England and Wales, the National Consumer Council (NCC) suggested that the system operated reasonably well in respect of the "articulate person who is able to identify and substantiate a manifest case of professional misconduct".[40] However, the system was rather less satisfactory in the run of matters, since "cases and circumstances are rarely as straightforward as these. Many complainants will face personal, educational, social and financial problems in bringing a genuine complaint".[41]

3.33 The NCC identified a number of specific problems of accessibility, including among other things, (1) the absence of an integrated system, with complainants finding it difficult to know where to lodge a complaint; (2) the difficulty in knowing what constitutes misconduct (which is likewise a problem for lawyers and their professional associations); (3) the problem of negligence allegations, which may have to be the subject of a separate civil claim in the courts; and (4) the centralisation of the relevant offices and procedures (in London).[42] The NCC recommended that access problems could be substantially reduced with the establishment of "a single body charged with specific complaints-handling responsibilities", which would be "a visible reception point for all complaints".[43]

3.34 The American Bar Association's Commission on Evaluation of Disciplinary Enforcement (ABA CEDE) came to similar conclusions in 1991. The ABA CEDE saw the need for a system with a number of component parts, but warned that:

> The availability of more than one mechanism to resolve disputes can backfire and result in increased public dissatisfaction unless a simple and direct procedure exists for making a complaint. Complainants should not be expected to know the distinctions among component agencies. They need a central intake office - one clearly designated agency to which to take any type of complaint.[44]

3.35 The ABA CEDE recommended that the central intake agency also be charged with: (1) providing assistance to complainants in stating their complaints; (2) making a preliminary assessment of the validity of the complaint; (3) dismissing the complaint or forwarding it to the appropriate agency for further action; (4) providing information to complainants about available remedies and procedures; (5) keeping complainants informed about the status of their complaints; and (6) tracking the handling and disposition of each complaint.[45]

3.36 The Commission agrees with the NCC and the ABA CEDE that a visible, central reception point for all complaints would be highly desirable, particularly in a divided profession such as ours in NSW, where there is currently the added complexity of the separate handling of complaints against barristers and solicitors by the Bar Association and the Law Society, respectively.

3.37 In DP 26, the Commission identified the earliest phase of the complaints system - including the provision of information and assistance to potential complainants and the reception and formal recording of complaints - as the most critical:

> The initial step in the complaints-handling process may well be the most important, especially from the point of view of the complainant. Persons making complaints must be assured that their problems will be handled promptly, efficiently, sensitively and impartially.[46]

3.38 Potential complainants are entitled to full and effective access to information about complaints procedures, remedies and related issues (such as civil actions, legal aid, ancillary services, and so on). Written

material should be widely available, and must be composed in "plain English" pitched at the general community.[47] There is no substitute, however, for direct person-to-person contact for the provision of information and assistance. Consequently, the relevant offices and officials also must be accessible in terms of location, working hours and attitude.[48]

3.39 Although the *Legal Profession Act* 1987 (NSW) currently requires the professional associations to "take all reasonable steps to ensure that a person who wishes to make a complaint is given such assistance as is necessary to enable the person to make the complaint in accordance with [the statutory requirements]",[49] the approach of the professional associations has been largely one of supplying a prospective complainant with a complaint form and an explanatory brochure, and leaving it to the complainant to take the initiative. Ironically, the legal profession has argued strongly against this "Do It Yourself Kit" approach in other contexts in which a person's rights or property interests are at issue - such as in conveyancing, wills and probate, and family law matters - on the basis that it is essential that the person has the benefit of direct legal advice and expertise in order to appreciate fully his or her position, options, rights and obligations.

3.40 The special needs of a person with a limited grasp of the English language (whether from a non-English-speaking background or with a disability affecting comprehension or expression) must be catered for adequately. This obviously will involve the production of literature in a range of community languages as well as the provision of interpreter services, but an effective strategy also will involve care in disseminating information in ways which *actually* reach the target groups.[50]

3.41 A program of community education about the role of lawyers and the existence and basic nature of the complaints system would be of general value.[51]

3.42 In the Morgan Poll conducted for the Commission, just under one-third (32.6%) of respondents correctly identified the Law Society and Bar Association as the bodies with primary responsibility for handling complaints against lawyers. Almost 40% could not venture an answer; 19% thought it was the responsibility of the Ombudsman; and the rest incorrectly identified a number of other agencies, such as the Department of Consumer Affairs (2.7%), the Attorney General's Department (1.5%) and the Independent Commission Against Corruption (1.2%). Older (over-35), male, urban, and tertiary-educated respondents were somewhat more likely to know about the regulation of lawyers, although only affluence (income over $40,000) correlated reasonably highly (54.6%) with correct knowledge of the system - probably because of higher levels of social and professional contact with lawyers.

3.43 In this Report, the Commission makes a number of recommendations aimed at significantly improving access to the complaints handling system. Among other things, we recommend that there be a Complainants' Charter of Rights which specifies that complainants have a *statutory right* to advice, assistance and effective access to the system, including interpreter services, physical access and so on. The establishment of a properly resourced office of Legal Services Ombudsman, charged with the responsibility of providing such advice and assistance, also should help considerably.

EFFICIENCY AND EFFECTIVENESS

Having regard to the multiple aims of a complaints handling system, a simple and comprehensive range of efficient and effective processes, services and techniques must be available to address the legitimate needs of complainants, legal practitioners and the society. This will involve: the prompt and thorough investigation of all disciplinary matters; consensual dispute resolution of appropriate complaints; a flexible range of sanctions and remedies; the availability of education, counselling and assistance for lawyers to prevent or minimise poor practice; continuous monitoring of the system; and coordination among the various agencies with responsibility for regulating the conduct of lawyers.

Commentary

3.44 As discussed above, the disciplinary system traditionally has used a common - and not very successful - approach to resolving all complaints about lawyers. This involved the processing of individual complaints to determine whether the allegations were sufficiently serious and backed by sufficient evidence to warrant a formal disciplinary proceeding to consider whether the practitioner was guilty of professional misconduct.

3.45 It is generally well-accepted now that the system must be substantially more variegated, with the recognition, among other things, that:

> "less serious" allegations may be actionable (as "unsatisfactory professional conduct"); that apart from any possible action against the lawyer, the grievances of individual complainants require redressing, such as through the award of compensation;
>
> there is a need for a faster and easier method of dealing with allegations of overcharging than by taxation of a bill of costs in the Supreme Court;[52]
>
> consensual conflict resolution techniques may be more effective in resolving some types of disputes;[53] and
>
> measures should be taken to *prevent* poor professional practice, through programs offering education, counselling and assistance.

3.46 Thus, complaints handling systems now must be comprehensive, utilising a range of processes, services and techniques to address all aspects of lawyer discipline, client satisfaction, and public interest.[54] However, the American Bar Association has warned that there is also a danger that expanding the number of mechanisms available will cause confusion for complainants, with the consequent need to ensure that the entire system is efficient, effective and well-coordinated, with a single point of entry.[55]

3.47 Some of the procedures mandated in the *Legal Profession Act* 1987 as well as some of the programs initiated by the legal profession itself have made the disciplinary system more complete and well-rounded. However, it is clear the system is still lacking or needs improvement in some key respects.

3.48 As measured by the Morgan Poll (above), very few members of the public can identify the bodies mainly responsible for handling complaints, much less the details of the system. Indeed, it is unlikely that many members of the legal profession would be able to describe fully the current system with any confidence. The Commission itself had to go to some pains to provide an accurate description and schematic drawing of the current statutory schemes in DP 26.[56] In the words of a leading mediator, "on a somewhat lighter note, the existing mechanisms in NSW could surely only have been designed by a bunch of lawyers."[57]

3.49 In NSW, where the practice of law is divided into two branches (barristers and solicitors) with separate admission and regulation,[58] there are some inherent complicating factors which are not present in a jurisdiction with a unified profession. It is also true that a system designed by lawyers may involve some complexity because of the traditional concern for natural justice and procedural fairness. Nevertheless, it seems that the system in NSW is unnecessarily complicated, with resulting negative effects on access, efficiency and public confidence.

3.50 Under the present system, complaints against barristers and solicitors are received and processed entirely separately by the Bar Association and Law Society, respectively. Explanatory literature, complaint forms, and other information and assistance are separately provided. Two different bodies - the Law Society Council and the Bar Council - have statutory responsibility for assisting complainants, investigating complaints, and making certain dispositions, such as dismissing complaints and issuing reprimands. Two different tribunals - the Standards Board and the Disciplinary Tribunal - may hear and determine complaints, although here the division is not based on the style of practice of the lawyer involved, but rather on the seriousness of the allegations (unsatisfactory professional conduct and professional misconduct, respectively). The Board and Tribunal may

award compensation (while the Councils may not), but only where the complainant has requested this in the original complaint.

3.51 The complainant may seek review of a Council decision to dismiss a complaint (but not a decision to issue only a reprimand), but the Conduct Review Panel may only recommend that the Council change its decision, first by approaching the Council itself and then by approaching the Attorney General. As happens in many cases, the complaint may be dismissed because it involves "mere negligence" or other unsatisfactory conduct which is determined to fall short of the "unsatisfactory professional conduct" disciplinary offence, and the complainant then must pursue a whole other course of action before the Consumer Claims Tribunal or the civil courts (in an action for negligence or breach of contract). Disputes over fees and costs, another significant category of complaints, also are frequently shuttled out of the system, with the client told to seek review of the solicitor's bill of costs in the Supreme Court through the arcane process known as "taxation". (Barristers fees are not directly taxable.) To the inconvenience and distress of complainants, it sometimes may take many months to find out that the wrong process was chosen first up, and that another avenue will have to be explored.

3.52 In this Report, the Commission makes a number of recommendations aimed at making the system more simple, streamlined and all-encompassing. The key features of the proposed system involve: a single point of contact for advice, assistance and lodging of complaints, through the office of the Legal Services Ombudsman; more flexibility in the award of compensation and other remedial orders; greater use of informal and consensual dispute resolution processes; faster, more active and more thorough investigation of complaints; merger of the Standards Board and Disciplinary Tribunal into a single body (the Legal Services Tribunal) able to hear all complaints against lawyers; and giving the Conduct Review Panel direct powers to refer matters to the Tribunal.

PROCEDURAL FAIRNESS

> **Both complainants and legal practitioners shall be entitled to be treated with fairness and justice in the investigation, hearing and determination of complaints.**

Commentary

3.53 It is fundamental that the complaints handling system must be perceptibly fair to both complainants and respondent lawyers, with the rules of natural justice applicable to at least the formal disciplinary proceedings.

3.54 Disciplinary proceedings are neither criminal nor civil, but rather have been classified by the courts as "protective" in nature (ie, protective of the public interest).[59] Since these proceedings are protective rather than punitive or prosecutorial, the rules of natural justice must be observed, but the respondent practitioner is not entitled to the full panoply of procedural rights and safeguards which apply to, say, criminal proceedings. The onus of proving misconduct lies on the complainant - usually the Law Society or Bar Association by the time the matter reaches the stage of a formal hearing. This is generally on the balance of probabilities, although the amount of proof required increases in accordance with the seriousness of the charges and the consequences for the respondent.[60]

3.55 In DP 26, the Commission noted that the tenor of many of the provisions of the *Legal Profession Act* 1987 seemed to suggest that "complainants and complaints ought to be treated with caution, while legal practitioners who are the subject of a complaint are to be accorded full procedural rights"[61]. We wrote then, and still maintain, that:

> Without derogating from the natural justice requirements which must be applied in favour of those who are in jeopardy of being sanctioned, the rights and responsibilities of complainants and legal practitioners should be constructed in a parallel manner.[62]

3.56 To this end, the Commission suggested that there be a legislative statement of a "Charter of Rights" for complainants, in order to clarify the position of complainants and emphasise the fairness and integrity of the

system. In this Report, the Commission recommends that such a Complainants' Charter of Rights be inserted into the *Legal Profession Act*, dealing with such matters as rights to: advice and assistance; immunity from civil liability; be kept informed; respond to statements by the other party; adequate reasons for decisions; be present at any hearing; and to have any adverse decision independently reviewed.

3.57 The advancement of the rights of complainants does not mean that the rights of respondent lawyers necessarily need be watered down, however. Lawyers should never be subjected to procedures which arbitrarily or unfairly do harm to their reputations or qualify or remove their practising rights. The Commission makes a number of recommendations in this Report aimed at improving the level of procedural fairness for a lawyer who is the subject of a complaint. For example, the Commission proposes that there be a limitation period on complaints (of six years, with discretion in the Legal Services Tribunal to consider claims out of time) and, even more importantly, that a complaint should lead to a limited waiver of the rules about confidentiality,[63] so that a lawyer properly may defend allegations made by a present or former client without the necessity of gaining the permission of the complainant to disclose confidential communications.

OPENNESS AND ACCOUNTABILITY

> **Public confidence in the complaints handling system requires that the system be fair, open and accountable. Subject to the need for confidentiality in certain circumstances, as many elements of the system as possible should be open to the public and on the record, and reasons for decisions must be provided. Non-lawyers must meaningfully participate at all levels of the process to ensure that different experiences and perspectives are represented, and to assure complainants that the system is not operated solely by and for lawyers.**

Commentary

3.58 In the context of complaints handling, it is necessary to employ a number of strategies in order to achieve the aim of an open and accountable system which encourages public confidence.

The need for "open justice"

3.59 The American Bar Association has identified secrecy as "the single greatest source of public distrust of lawyer disciplinary systems".[64] In DP 26, the Commission agreed that:

> As a general matter, the restoration and maintenance of public confidence in the legal profession's disciplinary processes is dependent upon clear evidence that the system is fair, open and accountable. As many elements of the system as possible should be open to the public and on the record, and reasons for decisions should be available.[65]

3.60 There is an increasing social expectation that public institutions will be as open and "transparent" as practicable. In recent times, this expectation has manifested itself in calls for "open justice" in the courts, Freedom of Information legislation, judicial review of administrative decision-making, "whistle blower protection" legislation, and other similar measures. (There also is a similar expectation of openness emerging with respect to *private* institutions with a public aspect, such as major corporations.)

3.61 The disciplinary system should be subject to the principles of "open justice". Formal hearings should always be open to the complainant and should normally be open to the general public, and subject to media reporting. At present, proceedings before the Disciplinary Tribunal are open, but Standards Board hearings are closed - even to the complainant, except for the limited purpose of considering compensation. In this Report, the Commission recommends that the merged body (the Legal Services Tribunal) should conduct its hearings in the

open, although evidence which relates to confidential and privileged client-lawyer communications may need to be taken in private, and there may be the rare case in which the interests of justice compel a closed proceeding.

3.62 While open justice applies to hearings and other aspects of the system, the Commission recognises that while the complaint is at the *investigative stage* (or under review), the files of the investigative or review agency should be free from civil discovery or production under Freedom of Information legislation. The same public interest arguments about the integrity of the investigative process that apply to investigations by the police, regulatory agencies, the Director of Public Prosecutions, the Independent Commission Against Corruption and others, also apply to investigations into the conduct of lawyers. Once the material is produced at the Tribunal it is subject to reporting, of course. Similarly, communications made as part of an informal dispute resolution conference should be privileged. In this Report, the Commission makes specific recommendations[66] regarding confidentiality and privilege in the disciplinary system.

Lay participation

3.63 Another method of achieving the desired levels of openness and accountability is to include persons from outside the practising legal profession in the regulation of the profession. Lay participation has two main advantages: it allays the suspicion that the disciplinary system is a "closed shop" which unfairly operates to protect lawyers, and it brings to the process a range of community experiences and perspectives which would not otherwise be available.

3.64 Although there was strong opposition from the legal professional associations to the inclusion of lay persons in the disciplinary process when the Commission first considered this issue over a decade ago, the practice is now generally well-accepted by the Bar Association and the Law Society.[67] In DP 26, the Commission expressed concern that some "lay" persons - particularly those appointed by the Bar Association - were in fact retired lawyers or others with a close association with the legal profession.[68] Happily, this is no longer the case. Both the Bar Association and the Law Society now advertise for lay participants, and recent appointees appear to be more genuinely independent of the professional associations in terms of background and outlook.

3.65 The present disciplinary system allows for the participation of lay persons (ie, non-lawyers): at the investigative stage, as (minority) members of the two professional Councils' Professional Conduct Committees; at the hearing and determination stage, as (minority) members of the Standards Board and Disciplinary Tribunal; and at the post-dismissal review stage, as (majority) members of the Conduct Review Panel.

3.66 The Commission believes that improvements still can be made in the use of lay persons, to ensure that they are able to participate fully and meaningfully. As suggested in DP 26, this may involve "special training courses, research and secretarial assistance, and other resources", as well as providing a "realistic level of compensation for the work involved".[69]

A Public Council on Legal Services?

3.67 In 1982, the Commission first recommended the creation of a broadly constituted Public Council on Legal Services, consisting mainly of non-lawyers, to contribute to the general regulation of the legal profession.[70] The Commission initially considered the creation of a much larger body,[71] but eventually recommended a nine-member Council, consisting of three nominees of the Attorney General (a lawyer, a non-lawyer, and a non-practising lawyer), three persons named by a panel comprised of the public (non-lawyer) members of the Legal Aid Commission and the Law Foundation, two persons named by the Consumer Affairs Council, and one person nominated by the Leader of the Opposition.

3.68 The Commission envisaged that the Public Council on Legal Services would play an important role in ensuring public accountability of the legal profession by, among other things, helping to select the public members of the Councils of the Law Society and Bar Association, advising the Attorney General and Parliament

on policy matters, and commenting on proposed rules and regulations affecting the regulation and discipline of the legal profession. The Commission saw particular value in establishing "a pool of non-lawyers who have special interests in, and experience of, the law and the legal profession",[72] and providing "a forum in which, because legal practitioners do not predominate, non-lawyers would be less reluctant to express their views, and to indicate their uncertainty or lack of knowledge, than in the general regulatory bodies, which would consist overwhelmingly of practitioners".[73]

3.69 In the end, the *Legal Profession Act* 1987 provides for a "Legal Profession Advisory Council" comprised of two barristers, three solicitors and four community representatives (one of whom may be a lawyer). Of the five barrister and solicitor members, three are to be nominees of the respective professional Councils. The Advisory Council is meant to "keep under constant review the structure and functions of the legal profession" and to report to the Attorney General on any matter relating to the legal profession, or on proposed regulations referred to it.[74] However, the profession-dominated Advisory Council has never been constituted.

3.70 In its present form the Legal Profession Advisory Council would have less to offer than the recommended Public Council on Legal Services, given its composition and limited role. The views and interests of the legal profession are already well represented in the media and in the political sphere by the Law Society and the Bar Association. The views of the wider community's interests and views about the regulation of the legal profession and the delivery of legal services are rather less well-represented, however.

3.71 The Commission is still of the view that a Public Council on Legal Services would be an appropriate body to advise on the appointment of independent members of the various committees and statutory authorities, to run orientation and training programs, and generally to "be a valuable source of support, information and views for the public members".[75] In DP 26, we wrote that:

> The Commission believes that serious consideration should be given to the establishment of the Legal Profession Advisory Council or, preferably, to the Commission's original recommendation for a more broadly constituted Public Council on Legal Services.

3.72 Since the Commission has a standing (but not implemented) recommendation on this point which it still endorses, and this recommendation has been raised again for consideration in the New South Wales Attorney General's Department's recent Issues Paper on the structure and regulation of the legal profession,[76] the Commission has not found it necessary to make a further recommendation on this point in this Report.

Reporting requirements

3.73 Third, the various components of the system should be obliged to account for themselves to Parliament through (at least) annual reporting requirements. In DP 26, the Commission looked at upgrading the reporting requirements placed on the professional Councils in respect of complaints handling, both in terms of frequency and quality.[77] The Commission suggested that it become standard practice for the professional Councils and other responsible agencies to make annual reports to the Attorney General, for tabling in Parliament, which contain "a full treatment of statistics, empirical and comparative analysis, case studies, satisfaction surveys, recommendations for consequential legislative or administrative change, and so on."[78] (The Law Society recently has commenced publishing a six monthly report on trends and statistics in the disciplinary process,[79] which the Commission considers further in Chapter 4.)

3.74 In this Report, the Commission makes a number of recommendations aimed at improving the quality and range of information to be contained in the reports of the Legal Services Ombudsman, the Law Society and Bar Councils, and the Conduct Review Panel.

External monitoring

3.75 Finally, the operations and decisions of the complaints handling system should be open to external monitoring. This is accomplished to a limited extent by the current system; however, in this report, the Commission makes recommendations aimed at substantially strengthening this external accountability from two directions: from an office of Legal Services Ombudsman at the early stages, and a more robust Conduct Review Panel at the later stages, of the complaints handling process.

EXTERNAL SCRUTINY AND REVIEW

The complaints handling system must be subject to external scrutiny at all levels to ensure its accountability and effectiveness. The existence of one or more agencies with "watchdog" or oversight responsibilities provides an important means of guarding against bias, arbitrariness, arrogance, complacency and other problems which destroy public confidence. Among other things, the system should afford a complainant the opportunity for a meaningful external review of a decision to dismiss a complaint and other adverse decisions.

Commentary

3.76 Open proceedings, lay participation and reporting, provide important internal checks on the integrity of the complaints system, as discussed above. However, concerns about the independence, fairness and efficiency of the complaints handling system also mandate the need for effective *external* scrutiny or oversight of the system, especially where some or all of the functions are subject to self-regulation or co-regulation by the legal profession.

3.77 Most critically, there should be some external agency or agencies with sufficient powers and resources to monitor the complaints handling process at every level. For example, Victoria currently has a Lay Observer,[80] and the Victorian Law Reform Commission has recommended the creation of a Legal Services Commissioner.[81] In England and Wales, an office of Legal Services Ombudsman recently has been established.[82] In California, there is an "independent discipline monitor".[83]

3.78 Under the current statutory regime in NSW, the Legal Profession Conduct Review Panel ("the Panel") offers a measure of external scrutiny, but it has no direct powers and its role is limited to the post hoc review of dismissals.[84] The Law Society's submission to the Commission recognised the need for external scrutiny, and proposed the introduction of a full-time "Lay Observer", who would take over the functions of the Panel and, importantly, would be entitled to attend and participate in the meetings of the various committees and Councils, as well as attend dispute resolution conferences as an observer, and would have access to all disciplinary files.[85] The Bar Association's submission also recognised the need for external scrutiny, but proposed enhancing the powers and resources of the Panel, rather than its replacement. The Commission agreed with much of what the Law Society and the Bar Association had to say about external scrutiny, and we outlined our own views on the functions of the external monitor in DP 26.[86]

3.79 After careful consideration, the Commission recommends in this Report that the external monitoring of the legal profession would best be accomplished by dividing this function between a more robust Panel and a newly created office of Legal Services Ombudsman. The Panel would continue to exercise a review function in relation to the decisions of the legal professional Councils, but would have greater jurisdiction, resources and investigative powers, as well as the *direct* authority to refer matters to the Legal Services Tribunal (without the intervention of the Attorney General) and the power to recommend the payment of compensation to complainants. The Panel also would operate to review the decisions of the Legal Services Ombudsman where the Ombudsman was involved in the investigation or dismissal of a complaint.

CONTRIBUTION TO THE GENERAL ENHANCEMENT OF PROFESSIONAL STANDARDS

The work and experience of the complaints handling system must feed back into the legal profession to contribute to the enhancement of professional standards, such as through changes in legal education, legal practice, or rules of ethics and professional responsibility.

Commentary

3.82 One of the Commission's main criticisms of the current complaints handling system is that it does little to assist in the enhancement of professional standards. While the most serious disciplinary matters - those involving allegations of professional misconduct - are subject to open justice in the Disciplinary Tribunal, are published, and sometimes attract media coverage, such matters are relatively rare.[87] Little seems to be learned, however, from the experience of processing the vast bulk of complaints, which raise "less serious" but far more prevalent client concerns about such matters as negligence, incompetence, delay, poor communications, discourtesy and overcharging.

3.83 In DP 26, the Commission considered that the gap between what clients most frequently complained about and what the legal profession took seriously enough to refer to a disciplinary hearing was a major source of complainant dissatisfaction and of the public perception that the disciplinary system only "covers up" for lawyers.[88]

3.84 In the Commission's survey of Law Society complaint files, it became apparent that the disciplinary system simply was not geared towards identifying matters of general concern from the run of individual complaints.

3.85 For example, a large proportion of the complaints boil down to the recollection of the solicitor versus the recollection of the complainant. (These are virtually all resolved in favour of the solicitor) Only in the rare case could the solicitor produce anything in writing to confirm his or her version of events. It seems to the Commission that good practice requires:

the keeping of file notes of relevant conversations and other matters;

routine, written (and preferably signed) confirmation of instructions;

clarity in relation to fee arrangements; and

clarity regarding who is responsible for disbursements (medical reports, valuations, translators, etc).

3.86 Yet the Law Society did not commonly suggest to the solicitor concerned that he or she might want to improve their record keeping in future. The tone of the letters notifying solicitors that the complaint against them had been dismissed certainly would not lead them to question their standards of practice. Nor is it common for a general practice direction or reminder to the profession to emanate from the complaints-handling experience of the Law Society.

3.87 The New South Wales Department of Health's Complaints Unit informed the Commission that it takes care to translate the mass of particular complaints into general concerns and lessons which are fed back into the medical and allied health professions through the specialist medical royal colleges, hospitals, medical schools and other institutions. The Complaints Unit expressly recognises one of its major objectives to be "to identify the implications for policy and administration which would improve the quality of health services",[89] and the Unit has established a sophisticated computer database to monitor actively patterns and trends which may have policy implications.[90] The *Health Care Complaints Bill* 1992 (which has been withdrawn for further consultation and consideration) lists the first object of the legislation as "to facilitate the maintenance of standards of health services in New South Wales".[91]

3.88 In the new system proposed in this Report, the Legal Services Ombudsman should play an important role in monitoring patterns and trends in complaints and should be under a positive obligation to assist in raising professional standards through research, education, training, and publication efforts.[92]

3.89 However, the major effort will still have to come from the profession itself. The Australian legal professions have lagged somewhat behind their counterparts in the United States, Canada and the United Kingdom in this regard, although the Australian professions traditionally have suffered from more limited resources and a lack of cohesion and organisation at the national level.[93]

3.90 In DP 26, the Commission noted that there was a pressing need in New South Wales:

> to emulate the "Client Care" program introduced in England and Wales, which is directed towards the improvement of lawyer-client communications and relations;[94]
>
> to develop codes of ethics and practice which are modern and more client- and community-oriented, rather than aimed at matters of intra-professional comity and restricting work practices;[95]
>
> to organise firms of solicitors in such a way as to emphasise matters of legal ethics and professional responsibility, such as through the creation of in-house ethics committees, specific training programs, and greater supervision;[96]
>
> to provide more basic and continuing legal education about legal ethics and professional responsibility, including courses which are incidental to the disciplinary process;[97] and
>
> to provide more counselling and assistance programs for legal practitioners who seek help or are required to seek help to resolve personal, professional, or commercial difficulties.[98]

3.91 In this Report, the Commission makes a number of recommendations aimed at facilitating these developments.

PROPER FUNDING AND RESOURCES

> **It is essential that adequate resources (financial, human and technical) are provided to permit the operation of a comprehensive system of regulation, with the features enumerated above. The sources of funding should recognise the interests of both the legal profession and the general public in the maintenance of high standards in the provision of legal services.**

Commentary

3.92 A complaints handling system with all of the attributes detailed above requires an adequate level of resourcing, including decent (professional and support) staffing levels, salaries which attract officers with the appropriate levels of expertise, computer hardware and software, and so on. A proper system involves not only the thorough investigation of complaints, but the timely investigation and processing of complaints, as well as a range of support and ancillary services and sufficient checks and balances to inspire public confidence.

3.93 The ABA CEDE recommended that it was necessary to ensure that:

> adequate funding and staffing is provided for the disciplinary agency so that: (a) disciplinary cases are screened, investigated, prosecuted and adjudicated promptly; (b) the work load per staff person permits careful and thorough performance of duties; (c) professional and support staff are compensated at a level sufficient to attract and retain competent personnel; (d) sufficient office and data processing equipment exist to efficiently and quickly process the work load and manage the agency; (e) adequate office space exists to provide a productive working environment; and (f) staff and volunteers are adequately trained in disciplinary law and procedure.[99]

3.94 Further, sufficient staff, resources and expertise must be available in order to:

> (1) fully investigate complaints, by such means as sending investigators into the field to interview witnesses and examine records and evidence; and (2) regularly monitor sources of public information such as news reports and court decisions likely to contain information about lawyer misconduct.[100]

3.95 The adequacy of resourcing of Ombudsman offices and other regulatory and "watchdog" agencies is often a source of controversy. However, there should be fewer problems in this regard with respect to a Legal Services Ombudsman or other external monitor of the legal profession, given the greater diversity of potential funding sources.

3.96 The ABA Model Rules for Lawyer Disciplinary Enforcement place the principal responsibility for funding the disciplinary system on the profession itself,[101] although it is noted that "there is also a strong public interest in effective disciplinary enforcement" so that it is "not inappropriate for public funds to be used toward financing the system".[102]

3.97 In New South Wales, all of the expenses of the existing system - the expenses of the Law Society and Bar Association, as well as those of the Standards Board, Disciplinary Tribunal and Conduct Review Panel - are reimbursed from the Statutory Interest Account.[103] In other words, the entire cost of the legal profession's disciplinary system is paid for out of the interest on *clients'* funds held in solicitors' trust accounts.

3.98 By way of contrast, in the elaborate and expensive disciplinary system in California - regarded as one of the leaders in professional regulation in the United States - the entire cost is borne by the legal profession itself through graduated licence fees.[104]

3.99 To provide another model, the NSW Department of Health's Complaints Unit is funded out of Consolidated Revenue, as will be the case with the proposed Health Care Complaints Commission when it replaces the Unit.

3.100 The Commission considers that it is appropriate in New South Wales for all three sources - statutory interest money, practising certificate fees, and general revenue - to be applied towards the complaints handling system to ensure adequate funding. However, we recommend that the primary source of funding for the complaints handling system should be a levy or charge on lawyers' practising certificates. As detailed in Chapter 5, a rather small annual charge per lawyer (of say $75-150) would raise quite a considerable amount ($1-2 million), which would not only pay for the cost of the office of the Legal Services Ombudsman but also would free up funds in the Statutory Interest Account which could then be applied to legal aid.

CONCLUSIONS

The central issue of independence

3.101 The submissions from the Law Society[105] and the Bar Association[106] in response to DP 26 both stated that there was no evidence for the Commission's supposition that there is an undercurrent of public dissatisfaction with the existing system. As discussed above, the issue of the independence of the complaints handling system was central to most of the submissions received by the Commission. A*ll* of the submissions - except those from the Law Society and the Bar Association - which considered the question favoured replacement of the current system with a Legal Services Ombudsman or an independent Legal Services Complaints Commission.

3.102 It is most instructive that these submissions came from a broad range of individuals and organisations, most of whom have direct - or even intimate - knowledge of the operation of the existing, largely self-regulatory, system, and few of whom can be accused of routine "lawyer-bashing". The Commission quotes from some of these submissions immediately below.

3.103 From the Registrar of the Legal Profession Disciplinary Tribunal, Mr Robert Bennett:

> The main difficulty that I see in retaining the existing system is that despite the best efforts of many individuals it is no longer sustainable in the public perception for the professional bodies to exercise both a disciplinary role and promote the interests of their membership. I draw support for this observation from the many comments made by complainants or telephone enquirers to myself and other Registry staff. ... It might also be considered that under both the previous system involving the Statutory Committee and the existing scheme the profession has had the opportunity to convince the community of the integrity of the respective processes yet, rightly or wrongly, are seen not to have achieved that level of acceptance which is vital to such processes.[107]

3.104 From the Chairperson of the Legal Profession Conduct Review Panel, Mr John F O'Neill:

> In general we would say Option One would be a significant improvement but suffer from the perception of lawyers looking after their own.[108]

3.105 From the New South Wales Commissioner for Consumer Affairs, Mr John Holloway:

> Arguably any appropriate mechanism for resolution of complaints about lawyers must be a mechanism which is independent, at first instance, of lawyers' professional bodies.[109]

3.106 From the Foundation Dean of Law of the University of Wollongong (and administrative and consumer law expert), Professor Jack Goldring:

> The public perception of self-regulation of any kind is one of well-justified scepticism. Even without your Discussion Paper, there are sufficient media reports to suggest that there is a general dissatisfaction with the way complaints about the provision of legal services, by both the private profession and government agencies, are handled.[110]

3.107 And from the Chief Magistrate of New South Wales, Mr Ian Pike:

> Over recent years a number of complaints by Magistrates concerning the behaviour of members of the legal profession have been referred to their respective bodies. The outcome has been less than satisfactory in the view of the Magistrates bringing the complaints. My general view, and it is a view shared by a number of Magistrates, is that the disciplinary functions of the controlling bodies are effective only in the event of some monetary defalcation but otherwise there is little effective response. I think that generally speaking bodies which investigate their own members, even if the investigating authority has a token "outsider", fails to respond as effectively as some independent body or person.[111]

3.108 The Omnibus Survey (public opinion poll) conducted for the Commission by the Morgan Research Centre also demonstrated a clear public preference for the complaints handling system to be independent of the control of the profession (see above).

3.109 As detailed in the Commission's report of its survey of complaint files (see Chapter 2), the apparently substantial *statutory* changes made to complaints handling by Part 10 of the *Legal Profession Act* 1987 have had a rather more modest effect in actual *practice*. All of this, taken together with the general principles enunciated in this Chapter, the other submissions received, and the rest of our research and consultation program, has led to the Commission's conclusion that it *cannot* recommend modification of the existing system aimed at producing another "improved" version. Even if the Commission could be confident that such tinkering would lead to a greater appreciation of complainants' rights, a reduction of the gap between consumer and professional interests and perceptions, more active and intensive investigation of complaints, and so on, it could not resolve the fundamental problem that the system would still lack the appearance of independence and thus would never enjoy complete public confidence.

3.110 This conclusion compels a choice between a Legal Services Complaints Commission (Option Two in DP 26) or a Legal Services Ombudsman and other related safeguards (Option Three in DP 26). For the reasons which follow, the Commission prefers the latter strategy.

3.111 Only one submission to the Commission suggested a fourth or any other significantly different approach. Mr Barry Hart, of the Chelmsford Victims Action Group proposed that any complaints handling procedure should come within the auspices of the Department of Consumer Affairs or, perhaps, be modelled on California's Board of Medical Quality Assurance, which has significant consumer representation.[112] None of the submissions picked up on the California example of a legal complaints system independent of the practising legal profession but controlled by the judiciary.[113]

Balancing independence and accountability

3.112 If independence was the *only* major attribute required, the Commission would have opted for a legal complaints commission as the potent vehicle for asserting the independence of a complaints handling system from professional control. However, the Commission believes that the *accountability* of the system is also essential to preserving public confidence.

3.113 A certain amount of cross-fertilisation has occurred in this reference. The Commission has been asked to look at not only the disciplinary system in respect of individual (mainly private) lawyers[114] (the subject of this Report), but also at the openness and accountability of public sector legal services, such as the Director of Public Prosecutions (DPP), the Crown Solicitor's Office, the Legal Aid Commission, and so on.[115] While the latter head of the reference will be the subject of a separate (and forthcoming) Discussion Paper and Report, the Commission already has received submissions in this area, many of which are addressed to alleged lack of accountability of some of these institutions.

3.114 For example, some of the submissions have pointed out that the Attorney General traditionally was accountable to Parliament (and at the ballot box) for the exercise of prosecutorial discretion (ie the decision to indict a person, or to issue a "no bill", or to grant immunity from prosecution in exchange for testimony, or to accept a plea to a lesser offence). The creation of the DPP's office was meant (in NSW and elsewhere) to de-politicise and regularise such decisions by vesting this discretion in an *independent* office holder. However, this increase in independence comes at the expense of accountability.[116] Although the DPP in New South Wales, Mr Reg Blanch QC, has chosen, as a matter of principle, to offer reasons for *some* types of decisions (such as "no bills"), he is not obliged to do this, nor is there is any mechanism for compelling the production of reasons for other types of decisions (such as the use of an informer) or to challenge the accuracy or sufficiency of reasons which have been supplied.

3.115 Following years of criticism that the disciplinary system in California was slow, lenient and dominated by the legal profession, the California legislature responded with sweeping reforms which brought in an independent discipline office (with a separate State Bar Court under the control of the senior judiciary) which "has become a nationwide model" in the United States.[117] Although only a very small proportion of complaints (1.75% in 1991) actually result in a prosecution before the Bar Court,[118] there have nevertheless been charges from informed sources that "the goal of the bureaucracy is not to achieve justice but to boost discipline statistics and thereby satisfy the Legislature's mandate to be tough on errant bar members" and that the prosecution "overcharges and under-investigates" complaints against lawyers.[119]

3.116 In New South Wales, the *Health Care Complaints Bill* 1992, which provides for the reconstitution of the Department of Health's Complaints Unit as an independent statutory authority, was withdrawn late last year for further consideration and consultation after meeting with strong opposition from precisely those community groups which might have been expected to be among its strongest supporters. Among other things, groups such as the Medical Consumers Association and the Chelmsford Victims' Action Group, were very anxious about what they perceived as a lack of accountability on the part of the proposed Health Care Complaints Commission.

3.117 Without having a view on the *merits* of this particular argument,[120] the Commission notes that the *fact* of this controversy supports our conclusion that consumer interests (and the public interest) are best served by a mechanism which provides for a high degree of accountability as well as manifest independence.

The nature and substance of complaints against lawyers

3.118 The design of a new system for the handling of complaints against lawyers requires a sense of proportion as well as devotion to principle. There are approximately 2000 complaints against solicitors and barristers each year, and it is common ground that the overwhelming majority of these relate to matters which are susceptible to consensual dispute resolution or raise, at most, issues of unsatisfactory professional conduct rather than professional misconduct. Few complaints raise the sort of (or the equivalent of the) "life-and-death" issues which the Department of Health's Complaints Unit often must address.

3.119 In any event, most of the Commission's concern about the inadequacies of the existing system do not relate to the handling of the serious allegations, which are usually treated with sufficient gravity (albeit rather slowly), but to the handling of allegations of substandard practice, such as poor communications, discourtesy, and delay. The latter category of complaints tend not to be fully or properly investigated, nor conciliated, and are too readily dismissed without sufficient consideration for the legitimate dissatisfaction of the complainant or the need to improve the legal practitioner's professional or administrative (or *personal*) skills.

3.120 The Commission believes that the demography of complaints does not compel the introduction of a high-powered, prosecution-oriented, complaints commission. In this Report, the Commission makes a number of important recommendations aimed at closing what we have described as "the profound gap between what angered clients and what lawyers and their professional associations saw as important enough to merit disciplinary action".[121] Among other things, the Commission has recommended that:

> potential complainants be assured of effective advice and assistance, and access to the complaints handling system;[122]
>
> much more emphasis be placed on the consensual resolution of lower level disputes, with the wider availability of compensation, and the possibility of simple arbitration as a back-up;[123]
>
> the handling of disputes about fees and costs be integrated into the main complaints handling system;[124]
>
> more matters involving unsatisfactory professional conduct flow through to the Legal Services Tribunal for hearing, with the Tribunal given flexible powers to fashion customised orders and sanctions;[125]
>
> there be more community education about the delivery of legal services;[126]
>
> there be much more concentration on the enhancement of professional ethics and standards, including attention to issues of education and prevention;[127] and
>
> that the complaints handling system be subject to vigorous external monitoring to ensure its independence and effectiveness.[128]

3.121 The establishment of an office of Legal Services Ombudsman would be very well-placed to advance many of these objects directly, as well as to complement or scrutinise the efforts of other institutions in relation to the other matters. The Commission cannot see how a complaints commission would fulfil these particular aims more effectively or efficiently.

Cost considerations

3.122 In DP 26, the Commission noted that it was not clear that a complaints commission was *necessarily* a more expensive option than the others, and we pointed out that the annual budget of the Department of Health's Complaint Unit was very similar to that of the Law Society in relation to disciplinary matters.[129] Most of the submissions, however - including those which supported the introduction of a legal complaints commission - regarded this as somewhat doubtful. Among other things, the many volunteers from the professional Councils

will likely need to be replaced by salaried employees and paid consultants. It may be that differing methods of accounting (such as the placing as certain costs "off-budget") or, more likely, hidden subsidies by the professional associations (such as rent, office supplies and so on) disguise the degree of actual difference in cost.

3.123 The Commission makes no positive finding in this area. However, in the preceding section, we have described the demography of complaints against lawyers in New South Wales. The cost of the complaints handling/disciplinary system is not immaterial, and it is questionable whether an elaborate or sizeable bureaucracy need be set up to handle the number and type of complaints which are presently received (and which are dealt with in substantial part by a voluntary work force).

3.124 As mentioned above, the complaints handling system in California "has become a nationwide model" in the United States. It has a large and elaborate disciplinary apparatus with an intake and preliminary screening staff of 75, an investigative staff of 113, and 55 prosecutors, as well as nine judges of the "State Bar Court" (who are appointed by the Supreme Court). The annual budget is well over $40 million and consumes three-quarters of the Bar's annual operating revenue. Yet in 1991, out of 76,858 complaints received, only 6447 complaints (8.4%) were investigated, only 1345 cases (1.75%) were prosecuted,[130] and only 564 lawyers (0.73%) were eventually disciplined (although a number of cases are still pending).[131] Thus, despite the costs involved, there are likely to be many dissatisfied complainants.

The benefits of the continued involvement of the profession

3.125 The Commission noted in DP 26 that amongst the potential disadvantages of the introduction of a legal complaints commission could be:

> hostility and lack of cooperation from the legal profession; ... and
>
> the possible loss to the system of accumulated expertise, at least in the transition.[132]

3.126 The preliminary submissions from the Law Society and the Bar Association both strongly opposed the removal of the legal professional Councils from the disciplinary process. The Bar Association submitted that:

> The establishment of additional structures which are separate and apart from the professional bodies creates tension between the profession and those organisations. They may give an appearance of accountability, but they do so at the expense of a quick, effective, protective regulation and dispute resolution. ... There is a fundamental and vital reason for not establishing such organisations [as a Complaints Unit or an Ombudsman's office] to receive and deal with complaints. The existence of "external regulators" effects a shift in responsibility away from the individual professional, and the profession generally. That is a most retrograde step, and a difficult one to reverse.[133]

3.127 As the Commission has already stated, "professional hostility is not in itself an argument against change, if this is clearly in the public interest".[134] Nevertheless, the Commission accepts that there is merit in the Bar Association's argument that the legal profession *should* take significant responsibility for the standards, conduct and practices of its members, and should not be compelled - or allowed - to play a purely passive role.

3.128 The new system that the Commission has recommended involves powerful external scrutiny of the operations of the professional association in the complaints handling area, but also envisages a high degree of cooperation between the professional Councils and the Legal Services Ombudsman in order to improve professional standards.

Independence of the profession and the rule of law

3.129 In DP 26,[135] the Commission noted in the course of considering the option of recommending an independent Legal Services Complaints Commission that, apart from the health care area, no other *private* professions[136] or service-providers (journalists, accountants, engineers, bankers, architects, etc) in New South Wales are subjected to so high a degree of public regulation.

3.130 The Commission posed the question, however, whether:

> it may be that there *is* something different or special about the medical and legal professions which requires regulation in a different or special way. The relationship between lawyers and their clients is deeper and more intimate than is the case with many other professionals, and is set in a more highly-charged context. Clients often come to lawyers in response to trauma, or actual or potential peril (personal or financial). Dealings with lawyers may involve, and sometimes require, the revelation of sensitive personal details, taking advice on important life decisions, and making admissions about personal misconduct. Another important distinction may be the fact that significant amounts of public funds are expended for the provision of legal services (with most of that money going to private practitioners) through the legal aid system and the courts, and, especially, for the provision of health care services (through the Medicare system and the public hospitals). In these circumstances there is an argument that a greater measure of public accountability is appropriate.[137]

The Commission still believes that such public interest considerations warrant the interpolation of an independent institution into (and external monitoring of) the regulation of the legal profession.

3.131 At the same time, the Commission recognises that another special and traditional feature of the legal profession is its independence from government control, in order to be free to represent those who challenge the (allegedly) excessive or abusive exercise of State authority. We have commented above on the tension between the need for independence on the one hand and the need for accountability on the other - or in this case, perhaps, on "the rule of lawyers" versus "the rule of law". There is an accepted value in a liberal, democratic society that certain institutions - notably, the judiciary, the legal profession, the universities and the press - should be allowed some uncommon privileges and immunities in order to safeguard the broader public interest in preserving liberty by permitting the system of "checks and balances" (to use the American term) to operate. Such considerations are not present (or certainly not in the same degree) when discussing the regulation of doctors, architects or others. While these professionals rarely come into direct conflict with the State when representing the interests of clients, lawyers are regularly obliged to act against government officials, instrumentalities, and even the State itself.

3.132 The Commission's recommended system should keep the legal profession properly accountable without jeopardising the profession's independence from undue government control or influence. The Legal Services Ombudsman should provide a powerful check on the regulatory activities of the professional associations, but he or she also will be open to considerable scrutiny, and will not have direct, punitive powers; rather such powers will continue to be located in an independent tribunal which obeys the rules of natural justice. The *potential* for improper interference with the independence of the legal profession must be greater in a system which concentrates power in a public (governmental or quasi-governmental) authority which is itself not entirely accountable.

3.133 In the same way that the Commission would not lightly propose the creation of a powerful "Press Complaints Commission" with authority to censure and censor the media (as is currently being discussed in the United Kingdom), we also have some qualms about the prudence of recommending a Legal Services Complaints Commission. Such a course *could* be justified, but this would require compelling evidence that the mechanisms we have chosen to ensure independence *and* accountability have not worked (or could not work) to regulate the profession in the public interest, so that the balance should be tipped purposefully in the direction of a more independent but less accountable regulator.

Prospects for attaining a high public profile

3.134 In its preliminary submission, the Australian Consumers' Association (ACA) compared the possibilities of establishing a Legal Services Ombudsman and a Legal Services Complaints Commission, and concluded that:

> It is possible for either an ombudsman or a complaints unit to meet the principles of accessibility, accountability, fairness and efficiency, but we believe an ombudsman has an advantage. A single ombudsman can achieve a higher public profile, leading to greater public awareness, trust and therefore greater accessibility.[138]

3.135 The Commission agrees that a single Legal Services Ombudsman is in a much better position to attain a reasonably high public profile through the mass media than is the head of a prosecution-oriented complaints commission. This is an important consideration, as we also foresee an important public *role* for the Legal Services Ombudsman, which includes community education about the legal profession and the delivery of legal services, advice and assistance to *potential* complainants, and the promotion of access to and confidence in the complaints handling system.

The desirability of uniformity

3.136 The Commission's terms of reference are addressed to the need to develop the best complaint handling system for New South Wales. However, so long as it does not result in a "lowest common denominator" approach, there are also advantages in achieving a measure of consistency, if not uniformity, among the states and territories in this regard. Legal practice in Australia traditionally tended to be highly provincial - with a natural lack of mobility amongst law students and legal practitioners reinforced by the erection of barriers to reciprocal admission - but this has changed markedly in recent times, with legal practice taking on an increasingly national (and international) character. While few law firms dared to cross the New South Wales-Victoria divide as recently as a decade ago, preferring to use local agents in recognition of the rivalry and the ostensibly differing legal cultures, there are now be few firms of any significant size which do not have branch offices in several capital cities, with partners admitted to practice in all jurisdictions.[139]

3.137 This trend will almost certainly intensify in coming years with better transportation and (especially) communications, and the needs of increasingly national and international markets for goods and services for parallel legal services. The High Court of Australia already has struck down legislation and practices aimed at unreasonably restricting the inter-state mobility of legal practitioners,[140] and the federal Trade Practices Commission is currently considering the general question of restrictive trade practices in the market for legal services.[141] Recent amendments to the *Judiciary Act* 1903 (Cth) permit lawyers employed in the Commonwealth Attorney General's Legal Practice "to practise as a barrister, solicitor, or barrister and solicitor, *in any court, or in any State or Territory*" (emphasis supplied).[142]

3.138 One consequence of these important changes in the organisation of legal work is that it is now quite critical that the various state and territory authorities responsible for the regulation and discipline of the legal profession begin to liaise and cooperate much more closely. This will involve establishing systems for the exchange of information, and the reciprocal recognition and enforcement of disciplinary decisions which affect rights of practice or are otherwise aimed at the protection of the public. Reciprocal enforcement requires a reasonable degree of confidence on the part of state and territory authorities in the integrity, impartiality and fairness of each other's disciplinary systems, and such confidence would be greatly enhanced by the maintenance of a common approach.

3.139 The Commonwealth Attorney General's Department has proposed recently:

> That a single independent statutory legal services ombudsman or complaints agency should be established in each State/Territory with responsibility for receiving, investigating and making recommendations concerning complaints made about any practising lawyer in the jurisdiction.[143]

3.140 The Victorian Law Reform Commission, in one of its final reports, recommended the establishment of an office of Legal Services *Commissioner* for that State, similar in concept to the Legal Services Ombudsman which we have recommended.[144]

3.141 This Commission believes that the establishment of similar systems for the handling of complaints against lawyers in New South Wales and Victoria would be an important step towards establishing a uniform, national approach. This would not only have symbolic value and create the momentum for uniformity, but would immediately bring about three-quarters of all Australian lawyers under the common regime, for that is the proportion of lawyers concentrated in those two States.[145]

Preference for a Legal Services Ombudsman

3.142 For all of the reasons of principle and practice discussed above, the Commission believes that the best course is to establish an office of Legal Services Ombudsman with broad powers to receive, investigate and oversee the handling of complaints. As stated in DP 26, this course of action:

> seeks to address the "weakest links" in the existing, largely self-regulatory, system of complaints-handling: namely the real and perceived lack of independence from the legal profession, the doubts about the initial intake of complaints and the adequacy of the investigation and, at the other end of the process, the efficacy of the external monitoring mechanism.[146]

3.143 Taken together with other recommendations which enhance the breadth and depth of accountability, as well as the fairness and efficiency of the disciplinary system, the Commission is confident that the resulting system based around the office of the Legal Services Ombudsman will be one which restores public confidence in the handling of complaints against lawyers, satisfies individual complaints, and contributes to the enhancement of professional standards.

FOOTNOTES

1. See DP 26, Chapter 3. See also D Weisbrot *Australian Lawyers* (1990) at 164-171 and 201-210, for a summary of the regulatory regimes in the various states and territories.

2. DP 26, at para 3.97.

3. Victoria. Law Reform Commission *Access to the law: Accountability of the legal profession* (DP 24, July 1991). (Hereafter, "VLRC DP 24".)

4. Victoria. Law Reform Commission *Access to the law: Accountability of the legal profession* (Report No 48, July 1992). (Hereafter, "VLRC 48".)

5. Law Institute of Victoria *The Law Institute's Response to the Law Reform Commission of Victoria's Discussion Paper No. 24: Access to the Law: Accountability of the Legal Profession* (1991) at 3-4. See also DP 26, at para 3.27.

6. R Beatty "Handling customer complaints" (December 1992) *The Australian Standard* 35. The Commission understands that Standards Australia expects to produce terms of reference for this project soon.

7. American Bar Association *Report of the Commission on Evaluation of Disciplinary Enforcement* (May 1991), at iv (hereafter "ABA Report").

8. ABA Report, at 19.

9. The California system is described in DP 26, at paras 3.146-3.151.

10. Royal Commission on Legal Services in England and Wales *Final Report* (Cmnd 7648, 1979) para 25.34 (also known as "the Benson Report").

11. National Consumer Council *In Dispute with the Solicitor* (1985) 27. (Hereafter, "NCC Report".)

12. NCC Report, at 27.

13. The English system in respect of solicitors was described in DP 26, at paras 3.110-3.130.

14. DP 26, at paras 3.120-3.126. The office is created by the *Courts and Legal Services Act* 1990 (UK) s 21.

15. DP 26, at paras 3.40-3.45.

16. VLRC 48, at para 83, Recommendation 1.

17. DP 26, at paras 3.152-3.183.

18. The *Health Care Complaints Bill* 1992 (NSW).

19. Law Society submission of 31 January 1992, at para 2.

20. "Other" responses were given by 0.8%, and 4.8% "could not say".

21. 4.3% could not say.

22. NCC Report, at 16-19.

23. DP 26, at paras 5.4 and 5.17-5.20.

24. Submission of 10 August 1992, at 2.

25. Submission of 17 August 1992, at 1.

26. Submission of 26 June 1992, at 6.

27. Submission of 12 June 1992, at 5, per Mr John F O'Neill AM, Mr Peter C Wolfe, and Mr John I Einfeld AM.

28. Submission of 21 February 1992, at 1.

29. Submission of 28 February 1992, at 3.

30. Submission of 11 August 1992, at 4.

31. Submission of 8 April 1992, at 1.

32. Submission of August 1992, at 15.

33. Submission of 19 August 1992, at 1.

34. Commonwealth Attorney General's Department *Submission to the Trade Practices Commission* (December 1992) Proposal 22, at 53. (Hereafter, "Commonwealth AG's TPC Submission".)

35. DP 26, at para 4.37.

36. See Weisbrot, at 204 and 210.

37. DP 26, at para 5.29.

38. See DP 26, Ch 3, generally.

39. ABA Report, Recommendation 3.1.

40. NCC Report, at 23.

41. NCC Report, at 23.

42. NCC Report, at 23-24.

43. NCC Report, at 24.

44. ABA Report, at 13.

45. ABA Report, Recommendation 3.2, at 13.

46. DP 26, at para 5.7.

47. DP 26, at paras 4.24 and 5.8-5.9.

48. DP 26, at para 4.27.

49. Section 130(5).

50. DP 26, at paras 4.25 and 5.10.

51. DP 26, at para 5.11.

52. DP 26, at paras 4.115-4.122. The ABA Report, Recommendation 18, proposes compulsory arbitration of fee disputes.

53. See DP 26, at paras 4.28-4.42.

54. ABA Report, Recommendation 3.1.

55. ABA Report, at 13.

56. DP 26, at p 8.

57. Submission of the Community Justice Centres, 16 August 1992, at 2, from the Director, Ms Wendy Faulkes.

58. See Weisbrot, at 2, 37, 59-62, 161-182, and 269, regarding the division-fusion debate, and other *informal* divisions within the legal profession.

59. See *Law Society of New South Wales v Weaver* [1977] 1 NSWLR 67, esp at 74-75, per Street CJ, and at 76 per Moffitt P.

60. See *Briginshaw v Briginshaw* (1938) 60 CLR 336, applied in the legal disciplinary context in *NSW Bar Association v Livesey* [1982] 2 NSWLR 231. See the discussion on this point in Weisbrot, at 202, 207-208.

61. DP 26, at para 4.21.

62. DP 26, at para 4.21.

63. Subject to protection against the *public* disclosure of this material, however. For instance, such evidence should be taken by the Legal Services Tribunal *in camera*.

64. ABA Report, at 23.

65. DP 26, at para 4.50.

66. See Recommendations 65-67, discussed in Chapter 5.

67. See DP 26, at para 4.70.

68. DP 26, at 4.72.

69. DP 26, at 4.75. See also para 5.61.

70. New South Wales Law Reform Commission *First Report on the Legal Profession: General Structure and Regulation* (LRC 31, 1982) (hereafter "LRC 31") paras 5.26-5.40.

71. New South Wales Law Reform Commission *Legal Profession Discussion Paper No 1: General Regulation* (1979) 189-192.

72. New South Wales Law Reform Commission *Second Report on the Legal Profession: Complaints, Discipline and Professional Standards* (LRC 32, 1982) (hereafter "LRC 32") para 6.22.

73. LRC 31, at para 5.27(iii).

74. See ss 58-59, and Schedule 3.

75. LRC 31, at para 5.27(vi).

76. New South Wales. Attorney General's Department *The Structure and Regulation of the Legal Profession* (Issues Paper, November 1992) at 44.

77. DP 26, at paras 5.62-5.67. See also paras 5.120 and 5.140.

78. DP 26, at para 5.67.

79. Law Society of New South Wales *The legal profession disciplinary process - Trends and statistics* (October 1992) (hereafter, "Law Society Trends and Statistics").

80. Discussed in DP 26, at paras 3.40-3.45

81. VLRC 48, at para 83, Recommendation 1.

82. Discussed in DP 26, at paras 3.120-3.126.

83. See DP 26, at para 3.150.

84. For a description of the nature and operations of the Panel, see DP 26, at paras 2.70-2.85.

85. The proposal is outlined in DP 26, at paras 5.89-5.92.

86. DP 26, at paras 5.93-5.95.

87. For example, only 21 solicitors were referred to the Disciplinary Tribunal in 1990; 8 in 1991, and 11 in the first six months of 1992. See Law Society Trends and Statistics, Table 7. Between 1988-1991, 13 barristers were sent to the Disciplinary Tribunal.

88. DP 26, at paras 5.29-5.34.

89. NSW Department of Health *Complaints Unit 1987 Annual Report* (1987) 6.

90. See DP 26, at paras 3.155-3.156.

91. Clause 3.

92. DP 26, at paras 5.148-5.149.

93. See Weisbrot, at 188-192.

94. DP 26, at paras 3.129-3.130.

95. DP 26, at para 4.86.

96. DP 26, at paras 4.89-4.91.

97. DP 26, at paras 4.93-4.101.

98. The Law Society operates a "Law Care" program which provides many of these services. See also the ABA Report, Recommendation 3.2.

99. ABA Report, at 50, Recommendation 14.

100. ABA Report, at 52, Recommendation 16.

101. American Bar Association Standing Committee on Professional Discipline *Model Rules for Lawyer Disciplinary Enforcement* (1989) r 8. (Hereafter, "ABA Model Rules".)

102. ABA Model Rules, commentary at 18.

103. DP 26, at paras 4.104-4.114. See the *Legal Profession Act* 1987 (NSW) ss 67 and 168.

104. See DP 26, at paras 3.146-3.151.

105. Submission of 31 July 1992, at para 1.4..

106. Submission of 31 July 1992, at 1-2.

107. Submission of 26 June 1992, at 6-7.

108. Submission of 12 June 1992, at para 28.

109. Submission of 10 August 1992, at 3.

110. Submission of 19 August 1992, at 1.

111. Submission of 17 August 1992, at 1.

112. Interview of 19 May 1992, together with a written submission.

113. See DP 26, at paras 3.146-3.151. See also D B Wilkins "Who Should Regulate Lawyers" (1992) 105 *Harvard Law Review* 799-887.

114. Although the private associations, the Law Society and Bar Association, are vested with public functions and powers under the *Legal Profession Act* 1987 (NSW).

115. The second head of this reference will be the subject of a separate Discussion Paper, to be released shortly, and Report.

116. See J Tombs "Independent Prosecution Systems" in G Zdenkowski et al (eds) *The Criminal Injustice System Vol 2* (1987). See also D Brown, D Farrier, D Neal and D Weisbrot *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (1990) 293-303.

117. M J Hall "Gotcha! The care and feeding of the state's disciplinary watchdog" (August 1992) *California Lawyer* 44. See DP 26, at paras 3.146-3.151.

118. Hall, at 44.

119. B Mahan, "Lawyers Who Defend Lawyers" (April 1992) 12(4) *California Lawyer* 24, at 25.

120. The accountability of the existing Complaints Unit is discussed in DP 26, at paras 3.182-3.183.

121. DP 26, at para 5.29.

122. See Recommendations 13-14.

123. See Recommendations 15-20.

124. See Recommendations 69-70.

125. See Recommendations 35-43.

126. See Recommendation 7.

127. See Recommendations 58-63 and 68.

128. See Recommendations 7-10 and 46-57.

129. DP 26, at para 4.110.

130. If the State Bar declines to file formal charges with the Bar Court, a complainant may appeal to a Complainants Grievance Panel, which has substantial lay representation. There also is an "independent discipline monitor" who reports annually to the State Legislature.

131. Hall, at 44.

132. DP 26, at para 5.126.

133. Bar Association submission of 20 February 1992, at 16-17. See DP 26, at para 5.127.

134. DP 26, at para 5.128.

135. DP 26, at para 5.102.

136. Public official and public servants in New South Wales including lawyers are, of course, subject to regulation by the Ombudsman, the Independent Commission Against Corruption, and other regulatory agencies.

137. DP 26, at paras 5.102-5.103.

138. ACA submission of 23 December 1991, at 1-2.

139. See Weisbrot, at 3, 65-66, 259-264 and 270.

140. *Street v Queensland Bar Association* (1989) 168 CLR 461.

141. Trade Practices Commission *Study of the Professions: Legal Profession* (Issues Paper, July 1992).

142. By the *Law and Justice Amendment Act (No 3)* 1992 (Cth) which, among other things, amends s 55E of the *Judiciary Act* 1903 and inserts new ss 55F and 55G.

143. Commonwealth AG's TPC Submission, Proposal 22, at 53.

144. See VLRC 48.

145. See Weisbrot, at 63 (Table 2) and 65.

146. DP 26, at para 5.129.

4. The Proposed New System

OVERVIEW

4.1 Following on from the Commission's identification of the general (or "best practice") principles which should govern the system of handling complaints against legal practitioners and the testing of the existing system against those principles in the previous Chapter, the Commission now sets out its recommendations for major reform, with supporting commentary. For reasons of convenience only, we present the "core" recommendations in this Chapter, which relate to the internal workings of the proposed system. The remainder of recommendations, which deal with external scrutiny, education and prevention, and ancillary matters (of no less importance), are presented in Chapter 5. (Chapter 6 contains a summary of all recommendations.)

4.2 In the preceding Chapter, we concluded that the design of a proper system of complaints handling must recognise that there are multiple aims which must be met: (1) there is a consumer dimension, with the consequent need to redress the complaints of dissatisfied users of legal services, but there is also (2) the need to ensure the diligence and competence of individual practitioners, as well as (3) setting and maintaining high standards of ethics and practice for the legal profession generally. Our central criticism of the operation of the existing system is that it is geared mainly to the second aim, fails to achieve even this adequately in relation to lower-level unsatisfactory professional conduct, and does not sufficiently address the other two aims.

4.3 Consequently, the vast bulk of complaints in any year are dismissed, which leaves complainants cold and sends the legal profession the quite incorrect message that, apart from some rare and spectacular lapses by a few individual lawyers (usually involving some aspect of dishonesty), there is really no need to improve the general standard of services provided. In fact, the Commission's File Survey confirmed that while a few complaints are completely insubstantial, most of them do point to genuine problems of service delivery, such as inordinate delay, poor lawyer-client communications, discourtesy and so on, for which the consumer gains no redress and the legal practitioner no sanction or incentive to improve.

4.4 Thus, the Commission has endeavoured to design a new system which is much more consumer-oriented and which actually will deal seriously and effectively with most complaints and disputes. Among other things, this will require educating the public about the nature of legal services and their rights and remedies under the disciplinary system, and educating the legal profession about the standards of practice and common courtesy to which clients should be able to feel entitled.

4.5 Briefly, the key features of the recommended new system include:

> both the perception and the reality of much more independence from the legal profession, through the establishment of the office of Legal Services Ombudsman, and changes to the provisions regarding the appointment of lay and legal participants in the disciplinary system;
>
> strengthening the mechanisms for ensuring the accountability of the legal professional associations and the other institutions involved in the complaints handling system, through the reinforcement of the powers and resources of the lay person-dominated Conduct Review Panel (as well as by the creation of the office of the Legal Services Ombudsman);
>
> much easier access to the system for potential complainants, in terms of information, language, physical access and so on;
>
> a more simple, streamlined structure to the system, with the central intake of all complaints about the (non-)delivery of legal services (including disputes about fees and costs), a central source of advice and assistance about making complaints (through the Legal Services Ombudsman), and a single Legal Services Tribunal to conduct hearings with greater and more flexible powers to sanction lawyers and make compensatory orders in favour of complainants;

> redress of the current imbalance of rights and safeguards between complainants and lawyers, with the creation of a statutory Complainants' Charter of Rights;
>
> a clearer distinction between consumer-type disputes and disciplinary matters, with a much greater emphasis on consensual dispute resolution, arbitration and compensation in the former cases; and
>
> increased attention to education and prevention measures, such as compulsory training in legal ethics for law students, feedback to the legal profession from the disciplinary system, and the emphasis on "Client Care" principles and practices in solicitors' offices.

4.6 The centrepiece of the reforms is the establishment of the office of Legal Services Ombudsman, around which the rest of the proposed system is designed. At the conclusion of the preceding Chapter, the Commission discussed the powerful concerns about independence and accountability which led us to the conclusion that the primary responsibility for the regulation and discipline of the legal profession could no longer be left to the profession itself, and which led us to prefer the strategy of using a Legal Services Ombudsman, rather than a Legal Services Complaints Commission.

4.7 Throughout the recommendations the Commission proposes that the independent bodies involved in the complaints handling system be referred to as the Legal Services Ombudsman, the Legal Services Tribunal and the Legal Services Conduct Review Panel. The current legislation uses the prefix "Legal Profession" to designate the various disciplinary bodies now in existence; [1] however, the Commission believes that there should be no possibility of confusion between those institutions which are controlled by the legal profession (such as the Councils of the Law Society and the Bar Association, and the committees which operate under the delegated authority of the Councils) and those which are designed to be independent of professional control.

RECOGNITION OF THE MULTIPLE AIMS OF THE LEGAL PROFESSION'S DISCIPLINARY SYSTEM

1. Part 10 of the Legal Profession Act 1987 should expressly recognise that the multiple aims of the disciplinary system are: (1) to redress the consumer complaints of users of legal services; (2) to ensure compliance by individual legal practitioners with the necessary standards of honesty, diligence and competence; and (3) to maintain the ethical and practice standards of the legal profession as a whole at a sufficiently high level.

2. Fulfilment of the multiple aims of the disciplinary system requires a comprehensive, integrated approach, which provides for: community education about the legal system and the role of lawyers; assistance for complainants to facilitate access to the complaints system; the prompt, thorough investigation of complaints; the diversion of appropriate matters for consensual dispute resolution; the formal hearing of allegations of unsatisfactory professional conduct and professional misconduct; a flexible range of sanctions and remedies which satisfy the needs of complainants and the public interest in effective discipline; and education, counselling, and other assistance programs for lawyers.

Commentary (Recommendations 1-2)

4.8 The Commission stated in DP 26 that the complaints handling system should be:

> more attuned to redressing the grievances of individual complainants, but this should not be at the expense of the general public interest in ensuring that licensed legal practitioners conduct their work with honesty, diligence and competence, and that the standards of practice required of lawyers generally are maintained at a sufficiently high level.[2]

4.9 Thus, the system for handling complaints against lawyers must serve at least three aims: to address promptly the consumer-type concerns of particular complainants; to secure the compliance of individual legal practitioners with the standards of professional practice; and to ensure that the standards of the profession generally are maintained at a high level. At the same time, it must be remembered that rights of

professional practice must not be arbitrarily removed or limited, nor should a practitioner's professional reputation be capriciously tarnished, so that a lawyer who has been complained about should be entitled to expect a fair hearing before suffering any penalty or being subject to any criticism.

4.10 In the preceding chapter, in relation to "best practice" principles for complaints handling, the Commission noted that the "one procedure fits all" approach which has applied in NSW has largely lost sight of the (first and third) aims of client/consumer satisfaction and maintenance of high professional standards. In practice, the traditional approach has had the flavour of litigation, with the focus on whether the complainant has made sufficiently strong allegations to put into question the respondent lawyer's continued rights of practice.

4.11 In DP 26, the Commission stated that one of the biggest problems with the existing system has for some time been the "profound gap between what angered clients and what lawyers and their professional associations saw as important enough to merit disciplinary action." [3] While clients overwhelmingly complain about such matters as negligence, incompetence, delay, poor communications, discourtesy and overcharging, these complaints are rarely proceeded with and rarely result in any censure, sanction or compensation. Even where the complainant has achieved the desired result - the reduction of a bill or the surrender of files, for example - the lengthy delays involved may take the gloss off the successful resolution. It is clear from the submissions received and from the Commission's own research - especially from the survey of Law Society complaint files - that this was fair criticism and that the problems are still pervasive.

4.12 The systems for handling complaints against solicitors in Victoria and in England and Wales have changed in recent years, putting far more emphasis on the prompt resolution of clients' grievances through the use of consensual dispute resolution techniques and the ready award of compensation.[4] The submissions of both the Law Society and the Bar Association recognise the need to move in this direction and propose mediation schemes for lawyer-client disputes.

4.13 The Commission generally supports these initiatives and makes numerous recommendations aimed at increasing the use of mediation and arbitration, and making compensation more readily available for the settlement of consumer-type disputes. However, the Commission stands by its caveat, quoted above, that a greater orientation towards client concerns must not come at the expense of the other aims of the system. What is needed is a comprehensive system with a number of separate components which, when taken together, meet all of the desired aims. [5]

THE LEGAL SERVICES OMBUDSMAN

3. An office of Legal Services Ombudsman should be established as an independent, statutory authority. The Legal Services Ombudsman should be appointed by the Governor in Council for a term not exceeding seven years, after which the person is eligible for reappointment.

4. It should be open to the Governor to appoint one or more persons (in the same manner) to the position of Deputy Legal Services Ombudsman if the workload of the office so requires.

5. The office should have a secretariat providing sufficient professional, support and technical services to discharge its statutory responsibilities promptly and effectively in the public interest.

6. A person is qualified to be appointed as the Legal Services Ombudsman if he or she is a person who is broadly familiar with the nature of the legal system and legal practice and possesses sufficient qualities of independence, fairness and integrity. The Legal Services Ombudsman need not be legally qualified, nor should legal qualifications or experience be a disqualifying factor; however, in the event of the appointment of a non-lawyer, legal advice should be available within the office.

7. The functions of the Legal Services Ombudsman should be to:

> **handle the initial intake of all complaints against legal practitioners - including non-lawyers who offer legal services, such as conveyancers;**

provide complainants and potential complainants with the appropriate level of advice and assistance about making complaints or pursuing other avenues and remedies;

regularly monitor sources of public information, such as news and current affairs reports and court decisions, which may contain information about the conduct of legal practitioners;

investigate directly complaints made against lawyers who currently serve or have recently served on one of the professional Councils or are otherwise associated with a Council or the complaints handling process, as well as those complaints which the Ombudsman believes should be handled directly in the interests of justice and public confidence;

refer all other complaints to the relevant professional Council for investigation (such reference may contain a recommendation to investigate, divert to mediation, or both);

commence an investigation or refer a matter to one of the professional Councils on his or her own initiative, such as where allegations have been aired publicly;

prosecute disciplinary matters before the Tribunal, following an investigation or upon the request of the Conduct Review Panel or a professional Council;

be responsible for community education about the regulation and discipline of the legal profession;

assume a general duty to assist in the enhancement of professional ethics and standards, through liaison with institutions which provide training and education for service providers, as well as through direct efforts, such as by sponsoring research, publishing, and holding seminars and workshops; and

report annually to Parliament through the Attorney General, and at least semi-annually to the professional Councils.

8. In the proper discharge of the functions of the office, the Legal Services Ombudsman should be entitled to:

have access, on a confidential basis, to all of the files and other records kept by the professional associations in relation to the assessment and investigation of complaints against lawyers and the disciplinary system generally;

have sufficient powers to conduct its investigations effectively, including the same powers available to the professional Councils in this respect;

have the power to dismiss a complaint after investigation, on the same bases available to the professional Councils in this respect;

attend and participate in any meeting of the professional Councils (or their committees) considering complaints;

attend the hearings of the Legal Services Tribunal as an observer;

attend any dispute resolution (mediation or conciliation) conference as an observer; and

protection from all liability for anything done in good faith in the course of executing his or her statutory responsibilities.

9. The Legal Services Ombudsman may, in the exercise of his or her discretion, take over the conduct of the investigation of a complaint which has been referred to one of the professional

Councils, where the interests of justice so require. In such a case, the Legal Services Ombudsman should be entitled to uplift the file and any other relevant material from the Council.

10. The Legal Services Ombudsman should, on a regular basis, conduct surveys of the views and levels of satisfaction of complainants and respondent lawyers with the complaints handling system. Such surveys should be published in the Legal Services Ombudsman's Annual Report.

Commentary

Generally

4.14 The Commission's recommendation for the establishment of an office of Legal Services Ombudsman is based variously on the need for perceived independence, fairness and external scrutiny.

4.15 As discussed in some detail in DP 26, [6] there is now a Legal Services Ombudsman in England and Wales, who mainly has a review function.[7] However, in the model we recommend in this Report, the Legal Services Ombudsman would have a greater and more direct role in the process, including providing assistance in the formulation of complaints and investigating some complaints. (Thus, for reasons of natural justice and potential conflict of interest it would be inappropriate for the Legal Services Ombudsman also to serve as the external monitor, and we prefer to leave that function to the Conduct Review Panel.)

4.16 The Commission has chosen to use the title "Legal Services Ombudsman" for the person selected to play the central role in ensuring the independence, accountability and efficiency of the complaints handling system. As we wrote in DP 26:

> The term is well-known and understood by the general public and the media (notwithstanding its Swedish origins), and carries the clear connotation of the independent and impartial investigation of complaints. While the title Ombudsman initially was used mainly in relation to complaints against governments or government officers,[8] there is a recent trend towards a more general usage.[9]

4.17 A "Banking Ombudsman" has been established in England [10] and in Australia, [11] and there have been calls in this country for similar positions to be created in the insurance and telecommunications industries. A number of newspapers (including the Sydney Morning Herald) have experimented with an in-house Ombudsman, supplementing the loose regulation provided by the Australian Press Council.

4.18 The preliminary submission of the Australian Consumers Association pointed out that a single ombudsman could be expected to attain a higher public profile than a complaints commission, leading to greater awareness of and trust in the complaints handling system. [12]

4.19 The Commission agrees that "putting a human face on the complaints handling system" has significant advantages, and considers the title "Ombudsman" to be the most appropriate one. However, the proposed title of the office is much less crucial than the proposed role of the office. The Commission notes, for example, that the Victorian Law Reform Commission recommended that an office of "Legal Services Commissioner" be established in that state.[13] The NSW Department of Community Services (DCS) recently has released a discussion paper favouring the creation of a "Community Services Commissioner" who would "investigate, mediate and conciliate serious complaints about programmes or services". [14] However, DCS also has left open the possibility of the appointment instead of a "Deputy Ombudsman (Community Services)", with a similar role.

4.20 The broad role of the office of Legal Services Ombudsman is described in Recommendation 7, and the powers necessary to fulfil those functions effectively are listed in Recommendations 8-10. The establishment of the Office itself, and the qualifications for appointment, are the subject of Recommendations 3-6.

The Office of Legal Services Ombudsman (Recommendations 3-6)

4.21 In Recommendation 3, the Commission formally proposes the establishment of the Office of Legal Services Ombudsman as an independent, statutory authority. The Office itself should have a secretariat (Recommendation 5) with sufficient resources - secretarial, clerical, administrative, professional, technical and technological - to enable the Legal Services Ombudsman to discharge his or her functions effectively. For example, the Office will require a good computer system, adequate telephone facilities and premises for dealing with members of the public, some library facilities, modern filing systems, and so on. Funding for the office is the subject of Recommendation 64, discussed in Chapter 5, below.

4.22 The Commission recommends (Recommendation 3) that the Legal Services Ombudsman should be appointed by the Governor in Council for a term of up to seven years, with the possibility of re-appointment, which is consistent with the nature and terms of appointment of other similar, independent, statutory office holders, such as Law Reform Commissioners, [15] the Ombudsman, [16] and the principal Commissioner of the Independent Commission Against Corruption.[17] The period of tenure is designed to promote the perception and actuality of independence, while retaining a degree of accountability that appointment-until-retirement (as in the case of judges) does not.

4.23 The method of appointment is important from the point of view of assuring public confidence in the new institution. In DP 26, the Commission wrote:

> Without doubt, the Legal Services Ombudsman must actually be, and be seen to be, above partisan political and sectional interests. As with all statutory office holders, the formal appointment should be by the Governor in Council (that is, the Governor acting on the advice of the Cabinet), after nomination by the Attorney General. The position should first be advertised in the media to attract a suitable field of candidates.[18]

We continue to believe that this is the most appropriate course. Regard should be had to the merit selection processes mandated in the Public Sector Management Act 1988 (NSW). If a Public Council on Legal Services were to be established, [19] it could play an important (advisory) role in the selection process.

4.24 We have not specifically recommended any method of removal of the Legal Services Ombudsman, but this also should be consistent with the position in respect of other statutory officers; ie, removal by the Governor (for proven misbehaviour) upon the address of both Houses of Parliament.[20]

4.25 The Commission anticipates that the appointment of a single Legal Services Ombudsman would be sufficient initially, assuming adequate support staff are provided as recommended. However, it may be that in future the workload of the Office will require the appointment of one or more Deputies to assist the Legal Services Ombudsman, at his or her direction (Recommendation 4). Such appointments should be made in the same manner as the appointment of the Legal Services Ombudsman - that is, by the Governor in Council, for a period of up to seven years. We note that provision is made in the governing Act of the Ombudsman's Office for the appointment of a Deputy and one or more Assistants, [21] and in the Independent Commission Against Corruption's Act for the appointment of Assistant Commissioners. [22]

4.26 The Commission gave careful attention to the qualifications of the Legal Services Ombudsman. The "threshold question is whether appointment to the office of Legal Services Ombudsman should be limited to persons without legal qualifications". [23] In England and Wales, for example, the legislation specifies that the Legal Services Ombudsman "shall not be an authorised advocate, authorised litigator, licensed conveyancer, authorised practitioner or notary".[24]

4.27 In DP 26, the Commission wrote:[25]

> The main rationale for limiting the position to non-lawyers is that the external monitoring function is best performed by a person who is not, and would not be suspected of being partial to the interests of the legal profession.
>
> The Commission agrees that the external monitor, whether a Legal Services Ombudsman or some other officer, must be free from any reasonable suspicion of bias (for or against the profession). However, it is less certain that the essential characteristic of independence means that anyone with

> legal qualifications automatically should be debarred from holding the office of Legal Services Ombudsman. Among practising lawyers, academic lawyers, magistrates, judges and non-practising lawyers (ie, those with legal qualifications who are working in management, banking, journalism and so on), there must be many persons with sufficient personal qualities of independence, fairness and integrity to warrant appointment. Conversely, among non-lawyers, there obviously will be many persons who would be inappropriately sycophantic, insensitive to the needs of consumers, or otherwise unsuitable for appointment.
>
> The Commission believes there are some important advantages in having a Legal Services Ombudsman who understands the substance, context and procedures of legal practice. The process of appointment, discussed above, which involves consultation and careful consideration, should ensure that the particular person chosen has the attributes and community standing to be, and be seen to be, independent of the profession. If a lay person was appointed as the Legal Services Ombudsman, he or she should could, where appropriate, take legal advice from some perceptibly neutral lawyer, such as an academic lawyer or retired judge.

4.29 This still represents the Commission's considered view (Recommendation 6). The Legal Services Ombudsman should be a person of demonstrable independence (and impartiality), fairness and integrity. Legal qualifications probably are desirable, but not essential. The submission from the NSW Commissioner for Consumer Affairs, Mr John Holloway, favoured the appointment of a person with legal qualifications.

4.30 It should be noted that the appointment of a legally-qualified Legal Services Ombudsman would not in itself depart from the Commission's stated aim of increasing lay participation and external scrutiny, since elsewhere in this Report we propose the continued (indeed, the increased) involvement of lay participants in other parts of the disciplinary system - such as on the Professional Conduct Committees of the Law Society and Bar Association, on the new Legal Services Tribunal, and on the Legal Services Conduct Review Panel.

Functions of the Legal Services Ombudsman (Recommendation 7)

4.31 Reception of all complaints. The office of the Legal Services Ombudsman should be the central intake agency for all complaints relating to the provision (or, sometimes, non-provision) of legal services. Generally this involves complaints by clients or former clients against their own lawyers, but the system is not so limited, and it may be that complaints against lawyers will be received from (eg) other lawyers, judicial officers, opposing parties, government officials, or members of the public. (In Recommendation 11, below, we specify that any person may make a complaint.) The system already deals to some extent with complaints against persons employed in lawyers' offices,[26] and there are provisions prohibiting the practice of law by "unqualified practitioners". [27] With the trend towards the deprofessionalisation of certain legal services, the system also should be able to accommodate the reception of complaints against providers of legal services who are not lawyers with practising certificates. For example, residential conveyancing, soon will be performed lawfully by licensed conveyancers as well as by solicitors. Under the new legislation, [28] the discipline of conveyancers is to be handled by the Law Society Council and the existing disciplinary bodies (the Legal Profession Standards Board, Disciplinary Tribunal, and Conduct Review Panel).

4.32 The use of the office of the Legal Services Ombudsman as the central intake agency has several major advantages. First, it affords prospective complainants the confidence to approach a clearly independent and impartial body. In DP 26, the Commission noted that:

> The initial step in the complaints-handling process may well be the most important, especially from the point of view of the complainant. Persons making complaints must be assured that their problems will be handled promptly, efficiently, sensitively and impartially. [29]
>
> The fact that a complaint about a lawyer must be made to that lawyer's professional association may have the effect of dissuading some dissatisfied clients and others from lodging a complaint. [30]

4.33 The American Bar Association's Commission on Evaluation of Disciplinary Enforcement has characterised this latter issue as "the familiar criticism that the fox is guarding the henhouse", which, given a

certain existing level of public distrust, is likely to be made even where the disciplinary system is in fact "fair to both respondents and complainants". [31]

4.34 Secondly, a central intake agency would permit the establishment of a single registry of complaints and inquiries,and permit the follow-up of some inquiries which do not result in a formal complaint. The legislation currently requires complaints to be in writing before a formal investigation can commence, [32] and the Commission believes that this is appropriate. However, the Commission is aware that there are some dissatisfied clients and others who go to the trouble of making the initial contact but then do not follow this up with a written complaint for one reason or another:

> There are many reasons why people may fail to follow up their concerns about a lawyer's conduct with a formal complaint. These include: the perception (correctly or incorrectly formed) that they were treated unsympathetically when they made the initial contact; the inability or unwillingness to put things in writing; the lack of opportunity to make use of the complaints assistance services provided during working hours; uncertainty over costs; or a sense of futility in complaining about a lawyer to that lawyer's professional association. [33]

4.35 Unfortunately, neither the Law Society nor the Bar Association currently keep detailed records of telephone calls to, or personal attendance at, their offices by persons who may wish eventually to complain about the conduct of a legal practitioner. In DP 26, the Commission contrasted this approach with that of the Complaints Unit of the New South Wales Department of Health:

> which does carefully record all inquiries made by telephone or in person. There are several good reasons for preferring the latter approach. The initial recording allows for follow-up, after a time, in those cases in which there appeared to a problem of some significance but a formal, written complaint providing full particulars has not been lodged. The Health Complaints Unit has decided that this issue is so important that it has reorganised its operations in recent times to dedicate more resources to the initial intake and follow-up phases of their complaints-handling procedures. This has involved the development of the necessary computer software to track complaints, the use of more senior staff at the initial stages, and regular meetings of staff to consider follow-up. [34]

4.36 The Commission believes that the statutory requirement to take "all reasonable steps" to assist complainants [35] should involve a proper system of recording, monitoring and following up initial contacts from potential complainants. This would now become the responsibility of the office of the Legal Services Ombudsman. Since there is to be increased use of mediation and conciliation (see Recommendations 15-20, below), persons who contact the Legal Services Ombudsman with complaints should be encouraged to participate in these informal dispute resolution processes in appropriate cases where the lawyer-client relationship has broken down, even though the complaint does not raise clear evidence of unsatisfactory professional conduct or professional misconduct.

4.37 This more active approach to the reception of complaints not only benefits individual complainants, but "also provides far more information about the general pattern of complaints, which is ultimately useful for developing policies and strategies aimed at preventing disputes and raising the standards of professional conduct and ethics." [36] (See Recommendation 63, discussed in Chapter 5, below, regarding the need for feedback from the disciplinary system to assist in the enhancement of professional standards.)

4.38 Thirdly, the provision of a single point of entry into the disciplinary system makes the process far more simple and efficient from the perspective of complainants. As discussed in the previous Chapter, one of the Commission's main aims is to streamline the system quite dramatically, to eliminate having the complainant shuttling back and forth before different agencies and institutions, and to avoid the necessity of the complainant having to launch multiple actions in different forums.

4.39 Advice and assistance. It should only be necessary for a person to identify that he or she has a dispute of some kind with a provider of legal services; the Legal Services Ombudsman should then be able to provide full and effective advice and assistance about how best to remedy the problem. In Recommendation 14, discussed more fully below, the Commission specifies that the right to comprehensive (and comprehensible) advice and assistance should be included in a statutory Complainants' Charter of Rights.

4.40 Media monitoring. Another important responsibility of the office of the Legal Services Ombudsman should be to monitor court decisions and, especially, press reports for information or allegations about the conduct of legal practitioners. The American Bar Association's Commission on the Evaluation of Disciplinary Enforcement has made a similar recommendation, commenting that:

> Proactive research includes actively monitoring such sources of information about possible lawyer misconduct as media stories and court decisions. Without the staff resources to monitor this information, lawyer misconduct that is public knowledge may escape disciplinary counsel's attention. 37

4.41 This Commission believes that there is almost nothing more certain to lead to the loss of public confidence in the administration of the complaints handling system than for allegations of professional misconduct (in the colloquial sense) to become public knowledge without any prompt, appropriate action or response from the bodies charged with investigating such improprieties and ensuring the fitness of legal practitioners. The Commission does not anticipate that this effort should be unduly onerous or expensive. It may be performed by staff or, perhaps, simply through subscription to one or more of the many media-monitoring and "clipping" services.

4.42 Referral and direct investigation. In many or most cases, the Legal Services Ombudsman will, having assisted the complainant to formulate a proper complaint, refer the matter to the relevant professional Council(s), possibly with an attached recommendation to investigate or divert for consensual dispute resolution, or both. The Legal Services Ombudsman likewise may refer matters to the professional Councils which have commenced on the Ombudsman's own initiative (such as where the Legal Services Ombudsman is aware of publicly-aired allegations of misconduct on the part of a lawyer).

4.43 However, it is an essential part of the Commission's recommended system that the Legal Services Ombudsman also be entitled to investigate a matter directly, in certain circumstances. Direct investigation should be obligatory where the subject of a complaint (or an investigation commenced on the Legal Services Ombudsman's own initiative) is a current or recently retired member of one of the professional Councils or is otherwise associated with a Council or with the complaints handling process. This latter category might include (but is not limited to) certain current or past employees of the professional associations (especially those who serve as senior managers), lawyers who serve on important Council committees (especially complaints committees), spouses or other close relatives of Council members, and so on.

4.44 The Commission sees this power as fundamental to ensuring that there is a public perception that the complaints handling process is independent and impartial, and is not part of a "club" in which prominent lawyers look after each other's interests. The natural justice protection also runs in the other direction - a professional Council should not be placed in the position of feeling the pressure to deal unnecessarily harshly with a former member or employee in order to avoid adverse allegations.

4.45 One of the major precipitating factors in the recent changes to the regulation of the legal profession in England and Wales (including the establishment of a Legal Services Ombudsman) was the considerable public outcry and agitation in 1982-1983 over the so-called "Glanville Davies affair". In that matter, 38 a complaint of gross overcharging was made by a client against the named solicitor , who at that time had been a member of the Council of the Law Society of England and Wales for 15 years. Although the solicitor's bill was reduced after "taxation" (review) by court officers from [[sterling]]197,000 to less than [[sterling]]68,000, the Law Society Council refused to pursue any disciplinary action and this decision was not challenged by the then-existing Lay Observer. The client was finally forced to take judicial action, and the Court found that Glanville Davies had been guilty of "gross and persistent misconduct", ordering that he be struck off the Roll of solicitors.

4.46 The Commission recommends that the Legal Services Ombudsman also have a more general power to investigate directly "in the interests of justice and public confidence". The decision whether to refer a matter to a Council or to investigate directly should be entirely at the discretion of the Legal Services Ombudsman. In practice, the decision to directly investigate may be because the particular matter has some special or unusual element in it, or has been the subject of public attention or controversy, or involves the possibility of a real or perceived conflict of interest if referred, or even because the Legal Services Ombudsman simply

wishes to handle a representative selection of matters in order to provide a "control group" vis-a vis the professional Councils. No doubt practical considerations also will be taken into account, for there is little value in the Legal Services Ombudsman taking on such an active caseload that he or she cannot devote sufficient attention and resources to each retained matter. (See also below, the power of the Legal Services Ombudsman under Recommendation 9, to take over the investigation of a complaint from one of the professional Councils.)

4.47 Prosecution of matters before the Legal Services Tribunal. Where the Legal Services Ombudsman has conducted the investigation of a complaint (or taken over the investigation under Recommendation 9), and has decided that the matter must proceed to the Legal Services Tribunal for a hearing, the Legal Services Ombudsman normally should also prosecute the matter before the Tribunal. Similarly, the Commission has recommended in this Report that the Conduct Review Panel, after review, should be entitled to refer matters directly to the Tribunal, without the intervention of the Attorney General. (See Recommendation 54, below.) In such cases, the Panel may request that the Legal Services Ombudsman or one of the professional Councils (as appropriate) prosecute the matter before the Tribunal. It also may be that on occasion, after completing an investigation, the Legal Services Ombudsman or a Council might believe that it is desirable for the prosecution be handled by the other, eg to avoid a potential conflict of interest. In such circumstances, it should open for a request to be made along these lines and such a request normally should be favourably acted upon.

4.48 Community and professional education. The general nature of the office and the specific role of the Legal Services Ombudsman in the complaints handling process make it necessary and appropriate for the Legal Services Ombudsman also to have responsibilities for community education, and for continuing legal education aimed at lifting standards of professional ethics and practice. This will involve, among other things, "promoting and conducting research; holding seminars, conferences and public meetings; publishing materials for public and professional use; utilising the media". [39]

4.49 In their submissions, the NSW Commissioner for Consumer Affairs, the Registrar of the Legal Profession Disciplinary Tribunal, and the Australian Consumers' Association (ACA), all agreed that there was a strong need for greater public awareness of the role of lawyers, the delivery of legal services, and the processes for complaining about the conduct of lawyers. The preliminary submission of the ACA noted that an advantage of the Legal Services Ombudsman proposal was that a "single Ombudsman can achieve a higher public profile leading to greater public awareness, trust and therefore greater accessibility". [40]

4.50 Reporting requirement. Finally, the Legal Services Ombudsman should be under a statutory obligation to report annually to the New South Wales Parliament (through the Attorney General), and at least semi-annually to the Law Society and the Bar Association. [41] The importance of this is twofold: first, it helps to ensure the public accountability of the office of the Legal Services Ombudsman itself; secondly, it affords the Legal Services Ombudsman a regular, formal mechanism for reporting on the state of the complaints-handling system, and for making suggestions about the improvement of that system and the enhancement of professional standards. Both the reports to Parliament and to the profession should be privileged. Such reports are likely to receive media attention, which will assist matters in terms of both community education and external scrutiny.

Powers of the Legal Services Ombudsman (Recommendations 8-10)

4.51 Investigatory powers. In order to discharge his or her responsibilities effectively in the public interest, the Legal Services Ombudsman needs to be given sufficient power both to investigate some complaints directly and to provide oversight of the handling of the remainder of complaints by the professional associations.

4.52 In respect of the former, the Legal Services Ombudsman should have the same powers as the legal professional Councils [42] and other similar bodies [43] to investigate complaints, such as to compel a reply or the supply of other relevant information from a respondent lawyer, to obtain files and other records from the lawyer involved, and so on. (See also Recommendation 23, below.) Where the Legal Services Ombudsman has directly investigated a complaint, he or she should be able to dismiss the complaint in the same manner (that is, with or without a reprimand) and on the same bases as the professional Councils. [44] Following an

investigation, the Legal Services Ombudsman should forward to the relevant professional Council any material which bears upon the issuing, suspension or cancellation of a practising certificate. [45]

4.53 Powers to observe. The Legal Services Ombudsman should be entitled to have access at all times, on a confidential basis, to all files and records kept by the professional associations relevant to the assessment and investigation of complaints against lawyers. For example, it may be important for the Legal Services Ombudsman in some cases to know the "complaints history" of the particular lawyer to decide whether to reprimand the lawyer or to refer the complaint to the Legal Services Tribunal for a hearing.

4.54 Such open access to the complaints files and records of the professional association also is essential to the Legal Services Ombudsman's oversight function. Similarly, the Legal Services Ombudsman should be free to attend any Council meeting or meeting of a committee of Council, dispute resolution conference, disciplinary hearing or other related proceeding in order to satisfy himself or herself that the proceedings are conducted in a fair and effective manner. The preliminary submission of the Law Society acknowledged this need in its proposal for an upgraded Lay Observer scheme. [46]

4.55 Protection from liability. The Legal Profession Act 1987 already provides that "no matter or thing" done in good faith for the purpose of executing statutory responsibilities for complaints handling by a Council, the Conduct Review Panel, the Standards Board or the Disciplinary Tribunal, shall subject a person to "any action, liability, claim, or demand". [47] The Act should be amended to extend this protection from liability for acts done in good faith to the Legal Services Ombudsman when this office is established.

4.56 Power to take over an investigation. One of the most important of the Legal Services Ombudsman's recommended powers (Recommendation 9) is the discretion to take over the conduct of the investigation of a complaint which has been referred to one of the professional Councils, where in the opinion of the Ombudsman, "the interests of justice so require". In such cases, the Legal Services Ombudsman should be entitled to uplift the complaints file and any other relevant material from the Council, in order to complete the investigation properly. In practice, this power would likely be used in circumstances in which (for example) an actual or possible conflict of interest arose, or there was a substantial and unreasonable delay in the conduct of the investigation, or there was public disquiet with the Council's handling of the matter.

4.57 The Commission hopes that this discretion will not have to be exercised often, and it should certainly be open to a Council to request that the Legal Services Ombudsman take over an investigation in appropriate circumstances. However, the ability of the Legal Services Ombudsman to take over an investigation should serve as a very powerful check on the powers of the professional Councils and an important safeguard of the public interest, which should re-assure the public of the independence and effectiveness of the disciplinary system.

4.58 Conduct of "satisfaction surveys". In Chapter 2, the Commission detailed its failure to gain the cooperation of the Law Society to conduct a survey of complainants and respondent lawyers to assess the relative levels of satisfaction with the various aspects of the existing disciplinary system. In DP 26, the Commission wrote that it is necessary, in order to preserve public confidence in the fairness and efficacy of the system:

> to put in place mechanisms throughout the disciplinary process which are responsive to the concerns of complainants and which assess the satisfaction of complainants with the manner in which their complaints are being handled. [48]

4.59 The Solicitors' Board in Victoria has recently begun surveying complainants and respondent solicitors to determine their relative levels of satisfaction with the dispute resolution process, thereby providing information which may help to improve services. [49] Such surveys also are common in the evaluation of disciplinary processes by the legal professions in the United Kingdom [51] and the United States.

4.60 The Commission feels sufficiently strongly about this matter to make a separate recommendation (Recommendation 10) that the Legal Services Ombudsman expressly be made responsible for surveying the views and attitudes of complainants and respondent lawyers with respect to the complaints handling system(s). The results should be published as part of the Legal Services Ombudsman's Annual Report. This

requirement should help to ensure a high level of public accountability and provide some of the information needed to "fine tune" and improve the system over time.

THE POSITION OF COMPLAINANTS

11. It should be open to any person to make a complaint alleging that a provider of legal services is guilty of conduct that may constitute unsatisfactory professional conduct or professional misconduct.

12. The lodgment of complaints should be subject to a limitation period of six years from the time of the conduct which is the subject of the complaint. It should be open to a complainant to seek leave from the Legal Services Tribunal to pursue a complaint outside the time limit, where the matter involves a question of professional misconduct.

13. A "Complainants' Charter of Rights", having statutory force, should be inserted into the Legal Profession Act 1987, in order to clarify the position of complainants (and respondent lawyers) and to emphasise the fairness and integrity of the system.

14. The Charter should provide that:

> **Complainants are entitled to receive sufficient advice and assistance in order to prepare a complaint in writing in the prescribed form, and to understand the nature of their rights and responsibilities in the disciplinary process.**
>
> **Complainants are entitled to effective access to the office of Legal Services Ombudsman and other relevant institutions.**
>
> **Complainants - and respondent legal practitioners - are absolutely immune from civil suit for all communications made to the officers of the agency responsible for the handling of complaints, for all communications made to the various disciplinary bodies exercising direct or delegated statutory powers, and for all statements made within the disciplinary proceedings.**
>
> **Complainants must receive regular and adequate notice of the status of disciplinary proceedings at all stages of the proceedings. In general, a complainant should receive, contemporaneously, the same notices and orders the respondent receives as well as copies of the respondent's communications to the agency, except information that is subject to another client's privilege.**
>
> **Complainants must be permitted a reasonable opportunity to rebut statements of the respondent before a complaint is dismissed.**
>
> **Complainants must be notified in writing when a complaint has been dismissed (with or without a reprimand to the legal practitioner). The notice should include a concise recitation of the specific facts and reasoning upon which the decision to dismiss was made. The complainant should normally be given a copy of the investigator's report, unless there are good reasons for not doing so in a particular case (such as problems of confidentiality).**
>
> **Complainants must be given proper notice of any disciplinary proceedings, and should have the right to attend any hearing. Complainants should have the right to appear as a party to the proceedings on the issue of compensation, and may appear as a party in respect of other matters with the leave of the Tribunal or Court, subject to the risk of costs.**
>
> **Complainants have the right to have the dismissal of a complaint or any other adverse decision reviewed by the Legal Services Conduct Review Panel.**

Commentary

Who may complain? (Recommendation 11)

4.61 Under the present arrangements, any person may make a complaint to the appropriate professional Council alleging that a legal practitioner is guilty of conduct amounting to unsatisfactory professional conduct or professional misconduct. [51] In practice, it is usually a client (or former client) who makes a complaint, but complaints also are received from other lawyers, judicial officers, the professional associations themselves, Members of Parliament, the Legal Aid Commission, executors, and others. [52]

4.62 One of the matters of controversy which led to the recent withdrawal by the Minister for Health, the Hon Ron Phillips, of the Health Care Complaints Bill 1992 (NSW), for further consideration and consultation, was the provision which limited the category of complainants to: the client, the parent or guardian of the client, a person chosen by the client to be his or her representative for this purpose, "a health service provider who has sufficient interest in the matter the subject of the complaint", the Director-General of Health or a delegate, and the Minister for Health or a delegate. [53] The provision came under attack from such groups as the Medical Consumers Association and the Chelmsford Victims' Action Group, who claimed that the exposure of "another Chelmsford" might be prevented in future if journalists, concerned individuals, and human rights groups, could not make the running on an issue for the benefit of current or former patients.[54]

4.63 It is outside the Commission's brief to comment upon the health care complaints system, but the Commission does feel strongly that the present position in the legal complaints system - that any person may make a formal complaint - should be maintained, and we have made a Recommendation to that effect.

4.64 The Commission is unaware of any evidence that the open-ended provision in the Legal Profession Act 1987 has been abused or has been the source of any mischief, and in any event the investigating authorities have sufficient powers to dismiss summarily frivolous or vexatious complaints. [55] Perhaps the most dubious use of the legal complaints system has been as a form of collection agency: in the Commission's survey of Law Society and Bar Association complaint files it seemed that some creditors (such as interpreters, expert witnesses, accountants, real estate agents, valuers, and other lawyers) lodge complaints about unpaid bills primarily for the purpose of pressuring or embarrassing the lawyer to pay. Unless there is evidence of a persistent pattern of poor business practices, it is likely that such matters will be sent for mediation in future.

4.65 The Commission was told in some submissions, and observed in a few complaints files, that complainants who are not present or former clients of the lawyer complained about are occasionally discouraged by the professional associations from pursuing their complaints through the disciplinary system. This is not the law, and any such practice should be discontinued. In our view, the benefits of a more open system in terms of public confidence and public protection greatly outweigh any problems which may be caused by the occasional complaint by a person without a legitimate interest in the matter.

Limitation period (Recommendation 12)

4.66 In DP 26, the Commission considered that a limitation period of six years on complaints against lawyers could be appropriate, having regard to the limitation period in respect of civil actions for professional negligence, as well as the limitation period for complaints against lawyers in Victoria. [56]

4.67 The Bar Association's submission proposed a limitation period of six months from the time when the complainant became aware of the conduct [57] which is the subject of the complaint. [58] In the only other submission received on this subject, the Kingsford Legal Centre preferred to impose no limitation period at all, but agreed with the Commission that if there has to be one, six years is appropriate. [59]

4.68 In the United States, the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement specify that disciplinary proceedings shall be "exempt from all statutes of limitations." [60] This is justified on the basis that:

> Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice. The time between the commission of the alleged misconduct and the filing of a complaint predicated thereon may be pertinent to whether and to what extent discipline should be imposed, but should not limit the agency's power to investigate.
>
> Discipline and disability proceedings serve to protect the public from lawyers who are unfit to practice; they measure the lawyer's qualifications in light of certain conduct, rather than punish for specific transgressions. Misconduct by a lawyer whenever it occurs reflects upon the lawyer's fitness. [61]

4.69 The Commission believes that there is considerable force in this argument. However, there is a reasonable countervailing interest in prescribing a limitation period, from the point of view of certainty as well as guarding against the abuse of process. Without any time limit on complaints (or limitation on who can complain), a practitioner may be placed in the position of having to defend allegations where it would be unreasonable for there to be lasting memories or documents or witnesses to the relevant circumstances.

4.70 In the Commission's view, the legislation should specify a limitation period of six years from the time of the conduct which is the subject of the complaint. To provide a measure of flexibility, a complainant or a professional association should be able to seek leave from the Legal Services Tribunal to pursue a claim outside the time period, where the matter involves a question of professional misconduct. (Lesser allegations of unsatisfactory professional misconduct should be statute barred outside the time period.) At the same time, it is always open for the legal practitioner to argue that a complaint - whether made inside or outside the limitations period - amounts to an abuse of process and should be stayed. [62]

4.71 In Recommendation 74, and the accompanying text in the next Chapter, the Committee deals with the more limited issue of complaints based on conduct which occurred before the coming into force of Part X of the Legal Profession Act 1987 (on 1 January 1988).

A Complainants' Charter of Rights (Recommendations 13-14)

4.72 Generally. In DP 26, the Commission noted that the "tenor of much of the Legal Profession Act 1987 suggests that complainants and complaints are to be treated with caution, while legal practitioners who are the subject of a complaint are to be accorded full procedural rights." [63] The Commission suggested that the best remedy for this situation would be to have a legislative statement of a "Charter of Rights" for complainants "in order to make clear the position of complainants and to emphasis the integrity of the system." [64]

4.73 The proposal to establish a Complainants' Charter of Rights was supported in the submissions of the NSW Commissioner for Consumer Affairs, Mr John Holloway, the Australian Consumers' Association, the Kingsford Legal Centre, and the Registrar of the Legal Profession Disciplinary Tribunal, Mr Robert Bennett. The professional associations were less enthusiastic. The Law Society wrote that it "does not agree that complainants are at any disadvantage in respect of the treatment of their complaints under the present system", but maintained that it was "always ready and willing to review its procedures to ensure that complainants have every reasonable opportunity to present their complaints and have them thoroughly investigated". [65] The Law Society did agree with most of the specifically enumerated "rights" proposed by the Commission, but considered that "such procedures can be followed without the requirement of a formal 'Charter of Rights'." [66] Similarly, the Bar Association agreed with most of the specific principles proposed for incorporation, but stated that

> it does not approve of the concept of a "Complainants Charter of Rights". Such a charter runs the risk of introducing inflexibility into the disciplinary proceedings. Further, there is, in the Bar Association's view, no room for a charter weighted in favour of one or other party to the disciplinary proceeding. [67]

4.74 The Commission fundamentally disagrees with the notion that while the specific principles and procedures aimed at ensuring fairness for complainants are appropriate, their statement within a statutory "Charter" is not. The Commission believes that it is symbolically very important for the legislation expressly to support the position of complainants, and it is practically very useful to present the various rights and procedures collectively in Charter form, which will make these matters accessible to the general public in a way that the legislation (and subordinate rules, regulation and practices) ordinarily cannot. The Commission does not believe that with sensible application these broad principles - which really (and properly) do no more than make clear what natural justice requires in the circumstances - would cause any undue inflexibility or other problems.

4.75 Because of the existing imbalance in the Legal Profession Act, most of the recommendations in this Report are aimed at supporting the position of the complainant; however, the Commission also does make a number of recommendations aimed at ensuring fairness for respondent lawyers. [68]

4.76 Access, advice and assistance. The Legal Profession Act currently requires that the professional Councils "take all reasonable steps to ensure that a person who wishes to make a complaint is given such assistance as is necessary" to comply with the statutory formalities. [69] Under the general regulatory scheme recommended by the Commission in this Report, this responsibility would largely pass to the office of the Legal Services Ombudsman.

4.77 The submission from the NSW Combined Community Legal Centres Group emphasised that, in its collective experience, the existing complaints procedures were clearly inadequate to meet the needs of persons from non-English speaking backgrounds, or persons with low literacy skills or other disabilities, preventing them from making an effective complaint. [70]

4.78 Ideally, much of the advice and assistance should be provided face-to-face. The office of the Legal Services Ombudsman should have access to interpreter services (in-house, or through the Ethnic Affairs Commission) and should liaise with the Disability Council of New South Wales and other relevant organisations about the best way to ensure that people with a disability have effective access to the office and that effective communication can be facilitated.

4.79 As the Commission noted in DP 26, this effort also will involve the production of:

> Brochures, pamphlets, videos and other means of communication ... to provide a clear statement (in Plain English) of: the rights and responsibilities of complainants; the assistance which is available to prospective and actual complainants; the general nature of the disciplinary process, including the remedial orders which may be given; and the other forums for the resolution of disputes about the provision of legal services (mediation, civil suits, the Consumer Claims Tribunal, etc). It must be remembered that while some complaints are received from other lawyers, judges, court officials and public officials, the great bulk of complaints are initiated by members of the public (usually clients), who begin the process with very little information about how the disciplinary system works. [71]

4.80 Having regard to the multicultural nature of the community in New South Wales, all of this literature and other media should be available in a wide range of community languages, with careful thought given to the question of "how to convey the information to targeted groups in a manner which most effectively identifies the way in which they actually, commonly receive information. ... More imaginative marketing techniques must be employed to reach more people and convey the information more effectively." [72]

4.81 The Commission acknowledged in DP 26 that the principle of making the disciplinary system more "accessible" to complainants means more than using accessible language, and also includes such practical matters as "location, working hours and minimal formality". [73] Thus, the office of the Legal Services Ombudsman should be able to be reached by public transportation and should be physically accessible to people with a disability. The office should allow some "after normal working hours" access (eg, on Thursday evenings or Saturday mornings), at least by appointment, so that it is not necessary for a person to miss a day's work or to have to make difficult or expensive child care arrangements in order to get advice or make a complaint.

4.82 These matters should be uncontroversial - the submissions of the Law Society, the Bar Association, the Australian Consumers' Association, the Commissioner for Consumer Affairs, the Community Justice Centres, and the Combined Community Legal Centres Group all agreed with the Commission's proposals in DP 26, upon which the recommendations in this Report are based.

4.83 Immunity for complainants and respondents. In DP 26, the Commission wrote that:

> In order for any disciplinary system to be effective, prospective complainants must feel free from any suggestion of intimidation or retaliation. The findings and recommendations of Royal Commission of Inquiry into Chelmsford Hospital pointed out the urgent need for complainant immunity in the medical disciplinary area [74]... The need for immunity in the legal disciplinary system is at least as plain, for prospective complainants will be acutely aware that lawyers will have the necessary expertise, access to the courts, and financial resources to sue or threaten to sue them, if they are so minded, in order to forestall or force a withdrawal of the complaint. [75]

4.84 Consequently, we proposed that "Complainants should be absolutely immune from civil suit for all communications made to a body with disciplinary responsibilities in respect of a complaint against a legal practitioner, and for all statements made within any disciplinary proceedings", [76] and that "all communications made in the course of making a complaint, and in the subsequent proceedings involving the resolution of that complaint, whether involving the complainant, the respondent lawyer, any person responding to a request for information from the authorities, the authorities involved, or the agents or staff of any of the aforementioned, should be privileged in respect of defamation and ... absolutely immune from other civil actions." [77] (It is already the case that members of the Standards Board, the Disciplinary Tribunal, the Review Panel, and the Bar and Law Society Councils, are immune from liability for any act done in good faith as part of their disciplinary responsibilities.) [78]

4.85 The Commission's proposals - which cover respondent lawyers as well as complainants, and upon which this Recommendation is based - met with agreement in whole or in part from the Law Society; the Bar Association; the Commissioner for Consumer Affairs, Mr John Holloway; and the Registrar of the Legal Profession Disciplinary Tribunal, Mr Robert Bennett; and accord with the recommendations of the American Bar Association's Commission on the Evaluation of Disciplinary Enforcement [79] and the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement. [80]

4.86 The Commission's recommendations would require consequential amendments to the Legal Profession Act 1987 (NSW) and the Defamation Act 1974 (NSW) to clarify the situation, and to make reference to the position of the office of the Legal Services Ombudsman. [81]

4.87 It should become the positive obligation of the office of the Legal Services Ombudsman routinely to inform all prospective complainants of the nature and existence of this absolute immunity. The body investigating the complaint - whether the Legal Services Ombudsman or one of the professional Councils - should be under a similar obligation to so inform the respondent lawyer, for it cannot be assumed that all legal practitioners will be aware of all details of the complaints handling system.

4.88 Right to be kept informed. In DP 26, the Commission noted that a "major source of complainant dissatisfaction seems to stem from the absence of regular communication from the professional associations and disciplinary bodies informing the complainant of the progress of the case." [82]

4.89 The Commission considered that:

> Complainants should be entitled to routine communication about the status of their complaint. In order to ensure that this actually occurs in practice, an officer in the complaints-handling agency should be designated to serve as the point of contact for the complainant in respect of each individual complaint, and the complainant should be so informed. That officer would be responsible for periodically reporting (say, every 60 days) in writing to the complainant about the progress of the matter, and for answering any direct inquiries from the complainant. [83]

4.90 The Commission noted [84] incidentally that problems occasionally arise where the Law Society appoints an inspector to examine trust accounts or an investigator to scrutinise the affairs of a solicitor of firm of solicitors. [85] Under the Legal Profession Act, the fact of such an appointment only may be disclosed to a small number of specified public or professional officials, and the complainant is not among these. [86] Thus, it may appear to a complainant that not much is happening in response to serious allegations, whereas in fact a thorough investigation is in train. The Commission proposed that, in such circumstances:

> As a matter of policy and good practice, the complainant should be entitled to be kept informed of the progress of the investigation by the complaints-handling agency and informed, at least in general terms, of the reason for any significant delay. [87]

4.91 The submissions from the Law Society, the Bar Association, the Commissioner for Consumer Affairs, the Australian Consumers' Association and the Community Justice Centres all supported the Commission's proposals on the right of a complainant to be routinely kept informed of the status of his or her complaint. The Law Society also supported the modification of the secrecy provisions of the Act "to allow information to be provided to a complainant with a legitimate interest even in circumstances where an investigation is proceeding under Section 55 of the Act" [88] through the appointment of an inspector or investigator.

4.92 Reasonable opportunity to rebut. Where a matter is to be referred to the Legal Services Tribunal for a hearing, under the Commission's recommendations, there naturally will be an opportunity for both the complainant (at least through the prosecuting agency) and the respondent practitioner to put their cases. However, the Commission noted in DP 26 that, currently, while a Council may not dismiss a complaint with a reprimand without the consent of the practitioner involved, "there is no parallel requirement to gain the consent of the complainant to a dismissal, with or without a reprimand, or to give the complainant an opportunity to be heard on the matter". [89] As a fundamental matter of procedural fairness, a complainant must be afforded a reasonable opportunity to rebut any statement by the respondent legal practitioner before a complaint is dismissed.

4.93 Proper reasons for dismissal. In DP 26, the Commission noted that the great majority of complaints result in a summary dismissal, and that a complainant had the right to feel dissatisfied if he or she received:

> a rather terse letter with the technical reason for the decision (such as, "the complaint did not disclose evidence of unsatisfactory professional conduct or professional misconduct") but without a full explanation in "Plain English". While the technical assessment of the merits of the complaint are no doubt usually correct, the manner of its communication may give rise to doubts about the probity of the process. [90]

4.94 The Commission proposed that:

> Complainants also should be entitled to a clear and full explanation of the reasons for any dismissal. The letter notifying the complainant of a dismissal should include a statement to the effect that "if you do not understand the result or wish to discuss this matter further, please contact [the designated officer]". The same general principles should apply to the determinations of the [formal disciplinary bodies]. [91]
>
> This proposal was supported by the NSW Commissioner for Consumer Affairs, Mr John Holloway, and the Australian Consumers' Association.

4.95 The Commission's survey of Law Society complaints files confirmed that the standard dismissal letter sent to complainants tended to be rather abrupt, with a formal reason for the dismissal but little in the way of genuine explanation and with no personal touch. The Bar Association, by contrast, also usually provided the complainant with the detailed investigator's report upon which the Council relied in coming to its decision, thus giving the complainant a clear insight into the nature and outcome of the investigation and the reasons for the Council's action. [92]

4.96 There may be some rare circumstances in which it is appropriate to withhold all or (more likely) part of the investigator's report from the complainant, such as where the report contains material which is the

subject of another person's privilege. However, in the general run of cases, the complainant should be entitled to a full explanation, including a copy of the investigator's report into the matter.

4.97 Rights to be present and to appear as a party. Another fundamental aspect of procedural fairness is the right to be given effective notice of any disciplinary proceedings which arise out of the person's complaint, and to be present at the hearing. However, under the present legislation, [93] complainants are not necessarily given notice of hearings (which is routinely provided only to parties), and may not be permitted to be present at the hearings of the Standards Board, which are held in camera. [94]

4.98 In DP 26, the Commission proposed that the complainant should have a statutory right to be present at any hearing into his or her complaint. [95] This was supported in the submissions of the Bar Association, the Law Society, the Commissioner for Consumer Affairs, the Registrar of the Disciplinary Tribunal, the Australian Consumers' Association, and the Kingsford Legal Centre.

4.99 More controversial is the issue of whether the complainant should have the right to appear as a party in any subsequent disciplinary proceeding. Under the existing legislation, the complainant may appear as a party before the Standards Board or the Disciplinary Tribunal only if he or she has requested the making of an order in relation to fees, compensation or waiver of a lien, [96] and that entitlement extends only to "those aspects of the hearing that deal with the loss (if any) suffered by the complainant as a consequence of the conduct the subject of the hearing". [97] On all other issues, the complainant must give way to the relevant professional Council. In DP 26, the Commission proposed that:

> a complainant should always be entitled to appear as a party to the hearing. Where the complainant takes an active role in the proceedings, it may be that such participation should be subject to a risk as to costs. [98]

4.100 The proposal was supported by the Commissioner for Consumer Affairs, the Registrar of the Disciplinary Tribunal, and the Kingsford Legal Centre, but was strongly opposed by the Law Society, the Bar Association, and the President of the Disciplinary Tribunal, Mr David Hunt.

4.101 The Commission is still of the view that, in theory, a complainant should be entitled to appear as a party subject to the (often powerful) disincentive of a risk as to costs. However, upon reflection, the Commission does recognise that there could be some practical problems in permitting complainants to appear as of right. For example, hearings before the Legal Services Tribunal will often involve an aggregation of complaints (into an "information"), so that an action against a practitioner could involve a large number of individual complainants. If even a proportion of those complainants chose to appear as parties, as well as the Legal Services Ombudsman or the relevant Council, the proceedings could become very unwieldy. At the formal hearing stage, the general public interest in the effective discipline of the legal profession becomes very strong, and this could be interfered with if the prosecution of the matter becomes dispersed, amateurish or ineffective.

4.102 The Commission believes that there is a happy compromise on this issue, and recommends that complainants should still have the right to appear as a party in respect of compensation, and but also should be able to appear as a party in other respects with the leave of the Tribunal, and subject to the risk of costs. The requirement of leave will guard against the sort of problems referred to above, while opening up the opportunity for complainants to appear as a party where the Tribunal is satisfied that this would assist matters.

4.103 Right to external review of any adverse decision. Under the Legal Profession Act, the Conduct Review Panel is required, upon application, to review the decision of one of the professional Councils to dismiss a complaint. [99] (A complaint may be deemed to be dismissed if the Council has not finalised its investigation after six months; however, in practice, this procedure is somewhat meaningless as there is rarely a sufficient record to review.) [100]

4.104 In DP 26, the Commission considered that the Panel's jurisdiction is far too limited:

> The Panel should be empowered to review every decision made by the professional associations and their Councils, whether this involves a decision to dismiss a complaint, or to issue a reprimand, or to take some other action short of referral to the Standards Board or the Disciplinary Tribunal. A complainant may feel no less aggrieved by a Council decision to issue a reprimand to a legal practitioner than by a decision to dismiss the complaint entirely. The aim of external accountability is not met in such circumstances if there is no recourse by the complainant to the Review Panel, and the complainant may well feel that the lawyer's interests were better looked after than his or her own. ... The Review Panel should have the same powers in New South Wales as the Legal Services Ombudsman has in England [101] - to be able to review every decision in the disciplinary process (or a failure to make a decision), except a decision made by a court or tribunal. [102]

4.105 The preliminary submission of the Law Society, which argued in favour of the replacement of the Panel by a "Lay Observer", agreed that the jurisdiction of the Panel was too narrow in this respect. [103] The submissions of the NSW Commissioner for Consumer Affairs and of the Legal Profession Conduct Review Panel itself supported the Commission's view in this regard.

4.106 In this Report, we recommend that the Panel (to be renamed the Legal Services Conduct Review Panel, to emphasise its independence from the legal profession) be empowered to review, upon application from the complainant, any adverse decision by the Legal Services Ombudsman or one of the professional Councils (short of referral of the matter to the Legal Services Tribunal). Decisions of the Tribunal itself are only reviewable in the Court of Appeal, of course. See Recommendation 44, below.

DISPUTE RESOLUTION

15. If a complaint does not raise issues of unsatisfactory professional conduct or professional misconduct, but is capable of consensual resolution, it should be open to the Legal Services Ombudsman, the Law Society and Bar Councils, and the Conduct Review Panel to refer the matter for conciliation or mediation.

16. If a complaint does involve an issue (or issues) of unsatisfactory professional conduct or professional misconduct, but also involves a consumer dispute which is capable of consensual dispute resolution (such as where an apology or compensation is called for), it should be open to refer the latter aspect for mediation or conciliation, while the disciplinary aspect proceeds through the formal disciplinary system. In such cases, the dispute resolution process should not have to wait for the disciplinary proceedings to conclude.

17. The Law Society and Bar Councils should maintain a list of mediators for this purpose, in consultation with the Legal Services Ombudsman and the Director of the Community Justice Centres.

18. Mediators on the list maintained by the professional Councils should be obliged to undertake a specific training program. The training program, as well as a Code of Conduct for mediation between lawyer and client, should be developed by the professional Councils in consultation with the Director of the Community Justice Centres and the Legal Services Ombudsman.

19. All confidential communications which are part of the mediation or conciliation process should be privileged, except for admissions or communications which reveal irregularities or dishonesty by a legal practitioner in respect of trust accounts or controlled funds.

20. In the event that conciliation or mediation fails to resolve the dispute, the complainant may apply to the Registrar of the Legal Services Tribunal to have the matter resolved by arbitration. In such cases, the Registrar or his or her nominee may award compensation not exceeding $6,000.

Commentary

Disputes suitable for consensual resolution (Recommendations 15-16)

4.107 Perhaps the matter on which there was the most agreement was the Commission's proposal [104] that there be much more use made of consensual dispute resolution techniques to settle the great bulk of complaints against lawyers which are of a "consumer complaint" type - that is, those disputes which do not raise issues about the character, honesty or competence of the legal practitioner involved. The complaints handling systems in Victoria and in England and Wales certainly boast high "success rates" for mediated settlements. [105]

4.108 Support for this came in the submissions of the Law Society, the Bar Association, the Australian Consumers' Association, [106] the Commissioner for Consumer Affairs, the Lawyers Reform Association, the Registrar of the Disciplinary Tribunal, the Chairperson of the Conduct Review Panel, and the Community Justice Centres.

4.109 Under Recommendation 15, each of the Legal Services Ombudsman, the professional Councils and the Conduct Review Panel (where a matter has reached that stage) would be empowered to refer a complaint for mediation or conciliation where they are satisfied that the matter "is capable of consensual resolution", [107] and the body is satisfied that the complaint does not raise issues of unsatisfactory professional conduct or professional misconduct (which are more properly the province of the formal disciplinary system).

4.110 In Recommendation 16, the Commission recognises that some complaints involve an accumulation of allegations, some of which may raise issues of unsatisfactory professional conduct or professional misconduct, and some of which may be categorised as consumer type disputes which are capable of consensual dispute resolution. In such circumstances, it should be open to the above-mentioned authorities to refer (only) the latter aspects of the complaint for mediation or conciliation.

4.111 For example, a complaint may allege that a legal practitioner handling the sale of real property on behalf of the client (complainant) had: communicated poorly with the client; negligently handled the settlement of the sale, costing the client some hundreds of dollars; overcharged for the services provided; and then dealt improperly with the proceeds of the sale held in trust. The first three matters could be sent for mediation, while the trust account issue should be formally investigated through the disciplinary process. In "mixed" consumer/disciplinary cases such as these, the dispute resolution process should proceed without having to wait for the formal investigation and the disciplinary proceedings to conclude, since there is no reason why the complainant should be out-of-pocket for a substantial time while the more serious allegations are being pursued. [108]

4.112 The Commission has cautioned before [109] that "alternative dispute resolution" (or ADR) should not be regarded as "a panacea for the notional ills of the judicial system but rather a set of further options to be carefully considered in each case". [110] In the context of complaints against lawyers, it is important not to lose sight of the multiple aims of the system, which include public interest concerns about the standards of the legal profession and the compliance of individual practitioners with those standards as well as the satisfaction of consumer-type grievances. [111]

4.113 Thus, the referring authorities - the Legal Services Ombudsman, the professional Councils and the Conduct Review Panel - must be careful not to divert entirely those disputes which may have public interest ramifications. For example, where substantial negligence or a pattern of poor practice becomes apparent on the part of lawyer or law firm, the lawyer or firm should not be able to "buy" themselves out of trouble regularly by quickly settling such matters through mediation. The authorities should carefully keep track of referrals in order to be able to identify those cases which require consideration by the disciplinary system.

4.114 Similarly, "it may be that the lawyer involved has acted utterly in accordance with standard legal practice, but the practice itself is arguably contrary to the public interest." [112] Disciplinary action against the particular lawyer concerned would be inappropriate in such circumstances, but there should be feedback into the system so that, for example, there are changes in legal education or changes in the codes of ethics and practice, or the issuing of a practice direction, or some other action calculated to remedy the problem. (See Recommendation 63, discussed in Chapter 5, below.)

Appointment and training of mediators (Recommendations 17-18)

4.115 In DP 26, the Commission considered that concerns about the imbalance of knowledge and power between lawyers and clients, and about the perception of impartiality, meant that it may be inappropriate for persons employed by or associated with the professional associations to serve as mediators:

> Perhaps the mediators used should not be staff members of the Law Society or Bar Association, and particularly not staff members who are involved in any way in the investigation or prosecution of complaints. ... There is already a danger that the dynamics of the mediation situation will inherently favour the lawyer, who is used to negotiating and operating in such an environment, rather than the lay complainant. While it is not really the role of the mediator to redress the balance of power or sophistication between the parties, an experienced mediator should be able to restrain one of the parties from being overbearing. In order to assure complainants that the system is not weighted against them, independent mediators should be used. Depending upon the nature of the complaint, the mediators need not necessarily be legally trained. For example, disputes about discourtesy or poor communications would not require the mediator to be a lawyer. Where an understanding of the exigencies of legal practice would be a major advantage for the mediator, such as in the case of a dispute arising out of the tactics or strategy employed by a barrister in the course of a trial, then it may be best to seek the services of an academic lawyer, a retired judge, a government lawyer or some other lawyer who is not readily associated with the interests of the professional associations. [113]

4.116 The submissions were split on the issue of whether mediators should be entirely independent of the professional associations. The Bar Association, the Commissioner for Consumer Affairs, the Australian Consumers' Association and the Community Justice Centres (CJC) agreed with the proposition, and the CJC offered itself as the mediation agency, given its demonstrated neutrality, effective use of limited resources, and connection to an established infrastructure for training, quality assurance and continuing development. [114] However, the Law Society and the (lay) Chairperson of the Conduct Review Panel disagreed, emphasising that it was important in some cases for mediation to be handled by senior and experienced lawyers who also have a knowledge of the disciplinary system. It is true that in Victoria and in England and Wales, client-lawyer mediation is handled by officers of the legal professional associations. [115]

4.117 In our recent Report on mediation (LRC 67), the Commission was reluctant to be overly prescriptive about training, qualifications and accreditation at this early stage in the development of ADR. [116] Similarly in this report, the Commission has decided to refrain from specifying precisely who may or may not serve as a mediator for the run of client-lawyer disputes. Rather, the Commission has recommended that the professional Councils maintain a list of mediators for this purpose, in consultation with the Legal Services Ombudsman and the Director of the Community Justices Centres. We have no hesitation in recommending, however, that the mediators on the list - including lawyers and non-lawyers [117] - be required to undertake a specific training program for this purpose. As we wrote in LRC 67:

> The Commission accepts that training for mediators is necessary for competence as a mediator and to enhance the credibility of mediation. We accept that no one is automatically qualified to perform the role of a mediator simply by virtue of professional or occupational qualifications in another discipline, or because of appropriate personal qualities. The role requires knowledge and skills of a distinct process. Training is the most effective way for a person to acquire expertise. Failure to undergo training in the process increases the risk that a mediator's behaviour will be incompetent and unethical, and of harm to clients. [118]

4.118 We also propose, in Recommendation 18, that the training program should be developed by the professional Councils in consultation with the Director of the Community Justice Centres and the Legal Services Ombudsman, and that a Code of Conduct for mediation between lawyer and client be developed in the same manner.

Confidentiality and privilege (Recommendation 19)

4.119 The Commission recognises that privilege ought normally to attach to confidential communications made during an attempt at consensual dispute resolution. Such informal processes only work if the parties are assured that there will be no negative repercussions flowing from candid conversation or the spirit of compromise.[119] However, as foreshadowed in DP 26, the Commission also recognises the need for an exception to the proposed general rule about privilege with regard to admissions or communications which reveal dishonesty or irregularities in dealings with trust accounts or controlled funds. [120]

4.120 Only the submission of the Bar Association addressed this area, with the Bar Association agreeing with the Commission on both the general rule and the exception. [121] (The exception, of course, would normally only apply to solicitors, as barristers do not hold or control clients' money.) See also Recommendations 65-67, discussed in Chapter 5, below, regarding confidentiality and privilege issues at the investigation and review stages.

Arbitration of disputes as a last resort (Recommendation 20)

4.121 It is to be hoped that most of the disputes which "are capable of consensual dispute resolution" (per Recommendations 15-16) will in fact be settled by that method. However, the Commission believes that there should be a mechanism for determining such disputes where the parties are unable to agree (whether through intransigence or bad faith, or for other reasons) on a satisfactory outcome.

4.122 In Victoria, the Registrar of the Solicitor's Board is empowered to award compensation in such cases after an informal, in camera hearing. [122] The (now defunct) Victorian Law Reform Commission has recommended that the Board be replaced by a Barristers and Solicitors Tribunal, and the Judicial Registrar of the Tribunal take over this arbitration function. [123]

4.123 This Commission recommends that arbitration powers be vested in the Registrar of the Legal Services Tribunal, with the Registrar able to refer matters to a nominated arbitrator if necessary (for reasons of speed or propriety). The Commission's has expressed the strong view throughout this Report that, in our proposed system, complainants who approach the Legal Services Ombudsman should be entitled to resolve their disputes fully and finally without having to launch additional or ancillary actions. Accordingly, we recommend that the jurisdictional limit of the Registrar should be initially set at $6000, the same as that of the Consumer Claims Tribunal (CCT), to obviate the need for complainants to have to approach the CCT. (It should remain open to clients to approach the CCT if they wish, subject to provisions to protect against "double-dipping".)

THE ROLE OF THE PROFESSIONAL COUNCILS

21. The Councils of the Law Society and the Bar Association should continue to be responsible for: the investigation of complaint matters (those forwarded by the Legal Services Ombudsman, as well as those matters in which a Council acts on its own initiative); diverting consumer complaints for dispute resolution; dismissing appropriate complaints (with or without a reprimand); determining which matters should be sent to the Legal Services Tribunal for hearing; and prosecuting disciplinary offences before the Tribunal.

22. The Councils must ensure that the investigation of complaints is accomplished in a prompt, active, thorough and professional manner. Sufficient resources and training (for members of the Council and its committees as well as for staff) must be provided to make this possible. An obligation on the part of the Councils (and the Legal Services Ombudsman) to investigate and process complaints expeditiously should be inserted into the Legal Profession Act 1987.

23. In the event that a legal practitioner unreasonably fails to reply to the allegations made in the complaint or to respond to requests for information, it should be open to a Council (or the Legal Services Ombudsman) to apply to the Registrar of the Legal Services Tribunal for an administrative penalty of up to $2000 to be assessed against the practitioner. (Nothing in this Recommendation is

meant to derogate from the power of a Council to suspend or cancel a practitioner's practising certificate under s 35 of the Legal Profession Act 1987.)

24. The Councils should operate several Professional Conduct Committees (exercising delegated authority) in tandem, to speed up its handling of complaints, reduce the workload of individual Committee members, and increase the intensity of investigations.

25. The powers of a Council should be the same whether the investigation has arisen on the Council's own initiative or following a complaint forwarded by the Legal Services Ombudsman.

26. Following an investigation into any complaint, a Council must refer a matter to the Legal Services Tribunal for a hearing if "it appears to the Council that (a) the legal practitioner may be guilty of unsatisfactory professional conduct or professional misconduct, or (b) the interests of justice so require". (The same standard shall apply in respect of the investigations of the Legal Services Ombudsman.)

27. Following a referral by its Council to the Legal Services Tribunal, or upon the request of the Legal Services Ombudsman or the Legal Services Conduct Review Panel, the Law Society and the Bar Association should be responsible for preparing the information and prosecuting the matter before the Tribunal and the courts.

28. Where a Council has dismissed a complaint following investigation (with or without a finding of unsatisfactory professional conduct), it should nevertheless have the power to award compensation to the complainant with the consent of the legal practitioner, or to refer the matter for mediation (and ultimately arbitration) on the question of compensation, or to make an ex gratia award of compensation from a discretionary fund maintained by the professional Council for this purpose.

29. The Act should be clarified to ensure that the Councils must report on their activities to the Parliament through the Attorney General at least once per year. It should be standard practice for the Councils each to produce a detailed report at least once per year specifically dedicated to the regulation and discipline of the legal profession.

30. The present role of Councils in the setting of standards of professional ethics and conduct should continue.

Commentary

The continuing role of the Councils (Recommendations 21 and 29-30)

4.124 For the reasons already discussed, the Commission has not recommended that the professional Councils be removed from the complaints handling process, but rather that the activities of the Councils in this area be made subject to tighter legislative requirements and placed under much closer external scrutiny by a Legal Services Ombudsman and the Conduct Review Panel. Under our recommendations, the Legal Services Ombudsman would have parallel powers in respect of investigation, but would be in a superior position in so far as the Ombudsman would be entitled to choose which matters to retain and to remove matters from the Councils, at his or her discretion.

4.125 As acknowledged in Recommendation 21, the Councils of the Law Society and the Bar Association would nevertheless retain statutory responsibility for:

> investigating complaints (at least those referred by the Legal Services Ombudsman, as well as those matters in which a Council acts on its own initiative);
>
> diverting appropriate matters for consensual dispute resolution, as well as generally supervising the mediation process (see Recommendations 15-18);

summarily dismissing frivolous or vexatious complaints;

dismissing other complaints, after investigation, with or without a reprimand, in accordance with s 134 of the Legal Profession Act;

referring to the Legal Services Tribunal for hearing those matters which involve substantial issues of unsatisfactory professional conduct or professional misconduct; and

prosecuting matters before the Tribunal, where the Council is the referring authority or the Council has been requested to prosecute by the Legal Services Ombudsman or the Conduct Review Panel.

4.126 The Councils, being the peak professional associations, also would continue their current role in the setting of standards of professional ethics and conduct - subject to the Supreme Court's general supervision of the administration of justice in New South Wales. (See Recommendation 30. See also Recommendation 59, discussed in Chapter 5, below, regarding the need for Codes of Conduct and Practice.)

4.127 In DP 26, the Commission looked at upgrading the reporting requirements placed on the professional Councils in respect of complaints handling, both in terms of frequency and quality. [124] The Commission suggested that it become standard practice for the professional Councils and other responsible agencies to make annual reports to the Attorney General, for tabling in Parliament, which contain "a full treatment of statistics, empirical and comparative analysis, case studies, satisfaction surveys, recommendations for consequential legislative or administrative change, and so on." [125]

4.128 The Law Society recently has commenced publishing a six monthly report on trends and statistics in the disciplinary process, [126] a welcome development which goes some of the way towards achieving the desired levels of presentation of statistical material, although it is rather shorter on analysis. The Commission also would like to see much more correlation of the statistical material. For example, the Law Society now offers a Table indicating the types of complaints received (failure to carry out instructions, poor communications, failure to account for trust account money, etc), but a better demographic portrait of the complaints handling system also would correlate the particular types of complaints with tabulated information about outcomes - how many complaints of a particular type are dismissed, how many are referred on to the Standards Board or Disciplinary Tribunal, what sanctions are meted out, and so on. An analysis of time taken to deal with complaints (by the presentation of mean and median figures as well as numbers of "more than 6 months" and "more than 12 months" matters) also would be useful. Since many complaints are received in one year but finalised in the next, it also would be helpful if the material was presented in such a way as to permit a particular year's complaints to be traced through to final disposition.

4.129 In Recommendation 29, the Commission proposes that it should be standard practice for the Councils to produce detailed reports (at least annually) which are specifically dedicated to issues of regulation and discipline. It is proposed that the Legal Services Ombudsman also will be placed under a statutory obligation to monitor relevant developments and to report fully (see Recommendation 7), so the information available in this area should be comprehensive and edifying.

Investigation of complaints (Recommendations 22-25)

4.130 The nature and quality of investigations. In the earlier inquiry into the legal profession, over a decade ago, the Commission criticised the inadequacy of the investigation of complaints by the professional associations, condemning, for example, the "perfunctory investigation of many complaints". [127] One of the main concerns at that time was that the professional associations relied very heavily on the information provided by the complainant to determine the validity of the complaint, often making a final decision on this basis without further investigation. If the investigation proceeded the next step was to contact the lawyer concerned for a reply. In the not infrequent event that the matter hinged on the word of one party to the dispute against the word of the other, the lawyer was generally given the benefit of the doubt without the matter being referred for a formal hearing. [128]

4.131 In DP 26, the Commission noted [129] that:

> Some of the submissions in the current inquiry question whether the investigation of many matters is adequate to define all of the possible issues and to ascertain all of the relevant facts, particularly in relation to the far more numerous complaints against solicitors. The chief technique employed in most cases for compiling the facts and preparing the report and recommendations for Council remains the "paper chase" of acquiring the written complaint, requesting a written response from the legal practitioner involved, and subsequently comparing them. Sometimes one party or the other is asked for further particulars. However, only in a very small proportion of cases is there a fuller examination using trained investigators or auditors, and these cases almost invariably involve allegations of fraud, trust account violations or other financial impropriety. In the circumstances, it is arguable that the bulk of complaints are processed, and not actively, thoroughly, investigated.
>
> In the absence of an inquisitorial procedure focussed on the active pursuit of the relevant facts, the result is often that the report made on the complaint is equivocal, pointing out that the complainant has made certain allegations, the legal practitioner has denied them, and there is no independent evidence to sustain either version of the facts. Given the requirement in the legislation that the professional Councils must be "satisfied" about the allegations before a complaint is referred to the Standards Board or the Disciplinary Tribunal, [130] the legal practitioner is effectively given the benefit of any doubt by the dismissal of the complaint, even though this may be due as much to the style of investigation as the actual state of affairs. [131]
>
> It is not hard to see that some complainants may be dissatisfied with this procedure, particularly when a notice of the dismissal follows a long period of silence. It is likewise easy to see that some complainants could draw the conclusion that the system is "fixed" or biased - a case of lawyers simply "protecting their own". However, the Commission believes that any problem lies more in the inadequacy of the system than in any lack of impartiality or integrity. The method of investigation of complaints that is used now is essentially the same one that was examined by the Commission over a decade ago. The new disciplinary scheme established by the 1987 Act has effected many changes in the handling of complaints, but the actual manner of investigation has survived largely intact. This appears to be a matter that is determined more by traditions and received wisdom - that is, by a local "culture" - than by legislation.

4.132 In their submissions to the Commission in response to DP 26, neither the Law Society nor the Bar Association directly addressed the criticism of the adequacy of their investigative processes, although the Law Society asserted that the desired "'culture of independence' already exists." [132]

4.133 The Commission's survey of the 1991 complaint files of both the Law Society and the Bar Association was conducted primarily to assess the methodology and effectiveness of the investigation of complaints by the professional associations. The summary of the results of the File Survey are discussed in Chapter 2, above, but the salient points are worth repeating here.

4.134 The File Survey clearly confirmed our view that the approach of the Law Society has been merely to process complaints, rather than to investigate them. The vast bulk of complaints are subjected to a classic "paper chase" approach, with the Law Society acting as a clearinghouse for correspondence between the complainant and the respondent solicitor. Only rarely is anyone (including one of the principals) actually interviewed face-to-face, nor are files or accounting ledgers often examined. Remarkably little initiative is shown in pursuing possible witnesses or other independent evidence which might confirm or deny the allegations which form the basis of the complaint. Often the "paper chase" actually seems to increase the heat in the dispute, as the parties react to the allegations, denials, and personal comments in each other's letters.

4.135 After such a desultory investigation, it is not surprising that most matters boil down to competing versions of the relevant conversations or events. In such cases, the solicitor's version is virtually always accepted, either directly or on the basis that the complainant has not adequately supported or documented his or her version. In effect, not only is the onus of proof placed upon the complainant, but also the responsibility for defining the issues and compiling all of the material evidence. Yet complainants are not

made aware of this, nor are most complainants in a position to provide this sort of sophisticated analysis themselves or to retain a legal adviser for this purpose. Clearly, this should be the responsibility of the Law Society.

4.136 Other serious concerns identified by the Commission's file survey include that:

> investigations often fail to pick up related or subsequent allegations of poor practice;
>
> matters closed with the "consent" of the complainant often indicate a pattern of poor professional practice, such as inordinate delays and poor communications (which ironically seem to be confirmed by the manner in which the solicitor involved responds to the Law Society's inquiries);
>
> there is still a marked reluctance to treat such failings as negligence, incompetence, delay, discourtesy, poor communications and overcharging, as disciplinary matters; and
>
> the failure to utilise distinguished practitioners in the same area of practice as the respondent solicitor for an expert opinion about whether the respondent had acted competently and diligently in accordance with proper professional standards.

4.137 It is unlikely that the police or other regulatory agencies would be satisfied with such an approach to the discharge of their responsibilities, and it is clear that complainants have a right to be dissatisfied with the nature and quality of the investigation into their complaints. At least as important is the fact that the current system does not really protect the consumers of legal services from poor practice, nor does the system identify areas in which the profession should seek to lift its standards and practices.

4.138 The Commission was rather more impressed with the investigations conducted by the Bar Association's four Professional Conduct Committees (PCC). Perhaps it is due to the luxury of only having to handle less than 5% of the number of complaints dealt with by the Law Society, but the Commission's survey of the Bar Association's complaints files suggested that each complaint was much more thoroughly and actively investigated by the barrister in charge (one of the members of the respective PCC). Among other things, there was a greater effort made to find independent witnesses and evidence; to compel respondents to answer in a timely fashion; to seek a "second opinion" from an independent expert; to assess whether the respondent was conducting his or her practice in an effective manner, apart from the specific details of the allegation; and to see the general implications of individual complaints, which might for example require a circular from the Bar Association reminding members of certain obligations. Even in a number of matters where it was resolved to dismiss the complaint, it was made clear to the barrister involved that his or her standard of practice could be lifted to prevent complaints in future.

4.139 However, the Commission also identified a number of problems with the Bar Association's investigations. Because the Bar's system relies so heavily on the volunteer, part-time, labour of the barrister members of the PCCs, the progress of each investigation is naturally dependent upon that barrister's workload, unavailability on circuit and so on. Many of the investigations seemed to take longer than necessary to complete. Further, the "substantive law" used by the Bar Association is derived largely from the Association's own rules, which in part are concerned with matters of service delivery to clients but to a much greater extent are concerned with matters of intra-professional seniority, comity, and restrictive trade practices. It is difficult to see how some of the investigations into supposed incidents of advertising, attracting publicity, and acting without the intervention of a solicitor, which follow complaints from other barristers or the Bar Association itself, relate to protecting the public interest.

4.140 In Recommendation 22, the Commission proposes that a positive obligation be placed upon the Councils to ensure a much more active, thorough, and "professional" form of investigation. It is difficult to legislate for effort, imagination and persistence, however, or to mandate legislatively for better training of investigative officers, for more resources devoted to investigation, and so on. Certainly the advent of the Legal Profession Act 1987, which was intended to promote a new approach, was unsuccessful in this regard. Under the new system proposed by the Commission in this Report, if the Law Society and Bar Councils do not themselves begin to expect and demand more from their complaints committees and officers, then the Legal Services Ombudsman will readily identify the shortcomings and act accordingly to publicise and remedy them.

4.141 The problem of delay. One of the common criticisms of the existing system by complainants is the slow processing of complaints. According to the figures supplied by the Law Society, the average "turn around time" for investigation of a complaint against a solicitor (being the average time between receipt of a complaint and its settlement, withdrawal or resolution by the Complaints Committee or Council) was 4.6 months in 1990. [133] According to the figures supplied by the Bar Association, the average turn around time for the investigation of complaints against barristers was 5.4 months in 1990. Further time must be added on for those matters which proceed to a hearing before the Standards Board or Disciplinary Tribunal, and those dismissed matters which are sent to the Conduct Review Panel for review.

4.142 The Commission's File Survey suggests that the "average" figures may not be entirely "typical". Some matters are dismissed, withdrawn or resolved by consent relatively quickly, while many take more than six months to process and some take more than one year. In some cases the delay may be justifiable, but in many cases there is no apparent reason for the delay, or at least no good reason.

4.143 Under the existing law, the Legal Profession Act provides that, for the purposes of seeking external review by the Conduct Review Panel, a complaint may be deemed to have been dismissed by a Council if a decision has not been made within six months after the making of the complaint. [134] As we noted in DP 26,

> This strongly suggests that it was contemplated by Parliament that the process of investigation and determination by committees and Councils would normally be completed within this time frame. However, the Act does not expressly require the Councils to act within any particular time limit, or even to act expeditiously. [135]

4.144 The Commission proposes in Recommendation 22 that the Councils - and the Legal Services Ombudsman, when his or her office is conducting an investigation

> be placed under an express statutory obligation to act expeditiously.

4.145 In order to speed up the process, the Councils and the Legal Services Ombudsman must have adequate powers to compel a prompt response from the lawyer complained about. One common cause of delay in the processing of complaints against solicitors is the failure of solicitors who are the subject of complaints to respond in a timely fashion, despite repeated requests (and even threats of suspension of practising rights) from the Law Society. In DP 26, the Commission wrote that we understood that:

> it is not uncommon for responses to be late and for some to be very late. The Commission is aware of individual cases in which the investigative process was delayed for lengthy periods - sometimes over a year - due to the failure of the lawyer involved to respond, or respond in a meaningful way, despite numerous letters from the professional association. [136]

4.146 This understanding was strongly confirmed by the Commission's survey of Law Society and Bar Association complaints files, which disclosed that a significant minority of practitioners fail to respond at all or in a meaningful way despite repeated threats that such failure can result in the suspension or cancellation of a practising certificate. Ironically, many of these complaints actually are about unacceptable delay or poor communications on the part of the legal practitioner concerned.

4.147 Following recent amendments to the Legal Profession Act, [137] both Councils now have the statutory power to cancel, suspend, or refuse to issue, a practising certificate to a legal practitioner who has been asked by the Council to "explain specified conduct" and fails, and continues to fail, to give a satisfactory explanation. [138] The problem is that the sanction of suspension or cancellation is so serious that it is reluctantly and rarely invoked, [139] and delinquent practitioners apparently count on this reticence. While suspension or cancellation of practising rights is the proper ultimate sanction, the initial approach to compelling cooperation should be shorter and sharper.

4.148 In Victoria, as in NSW, a legal practitioner is asked to respond to a complaint within 14 days. [140] If no response is received in that time, a second letter is sent. Failure to reply to this letter within seven days is itself considered a "standards breach" (which is equivalent to "unsatisfactory professional conduct" in NSW),

and often results in a fine for the practitioner as well as the recording of the standards breach. [141] In DP 26, the Commission suggested that:

> A similar requirement [to the Victorian system] should be imposed under the legislation in this State. A persistent failure to respond to a complaint, or a pattern of persistent delay in responding to complaints, should result in the suspension of the legal practitioner's practising certificate. [142] [Emphasis supplied]
>
> Complainants should be entitled to expect that their allegations will be handled promptly, and the investigative agencies should be entitled to expect that licensed legal practitioners - who are held out as being "fit and proper persons" - will answer allegations promptly and with complete candour.

4.149 In Recommendation 23, the Commission does propose that an unreasonable failure to respond to requests for information should result in the imposition of an "administrative penalty" (ie, a civil "fine") of up to $2000. For reasons of natural justice, the Commission believes it would be inappropriate for the investigating body to have punitive powers, so we suggest that the Councils and the Legal Services Ombudsman should be able to refer such matters to the Registrar of the Legal Services Tribunal for summary hearing and determination. (In Recommendation 45, below, the Commission proposes that the Registrar be given the appropriate powers for this purpose.)

4.150 Naturally, in determining the unreasonableness or otherwise of the practitioner's lack of cooperation, the Registrar will have regard to the normal events of life, such as illness, holidays, absence on circuit and so on, as well as the stresses and exigencies of professional practice.

4.151 Whether or not this course of action is pursued, it would be still be a matter for the relevant Council to determine whether the person's practising certificate should be suspended or cancelled for failure to provide an explanation or requested information.

4.152 The operation of complaints committees. Greater efficiencies also could be achieved by some re-organisation of the Law Society Council's internal system for handling complaints, in accordance with Recommendation 24. The Bar Council, which handles only 80 complaints per year, divides the work among four Professional Conduct Committees (PCCs). The Law Society, which fielded 1898 complaints in the 1991-1992 financial year, uses only one PCC (until recently known as the Complaints Committee), comprised of 14 persons, eight of whom double up as members of the Council. [143] In DP 26, the Commission noted that:

> it appears that much greater use could be made of non-Council members in order to provide the numbers to operate several Complaints Committees in tandem. [144]

4.153 The Commission believes that complaints handling could be significantly improved if the Law Society set up at least four PCCs with, say, five or six members each. The workload of each PCC would be much more manageable, and complaints would receive greater attention more quickly. Under the Legal Profession Act, committees of Council exercising delegated authority must be chaired by a Council member, but the general membership is not so limited. Since the reports and recommendations of the PCC calling for disciplinary action must go to the Council anyway, greater use could be made of non-Council members (lawyers and non-lawyers) in order to staff the additional committees.

4.154 The Bar Association recently asked the lay members of its PCCs to comment upon their experience and to suggest practical measures for improving the performance of the system. Seven of the eight lay members were able to respond in writing, and the Bar Association kindly supplied this material to the Commission. The suggestions for improvement, which should be taken note of by the Councils and the Legal Services Ombudsman, are quite thoughtful and illuminating, and include:

> the Association taking "a more pro-active role" in assisting with the formulation of complaints;
>
> the re-allocation of responsibility for investigation and report to avoid lengthy delays where the assigned legal member cannot proceed quickly because of pressures of work or other reasons (or perhaps more, or alternate, barrister members);

earlier receipt of PCC papers (especially the preliminary report) - at least 3 working days before the meeting, rather than the evening before, as is now common;

the use of computer technology to order/reduce paperwork;

the assignment of a responsible lay member for each complaint in addition to the responsible legal member;

a reduction in the use of legal jargon at meetings and in investigative reports;

more tolerance by (certain) legal members of the views expressed by lay members at meetings;

the need for discussion of "general ethical principles beyond Bar Rules" at PCC meetings;

the specific noting for the benefit of Council (or the preparation of a minority report) where a lay member votes against the majority PCC recommendation to dismiss a complaint - and perhaps automatic review by the Conduct Review Panel in such cases;

feedback through the Bar Association about areas where there are a "plethora of complaints";

establishment of a Bar Association database covering all aspects of complaints handling;

the need for orientation and training programs for lay members - eg regarding the rules about confidentiality; and

providing the opportunity for the lay members to meet collectively from time to time to discuss common concerns.

4.155 Many of these matters (greater assistance for complainants, the construction of complaints databases, training for lay participants, feedback from the disciplinary system to the profession at large, and so on) are the subject of recommendations in this Report; the rest are sensible suggestions which may be taken up administratively.

4.156 Rationalisation of powers. The preliminary submission of the Bar Association pointed out that there is an anomaly in the provisions of the Legal Profession Act 1987, under which the Councils have different dispositive powers depending upon whether they are investigating complaints made by external complainants or matters which they are pursuing on their own initiative. A Council cannot reprimand [145] the legal practitioner involved, for example, if the investigation arose on the Council's own motion - it can only refer the matter to the Standards Board or the Disciplinary Tribunal. [146] In DP 26, the Commission agreed that:

> There does not appear to be any good reason for this discrepancy. Identical remedial orders should be available to a Council whether the investigation commenced on the complaint of a client or a court or some other agency, or on the motion of the Council itself. [147]

4.157 In Recommendation 25, the Commission proposes that the powers of the professional Councils should be identical whether the complaint under investigation originates internally or externally.

Referral and prosecution (Recommendations 26-27)

4.158 Another anomaly in the present legislation relates to the standard for referral of a complaint for hearing. The professional Councils only may refer complaints to the Standards Board or the Disciplinary Tribunal if they are "satisfied" that the complaint involves a question of unsatisfactory professional conduct or professional misconduct, respectively. [148] However, if a Council is acting on its motion rather than on an outside complaint, it may refer the matter to the Board or Tribunal "if it appears to the Council that the legal practitioner may be guilty of unsatisfactory professional conduct or professional misconduct". [149] In the former case, a Council which is unsure about the probity of the evidence or the "guilt" of the practitioner

could not be said to be satisfied, and thus could not refer the matter to the appropriate disciplinary body for a hearing and determination. It seems odd to the Commission that a Council's uncertainty effectively serves to pre-empt the consideration of a complaint by an independent tribunal. No doubt this position also contributes to the unfortunate gap, which the Commission has identified, between the types of conduct which actually are most complained about by former clients and others, and the types of matters which the Councils actually refer for a hearing. [150]

4.159 In DP 26, the Commission wrote that:

> the appropriate standard for referral should be that "it appears to the Council that (a) the legal practitioner may be guilty of unsatisfactory professional conduct or professional misconduct, or (b) the interests of justice so require". [151]
>
> In Recommendation 26, we formally propose that this become the new statutory standard for referral of matters to the Legal Services Tribunal. Given that we recommend elsewhere (see Recommendation 7) that investigations into complaints be conducted by the office of the Legal Services Ombudsman as well as the professional Councils, the standard should apply in all cases.

4.160 In Recommendation 27 we specify that each professional association should retain the power to prosecute matters [152] before the Tribunal following referral by its Council. The Law Society or Bar Association also should prosecute where it has been asked to do by the Legal Services Ombudsman (following an investigation and recommendation to this effect by the Legal Services Ombudsman) [153] or the Legal Services Conduct Review Panel (following a review in which the Panel has decided to refer the matter directly for hearing). [154] In the event that the matter goes to the Court of Appeal (or for some reason to another court), the professional associations likewise should have standing and the responsibility for pursuit of the matter. [155]

4.161 The standing of the professional associations and their Councils before the courts was discussed in DP 26, and was the subject of the High Court's decision in Wentworth v NSW Bar Association. [156] The High Court ruled that, given the express conferral in the Legal Profession Act [157] on the Bar Council of the right to appear, rather than the Bar Association, the Bar Association should be given leave to appear in relation to the conduct of (or admission of) barristers only in exceptional circumstances, whether or not the Bar Council is also participating. [158]

4.162 In DP 26, the Commission agreed with the preliminary submission of the Bar Association that whatever the outcome of the High Court hearing, the matter should be put beyond doubt by an amendment to the Legal Profession Act 1987 providing that the Bar Association is entitled to call evidence and cross-examine in relation to admission and disciplinary proceedings. [159] The professional associations, rather than their executive Councils, are in a better position to provide the funding and support for proceedings in the courts. Consequently, we have recommended that it is the professional associations that should run the court actions once their governing Councils have decided to pursue this course, or they are asked to pursue this course by one of the other bodies with referring powers.

Dispositive powers (Recommendation 28)

4.163 Under the present legislation, [160] the professional Councils have a number of options for dealing with complaints after investigation. A Council must dismiss the complaint, if it is satisfied that the complaint does not involve any question of unsatisfactory professional conduct or professional misconduct. A Council must refer the matter to the Disciplinary Tribunal if it involves a question of professional misconduct. If the complaint involves a question of unsatisfactory professional conduct, however, the Council may refer the matter to the Standards Board, or reprimand the legal practitioner (with his or her consent), or dismiss the complaint. In the latter case, the Council must be satisfied that "the legal practitioner concerned is generally competent and diligent and that no other material complaints have been made against the legal practitioner".

4.164 In DP 26, the Commission noted that the decision by a Council to dismiss a complaint (with or without a reprimand) even though the complaint involved a matter of unsatisfactory professional misconduct could have the effect of robbing a complainant of the possibility of compensation, since only the Standards Board (and the Disciplinary Tribunal) may award compensation. [161]

4.165 In keeping with the Commission's various aims of streamlining the system, promoting consensual dispute resolution, ensuring natural justice, and increasing the availability of compensation, the Commission has proposed in Recommendation 28 that the Councils have further options after deciding to dismiss a complaint. Councils should have the power to award compensation to the complainant with the consent of the legal practitioner(s) involved, consent being required in the absence of a hearing for natural justice purposes. Alternatively, the Council may refer the matter for mediation (and then to arbitration if mediation fails) on the question of compensation. Finally, the Council may make an ex gratia payment of compensation to the complainant from a fund maintained for this purpose.

4.166 In Victoria, the Legal Profession Practice Act 1958 (as amended) provides that the Law Institute shall maintain a "Law Institute Discretionary Fund", which is funded out of the Solicitors' Guarantee Fund (equivalent to the Fidelity Fund in NSW) as well as all penalties paid to or recovered by the Institute in respect of Disputes and Complaints. [162] On the recommendation of the Secretary of the Law Institute Council and the Lay Observer, compensation may be paid from this Fund to a complainant who "has suffered loss as a result of the action or omission of a solicitor and the Council considers it just and equitable that the payment be made". Such a payment does not affect the right of the complainant to pursue other avenues to recover damages for pecuniary loss, although the amount paid in compensation must be taken into account in the calculation of damages in any subsequent court action. [163] The Commission believes that similar provisions should be enacted in New South Wales to facilitate the establishment of a discretionary fund. See also Recommendation 64, and supporting commentary, regarding other possible sources of funding for such a scheme.

THE LEGAL SERVICES TRIBUNAL

31. The Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal should be combined to form a Legal Services Tribunal. The Tribunal would hear complaints involving issues of unsatisfactory professional conduct or professional misconduct, or both.

32. The Legal Services Tribunal (the "Tribunal") should consist of: at least one judge, at least two barristers and two solicitors, and at least two lay persons, appointed by the Attorney General. The Attorney General should be able to appoint the barrister and solicitor members of the Tribunal without the need for a nomination from the relevant professional Council. One of the judicial members of the Tribunal should be appointed President of the Tribunal by the Attorney General.

33. The President of the Tribunal or his or her nominee should determine the membership of the Tribunal for the purposes of any particular hearing. The judicial member of the Tribunal should preside at the hearing, or in the absence of a judicial member, one of the barrister or solicitor members designated by the President or his or her nominee. The Tribunal should be comprised of equal numbers of independent members and barrister or solicitor members (depending upon whether the information concerns a barrister, a solicitor, or both), plus the presiding member, with a total of three or five members.

34. Hearings of the Tribunal should be conducted in public. The presiding member of the Tribunal may close, or limit the reporting of, the proceedings in those exceptional cases where the presence of the public would defeat the ends of justice. The determinations of the Tribunal should be put in writing, and should be published. (See Recommendation 67, below, regarding the special position of evidence related to privileged communications between client and lawyer.)

35. Having regard to the "protective" nature of the Tribunal's jurisdiction, the Tribunal should be flexible in its procedures, the rules of evidence do not apply, and it may adopt an inquisitorial style.

36. Notwithstanding Recommendation 35, when conducting a hearing into an information involving a question of professional misconduct, the Tribunal should be bound by the rules of evidence.

37. Prior to the commencement of the proceedings, the legal practitioner involved should be obliged to file a Reply to the information (that is, to "plead"), in order to narrow the issues for hearing.

38. Subject to considerations of natural justice in each case, the Tribunal should have the power to deal with matters of professional conduct which arise in the course of proceedings and should be able to order the joinder of informations against two or more practitioners for hearing.

39. The Tribunal should have the same powers as the Supreme Court to discipline legal practitioners, as well as those powers which are specifically enumerated by statute.

40. The enumerated powers of the Tribunal, in the Legal Profession Act, in respect of a barrister or solicitor, should include the powers to:

> **order that a person's name be removed from the Supreme Court's roll of practitioners;**
>
> **cancel, or suspend for any period, a person's practising certificate;**
>
> **place conditions upon a person's practising certificate, including, but limited to, conditions involving: supervision of the person's work by another practitioner, requiring the person to cease to accept instructions in a specified class (or classes) of legal work, or further education;**
>
> **impose a fine of not more than $5,000 for a finding of unsatisfactory professional conduct, or not more than $50,000 for a finding of professional misconduct;**
>
> **issue a public reprimand, unless special circumstances require a private reprimand;**
>
> **order that the person undertake and successfully complete a specified course of further legal education;**
>
> **or to do any combination of those things.**

41. The Act should continue to specify that in relation to a solicitor, the Tribunal also should have the powers in relation to the supervision or management of the practice which are enumerated in section 149(2)(c)-(g) of the Legal Profession Act 1987.

42. Where the Tribunal determines that, whatever the shortcomings of the individual solicitor or solicitors involved, the evidence indicates a systemic problem in relation to a firm of solicitors, the Tribunal should have the power to join the law firm as a party to the proceedings and then to make appropriate orders in relation to the internal systems of management and supervision of the firm, aimed at rectifying the problem.

43. The Tribunal should be free to make a compensatory order (of the kind now specified in s 149(3), but without a specified upper limit) against the legal practitioner where the complainant has suffered loss as a result of the practitioner's conduct. Where such an order was not sought at the start of proceedings, the informant or the complainant may seek leave from the Tribunal to amend the information for this purpose. The Tribunal should be free to make a compensatory order without the consent of the legal practitioner involved.

44. The determinations of the Tribunal should be subject to judicial review only by the Court of Appeal. Appeal on matters of law should be as of right, but special leave should be required to appeal on matters of fact.

45. The Registrar of the Tribunal should have the power to arbitrate (or nominate an arbitrator) in relation to lawyer-client disputes which could not be settled by mediation, and to impose an

administrative penalty of not more than $2,000 against a legal practitioner who unreasonably fails to provide information requested by one of the professional Councils or the Legal Services Ombudsman for the purposes of investigating a complaint.

Commentary

Merger of the Board and Tribunal (Recommendation 31)

4.167 In DP 26, the Commission canvassed the possibility of merging the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal. [164] Under the provisions of the Legal Profession Act 1987, the Standards Board hears complaints about unsatisfactory professional conduct, while the Disciplinary Tribunal hears complaints about professional misconduct. The Act follows recommendations made by this Commission in 1982, in our earlier reference on the Legal Profession. [165] The logic behind the establishment of a two-tier process was that poor work falling short of professional misconduct (such as cases of delay or negligence) also should be dealt with by the disciplinary system, but that:

> it would be unfair and counterproductive if less serious breaches were made subject to the same procedures and sanctions as the serious breaches. The system therefore provided for a formal body, a Tribunal, to deal with serious breaches and a less formal body, a Board, to deal with less serious breaches. [166]

4.168 By splitting the process, the Commission hoped that the less serious complaints would now receive more attention from the professional Councils, reducing the gap between what clients and others actually typically complain about and the much more limited range of matters that the professional Councils are willing to refer to a disciplinary body for hearing.

4.169 However, in practice, the system has not operated as intended. Although the vast proportion of complaints raise issues of unsatisfactory professional conduct (such as negligence, incompetence, delay, poor communications, discourtesy, overcharging) rather than professional misconduct, only a very small number of matters are actually referred to the Standards Board for determination. In DP 26, the Commission analysed the figures provided by the professional Councils for the calendar year 1990. Of the 1245 written complaints against solicitors, over 80% related to (what would amount to) unsatisfactory professional conduct, yet only 12 complaints (or 1%) went to the Standards Board, while 55 complaints were sent to the Disciplinary Tribunal. Out of 79 written complaints received by the Bar Association in 1990, only four were referred to the Standards Board, while nine went to the Disciplinary Tribunal. In the first four years after the new system was put in place, only 50 complaints [167] were referred to the Standards Board from the two Councils, while 200 complaints [168] were referred to the Disciplinary Tribunal. [169]

4.170 As the Commission noted in DP 26, there are problems with the two-tier system which go beyond the major failure to provide the Standards Board with any significant caseload:

> Dual complaints involving elements of both unsatisfactory professional conduct and professional misconduct, or complaints which tread the fine line between unsatisfactory professional conduct and professional misconduct, place the Bar and Law Society Councils in the difficult position of having to decide whether to send a particular matter to the Board or to the Tribunal, or whether to divide the complaint and refer aspects to each body for hearing. [Further], there are suggestions from the profession that the Standards Board is not operating as the simple, summary, inquisitorial proceeding that was originally intended, but instead has become a more adversarial process not unlike that of the Disciplinary Tribunal. [170]

4.171 The Commission's suggestion that the Standards Board and Disciplinary Tribunal be merged was supported in most of the submissions which addressed the issue, and by most of those in the best position to have observed the current hearings system in operation. The submissions from the New South Wales Bar Association and the President of the Disciplinary Tribunal, Mr David Hunt, [171] both recommend the merger of the Board and Tribunal into a body which may hear and determine both forms of complaint. The Bar's

submission states that the "two-tier approach involves additional expense and bureaucracy which is unwarranted. Secondly, the two-tier system creates difficulties and restrictions which are inimical to an efficient and streamlined system of dealing with complaints from the public." [172] A submission in support of merger also was received from Mr Robert Bennett, the Registrar of the Standards Board, Disciplinary Tribunal and Conduct Review Panel. [173] Only the Law Society's submission favoured retention of the current bifurcated system, but little supporting argument was provided. [174]

4.172 The Commission has concluded that merger of the two bodies would result in a more streamlined, rational, and efficient process, and accordingly has recommended merger, with the new body to be known as the "Legal Services Tribunal" - rather than the Legal Profession Tribunal, to emphasise its independence from the profession.

Composition of the Disciplinary Tribunal (Recommendations 32-33)

4.173 Judicial members. The Legal Profession Act 1987 originally provided that the President of the Disciplinary Tribunal was to be the Chief Justice of the Supreme Court of New South Wales, who would appoint two other Supreme Court judges to be members of the Tribunal. [175] When conducting a hearing, the Tribunal was to have been comprised of a judicial member as well as a legal member and a lay member (or two legal members and two lay members, as the President considered appropriate in the circumstances of the case). [176] In 1989, the legislation was amended to remove the judicial members of the Tribunal, [177] based on a policy of utilising judges to reduce delays in the courts and appointing senior lawyers (usually barristers) to quasi-judicial bodies and tribunals instead. [178] Thus, for the purposes of conducting a hearing into a complaint, the Disciplinary Tribunal currently is constituted by two of its legal members (depending upon whether the complaint concerns a solicitor or barrister) and one of its lay members, as determined by the President of the Tribunal. [179]

4.174 In DP 26, the Commission noted that the American Bar Association placed "the highest priority on promoting, developing, and supporting judicial regulation of the legal profession and professional responsibility", [180] and queried whether:

> there may be a special case for having a judicial presence on (and supervision of) the Legal Profession Disciplinary Tribunal. Such a presence would go some way towards ensuring that complainants and the general public regard the Tribunal as being sufficiently independent of the practising profession. [181]

4.175 The Bar Association's submission accepted the idea of judicial involvement in disciplinary hearings in principle, but expressed some concern about whether this would impose a further burden on the court system unless more judges are appointed. [182] The Registrar of the Disciplinary Tribunal, Mr Robert Bennett, wrote that practical difficulties had arisen in trying to schedule sittings of the Tribunal and the Standards Board because of limited availability of barrister members, especially Queen's Counsel, which sometimes resulted in matters being stood over for considerable periods. Mr Bennett suggested the use of retired judges and magistrates. [183]

4.176 Whatever the general policy on the allocation of judges to tribunals, the Commission has concluded that there are good reasons for judicial involvement in the legal disciplinary process, and we have so provided in Recommendation 32. The Commission believes that judicial involvement would:

> increase the public perception of the independence of the Tribunal and the disciplinary process generally;
>
> properly recognise the important rights and interests at issue in disciplinary hearings;
>
> justify the greater flexibility and range of sanctions which the Commission has recommended for the Tribunal;
>
> obviate the need for consent arrangements in the award of compensation;

> limit the basis and nature of appeals from the decisions of the Tribunal; and
>
> eliminate the anomaly whereby the Medical Tribunal is presided over by a judge, [184] but the legal equivalent is not.

4.177 To the extent that the use of sitting judges might impose too heavy a burden on the already over-crowded court system, the Commission believes that Mr Bennett's suggestion of the use of retired judges has merit.

4.178 In the normal course of things, the judicial member (or one of the judicial members if there is more than one) should be appointed the President of the Tribunal.

4.179 Legal members. Under the current provisions of the Legal Profession Act 1987, the solicitor and barrister members of the Standards Board and Disciplinary Tribunal are appointed by the Attorney General on the nomination of the Law Society Council and Bar Council, respectively. [185] The Commission believes, as a general matter, that it is most inappropriate for the members of a public tribunal exercising judicial or quasi-judicial powers to be nominated by private associations. In the particular case of the legal disciplinary body, it is important for the Legal Services Tribunal to be clearly perceived to be independent of the legal profession. The Attorney General may well wish to consult with the legal professional associations before making appointments to the Tribunal, but the Attorney should not be limited to appointing the nominees of the profession.

4.180 Lay members. As the commission wrote in DP 26,

> Although there was very strong opposition to non-lawyer ("lay") involvement in the disciplinary process when the Commission first considered these issues over a decade ago [186] ... it is now widely accepted that this is an important feature of the system and is essential in providing sufficient external accountability to maintain public confidence in the integrity of the system... .[187]
>
> It is obviously critical that the lay members themselves are widely regarded as independent of the legal profession and of sufficient integrity and firmness of mind to participate fully in the deliberations of the Tribunal without being overwhelmed by the judicial or legal members.

4.181 Appointment of lay members to the Tribunal by the Attorney General normally should follow a system of advertising, interviewing and selection on merit, in the manner associated with appointment to important public bodies.

4.182 As discussed in Chapter 3, above, a Public Council on Legal Services, first recommended by the Commission in 1982, could play an important role both in advising the Attorney General regarding appointments (without binding the Attorney) as well as providing training and support services for appointees.

4.183 Composition for individual hearings. The precise composition of the Legal Services Tribunal should be determined by the President or a nominee in each case. While the Commission has recommended that judicial membership of the Tribunal be restored, it is not necessary that every hearing be presided over by a judge, although judicial presence normally should be regarded as desirable. In the absence of a judge, one of the legal members of the Tribunal should be designated as the presiding member.

4.184 In Recommendation 33, the Commission proposes that the Tribunal should be comprised of equal numbers of independent members and legal members, plus the presiding member. The Tribunal normally would be comprised of three members, but the President or a nominee may determine that a particular hearing, because of (say) the importance or complexity of the issues involved, requires a bench of five members. Where the Tribunal has ordered the joinder of informations against two or more practitioners for hearing (see Recommendation 38), and the respondents include both solicitors and barristers, the President also may wish to set a five member bench in order to include legal members from both divisions of the profession.

Hearings before the Tribunal (Recommendations 34-38)

4.185 Hearings to be in public. The American Bar Association's Commission on the Evaluation of Disciplinary Enforcement recently reported that it was:

> convinced that secrecy in discipline proceedings continues to be the single greatest source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and the media will be able to freely comment on the proceedings. The public does not accept the profession's claims that lawyers' reputations are so fragile that they must be shielded from false complaints by special secret proceedings. The irony that lawyers are protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public. On the contrary, it is a source of great antipathy toward the profession. ... The arguments against open disciplinary systems are based on conjecture and emotion, not experience. [188]

4.186 In DP 26, the Commission agreed that:

> As a general matter, the restoration and maintenance of public confidence in the legal profession's disciplinary processes is dependent upon clear evidence that the system is fair, open and accountable. As many elements of the system as possible should be open to the public and on the record, and reasons for decisions should be available. [189]

4.187 Under the present legislative arrangements, the hearings of the Standards Board into allegations of unsatisfactory professional conduct are held "in the absence of the public" (in camera), and the complainant has no statutory right to be present other than the limited right to be appear as a party for the purposes of a compensation claim. [190] Hearings of the Disciplinary Tribunal into allegations of professional misconduct normally are held in public, but the Tribunal does have the discretion to close the proceedings to all but the parties and their representatives in the interests of justice. [191]

4.188 The Australian Consumers' Association agreed that opening up the proceedings would "help restore public confidence in the complaints system". [192] However, the submissions of the Bar Association and the Law Society disagreed with the Commission that hearings into allegations of unsatisfactory professional conduct should be open to the general public. The Bar Association agreed that the complainant should be allowed to be present, but expressed concern that a publicly-heard allegation of poor performance could result in professional stigma even if dismissed, so that public hearings were not justified in minor matters. [193] The Law Society also submitted that allegations of unsatisfactory professional conduct did not "raise questions of fitness to practice affecting the general community. On the contrary they will be personal to the complainant and the solicitor and no public interest is served by opening the proceedings to the general public." [194] The President of the Disciplinary Tribunal, Mr David Hunt, also expressed concern that opening the hearing to the public would make it difficult to proceed in a relatively informal manner. [195]

4.189 The Commission finds that it cannot accept the assertions of the professional associations. No doubt the hearing of a serious allegation against a lawyer amounting to professional misconduct could result in professional stigma even if dismissed, yet the Bar Association accepts (and it is generally uncontroversial) that such proceedings should almost always be held in public. [196] And contrary to the view of the Law Society, unsatisfactory professional conduct, by statutory definition, clearly goes beyond the bounds of a purely "personal dispute" between lawyer and client, since it "involves a substantial or consistent failure to reach reasonable standards of competence and diligence". [197]

4.190 The Commission still believes that all hearings in respect of unsatisfactory professional conduct and professional misconduct should be open to the public. (And certainly complainants always must have the right to be present at any formal hearing of their complaint.) In DP 26, we noted that the threat to the reputation of the legal practitioner involved in the former case is no greater than that of the lawyer sued for professional negligence in the District Court or the ordinary citizen charged with a minor criminal offence in the Local Court, both of whom are subjected to "open justice" in the public interest. [198]

4.191 Whatever small discomfort is occasionally caused to practitioners because of the operation of "open justice" principles in the disciplinary system will be heavily outweighed by the increased public confidence in the fairness and propriety of the system, and the greater level of knowledge (by members of the public and by lawyers) of what standards of professional conduct are expected of competent and diligent legal practitioners. As the submission of the Attorney General's Department suggested, "the total secrecy which [currently] surrounds the Board's proceedings seems to be counterproductive". [199]

4.192 In extraordinary cases it may be necessary to close the proceedings, or limit the reporting of proceedings, but we recommend that this discretion should be exercised only "where the presence of the public will defeat the ends of justice", [200] as is the case in the Supreme Court (where closure is rare). A special exception to the general rule should be made in relation to the taking or reporting of evidence of (otherwise) confidential and privileged communications between client and lawyer. This is provided for in Recommendation 67, which is discussed in Chapter 5, below.

4.193 Evidence and procedure. One of the main ideas behind the current bifurcated system of disciplinary hearings is that the Standards Board, which hears the less serious category of complaints about unsatisfactory professional conduct, would conduct itself in a relatively informal manner, while the Disciplinary Tribunal would hold more formal hearings into allegations of professional misconduct. For the reasons discussed above, the Commission has concluded that the bifurcated system has not worked as intended (or well), and we have recommended merger of the two disciplinary bodies into a new Legal Services Tribunal.

4.194 The Commission considered in DP 26 that there is no reason why, when hearing a complaint about unsatisfactory professional conduct, the new Tribunal could not conduct itself in a more inquisitorial and somewhat less formal manner than it otherwise might. [201] The submissions of the Bar Association [202] and the Registrar of the Disciplinary Tribunal, Mr Robert Bennett, [203] both agreed with the Commission on this issue.

4.195 The courts in New South Wales have stated that disciplinary proceedings are neither criminal nor civil, but rather are "protective" (of the public interest). [204] As a general matter, the Commission believes that the new Tribunal should adopt a more flexible and inquisitorial style, subject, of course, to the imperatives of administrative natural justice. We have recommended as well (see Recommendations 35-36) that this flexibility should extend to the rules of evidence, so that the Tribunal may inform itself in any manner it sees fit, except in relation to a charge of professional misconduct. Given the severity of the penalties available (and likely) in the event of a finding of professional misconduct, the rules of evidence should apply in such proceedings.

4.196 The legal practitioner to "plead". Under the present legislative arrangements, there is no formal requirement for the legal practitioner to "plead" with respect to any allegations made against him or her. The preliminary submission of the Bar Association suggested that, as a result, the issues for hearing and determination were not narrowed and that this caused unnecessary expense and delay. [205] In DP 26, the Commission took up this point and suggested that:

> The disciplinary process probably would be expedited and facilitated by requiring legal practitioners to respond formally to complaints (to "plead") in a timely fashion and in a manner which serves to narrow the issues for investigation and hearing. The legal practitioner's candour - or lack of candour - in this respect should itself be a matter for consideration by the disciplinary authorities. [206]

4.197 The Registrar of the Disciplinary Tribunal, Mr Bennett, informed the Commission that, in practice, he asks the legal practitioner concerned whether he or she intends to contest all of the grounds of the complaint. The answer is incorporated into a statutory declaration. Nevertheless, Mr Bennett agreed with the Commission and the Bar Association that the position should be clarified and formalised in the legislation. [207] In Recommendation 37, the Commission proposes that prior to the commencement of the hearing of disciplinary charges the legal practitioner involved should be obliged to file a Reply to the information (that is, to "plead").

4.198 Joinder of informations, and matters arising. Early in the inquiry, the Bar Association and Law Society both pointed out to the Commission that the existing disciplinary bodies have no power to deal with matters involving unsatisfactory professional conduct or professional misconduct which are revealed in the course of a hearing but which were not the subject of the particular complaint or complaints being heard. The Commission suggested in DP 26 that the disciplinary bodies should have the power to deal with matters arising (subject to considerations of natural justice in each case). [208] The Bar Association [209] and Law Society [210] agreed with this, of course, as did Mr Robert Bennett (the Registrar of the Disciplinary Tribunal) [211] and Mr David Hunt (President of the Disciplinary Tribunal). [212]

4.199 Similarly, the Commission mentioned in DP 26 that:

> There may be some cases in which it is difficult to determine before hearing whether one or another legal practitioner (or both) is responsible for the conduct or failing complained of. Absent a formal hearing there may be insufficient information for the relevant Council to make the determination, or it may be one practitioner's word against the other. Consideration should be given to permitting the joinder of complaints in these circumstances, to permit the Board or Tribunal, as appropriate, to make the determination after hearing from all of the parties. This may be especially important where the legal practitioners involved are a barrister and a solicitor, in which case neither professional Council would have sufficient jurisdiction to handle the matter properly. [213]
>
> The submission of the Bar Association agreed with this suggestion. [214]

4.200 In Recommendation 38, the Commission proposes that, subject to principles of natural justice, the Legal Services Tribunal be empowered to deal with matters arising and to order the joinder of informations against two or more practitioners.

Powers of the Tribunal (Recommendations 39-43)

4.201 The Tribunal should have the same powers as the Supreme Court. In DP 26, the Commission noted that it was widely accepted that there are:

> some anomalies and inconsistencies in the distribution of powers between the disciplinary bodies provided for in the Legal Profession Act 1987, and in the sanctions and orders available in respect of members of the different branches of the legal profession. For example, under the prior legislation, it was generally considered that the Solicitors' Statutory Committee had the same powers to discipline solicitors as the Supreme Court had in relation to solicitors and barristers. However, the Standards Board and the Disciplinary Tribunal have only those powers which are specifically enumerated in ss 149 and 163 of the 1987 Act. In this respect, the previous position is to be preferred. [215]

4.202 In Recommendation 39 we make clear that the reconstituted Legal Services Tribunal should be given the same powers as the Supreme Court to discipline barristers and solicitors, as well as those powers which are specifically enumerated by statute.

4.203 Another issue raised in DP 26 [216] is whether the Disciplinary Tribunal's specified powers to make orders against a legal practitioner found guilty of professional misconduct [217] implicitly subsume the (more varied) powers of the Board and Tribunal with respect to practitioners found to have engaged in unsatisfactory professional conduct. [218] The Commission believes that this should be the case, but in any event the problem would pass with the merger of the Board and Tribunal, as we have recommended in this Report.

4.204 The Tribunal's enumerated powers. In Recommendation 40, the Commission lists the disciplinary powers of the Legal Services Tribunal which should specifically be enumerated in the Legal Profession Act. There is not much of controversy here, since the Commission largely has replicated the aggregated powers of the existing Board and Tribunal. The Commission does not believe that it is necessary or useful to specify a separate array of powers in respect of unsatisfactory professional conduct and professional misconduct - most of the disciplinary orders will be relevant in either case, and common sense as well as common law

would not permit the most severe sanctions (such as striking off) to be imposed for minor transgressions, whatever the categorisation.

4.205 Two aspects of the Recommendation are worth discussing separately, however. First, the Commission suggested in DP 26 that the current maximum fines of $2000 for unsatisfactory professional conduct [219] and $25,000 for professional misconduct [220] seem to be too low, having regard to the maximum penalties now applicable to doctors, company directors, and other professional advisers who conduct themselves in a substandard or improper fashion. [221] The (Medical) Professional Standards Committee, for example, which is the equivalent of the Legal Profession Standards Board, currently may impose a fine not exceeding $5000. [222] In order to give the Legal Services Tribunal sufficient flexibility to impose a substantially greater fine than is now available where the circumstances warrant such a penalty, the Commission has recommended that the maximum fines be raised to $5000 for unsatisfactory professional conduct and $50,000 for professional misconduct.

4.206 Secondly, the Commission has sought to clarify the position in relation to the administration of a reprimand. Under the existing law, a legal practitioner can be reprimanded by a Council (with the consent of the practitioner) [223] or by the Standards Board, for unsatisfactory professional conduct. [224] The Commission believes that a reprimand by the new Tribunal normally should be a public reprimand, unless special circumstances require a private reprimand. For example, if a lawyer's professional practice fell into disarray because of a personal tragedy or other compelling personal problems, the Tribunal might feel that a private reprimand is preferable.

4.207 The Tribunal's powers over solicitors' firms. In Recommendation 41, the Commission specifies that the Legal Services Tribunal should continue to have the powers over law practices or firms (and associated solicitor corporations), enumerated in s 149(2)(c)-(g) of the Legal Profession Act 1987 (NSW). [225] These include the powers to order:

> periodic inspection of the practice;
>
> that the practice seek management advice;
>
> that the practice cease to employ a specified person or persons;
>
> that "a person belonging to such class of persons as it may specify in the order" be employed; and
>
> that the practice cease to accept instructions in relation to a specified class or classes of work.

4.208 In DP 26, the Commission wrote that: [226]

> In a number of matters observed by the Commission or which have been brought to our attention, the complaint and the ensuing investigation indicated that, in addition to (or instead of) personal failings on the part of the legal practitioners concerned, there was evidence of broader, systemic problems in the law firms concerned. It should be possible for the various legal profession disciplinary bodies to make appropriate orders in respect of a firm of solicitors - short of putting in a receiver [227] - aimed at rectifying any perceived systemic problems. For example, it should be possible to order the establishment of an internal Ethics Committee, or to improve internal systems of management and supervision, with the firm required to approach the disciplinary body after a specified period of time to demonstrate what changes have been made and their effectiveness.

4.209 The Commission's File Survey (of Law Society complaints files) confirmed our earlier impression that the evidence sometimes reveals systemic failure on the part of the law firm involved. Consistent with our general policy of affording the Legal Services Tribunal sufficient flexibility to fashion customised orders and sanctions, the Commission also recommends (Recommendation 42) that in such circumstances, the Tribunal should be able to make appropriate orders in respect of the firm of solicitors to rectify the problem. [228]

4.210 Powers to make compensation orders. The current legislation allows for the award of compensation to complainants in certain circumstances, but imposes a number of unnecessary constraints. The Standards Board and the Disciplinary Tribunal both have the power to make an order that the legal practitioner waive or repay fees, carry out certain legal work free of charge or for a specified fee, waive any lien in respect of documents, or pay a specified amount of compensation, upon a finding of unsatisfactory professional conduct or professional misconduct, respectively. [229] However, such a compensatory order may be made only where the complainant specifically has requested such a remedy in his or her complaint, with supporting particulars, [230] and two other qualifications are met.

4.211 First, an order for compensation of up to $2000 may be made without the consent of the legal practitioner involved, but the consent of both the practitioner and the complainant is required for an order above that cash amount, or for any of the other three compensatory orders. [231] This provision creates the anomalous situation that the complainant may be awarded cash compensation of $2000 without the consent of the lawyer involved, but cannot get a fee waiver or specific performance worth, say, $500, without the practitioner's consent. Secondly, the complainant must not have received, nor be "entitled to receive compensation pursuant to an order of a court or compensation from the Fidelity Fund". [232]

4.212 In DP 26, the Commission was critical of the way in which these conditions:

> appear to be weighted too heavily against the complainant. The Board and Tribunal should have the power to make any or all of the orders referred to above if the interests of justice and fairness so require. Complainants will often not be aware of the nature or existence of a solicitor's lien, for example, or understand in advance the sort of compensation they may be entitled to. Where a Board or Tribunal is satisfied on the evidence that a complainant has suffered as a result of a legal practitioner's poor professional work, and such harm may be rectified in whole or in part by an award of compensation or other remedial order, it should be free to make such an order whether or not the complainant has specifically requested such a course of action and whether or not the legal practitioner consents to such an order. The consent requirement is particularly difficult to understand in view of the requirement that the Board or Tribunal may make a remedial order only if it is first satisfied that the legal practitioner is guilty of unsatisfactory professional conduct or professional misconduct and the complainant has suffered loss as a consequence. [233]

4.213 The Commission also queried the appropriateness of the current upper limit of $2000 for compensation orders, and suggested:

> a more realistic sum of $10,000. The point of providing for compensation within the disciplinary process is to avoid the need for the complainant to go to yet another civil court or tribunal (such as the Consumer Claims Tribunal) to seek redress. However, this aim is not achieved where the compensation ceiling is so low that it forces complainants to go elsewhere to get a proper remedy. [234]

4.214 In the submissions received, the Bar Association [235] disagreed with the Commission's proposal to increase the limits on compensation, but the Law Society, [236] the Kingsford Legal Centre, [237] the Australian Consumers' Association, [238] and the Registrar of the Disciplinary Tribunal, Mr Robert Bennett, agreed with the Commission. Mr Bennett suggested that a limit need not be prescribed, with the amount left open to the disciplinary body to decide, having regard to the particular circumstances of each case. [239]

4.215 In Recommendation 43, the Commission accepts this latter approach, and recommends that the Legal Services Tribunal should be free to make an appropriate compensatory order in each case, without the practitioner's consent and without a specified maximum amount. A complainant should no longer be estopped from receiving compensation because of a failure to request this in the original complaint. As a matter of fairness and good practice the complainant should be required to request compensation by at least the commencement of the hearing, but even here the Commission would allow a complainant or an informant to seek the leave of the Tribunal to amend the information [240] for this purpose. Since the Commission has recommended that the Tribunal normally be presided over by a judge, and Tribunal decisions are reviewable by the Court of Appeal (see below), there seems little point in fettering the ability of

the Tribunal to award compensation where it has found that the complainant has suffered loss as a result of the practitioner's conduct.

Review of Tribunal decisions (Recommendation 44)

4.216 For the avoidance of doubt, the Commission has specified that determinations of the proposed Legal Services Tribunal should be subject to judicial review only by the NSW Court of Appeal. Under the Supreme Court Act 1970 (NSW), appeals from or review of the decisions of "specified tribunals" are assigned to the Court of Appeal. [241] A tribunal which has "amongst its number a judge" is automatically a "specified tribunal", [242] while the Legal Profession Disciplinary Tribunal (but not the Standards Board) is expressly included in this category. [243] As the successor to the Disciplinary Tribunal, and as a "a body of persons having amongst its number a judge", the proposed Legal Services Tribunal clearly should be in this category as well.

4.217 The Legal Services Tribunal will be specialist tribunal chaired by a judge, with professional and lay representation. In the circumstances, any appeal from one of its decisions should be by way of a review on the record, rather than by way of a re-hearing. [244] Appeals on matters of law should be as of right, but an applicant should be required to get the leave of the Court to appeal on a matter of fact.

Powers of the Registrar (Recommendation 45)

4.218 Two of the Commission's initiatives in this Report require consequential enhancement and re-definition of the powers of the Registrar of the Legal Services Tribunal. First, the Commission has proposed in Recommendation 20 that in the event that consensual dispute resolution fails to resolve a consumer-type dispute, a complainant may apply to the Registrar of the Tribunal to have the matter resolved by arbitration. [245] The Commission recommends that in such cases the Registrar, or another arbitrator nominated by the Registrar, may award compensation of up to $6000. This amount also is the upper limit of the jurisdiction of the Consumer Claims Tribunal (CCT), and the Commission's intention is to obviate the necessity for a complainant to make a separate claim to the CCT, in keeping with our aim of allowing complainants the opportunity to resolve all issues relating to their complaint within the ambit of the one system.

4.219 The second matter involves empowering the Registrar to impose an "administrative penalty" (a civil "fine", effectively) of up to $2000 against a legal practitioner, upon the application of the Legal Services Ombudsman or one of the professional Councils, where the practitioner unreasonably has failed to provide information requested for the purposes of investigating a complaint. (Recommendation 45 follows from Recommendation 23, which is discussed above.)

EXTERNAL REVIEW

46. The Legal Profession Conduct Review Panel should be renamed the "Legal Services Conduct Review Panel" (the "Panel") and should be empowered to review the handling of any complaint which has not been referred to the Tribunal for a hearing.

47. The composition of the Panel should remain as provided in s 126 and Schedule 4 of the Legal Profession Act 1987, except that the Attorney General should be able to appoint the barrister and solicitor members without the need for nomination by the respective Council. It should continue to be the position that one of the independent members should be appointed Chairperson of the Panel by the Attorney General.

48. The appointment of all members of the Panel should follow a system of advertising, interviewing and selection on merit, in the manner normally associated with appointment to important public authorities.

49. The independent members of the Panel should normally be persons who are not practising lawyers. However, it should be open to the Attorney General to appoint a person who has legal qualifications so long as he or she does not hold a current practising certificate. The legislation should specify that the main requirements for appointment as an independent member of the Panel

are that the person: (1) is independent of the legal profession, and (2) has sufficient experience and community standing to promote public confidence in the integrity of the system.

50. The independent members of the Panel should be entitled to receive a reasonable level of remuneration, having regard to the time commitment and complexity of the work involved, in order to attract and retain competent people.

51. The Panel should be allocated sufficient resources to ensure that it can carry out its functions promptly and effectively in the public interest. In particular, the Panel should have a sufficient budget to enable it to:

establish a small, full-time secretariat, to facilitate the work of the part-time Panel;

provide the necessary legal and technical advice and research to its members;

make possible the active investigation or re-investigation of complaints in appropriate cases;

conduct relatively informal hearings at which the parties may be heard; and

organise training programs for its members, especially the independent members.

52. The Panel should be able to undertake a review upon an application from the complainant; or upon the request of the Attorney General, the Legal Services Ombudsman or a professional Council; or on the Panel's own motion.

53. The Panel should be entitled to go beyond the file compiled by the professional Council or the Legal Services Ombudsman to conduct a thorough review of the complaint, which may involve further investigation or re-investigation, or asking the parties to appear before it. The Panel also should be able to ask that the Council or the Legal Services Ombudsman conduct further investigations into a complaint instead of or in addition to pursuing its own inquiries.

54. The Panel should be empowered to refer a matter back to a Council or to the Legal Services Ombudsman for further investigation, or to refer a matter directly to the Tribunal for a formal hearing, without the intervention of the Attorney General. Where the Panel refers a matter to the Tribunal for hearing, the Panel should nominate the Legal Services Ombudsman or the appropriate professional Council to prosecute the information.

55. The Panel should be empowered to refer a matter for dispute resolution (see also Recommendations 15 and 28) or to recommend the payment of compensation to a complainant in appropriate cases, from a discretionary fund maintained by the professional Councils for this purpose.

56. If the Panel upholds the decision of the Council or the Legal Services Ombudsman, it should provide the complainant with adequate reasons in writing for the Panel's decision.

57. The Panel should be obliged to report annually to Parliament through the Attorney General, and at least semi-annually to the professional Councils and the Legal Services Ombudsman.

Commentary

External monitoring generally

4.220 At present, the Panel may, following an application by a complainant, review the dismissal of a complaint by a professional Council (or a committee of Council with delegated authority). [246] In each case, the Panel is comprised of two lay persons and one barrister or solicitor, depending upon the nature of the complaint. The Panel may deem that a complaint has been dismissed if it has not been disposed of within

six months. [247] The procedure is a purely paper one, with the Panel simply reviewing the file sent by the Law Society or Bar Association. No new information is called for, although on occasion some new material is presented in the complainant's letter requesting review. In the event that the Panel disagrees with the dismissal, it notifies the relevant Council, which has the opportunity to reconsider the file. If the Council stands by the decision to dismiss the complaint, the Panel can recommend to the Attorney General to forward the complaint to either the Standards Board or the Disciplinary Tribunal. The Panel has no power itself to direct a complaint for a formal hearing.

4.221 It was evident from the Commission's research and widely acknowledged in the submissions - including the submission from the Panel itself - that the Panel got off to a slow and uncertain start after its establishment under the Legal Profession Act 1987. [248] Some of the teething problems included: lengthy delays in the review process, caused by a shortage of some categories of members, the serious illness of one member and the lack of alternates; [249] uncertainty about the confidentiality and privilege of material in the files once they came into the possession of the Panel, which led to the refusal of the Bar Association to turn over any complaint files for over three years; [250] some delays in the processing of referred matters by the Attorney General's Department, and some communications problems between the Department and the Panel.

4.222 Happily, these particular problems have now largely abated. The Panel finally has a full complement of members and alternates, and it has been sitting very frequently to clear the heavy backlog of complaints. When the Commission commenced this inquiry, it took eight to ten months to get a matter reviewed by the Panel. According to information supplied recently by the Panel's Registrar, matters are now being cleared within six to eight weeks. [251] The Bar Association has come to an agreement with the Panel about confidentiality, and the Panel may now review dismissed complaints about barristers. The Attorney General's Department also has greatly speeded up its handling of referred matters, and there are better lines of communication between the Department and the Panel.

4.223 However, in DP 26 the Commission also identified a number of significant structural problems with the powers and operations of the Panel, which prevent it from providing as effective an oversight of the system as complainants and the public generally are entitled to expect. These problems include:

> the Panel's jurisdiction is limited to dismissed matters, although complainants may feel dissatisfied with a Council's handling of a complaint which has been disposed of in some other way, such as where a practitioner has been reprimanded; [252]
>
> the Panel's review currently relies upon information obtained derivatively from the files of the professional associations, without any independent investigation of its own; [253]
>
> the Panel has only recommendatory power, necessitating further review by the Attorney General's departmental officers, with the consequent duplication of efforts and further delays; [254] and
>
> questions about the membership and resourcing of the Panel. [255]

4.224 The Law Society's submission argued strongly for the replacement of the Panel by a "Lay Observer", with wide access to all parts of the disciplinary system. [256] However, the Commission is of the view that the external monitoring function is much better left to a panel, rather than to an individual (as the Law Society has suggested). As we noted in DP 26,

> For the purposes of reviewing individual complaints, and bringing a range of viewpoints and expertise to bear, the multi-member Panel - which includes a legal representative, who can offer technical and practical insights - is better placed to get through the work. [257]

4.225 The NSW Commissioner for Consumer Affairs, Mr John Holloway, shares the Commission's doubts about "whether the external monitoring function would be most effectively discharged by a single person, no matter how eminent". [258] The submission from the President of the Disciplinary Tribunal, Mr David Hunt,

also considered that the Panel "can be made to work effectively provided sufficient resources are allocated to handle the volume of matters". [259] These views are reinforced by the fact that the number of requests for reviews is likely to increase significantly in coming years, in line with the general increase in the number of complaints as well as the expanded jurisdiction of the Panel, which would not be limited to reviewing dismissed matters.

4.226 Under the current legislation, the only qualification for appointment as a lay member of the Panel is that the person is not a legal practitioner. [260] As was noted in DP 26, it is the Commission's view that,

> it is important that the person be of sufficient integrity, strength of character, independence, experience and community standing that he or she will be capable of questioning the decisions of a Council of eminent lawyers in a fair but firm manner, and of assuring the general public of the probity of the disciplinary system. These qualifications should be spelled out more fully in the legislation. ... In order to attract the best possible candidates and to assure the public of the independence of the persons appointed to the Panel, such appointments should only take place following a proper advertising and selection process. [261]

The Conduct Review Panel (Recommendations 46-52)

4.227 The Panel's jurisdiction. The Panel currently is only authorised to review "a Council's decision to dismiss a complaint" [262] (or a "deemed dismissal" where the Council does not make a determination within six months). [263] The review may only commence upon an application from the complainant, made within two months of the Council's decision (or deemed decision). [264]

4.228 The Commission believes that this is unduly restrictive in two respects. First, the Panel should be entitled to review any (adverse) decision by the investigating body (one of the Councils, or the Legal Services Ombudsman, under our recommendations). As mentioned above, a complainant could well feel dissatisfied with a decision to reprimand a legal practitioner, for example. Review should be available in all cases where the investigating body decides not to refer the matter to the Legal Services Tribunal for a hearing.

4.229 Secondly, it will normally only be the complainant who is interested in seeking a review. However, there may be occasions on which the decision to dismiss a complaint is questionable in terms of public policy, but the complainant does not wish to pursue the matter. For example, a complainant may regard the review process as futile or too much trouble; or the complainant already may have prompted some positive action from the lawyer, or may have received some compensation. If such a case comes to public attention it could lead to the loss of public confidence in the integrity and efficacy of the system. Consequently, we recommend (Recommendation 52) that it also should be open to the Legal Services Ombudsman, one of the professional Councils (where the Legal Services Ombudsman conducted the investigation), or the Attorney General to approach the Panel to seek review of the decision, and the Panel also should be able to initiate a review on its own motion. Such cases probably will be rare, but it is nevertheless important that the external monitor be able to resolve doubts about any questionable decision, and not merely those in which the complainant takes the initiative.

4.230 Appointment of members. In keeping with the Commission's view that there be no confusion about the status of the independent bodies involved in the regulation of the legal profession, we have recommended that the Panel be renamed the Legal Services Conduct Review Panel. As with the Legal Services Tribunal (see Recommendation 32, above), the Commission believes that it is inappropriate for legal members of the Panel to be appointed by the Attorney General upon the nomination of the professional Councils. The Panel should have the benefit of legal expertise and perspectives, but the Attorney's discretion to appoint appropriate lawyers for this purpose should not be so fettered, nor should the perception of the legal members' independence and impartiality be compromised by the manner of their nomination. Consequently, we have recommended (Recommendation 47) that the Attorney General may appoint legal members of the Panel without the need for nomination by the professional Councils. The Attorney may wish to consult with the Councils (and others) about such appointments, of course. The Commission also recommends (Recommendation 48) that the appointment of all members of the Panel (legal and lay) should follow merit selection principles and procedures, in keeping with the nature and importance of the office.

4.231 Under the Legal Profession Act 1987, the only qualification for appointment as a lay member of the Panel is that the person is not a legal practitioner. [265] In DP 26, the Commission proposed that the legislation spell out the qualifications required for appointment as a lay member of the Panel, in a more specific and positive fashion, emphasising:

> that the person be of sufficient integrity, strength of character, independence, experience and community standing that he or she will be capable of questioning the decisions of a Council of eminent lawyers in a fair but firm manner, and of assuring the general public of the probity of the disciplinary system. [266]

4.232 In Recommendation 49, the Commission incorporates these qualifications into the qualifications for appointment. The Commission also gave considerable attention to the question whether a person who has legal training but does not practice law should be eligible for appointment as a lay member of the Panel. It is the Commission's view that the possession of a law degree or an Admission Board diploma should not in itself disqualify the person from appointment, so long as the person does not hold a current practising certificate and meets the other criteria of independence of mind and community standing. The Commission is aware that it is increasingly common for persons with legal training to pursue careers other than as legal practitioners - for example, in accounting, industry and commerce, journalism, public administration, and so on. The Commission also is aware of the comment that, with the popularity of legal studies and the proliferation of university law schools, there may soon be a time when it will be difficult to find an adult in New South Wales without legal qualifications.

4.233 In order to attract and retain good lay members of the Panel, members should be entitled to receive a "reasonable" level of remuneration, having regard to the nature of the work involved. Members of the Panel should receive some recognition of, and recompense for, the time, out-of-pocket expense, and inconvenience of such service. However, people should be motivated to apply for appointment and to serve on the Panel for reasons having to do with the spirit of public service rather than a desire for pecuniary gain, and the stipend need not be unduly large. (See Recommendation 50.)

4.234 The Panel itself must be sufficiently resourced to permit it to carry out its responsibilities effectively and efficiently, in the public interest. [267] In particular, the Commission recommends (Recommendation 51) that sufficient resources be made available to: establish a small, full-time secretariat, to facilitate the work of the part-time Panel; provide the necessary legal and technical advice and research to the lay members of the Panel; make possible the active investigation or re-investigation of complaints in appropriate cases (see below); conduct relatively informal hearings at which the parties may be heard; and run training programs for the members, especially the lay members. [268]

The Panel's powers and obligations (Recommendations 53-57)

4.235 The nature of the review. The Legal Profession Act 1987 states that the Review Panel "shall review" decisions to dismiss a complaint, upon application from the complainant. To this end, the Panel is required to consult with the relevant professional Council and is entitled to view the records and documents held by the Council in relation to the investigation of the particular case. [269] As a matter of practice, the Review Panel generally conducts only an administrative "paper review", in camera, based upon the application of the complainant and the existing record. In practice, the Panel sometimes asks the professional associations to produce further information - that is, to present fresh evidence - and complainants sometimes raise new material in their application for review. Having regard to its resources and its own interpretation of the relevant sections of the Act, however, the Panel does not undertake any fresh investigation or re-investigation, solicit submissions from the parties, or examine witnesses. [270]

4.236 In DP 26, [271] the Commission wrote that the Panel itself had acknowledged that:

> this procedure often comes as a disappointment to complainants, who assume that they will be notified of the time of the review, will be entitled to be present and to be heard (in person or through a representative), and will be able to put on and challenge evidence. That is, complainants assume that they will receive the opportunity to "appeal" against the Council's decision. One experienced member of the Panel described this as "an austere, dehumanised procedure which does not satisfy the

> public". The Chairperson of the Panel, Mr John O'Neill, described the Panel's powers in this regard as "deficient".

4.237 As we noted in DP 26, it is arguable that the Panel actually has greater powers under the Act than it has chosen to exercise, given the judicial interpretation of the term "review" in other similar contexts. [272] Whatever the correct position, it is obvious "that these powers ought to be clarified and significantly increased by legislation in order to permit the Panel to conduct an effective review of the decisions of Councils to its own satisfaction and that of complainants". [273]

4.238 The Legal Services Ombudsman in England and Wales - who is vested with the same review function as the Panel - has more thorough-going powers to review dismissed complaints, including re-investigation where appropriate. The Legal Services Ombudsman may require any person to furnish information or produce documents considered relevant, and has the same powers as the English High Court to compel attendance, examine witnesses, and so on. [274]

4.239 In Recommendation 53, we propose that the legislation should make clear that the Panel is entitled to go beyond the record compiled by a Council or the Legal Services Ombudsman to conduct a thorough investigation or re-investigation of a matter. This should involve the ability to ask the parties to appear before it - not for a formal hearing, but rather for an interview to assist the Panel with its investigation. It must be remembered that the Panel is not a judicial or deliberative body, but rather is an administrative body. While the rules of administrative natural justice must be respected, the more elaborate rules which apply to full-blown hearings are not relevant here. Rather than exercise these powers directly, the Panel may wish simply to get a clarification from a Council or from the Legal Services Ombudsman (as it does now with respect to the former) or to request that the Council or the Ombudsman conduct some further investigation. For example, the Commission noticed in its File Survey (see Chapter 2) that the Law Society often failed to interview third parties who might have shed some light on the dispute. Rather than re-investigate the entire matter in such cases, the Panel may prefer to clarify whether the Council tried to interview the third party and, if it has not, recommend that the Council do so promptly.

4.240 It was recognised in DP 26 [275] that the Panel's view of the extent of its own powers is at least partly coloured by practical considerations about the resources which are made available to it, and which currently are not calculated to support a system of full hearings. The issue of resources is discussed more fully, below.

4.241 Power to refer a matter directly for hearing. Under the current legislation, if the Panel disagrees with the decision of a Council to dismiss a complaint, it has no direct powers to refer the matter to the Standards Board or Disciplinary Tribunal for a hearing. Rather, the Panel must first approach the Council and ask it to re-consider its decision; [276] if the Council stands by its original decision to dismiss, then the Panel can only make a recommendation to the Attorney General that the matter be referred to the Standards Board or Disciplinary Tribunal for a hearing. [277]

4.242 In DP 26, the Commission wrote that:

> It is difficult to see why the recommendation of the Panel should not be given direct effect, rather than triggering yet another review by the Attorney. In recent discussions with the Commission, the Bar Association supported this view. The Attorney General is required to "take into consideration, but is not bound to follow, the recommendation made by the Panel". [278] If the Panel's only power is to refer the matter for hearing, there is little danger in giving this direct effect. The added layer of the Attorney General, who would no doubt act on the advice of departmental officers or the Crown Solicitor, only contributes to delays in the final determination of a complaint, and leads to the view that the system is balanced against the complainant. [279]

4.243 As the Panel itself submitted,

> Referring matters to the Attorney General if we have not been able to persuade the Law Society to change its views has been a frustrating procedure and in our view unnecessary. Our decision is really "there is a case to answer" not a conclusion as the matter will still be heard by the Board or Tribunal.

> Even if there was not a year's delay in hearing back from the Attorney we see no merit or benefit in this step. [280]

4.244 Although the handling of such matters by the Attorney General's Department is now more prompt and the communications between the Attorney and the Panel are much improved, the Commission still believes that the requirement of the Attorney's intervention is unnecessary and undesirable. We recommend (Recommendation 54) instead that the Panel be empowered to refer a matter back to the investigating body (a Council or the Legal Services Ombudsman) or to refer the matter directly to the Legal Services Tribunal for a hearing.

4.245 In the event that the Panel refers the matter for hearing, the Panel should nominate either the Legal Services Ombudsman or one of the professional Councils, as appropriate, to prosecute the matter before the Legal Services Tribunal. The Commission believes that the prosecutorial role should not be performed by the Panel itself, which is established for rather different purposes (to provide external scrutiny of the process), so that a prosecutor must be found. Where the decision of a Council to dismiss a complaint is not accepted by the Panel, the Panel should normally ask the Legal Services Ombudsman to take the case to the Tribunal; where it is the decision of the Legal Services Ombudsman to dismiss a complaint that is at issue, the Panel normally should request the appropriate Council to pursue the matter before the Tribunal. However, the Commission does not see any reason to specify this in the legislation, and prefers to leave it to the discretion of the Panel to nominate the appropriate body to prosecute. There may be some cases from time to time in which the Panel believes that the investigating body which dismissed the complaint initially is nevertheless the most appropriate prosecutor, having regard to practical or resource concerns, or familiarity with the complexities of the matter. The Legal Services Ombudsman and the Councils should be sufficiently "professional" to prosecute such matters properly notwithstanding their earlier decision to dismiss.

4.246 The submission from the Attorney General's Department discussed the appropriateness of the Attorney General appearing as a party to disciplinary proceedings. [281] Apart from the current statutory requirements relating to Attorney's particular role in the review and referral of complaints, the main point of principle in favour of the Attorney appearing as a party emerges "by virtue of his position in relation to the legal profession" (ie, the Attorney's role as chief law officer). However, the submission also highlighted arguments against the involvement of the Attorney in this way, mainly that:

> In becoming the de facto complainant the Attorney General will be placed in the position of having to substantiate the complaint by himself obtaining all the evidence necessary. This would place a heavy demand on his Department's resources if it is found that a complainant's evidence is incomplete and the Department is required to carry out further investigations and obtain further evidence. While a body such as the Law Society has inspectors for that purpose, this Department does not. [282]

4.247 Since we have recommended the creation of a Legal Services Ombudsman with investigatory powers and special expertise and responsibilities in this area, the Commission believes that this prosecution role properly should pass from the Attorney to that public official (in the same way that the day-to-day responsibility for criminal prosecutions has largely passed from the Attorney General to the Director of Public Prosecutions).

4.248 The Panel's role in dispute resolution. The Panel may take the view in some cases that the matter would be better handled by consensual dispute resolution rather than (or in addition to) a hearing before the Legal Services Tribunal. Assuming that the matter has not already proceeded down this track before it reached the Panel, the Panel should have the option of referring the matter for mediation or conciliation (see Recommendation 15). The Panel also should have the option of recommending that a Council make an ex gratia award of compensation to the complainant from a discretionary fund maintained for this purpose. [283] (See Recommendation 28, and the supporting commentary, above.)

4.249 The Panel to provide reasons for its decisions. As discussed in the previous Chapter and elsewhere in this Report, it is a matter of fundamental fairness that a complainant (and a respondent, for that matter) be given adequate and comprehensible reasons in writing for an adverse decision. In DP 26, the Commission proposed that this principle be extended to the situation in which the Panel "upholds" the decision of a

Council (or the Legal Services Ombudsman) to dismiss a complaint, [284] and we have a made a recommendation to this effect here (Recommendation 56). There is currently no obligation for the Panel to provide reasons.

4.250 The Bar Association's submission agreed with the Commission on this point. The submission from three of the lay members of the Panel, including the Chairperson, [285] reported that the legal members of the Panel have always been reluctant to provide reasons to the complainant, because the Panel: wished to avoid further correspondence; wished to avoid the possibility of an action for defamation; and regarded such efforts as time consuming and probably repetitive. However, the lay members accepted that with adequate resources (as we have recommended) and protection from liability for defamation (which is already provided for in the Legal Profession Act), [286] such a statutory obligation would be "feasible".

4.251 Reporting requirements. As with all of the other main agencies in the complaints handling system, the Panel must be held to an appropriate standard of accountability. In Recommendation 57, the Commission proposes that the Panel be placed under a statutory obligation to report to Parliament (through the Attorney General) annually, and to report to the professional Councils and the Legal Services Ombudsman at least twice annually. The report to Parliament should be a major review of the past year, with full details of the Panel's budget and staffing details, operations, and observations. The latter requirement is aimed at providing the investigating bodies with sufficient information and analysis of their performance to facilitate improvements in their operations.

FOOTNOTES

1. Eg, the Legal Profession Standards Board, the Legal Profession Disciplinary Tribunal, the Legal Profession Conduct Review Panel.

2. At para 4.37.

3. DP 26, at para 5.29.

4. See DP 26, Ch 3, passim.

5. Report of the Commission on Evaluation of Disciplinary Enforcement to the American Bar Association (May 1991) Recommendation 3.1. (Hereafter, "ABA Report".)

6. DP 26, at paras 3.101-3.126.

7. Courts and Legal Services Act 1990 (UK) s19.

8. There is an Ombudsman, in this sense, in New South Wales as well as for the Commonwealth. See, eg, the Ombudsman Act 1974 (NSW).

9. DP 26, at paras 5.131-5.132.

10. As well as a Building Societies Ombudsman Scheme.

11. Formally "the Australian Banking Industry Ombudsman Ltd". This is a voluntary scheme developed (in the face of calls for legislation) and funded by the Australian Bankers Association. It is modelled, to some extent, on the English Banking Ombudsman. See G Burton, "A Banking Ombudsman for Australia" (1990) 1 Journal of Banking and Finance Law and Practice 29-55, and JG Starke, "Establishment of a non-governmental national banking ombudsman system" (1989) 63 Australian Law Journal 454-456.

12. ACA submission of 23 December 1991, at 1-2.

13. Victoria. Law Reform Commission Access to the law: Accountability of the Legal Profession (Report No 48, 1992) Recommendation 1. (Hereafter, "VLRC 48".)

14. NSW Department of Community Services Improving services by listening and responding: Appeals and Complaints Mechanisms for Community Services in NSW (November 1992) at 5.

15. Law Reform Commission Act 1967 (NSW) s 3B.

16. Ombudsman Act 1974 (NSW) s 6.

17. Independent Commission Against Corruption Act 1988 (NSW) Sch 1, cl[4], limits the term to not more than 5 years, with eligibility for re-appointment.

18. DP 26, at para 5.152.

19. See the discussion of this matter in Chapter 3, above. See also DP 26, at para 5.153.

20. See, eg, the Ombudsman Act 1974 (NSW) s 8; see also s 8A regarding functions and ss 10-10B regarding delegation.

21. Ombudsman Act 1974 (NSW) s 6.

22. Independent Commission Against Corruption Act 1988 (NSW) s 6.

23. DP 26, at para 5.154.

24. Courts and Legal Services Act 1990 (UK) s18(5).

25. DP 26, at paras 5.156-5.158.

26. Legal Profession Act 1987 (NSW) ss 120-121.

27. Legal Profession Act 1987 (NSW) Part 9.

28. Conveyancers Licensing Act 1992 (NSW) Part 6. The Act was assented to on 8 October 1992. At the time of writing, the Act was partly proclaimed, and full proclamation was expected in the near future.

29. DP 26, at para 5.7.

30. DP 26, at para 5.17.

31. ABA Report, at iv.

32. Legal Profession Act 1987 (NSW) s 130.

33. DP 26, at para 5.14.

34. DP 26, at para 5.13.

35. Legal Profession Act 1987 (NSW) s 130(5).

36. DP 26, at para 5.16.

37. ABA Report, Recommendation 16(2), discussed at 16.

38. See R L Abel The Legal Profession in England and Wales (1988) at[255], for a brief account of this matter. See also DP 26, at para 3.112.

39. DP 26, at para 5.149. See also paras 5.11 and 5.148.

40. ACA submission of 23 December 1991, at 1-2.

41. See DP 26, at paras 5.120 and 5.140.

42. See, eg, the Legal Profession Act 1987 (NSW) ss 51, 54, 55, and 63.

43. See, eg, Part 5 of the Medical Practitioners Act 1938 (NSW). Cf the Health Care Complaints Bill 1992 (NSW) cll 56-64, regarding the investigation of complaints.

44. Legal Profession Act 1987 (NSW) s 134.

45. See DP 26, at para 5.110.

46. Law Society preliminary submission, at 3-5. See also DP 26, at paras 5.93 and 5.143.

47. Section 172.

48. DP 26, at para 4.6.

49. DP 26, at para 4.6.

50. See eg E Skordaki and T Dimmock A Survey of Complainant Satisfaction Among Lay Complainants to the Solicitors' Complaints Bureau (February[1990]).

51. Legal Profession Act 1987 (NSW) s 130(1).

52. Eg, of the 1738 complaints against solicitors in 1991, 1365 were from clients/former clients. See the Law Society of New South Wales The legal profession disciplinary process: Trends and statistics (October 1992) Table[2]

53. Clause 20.

54. See Editorial "Flawed patients complaints law" Sydney Morning Herald, 2 November 1992, at 16.

55. Legal Profession Act 1987 (NSW) s 132.

56. See DP 26, at para 4.130.

57. The "became aware of" formula of words suggested by the Bar Association might be appropriate for complaints by clients or former clients. However, it would present problems where another person "became aware of" the conduct in question some years later. The existing law allows "any person" to lodge a complaint about the conduct of a lawyer, and the Commission has recommended that this position continue.

58. NSW Bar Association submission of 31 July 1992, at 20-21.

59. Kingsford Legal Centre submission of 11 August 1992, at 6.

60. American Bar Association Standing Committee on Professional Discipline Model Rules for Lawyer Disciplinary Enforcement (1989) r 32. (Hereafter, "ABA Model Rules".)

61. ABA Model Rules, commentary at 62.

62. See the reference to the emerging case law in this area in DP 26, at para4.131, fn 167.

63. DP 26, at para 4.21.

64. DP 26, at para 4.23.

65. Law Society submission of 31 July 1992, at para 7.6.

66. Law Society submission of 31 July 1992, at paras 7.7-7.8.

67. Bar Association submission of 31 July 1992, at 5-6.

68. See eg Recommendation 12 regarding a limitation period, Recommendation 14 regarding civil immunity from civil suit for communications within the disciplinary process, and Recommendation 67 regarding the limited waiver of client confidentiality in order to respond to complaints.

69. Section 130(5).

70. Submission of the NSW Combined Community Legal Centres, 28 February 1992, at 2-3. (Hereafter, the "Community Legal Centres submission".)

71. DP 26, at para 4.24.

72. DP 26, at para 4.25.

73. DP 26, at para 4.27. See also paras 5.10 and 5.107.

74. Justice Slattery's main recommendations in this area were that: (1) All causes of action for defamation or malicious prosecution for communication or actions referring to the professional conduct of any mental health professional should be abolished; and (2) Those who take part in the decision-making process - professional bodies, boards, Complaints Units and so on - should be granted either absolute privilege subject to claims for intentional malice or recklessness or alternatively should be granted qualified privilege.

75. DP 26, at para 4.8.

76. DP 26, at para 4.9.

77. DP 26, at para 4.16.

78. Sections 172 and 211. Members of conduct committees, acting under delegated authority from the Councils, are also expressly covered by s 172(3).

79. ABA Report, Recommendation 8.

80. ABA Model Rules, r 12.

81. See the discussion on this point in DP 26, at paras 4.11-4.13.

82. DP 26, at para 4.14.

83. DP 26, at para 4.16.

84. DP 26, at para 4.17.

85. Section 55. The instrument making the appointment must be signed by the President or two members of Council.

86. Section 56.

87. DP 26, at para 4.17.

88. Law Society submission of 31 July 1992, at para 7.4.

89. DP 26, at para 4.22.

90. DP 26, at para 4.14.

91. DP 26, at para 4.13.

92. The Bar Association also notified the Commission that this is now its official policy: Submission of the New South Wales Bar Association, 20 February 1992, at 7.

93. Legal Profession Act 1987 (NSW) ss 144-145.

94. See DP 26, at para 4.19.

95. DP 26, at para 4.19.

96. Section 130(3).

97. Under ss 144 and 158.

98. DP 26, at para 4.18.

99. Sections 137 and 139.

100. Section 134(4).

101. Courts and Legal Services Act 1990 (UK) s 19.

102. DP 26, at para 5.75.

103. Discussed in DP 26, at para 5.71.

104. DP 26, at para 4.29.

105. See DP 26, at para 4.35.

106. The preliminary submissions of the Law Society, the Bar Association, and the ACA are discussed in DP 26, at paras 4.31-4.35.

107. See DP 26, at para 3.54, regarding the statutory provision in South Australia: s 74(1)(b) of the Legal Practitioners Act 1981 (SA).

108. This accords with the preliminary submission of the Australian Consumers' Association, referred to in DP 26, at para 4.32.

109. New South Wales Law Reform Commission Alternative Dispute Resolution: Training and Accreditation of Mediators (LRC 67, 1991).

110. DP 26, at para 4.28.

111. DP 26, at para 4.37.

112. DP 26, at para 4.38.

113. DP 26, at para 4.40.

114. Submission of the Community Justice Centres of 16 August 1992, at Attachment "C', per the Director, Ms Wendy Faulkes.

115. See DP 26, at paras 3.13-3.15 and 3.117-3.118, respectively.

116. See generally, LRC 67.

117. See DP 26, at para 4.40.

118. LRC 67, at para 3.6. See DP 26, at para 4.42.

119. DP 26, at paras 4.80-4.81.

120. At para 4.82.

121. Bar Association submission of 31 July 1992, at 12.

122. See DP 26, at para 3.15.

123. VLRC 48, Recommendation 9, discussed at para 42.

124. DP 26, at paras 5.62-5.67. See also paras 5.120 and 5.140.

125. DP 26, at para 5.67.

126. See Law Society Trends and Statistics.

127. New South Wales Law Reform Commission Complaints, Discipline and Professional Standards - Part 1 (DP 2, 1979) para 3.64.

128. DP 2, at paras 3.76-3.83.

129. DP 26, at paras 5.45-5.47.

130. Section 134.

131. In the case of the smaller number of complaints against barristers, the Bar Council has told the Commission that its position is to refer equivocal cases to the Board or Tribunal for determination.

132. Law Society of New South Wales, Submission of 31 July 1992, at para 6.6.

133. Law Society submission, App 2, at 23. The Law Society expressed its figures in days (155, 161 and 140, respectively), which we have converted to months using a factor of 30.4.

134. Section 134(4).

135. DP 26, at para 5.25.

136. DP 26, at para 5.26.

137. The Legal Profession (Practising Certificates) Amendment Act 1992 (NSW). See also DP 26, at para 5.28.

138. Under the Legal Profession Act 1987 (NSW) s 35. See also r 67 of the NSW Bar Association Rules.

139. Between the entry into force of Part 10 of the Legal Profession Act[1987] (January 1988) and the publication of DP 26 (May 1992), the Law Society Council passed 131 resolutions threatening this sanction, with only five practising certificates ultimately cancelled for continued failure to reply. See DP 26, at para 5.28.

140. Solicitors' (Professional Conduct and Practice) Rules (Vic) r6 requires within 14 days "a full and accurate account of the solicitor's conduct in relation to the subject matter of the complaint, unless the solicitor has a sufficient and satisfactory reason for not furnishing an account thereof".

141. See DP 26, at para 5.27.

142. DP 26, at para 5.27.

143. See Law Society Trends and Statistics.

144. DP 26, at para 5.51.

145. Under s 134(1)(b)(ii).

146. Section 135.

147. DP 26, at para 5.54.

148. Section 134.

149. Section 135.

150. DP 26, at para 5.32.

151. DP 26, at para 5.56.

152. Now termed "informations" - see Recommendation 72, discussed in Chapter 5, below.

153. See Recommendation 7, above.

154. See Recommendation 54, discussed in Chapter 5, below.

155. DP 26, at paras 5.68-5.69.

156. Wentworth v NSW Bar Association (1992) 106 ALR 624.

157. Section 51.

158. Per Deane, Dawson, Toohey and Gaudron JJ; Brennan J disagreed on this point, believing that the Court ought to be able to seek and receive assistance from such persons as it sees fit in these matters, including the Bar Association.

159. DP 26, at para 5.69.

160. Legal Profession Act 1987, s 134.

161. DP 26, at para 5.55.

162. See ss 38 ZI and 72A. Part IIIA of the Act deals with Disputes and Complaints.

163. Section 72A(3)-(4).

164. DP 26, at paras 4.43-4.49.

165. New South Wales Law Reform Commission Second Report on the Legal Profession: Complaints, Discipline and Professional Standards (LRC 32,[1982]). (Hereafter, "LRC 32".)

166. LRC 32, at para 3.26.

167. Involving 34 legal practitioners.

168. Involving 69 legal practitioners and 3 clerks.

169. It is interesting to note, by way of contrast, that in the period between[1968]-1978 - that is, in the decade before the Commission's previous inquiry into the legal profession - the Law Society and Bar Association between them referred fewer than ten complaints to the Supreme Court, and the Law Society referred fewer than 60 complaints to the Solicitors' Statutory Committee, the predecessor to the Disciplinary Tribunal. See DP 2, at para 5.19.

170. DP 26, at para 4.47.

171. Submission of 5 February 1992, at 1.

172. The Bar Association reports that this is now its policy: (Preliminary) Submission of the New South Wales Bar Association, 20 February 1992, at 10-11.

173. Submission of the 26 June 1992, at 4.

174. Law Society of New South Wales, Submission of 31 July 1992, at para 7.12.

175. Section 128.

176. Section 151.

177. Legal Profession (Amendment) Act 1989 (NSW).

178. See New South Wales Parliamentary Debates (Hansard), 2 August,[1989], at 9144, per the then Attorney General, Mr Dowd (Legislative Assembly). See DP 26, at para 4.68.

179. Section 156.

180. DP 26, at para 4.69, referring to the ABA Report, Recommendation 2.1, at[6]

181. DP 26, at para 4.69.

182. Bar Association submission of 31 July 1992, at 11.

183. Submission of 26 June 1992, at 5.

184. See the Medical Practitioners Act 1938 (NSW) ss 32M and 32N.

185. Sections 127-128.

186. See DP 2, at paras 5.19-5.24; and LRC 32, at paras 2.15-2.17, 3.19-3.21,4.4, 6.24-6.25, and 6.36-6.37.

187. DP 26, at para 4.70.

188. ABA Report, at 23.

189. DP 26, at para 4.50.

190. Legal Profession Act 1987 (NSW) ss 144-145.

191. Section 159.

192. ACA submission of August 1992, at para 3.6.3.

193. Bar Association submission of 31 July 1992, at 8.

194. Law Society submission of 31 July 1992, at para 7.13.

195. Submission of 5 February 1992, at 2.

196. Bar Association submission of 31 July 1992, at 10.

197. Legal Profession Act 1987 (NSW) s 123.

198. At para 4.51.

199. Letter of 14 August 1992, from the Director General, at 5.

200. See the Supreme Court Act 1970 (NSW) s 80b.

201. DP 26, at para 4.49.

202. Bar Association submission of 31 July 1992, at 8.

203. Submission of 26 June 1992, at 4.

204. See Law Society of New South Wales v Weaver [1977] 1 NSWLR 67, esp at 74-75 per Street CJ, and at 76 per Moffitt P.

205. Bar Association preliminary submission of 20 February 1992, at 14.

206. DP 26, at para 4.134.

207. Submission of 26 June 1992, at 5.

208. See DP 26, at para 4.66.

209. Submission of 20.2.92, at 12.

210. Law Society letter to the Attorney General of 4.8.92, at 11.

211. Submission of 26 June 1992, at 4.

212. Letter of 1.7.92, at 4-5.

213. DP 26, at para 4.67.

214. Bar Association submission of 31 July 1992, at 11.

215. DP 26, at para 4.54.

216. DP 26, at para 4.54.

217. Under the Legal Profession Act 1987 (NSW) s 163.

218. Under the Legal Profession Act 1987 (NSW) s 149.

219. See s 149(1)(c) in relation to barristers; s 149(2)(i) in relation to solicitors.

220. Section 163(1)(d).

221. DP 26, at para 4.60.

222. Under the Medical Practitioners Act 1938 (NSW) s 32I.

223. Legal Profession Act 1987 (NSW) s 134(2).

224. Legal Profession Act 1987 (NSW) s 149(1)(a) and (2)(a).

225. These powers are now vested in the Standards Board and, under s 163(2)(b), in the Disciplinary Tribunal.

226. DP 26, at para 4.59.

227. See the Legal Profession Act 1987 (NSW) ss 91 et seq.

228. There are parallels here with the more innovative sanctions being developed in connection with corporate liability. See Australian Law Reform Commission Sentencing: Penalties (ALRC DP 30, 1987) paras 283-307, in which the ALRC considers such options as dissolution, disqualification from government contracts, equity fines (dilution of shares), supervisory orders, publicity orders and community service orders. See also B Fisse, "Sentencing Options Against Corporations" (1990) 1 Criminal Law Forum 211-258, regarding court-ordered internal discipline and organisational reform.

229. Sections 149(3) and 163(3).

230. Section 130(3)-(4).

231. Sections 149(4)(b) and 163(4)(b).

232. Sections 149(4) and 163(4).

233. DP 26, at para 4.64.

234. DP 26, at para 4.65.

235. Submission of 31 July 1992, at 11.

236. Submission of 31 July 1992, at para 7.15.

237. Submission of 11 August 1992, at 6.

238. Submission of August 1992, at 13.

239. Submission of 26 June 1992, at 4.

240. See Recommendation 72, discussed in Chapter 5, below, regarding the proposed use of the terms "complaints" and "informations".

241. Section 48(1)(b).

242. The wording of s 48(1)(a)(vii) is somewhat obscure, however, particularly in relation to a situation in which the judge does not necessarily sit on every proceeding.

243. Section 48(1)(a) (viii).

244. See also Victoria. Law Reform Commission Access to the law: Accountability of the Legal Profession (Report No 48, 1992) (hereafter "VLRC 48") Recommendation 8 and commentary at para 41.

245. See also VLRC 48, Recommendation 9.

246. Legal Profession Act 1987, ss 126 and 137-141.

247. Legal Profession Act 1987, s 134(4).

248. See ss 126, 137-141 and Schedule 4.

249. DP 26, at para 5.72.

250. DP 26, at para 5.73.

251. Letter from Mr Robert Bennett, Registrar, 2 November 1992.

252. DP 26, at para 5.75.

253. DP 26, at paras 5.76-5.81.

254. DP 26, at paras 5.82-5.84.

255. DP 26, at paras 5.85-5.86 and 5.87-5.88, respectively.

256. Law Society submission of 31 January 1992, at para 1.7.

257. DP 26, at para 5.94.

258. Submission of 10 August 1992, at 2, quoting from DP 26, at para 5.94.

259. Submission of 5 February 1992, at 3.

260. Legal Profession Act 1987 (NSW) s 126(2)(c).

261. DP 26, at paras 5.85-5.86.

262. Legal Profession Act 1987 (NSW) s 137(1).

263. Legal Profession Act 1987 (NSW) s 134(4).

264. Legal Profession Act 1987 (NSW) s 137(2).

265. Section 126(2)(c). Schedule 4, cl 2(1), originally provided that the person must be under 70 years of age, but this has been repealed.

266. DP 26, at para 5.85.

267. See DP 26, at para 5.88.

268. See DP 26, at paras 5.88 and 5.146.

269. Section 139.

270. See DP 26, at para 5.76.

271. DP 26, at para 5.77.

272. DP 26, at para 5.78. See also para 5.146.

273. DP 26, at para 5.78.

274. Courts and Legal Services Act 1990 (UK), s 19.

275. DP 26, at para 5.81.

276. Legal Profession Act 1987 (NSW) s 139(2).

277. Section 140.

278. Section 141.

279. DP 26, at para 5.84. See also para 5.146.

280. Conduct Review Panel submission of 12 June 1992, from the Chairman, Mr John F O'Neill AM, and Messrs John I Einfeld AM and Peter C Wolfe, at para 16.

281. Submission of 14 August 1992, at 2-3, from the Director General.

282. At 3.

283. See DP 26, at para 5.95.

284. DP 26, at para 5.84.

285. Submission of 12 June 1992, at para 12.

286. See s 172, which protects members of the Panel (as well as members of the Councils, the Standards Board and the Disciplinary Tribunal) from "any action, liability, claim or demand" for any "matter or thing" done in good faith as part of the disciplinary system.

5. Related Matters

INTRODUCTION

5.1 In the preceding Chapter, the Commission detailed and commented upon the "core" recommendations for the proposed new system of handling complaints against lawyers. In this Chapter, we look at related - but no less important - matters, dealing with education and preventive measures in respect of legal ethics and professional responsibility; confidentiality and privilege; disputes over fees and costs; solicitors' liens; clarification of terminology and transitional provisions in the *Legal Profession Act* 1987; and reciprocal enforcement of disciplinary orders. The Commission also makes a recommendation for a new method of funding the complaints handling system, through a levy or charge on lawyers' practising certificates.

EDUCATION, PREVENTION AND PROFESSIONAL STANDARDS

58. The Law Society should take immediate steps to adapt and introduce the "Client Care" program developed in England and Wales, which is directed towards the improvement of lawyer-client communications and relations, including the establishment of internal ethics committees and complaints handling procedures.

59. The Law Society and the Bar Association should collaborate on the production of a Legal Profession Code of Ethics and Professional Responsibility, to be completed and presented to the Attorney General within one year, which is oriented towards lawyers' obligations to clients and to the community.

60. The professional associations should ensure that more basic and continuing education about legal ethics and professional responsibility is available, including courses which are incidental to the practising certificate and disciplinary systems.

61. The professional associations should ensure that adequate counselling and assistance programs are provided for legal practitioners who seek help or are required to seek help to resolve personal, professional, or commercial difficulties.

62. Successful completion of a subject which adequately deals with the issues of legal ethics and professional responsibility should be compulsory for LLB students in University law schools in NSW (and for students in the Admission Board courses), and should be compulsory for admission to practise as a barrister or solicitor of the Supreme Court of New South Wales.

63. The professional Councils and the Legal Services Ombudsman should ensure that there is feedback from the disciplinary system to the legal profession in order to facilitate changes in (basic, practical or continuing) legal education or legal practice aimed at remedying common problems.

Commentary

Client Care (Recommendation 58)

5.2 In DP 26, the Commission discussed at some length issues relating to the enhancement of standards of professional ethics and practice, and made some proposals with this aim. Unfortunately, few of the submissions addressed these issues or proposals. While prevention may be preferred to cure in the homily, it excites less interest in the media. Nevertheless, the Commission has continued its research and consultation program in this area, and we make a number of recommendations about education and prevention in this Report.

5.3 In Recommendation 58, the Commission calls on the Law Society to take steps to adapt and adopt the "Client Care" program, which has been successful in England and Wales. The program is aimed at the improvement of lawyer-client communications and relations, and involves the organisation of *all* firms of solicitors in such a way as to emphasise matters of legal ethics and professional responsibility, such as through the creation of in-house ethics and complaints committees, specific training programs, greater supervision, and clear lines of authority and responsibility in matters of ethics.[1]

5.4 One aspect of the Client Care program in England and Wales which the Commission does *not* endorse, however, is the requirement that a client first go through a law firm's internal complaints handling procedures before he or she may approach the Solicitors' Complaints Bureau. While direct and consensual dispute resolution will often be effective, the Commission does not believe that clients should be *compelled* to go through the law firm where they feel that this would be futile, unpleasant, or even traumatic. It may be that in future the Legal Services Ombudsman will sometimes recommend a direct approach to the firm (or barrister) involved, but this should not normally be a pre-condition for receiving the complaint.

5.5 The Commission is aware that the Law Society of New South Wales is familiar with the English Client Care scheme and conducted a CLE seminar on this topic at the "LEXPO Congress '92".[2] The purpose of the recommendation is to encourage further development of Client Care principles and practices in New South Wales in the near future.

Developing Codes of Ethics and Practice (Recommendation 59)

5.6 The production of industry-wide Codes of Practice is now commonplace in Australia, and is thought to be an essential part of (or pre-condition to) the regulation of any industry or occupation. For a profession which so highly prizes the "service ideal", it is remarkable that the legal professions in Australia have been so slow to produce Codes which are of any value to clients.

5.7 The New South Wales Bar Association produces a set of Rules for its members, which effectively have application to all barristers when a rule is recognised by the courts. The Law Society of New South Wales includes a considerable amount of material on ethics in the loose leaf service that is provided to all solicitors,[3] in the form of textual discussion, annotated legislation, rules and regulations, and a collection of ethical rulings, practice guidelines and special bulletins from the Law Society Council, but has yet to produce the long-awaited codification.[4] Both the Bar Association's and the Law Society's materials, however, are intended to be read by practitioners, and suffer from the criticism levelled by Maley at the traditional approach to "professional ethics":

> By far the most attention is paid ... [to] detailing the professional's obligations to his colleagues, to matter of etiquette between colleagues, and to carrying his professional practice in ways which do not infringe colleague-prerogatives or give him a professional (especially an economic) advantage.[5]

5.8 What the Commission seeks as a result of Recommendation 59 is:

> a practical, modern, *client-centred* approach ... While there is a need to preserve professional comity, legal ethics should be about defining and encouraging the provision of proper services to clients, having regard to general concerns about candour, fairness, and social responsibility. Ethical behaviour, for example, will sometimes require counselling clients that they may *not* pursue a certain course of action.[6]

5.9 The submission from Mr Barry Hart, of the Chelmsford Victims' Action Group, makes the point that the *Legal Profession Act* and the *Medical Practitioners Act* do not speak to the consumers of professional services. According to Hart, the emphasis should be on the protection of the public by spelling out the expected standards of practice, and by defining professional misconduct from the public's point of view rather than in terms of what the profession regards as unacceptable.[7] Whether or not these matters should be included in the basic legislation, they certainly should be expressed in a professional code of practice.

5.10 Apart from being more client-centred, a new professional code of conduct should take account of the contemporary circumstances of legal practice in New South Wales,[8] such as the growth of public sector and corporate sector legal services, the changing organisation of private sector legal work (eg, with the growth of the "mega-firms" and increasing inter-state and international practice), the opening up of advertising and marketing of legal services and the consequent increase in competition (from within and without the profession), and the needs and imperatives of practising law in a multicultural society.[9]

5.11 In its recent Report on *Accountability of the Legal Profession*, the Victorian Law Reform Commission (VLRC) recommended[10] that the two branches of the profession collaborate on the production of a Common Code of Professional Conduct which would spell out and make readily available to both lawyers and clients the high standards of service, skill and integrity which clients should be able to expect of lawyers (and lawyers should expect of themselves). The VLRC commented that:

> A Common Code might lay down and elaborate upon general rules relating to a lawyer's duties of integrity, candour, competence, independence, diligence, confidentiality, impartiality, courtesy and fidelity to the law. A Common Code might also deal with the minimum obligations of all lawyers to make their services available to the public, their obligation not to withdraw their services except in specified circumstances, and their ethical obligation to charge fair and reasonable fees. The Commission would be surprised to learn that there is not common ground between [barristers and solicitors] in relation to these and other professional responsibilities.[11]

5.12 This Commission agrees with the (now defunct) VLRC that there is merit in the professional associations cooperating in the production of a client and community-centred (Common) Legal Profession Code of Ethics and Professional Responsibility, and we have recommended accordingly. The professional associations would be free, of course, to supplement the Common Code with material which is pertinent only to either barristers or solicitors.

Continuing and further legal education programs (Recommendation 60)

5.13 In DP 26, the Commission stated that the "foundations of understanding of professional responsibility gained at law school must be regularly reinforced in practice."[12] The purpose of Recommendation 60 is to remind the professional associations and other providers of further and continuing legal education that more seminars and workshops on legal ethics and professional responsibility should be added to the many programs currently offered on various areas of substantive law, practical skills development and office management. Thought should be given to requiring practitioners to undertake periodic courses on legal ethics and professional responsibility as a condition of maintaining a current practising certificate.

5.14 The Commission has recommended in this Report that the proposed Legal Services Tribunal be given considerable flexibility to fashion an appropriate, customised sanction following a finding of unsatisfactory professional conduct or professional misconduct. This would include the power to order that the person undertake and successfully complete a specified course of further legal education, or to place a condition upon a person's practising certificate requiring the person to undertake further education.[13] One order which should be utilised, where appropriate, is for the lawyer involved to undertake and successfully complete an approved course of continuing or further education relating *specifically* to legal ethics and professional responsibility.

5.15 As the Commission noted in DP 26,

> In California, the State Bar has established an "Ethics School" for the purpose of facilitating such orders, and lawyers in that state may be required to attend for a specified period of time and successfully complete a designated program at the School. The Commission can see some virtues in the establishment of a similar institution in New South Wales, although it is recognised that this State has only about 5% the number of lawyers that California has, and economies of scale may limit such innovations here. Nevertheless, this is a matter worthy of consideration, perhaps in conjunction with associations representing other professions and with bodies devoted to ethical training, such as the St James' Ethics Centre in Sydney.[14]

Counselling and assistance programs (Recommendation 61)

5.16 There is strong evidence in Australia and overseas suggesting that legal practice can be a particularly stressful occupation. Many of the most serious disciplinary offences in recent years have been occasioned more by personal problems, such as drug or alcohol dependency and gambling, than by lack of professional competence.

5.17 In this recommendation, the Commission seeks to highlight the need for adequate counselling and assistance programs for legal practitioners who seek help to resolve personal, professional, or commercial difficulties. Submission to a counselling or assistance program also should be available as a disciplinary sanction, so that such a course may be directly required or prescribed as a condition on a lawyer's practising certificate.

5.18 Participation in a counselling or assistance program should normally be on a completely confidential basis; however, where participation follows a disciplinary order or condition, then information on progress should be made available (on a confidential basis) to the Legal Services Ombudsman and/or the relevant professional Council, depending upon who is charged with monitoring the particular case.

5.19 The Commission is aware that the professional associations already have established some counselling and assistance programs for practitioners. For example, the NSW Law Society operates "LawCare", a confidential and voluntary counselling service to help solicitors "whose professional lives are threatened by work or financial pressures, alcohol or other drug dependency, family difficulties and so on".

Teaching legal ethics and professional responsibility in the law schools (Recommendation 62)

5.20 As discussed in DP 26,[15] several law schools (the University of New South Wales, the University of Wollongong, and the planned course at the University of Newcastle) and the Admission Board have *compulsory* subjects covering legal ethics and professional responsibility; another law school (the University of Technology, Sydney) includes legal ethics and the legal profession among a cluster of "skills subjects" from which students are obliged to choose; while the remaining law schools (University of Sydney, the Australian National University, Macquarie University) do not offer subjects in this area. The admission authorities (the Joint Qualifications Committee of the Supreme Court) generally require the study of legal ethics in order to satisfy the educational qualifications for admission to practice as a lawyer in New South Wales, but this may be satisfied by the Admission Board course or the segment on legal ethics taught at the College of Law.

5.21 The Commission noted in DP 26, and still believes strongly that:

> the study of legal ethics and professional responsibility should be an integral part of any law school program, whether this involves mounting a discrete, compulsory subject or dealing with these questions as a significant part of a larger subject. It is only during this formative period in a lawyer's education that there is the opportunity for sustained study, discussion and reflection.[16]

Only one submission was received on this issue, with the Bar Association agreeing with the Commission's view.[17]

5.22 While accepting that the university law schools should be accorded a very large degree of autonomy in curriculum matters, the Commission recommends that a subject on legal ethics and professional responsibility be compulsory for LLB students. Although the actual length of university studies varies considerably depending upon the particular degree (or, more commonly, *joint* degree) program undertaken, virtually all LLB students do the equivalent of three years of full-time study of law subjects. It is not unreasonable to ask potential lawyers to devote a small portion of that time learning about and thinking about basic issues of professional responsibility, the delivery of legal services, the structure and regulation of the profession, and so on. Such matters are at least

as important for incipient lawyers as are the substantive "building block" subjects or "skills subjects" which are compulsory in all law schools.

5.23 The effective teaching of professional responsibility in NSW may be assisted in future through the efforts of the Law Foundation's Centre for Legal Education. The Centre has initiated and is providing support to a Standing Committee on the Teaching of Professional Responsibility. One of the possibilities being considered by this Committee is the preparation of a "model curriculum" for teaching in this area, with written materials and other teaching resources. The model curriculum could be used in its entirety, or law teachers could pick and choose from the available materials to design or customise their own subject. The Commission welcomes this initiative.

5.24 The Commission wishes to make clear its view that it is inadequate to teach legal ethics and professional responsibility as if these are matters are etiquette which must simply be transmitted, committed to memory and recalled on the appropriate occasions (such as at the examination). Rather, these are matters which are bound up in the fundamental nature and essence of lawyering and legal professional *practice,* which necessitates a *process* or *problem-solving* approach to the subject. Ideally this involves a clinical approach, and certainly the opportunity for reflection and discussion, but in any event we regard the "large lecture" as an unsuitable pedagogical technique (and the large lecture hall an unsuitable venue) for creating a professional sensibility and developing a thoughtful and lasting commitment to ethical conduct.

5.25 It is not yet clear what practical effect the proposed uniform mutual recognition legislation (regarding reciprocal interstate admission of lawyers) will have on educational requirements for admission, or what practical effect the proposed changes in practical legal training will have on teaching professional responsibility prior to admission. Professional responsibility *is* one of the "areas of knowledge" that is meant to be incorporated into every law degree program. In any event, the Commission believes that it is appropriate to develop university law school programs in this state with an eye toward the enhancement of professional responsibility and professional standards.

Feedback from complaints to the educational system (Recommendation 63)

5.26 In DP 26, the Commission expressed concern that:

> The existing disciplinary system for lawyers, in common with most quasi-judicial systems, proceeds on a case-by-case basis with the focus on the handling of individual complaints. There is no person or institution charged with maintaining an overview of the whole process, to ascertain trends in the demography or subject matter of complaints or to make recommendations about changes in legal education or practice aimed at remedying common problems.[18]

5.27 We contrasted this deficiency with the approach of the NSW Department of Health's Complaints Unit, which sees one of its major roles as monitoring the whole system of health care provision as well as processing individual complaints. To this end, the Complaints Unit has developed a sophisticated, computerised data base which can cross-reference the information using a number of variables. For example, the data base can provide information about trends in complaints according to geographic region, area health authority, medical speciality, hospital, and so on. The information gained may then be fed back to the specialist medical colleges, the Health Department, hospitals and others in order to address specific concerns and to assist in education and policy development.

5.28 As discussed in Chapter 2 of this Report, the Commission identified a number of common problems in the course of its File Surveys of the complaints files of the Law Society and (to a lesser extent) the Bar Association, which were not picked up by the professional Councils or their officers and fed back to the profession for its information and action. For example, it became apparent from the manner in which most solicitors responded to complaints that many solicitors, at least, fail to put their instructions in writing or get clients to sign them, fail to keep file notes of communications with clients, and fail to disclose clearly the fee arrangements and responsibility for disbursements. A Special Bulletin to all solicitors from the Law Society reminding them of recommended practice and procedure in this area, and offering CLE or other training and

assistance, would no doubt prevent many disputes from arising in the first instance and would lead to the faster resolution of those disputes which still do arise.

5.29 The Law Society's new six-monthly publication on "trends and statistics" emerging from the disciplinary process is useful,[19] but does not contain enough qualitative analysis or advice beyond the presentation of the raw data - a conscientious practitioner reading the publication would learn nothing about how to improve his or her professional standards, and a CLE provider would likewise learn little about the needs of the profession.

5.30 More and better reporting (in the journalistic sense) of the decisions of the Legal Services Tribunal would also be very valuable. The position in NSW has improved considerably in recent years; the Law Society now includes full reports of the Disciplinary Tribunal as a supplement to the *Law Society Journal*, and the Bar Association has a new "Legal Ethics" section (in different colour paper) in its quarterly *Bar News,* with digests of Standards Board and Disciplinary Tribunal decisions. It is important that the material on discipline be presented in a distinct and "eye-catching" manner, so that lawyers who browse the professional magazines may actually take some note of the contents. For example, the Commission commends the Law Society of Upper Canada (Ontario) in this regard for its new periodical *Discipline Digest*.[20] This publication clearly and concisely sets out the facts of each disciplinary case, the relevant principles, the disposition, and the reasons for the disposition. Lawyers in Ontario can no longer have any excuse for failing to keep abreast of the standards of professional conduct required of practitioners.

5.31 In Recommendation 63, the Commission proposes that a positive responsibility be placed on the Legal Services Ombudsman and the Councils of the Law Society and the Bar to ensure that there is feedback from the disciplinary process to the profession in order to remedy common problems and improve the standards of the delivery of legal services. For the bodies charged with the day-to-day investigation of complaints against lawyers this should not be an onerous task, and greater efforts in this area should be handsomely repaid over time.

FUNDING

64. A graduated charge or levy on the annual practising certificate fees of legal practitioners should be imposed to fund at least the major portion of the complaints handling system, including the establishment and operation of the office of Legal Services Ombudsman. The charge or levy should be fixed by regulation by the Attorney General. The system should continue to have access to funds from the Statutory Interest Account and, if necessary, from Consolidated Revenue.

Commentary

5.32 At present, the funding of the administration of the current complaints handling and disciplinary system, including the activities of the professional Councils, is drawn entirely from the Statutory Interest Account - ie, the interest on *clients' moneys* which are under the temporary control of solicitors and the Law Society. Statutory Interest money is used to reimburse the costs of the Law Society and Bar Councils and their committees and departments involved in the investigation of complaints,[21] the costs of operating the Standards Board, Disciplinary Tribunal and Conduct Review Panel, and other costs (eg court actions) involved in prosecuting "unqualified practitioners"[22] or lawyers whose professional conduct has been complained about.[23] (Other disbursements from the Statutory Interest Account[24] are made for the purposes of legal aid, the supplementation of the Fidelity Fund, legal education, the Law Foundation, and the operation of the Legal Fees and Costs Board.[25]) The disbursement of funds from the Statutory Interest Account is "determined" by the Law Society Council and "approved" by the Attorney General.[26] This is supplemented by a considerable amount of voluntary labour by the members of the professional Councils and their Professional Conduct Committees.

5.33 As discussed in DP 26, there are at least two other possible sources of funding for the complaints handling system, which can supplement or supplant the existing source. First, funding from Consolidated Revenue is a possibility. The Health Department's Complaints Unit (and the proposed Health Care Complaints

Commission) is funded entirely from Consolidated Revenue, with no direct contribution from the medical profession or other health care professionals under the Unit's jurisdiction. The expenditure of public money for this purpose is justified on the basis that:

> the regulation of health care professionals is a matter of general public interest of sufficient importance to warrant the expenditure of public funds. Having given up their own regulatory responsibilities to an independent body, the medical and allied health professions have likewise been relieved of the responsibility for funding the system. Unlike lawyers, of course, health care professionals do not hold clients' funds in trust, and thus there is no equivalent ancillary source of funding.[27]

5.34 The other alternate source is revenue raised from an increase or levy on annual practising certificate fees for barristers and solicitors. In DP 26, the Commission noted that American pattern is to rely largely on this source - the elaborate and expensive lawyers' disciplinary system in California is funded entirely out of annual fees, while statutory interest money is reserved for application to legal aid and other public interest programs.[28]

5.35 The American Bar Association's Commission on the Evaluation of Disciplinary Enforcement wrote recently that the "Commission is unanimous in its conviction that adequate funding of the disciplinary [system] must be provided even if it requires a substantial increase in the annual assessment of lawyers."[29] Similarly, the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement ("ABA Model Rules") provide for the imposition of a levy on practising lawyers in order to fund the disciplinary system,[30] on the basis that:

> The profession recognizes that the creation and maintenance of an effective structure for discipline and disability proceedings is one of its primary responsibilities. The level of funding for the agency will determine whether it can hire experienced, full-time lawyers as counsel, or whether it can rely upon volunteers, part-time participants and clerks. Adequate funding will enable the agency to unravel a complex or obscure fact situation with which it might not otherwise be able to cope. The level of funding will determine how promptly allegations can be resolved, thereby affecting the length of time the lawyer remains uncertain about his future, the extent to which clients are exposed to further harm, and the amount of public confidence in the system.[31]

5.36 The ABA Model Rules do admit the possibility of some public funding, as well:

> The establishment of an adequate structure for lawyer discipline and disability proceedings is one of the principal obligations of the legal profession. It is likely therefore that the funding of the system will come primarily from lawyers admitted to practice in the state. It should be noted, however, that there is also a strong public interest in effective disciplinary enforcement. It is for that reason not inappropriate for public funds to be used toward financing the system.[32]

5.37 In DP 26, the Commission raised for consideration the future funding of the disciplinary system and related processes. The submission received from the Commissioner for Consumer Affairs, Mr John Holloway, stated that "whatever course [of regulation] is adopted, costs should be met wholly, or in part, by appropriate funding from the legal profession."[33] The Kingsford Legal Centre submitted that funds raised from practising certificate fees or a levy on practitioners should be used to supplement Statutory Interest Account funds, although this should not lead to a position whereby the profession feels entitled to control the disciplinary process.[34] The Australian Consumers' Association submitted that Consolidated Revenue and practising certificate fees could be used to supplement funding, and considered that consumers should have the majority vote in the way that Statutory Interest Account money is disbursed, since this is clients' money rather than solicitors' money.[35]

5.38 By way of contrast, the legal professional associations were content with the present funding arrangements. The Law Society submitted that the use of Statutory Interest Account funds is

> thoroughly compatible with the public interest. That system provides direct relief to consumers of legal services who have suffered at the hands of a legal practitioner and it maintains standards for the delivery of legal services.[36]

5.39 The Bar Association opposed any effort to impose a financial obligation on the profession, submitting that:

> Practising certificate fees are high enough now. Many have difficulties in these recessionary times in paying them. An increase in fees or a levy to fund an external disciplinary system will merely provide a further financial barrier to entry to the Bar and would be anti-competitive.[37]

5.40 The Commission has concluded, however, that it *is* appropriate and desirable for legal practitioners to bear the primarily responsibility for funding the disciplinary system and its ancillary features and processes, and we have so recommended. The Commission agrees with the American Bar Association that, in theory, it also is appropriate for public funds (Consolidated Revenue) to be used for these purposes. As we noted in DP 26, arguably "the community has as great an interest in the proper and effective regulation of lawyers as it does in the regulation of doctors".[38] However, we accept that competing demands on public funds make such a commitment unlikely at this time.

5.41 In an event, a relatively modest addition to practising certificate fees or a (stepped) *per capita* levy on legal practitioners would not only obviate the need for public funding but also would be sufficient to wean the disciplinary system from its reliance on Statutory Interest Account money. This would free up the equivalent amount of money for legal aid, where additional funding is desperately needed. In the year ending 30 June 1992, disbursements of over $3.36 million were made from the Statutory Interest Account alone for the purposes of: (1) the costs of administration of Part 10 (Professional Misconduct) of the *Legal Profession Act* 1987 ($749,291 - mainly the operation of the Standards Board, the Disciplinary Tribunal and the Conduct Review Panel); and (2) reimbursement of the expenses of the Law Society ($2,291,432) and the Bar Council ($320,934) incurred in connection with administering Parts 9 (Unqualified Practitioners) and 10 of the Act.[39]

5.42 According to the professional associations, there were 11,805 "active solicitors" (including 5511 principals) in New South Wales as at 1 July 1992, and 1,723 "practising barristers" as at 4 October 1992, or a total of 13,528 with current practising certificates. Thus, an annual *average* charge per NSW lawyer of:

> only **$75** each would yield **$1,014,600** per annum;
>
> only **$100** each would yield **$1,352,800** per annum;
>
> only **$125** each would yield **$1,691,000** per annum; or
>
> only **$150** each would yield **$2,029,200** per annum.

5.43 The Commission believes that the charge should be graduated, with principal solicitors and more senior barristers (with, say, more than seven years of practice at the Bar) paying significantly more than other lawyers.[40] Further gradations could be made if it was thought desirable. The increasing numbers of lawyers entering the profession should ensure that the annual levy need not increase by very much over time.

5.44 Having regard to our own staffing arrangements and annual budget,[41] the Commission anticipates that the annual cost of the office of Legal Services Ombudsman should be less than $1 million, which would easily be covered by the $75 (average) charge; a greater charge would replace Statutory Interest allocations for other parts of the system, such as for the operations of the Legal Services Tribunal, and free up the equivalent amount for legal aid.

5.45 With due respect to the Bar Association, it is hard to see how such a modest contribution from barristers towards the funding of the system which ensures professional responsibility and proper delivery of legal services to the public, as well as offering education and assistance to lawyers, would have any (negative) effective on entry into the profession or competition among legal professionals. Leaving aside the irony of the Bar Association expressing concern about anti-competitive measures, but having regard to the current costs of practising at the Bar - the expense of chambers, practising certificate fees, special court dress, maintaining a legal library, and so on - the sort of charge we have suggested for disciplinary purposes is trivial by comparison.

5.46 The amount of the annual charge or levy should be fixed by the Attorney General, the responsible minister, by regulation. The Attorney would no doubt wish to consult with the Legal Services Ombudsman, the professional Councils, and other interested parties on this matter. However, although this fund raising effort would bear a relation to the system of administering practising certificates, it is imperative that the professional Councils do not have *control* over the setting of the charge or levy, so that it is beyond their power to starve the Legal Services Ombudsman of necessary funds.

5.47 In Recommendation 28, above, the Commission proposes that the professional Councils maintain a discretionary fund from which they can make a direct *ex gratia* award of compensation to a client (or another category of complainant) where this is the most fair and appropriate way of remedying the person's consumer-type grievance against a lawyer. This is the position in Victoria, and it appears to have worked well.

5.48 In Recommendation 55, the Conduct Review Panel is empowered to recommend such a course of action to the relevant Council. Most matters requiring compensation will probably will be dealt with under the more routine dispute resolution procedures proposed in Recommendations 15-20; however, there will be cases in which, for one reason or another, compensation has not been considered at an early stage and it would be unfair or futile to attempt to refer the matter for dispute resolution at a later stage. As with other aspects of the complaints handling system, the Commission believes that resourcing this discretionary fund should primarily be the responsibility of members of the profession, through a graduated charge on practising certificate fees.

RELATED MATTERS

Issues of confidentiality and privilege

65. All files held by the Legal Services Ombudsman, the Law Society and the Bar Association, relating to the investigation of a complaint (or held by a mediator or arbitrator appointed for this purpose) should be immune from civil discovery and exempt from production under the *Freedom of Information Act* 1989.

66. All files held by the Legal Services Conduct Review Panel for the purposes of reviewing the actions and decisions of the Legal Services Ombudsman, the Law Society, or the Bar Association in relation to a complaint also should be immune from civil discovery and exempt from production under the *Freedom of Information Act* 1989.

67. To the extent that it is reasonably necessary in order to defend allegations made in a complaint or information, a legal practitioner should be entitled to disclose confidential information to the investigating body which might otherwise be the subject of the client's legal professional privilege. As with other such communications made to the Law Society, the Bar Association, the Legal Services Ombudsman or the Conduct Review Panel relating to a complaint, this information should be immune from civil discovery and exempt from production under the *Freedom of Information Act* 1989. In the event that the matter proceeds to a hearing before the Legal Services Tribunal, unless the client waives privilege, evidence which relates to privileged communications between client and lawyer should be taken in private or be subject to an order prohibiting publication.

Commentary (Recommendations 65-66)

5.49 While generally endorsing the need for "open justice" in the complaints handling system, the Commission nevertheless recognises that the position in respect of investigations and informal dispute resolution efforts must of necessity be somewhat different. In DP 26, the Commission considered that privilege (from civil discovery and Freedom of Information) normally ought to attach to confidential material gathered in the course of investigations, trust account inspections or other aspects of the administration of the disciplinary process:

> The disciplinary process should not be used as a form of discovery in contemplation of civil litigation, nor as a means of commercial debt recovery. There is a strong public interest in ensuring that the investigation of complaints against lawyers is conducted in a thorough, active manner, and that lawyers are under an obligation to be candid with the disciplinary authorities. Confidentiality is an essential part of any *investigative* procedure, while subsequent proceedings should, to the greatest extent possible, be subject to principles of open justice. The confidentiality of other investigative agencies, such as the police, the Director of Public Prosecutions, the Independent Commission Against Corruption and the Ombudsman is already recognised in the FOI Act. The Commission proposes that the investigation of complaints against legal practitioners be treated in the same way, and be given express protection in the *Legal Profession Act* and the *Freedom of Information Act*.[42]

5.50 The ABA Model Rules also recognise the need for confidentiality prior to the filing and service of formal charges, except that the pendency, subject matter, and status of an investigation may be disclosed where the respondent has waived confidentiality or the proceeding is based on allegations that have become generally known to the public.[43] The commentary attached to the Model Rules notes that the confidentiality "is primarily for the benefit of the respondent, and protects against publicity predicated upon unfounded accusations"; however, where the allegations already have received public attention the disciplinary agency must be able to acknowledge the existence of an investigation, otherwise it "could lead to a mistaken notion that the agency is unaware of or uninterested in allegations of misconduct, without in any way protecting the reputation of the lawyer".[44]

5.51 The same principles apply in respect of the files and other confidential material held by the Conduct Review Panel. The Panel operates to impose an external check on the investigative and prosecutorial responsibilities of the professional Councils (and the Legal Services Ombudsman, once established), and is thus really part of the investigative apparatus which should be accorded privilege and exemption from FOI. As the Commission noted in DP 26, concerns about the privilege of files turned over by the professional Councils led to the Bar Council's decision not to refer any files - and thus effectively to prevent any review - for some years until this was informally resolved in late 1991.[45]

5.52 All of the submissions received on this topic - from the Law Society, the Bar Association, the Registrar of the Disciplinary Tribunal, Mr Robert Bennett, and the Community Justice Centres - agreed with these proposals in DP 26.

5.53 The question of confidentiality and privilege in respect of mediation and other forms of dispute resolution is considered above, in the commentary following Recommendation 19.

Commentary (Recommendation 67)

5.54 In this Recommendation, the Commission has sought to balance the rights of a complainant to suffer no disadvantage or discouragement in the lodgment of a complaint with the right of a legal practitioner to have the opportunity to defend properly any allegations which bear upon his or her professional reputation or rights of practice.

5.55 Under the rules and ethics of the legal profession, a lawyer may not disclose confidential communications made within the lawyer-client relationship; indeed, with some limited exceptions, such communications are privileged from discovery through the processes of the courts, a position which most other professional-client communications (such as accountant-client) do not enjoy. The confidentiality and privilege belong to the client, and it is only the client who may waive these rights.

5.56 In the context of complaints against lawyers, this position can cause problems in so far as a legal practitioner effectively may be deprived of the opportunity to defend himself or herself, when a defence is in truth available. A practical example of this would be the situation where a client complains about his or her barrister's conduct of the cross-examination of a critical witness in a criminal trial. The barrister, who is under a duty not to wilfully mislead the court nor to put propositions which are known to be false,[46] may have carefully tailored the

cross-examination because of confidential communications between the barrister and client which, say, indicate that the witness is telling the truth, or that the client is factually guilty.

5.57 The Commission proposes that there should be a limited waiver of client confidentiality, but only to the extent *reasonably necessary* for the lawyer to defend the allegation. The disclosure of client confidences by a lawyer absent this necessity would in itself amount to a breach of ethics, and a quite serious breach where the disclosure is made for the purpose of intimidation or revenge.

5.58 Any disclosures of confidential material that are made to the investigating authorities or the Conduct Review Panel are privileged under the preceding two Recommendations. In order to ensure that the client suffers no disadvantage from disclosure at the hearing stage, the Commission proposes that (unless the client agrees to waive privilege) such evidence should be taken in private or be the subject of a non-publication order.

Disputes about fees and costs

68. It should be a rule of practice that a legal practitioner is obliged to disclose clearly in writing, at the commencement of the lawyer-client relationship, all reasonably foreseeable fees, costs and disbursements, followed by a written fee agreement in Plain English.

69. Every bill of costs rendered by a legal practitioner should contain a standard, clear, brief statement informing the client what to do in the event of any question or problem, and what procedures are available for external review of the bill.

70. The system of taxation of bills of costs by the Supreme Court should be replaced by a two-phase process of mediation and arbitration, to be determined by the Attorney General's Working Party on Legal Costs. This process should be integrated into the general complaints-handling system recommended in this Report, with access through the office of the Legal Services Ombudsman.

Commentary (Recommendations 68-70)

5.59 Although the issue of barristers' and solicitors' remuneration[47] is not expressly part of the Commission's terms of reference for this inquiry, disputes about legal fees, costs and disbursements represent a significant proportion of the complaints received by the legal professional associations[48] and are the cause of a good deal of the current public disquiet about lawyers. The Commission believes that it is necessary and proper for this matter to be dealt with as part of the overall rationalisation of the system of complaints-handling and discipline.

5.60 Under the existing law in NSW, a solicitor may not sue for costs until at least one month after the delivery of a bill of costs to the client.[49] Upon the application of a client, the Supreme Court may order a solicitor to provide a detailed bill of costs to a client, and may order the surrender of documents held pursuant to a solicitor's lien.[50] In the event of a dispute about the amount of the bill, a client may apply to the Supreme Court to have the bill "taxed" (appraised) by Court officers.[51] If the bill is reduced by a factor of at least one-sixth by taxation officers, the client has "won", and the losing party bears the expenses of the process.[52]

5.61 In DP 26,[53] the Commission noted that:

> It is widely accepted that taxation is a cumbersome, little-understood, and generally unsatisfactory method of resolving disputes about fees and costs.[54] It is well beyond the reach of most clients to initiate an action in the Supreme Court simply to require a solicitor to render a proper bill of costs, or to have a lien lifted, or to have the fairness or otherwise of a bill of costs assessed. Nor is there any special reason why, if the formal Courts must play a role, such matters could not be heard in the lower courts.

5.62 The Commission's proposed reforms in this area are based on a series of related propositions, that: (1) there is no marked inherent difference between a client-lawyer dispute over fees and costs and other types of client-lawyer dispute; (2) the procedures for resolving disputes over fees and costs should be integrated into the general system for dealing with client-lawyer disputes; (3) the procedures for resolving disputes over fees and costs should be simple, quick, inexpensive and accessible, with an emphasis on consensual or summary procedures;[55] and (4) such disputes are eminently preventable with proper disclosure and communication by lawyers at the initial stages of the relationship.

5.63 In DP 26,[56] the Commission wrote that:

> Any system designed to reduce the level of conflict between lawyers and clients over fees must address the *prevention* of such disputes as well as prompt and effective resolution. This is best achieved by ensuring that there is clearly communicated, "up-front", written disclosure to clients (and prospective clients) of all reasonably foreseeable fees, costs and disbursements, followed by written fee agreements in Plain English. These documents should include information about the scope of the retainer, the basis of charges, the nature of disbursements, the method by which clients will be kept informed of the progress of the matter and the accrual of costs, and a contact person in the event of questions or problems. This "Client Care" approach was adopted by the Law Society of England and Wales about one year ago,[57] and appears to be working well.
>
> Similarly, every bill of costs rendered by a legal practitioner should contain a clear, brief statement at the end about what to do in the event of any question or problem, and how to seek external review.

5.64 Recommendations 68-69 do provide for comprehensible, up-front, written fee agreements, and for bills of costs to contain a standard simple statement of the procedure for review of the bill. The Commission's research and the submissions received indicate that while most disputes are over the total *amount* of the bill - which takes the client by surprise - many disputes are also about the *manner* of billing (whether fees and costs are to be paid at the outset, or on an interim basis, or after the completion of the work or the judgment) and the lack of any express or obvious *explanation* for certain charges (such as large amounts for photocopying or travel, or telephone calls, or "perusal of documents"). It is incumbent upon lawyers to ensure that clients are clear about these matters at all times.

5.65 The Attorney General's Department has advised the Commission that the Attorney General's Working Party on Legal Costs, which is due to report early in 1993, "has determined that mandatory disclosure will be a requirement and that a guideline on what disclosure entails will be produced", and that the need for a statement about review on all bills of costs also has been accepted, "although the precise detail of the statement remains to be finalised".[58]

5.66 In Recommendation 70, the Commission proposes that the resolution of disputes about fees and costs be removed from the Supreme Court and replaced by a two-phase system of mediation (in the first instance) and arbitration (where mediation fails). That is, we recommend that such disputes normally should be resolved in the same manner that we have suggested other "consumer" type disputes be resolved. The Commission has not prescribed the detail of the proposed new system in this Report, as this is the subject of a review currently being completed by the Attorney General's Working Party on Legal Costs which is expected to result in legislative action in 1993.

5.67 The Commission does make a positive recommendation that all fees and costs disputes should be channelled through the office of the Legal Services Ombudsman, even if the matter is to be sent to a court or other forum for determination. There are at least two very good reasons for integrating the procedures for resolving fee disputes into the general system for handling complaints against lawyers. First, one of the Commission's central concerns in this Report is to rationalise the system and impose a single point of entry for all disputes, so that complainants are not given the "run-around" or forced to launch multiple actions, and so that they may be properly advised of their position and their options.

5.68 Secondly, it may be that a "fee dispute" also has a disciplinary aspect, whether or not this is apparent to (or of interest to) the client. Gross or fraudulent overcharging would amount to a serious disciplinary matter in

itself, but it also may be that the client's allegation of "overcharging" comprehends other concerns about the lawyer's professional conduct, such as incompetent service or poor communications, which contribute to the client's unwillingness to pay the bill of costs as presented.

Solicitors' liens

71. Solicitors' liens should be abolished.

Commentary (Recommendation 71)

5.69 Prior to the publication of DP 26, the Commission received a number of submissions from individuals as well as from the Australian Consumers' Association (ACA) calling for the abolition of the common law "solicitor's lien". Under this lien, a solicitor may withhold all files, documents and other personal property of the client from the client until the solicitor's bill of costs has been paid *in full*[59] or there is a Supreme Court order requiring the solicitor to give up the documents.[60] The ACA's submission stated that: "The present lien which solicitors have over files until fees are paid is a substantial barrier to consumers being able to seek advice, complain, or take action against their previous lawyer. This barrier to accountability needs to be removed."[61] The NSW Combined Community Legal Centres Group (CCLCG) submission identified a particular problem with "the use of liens in disputes involving costs to impede access to documents necessary if the client is to obtain a second opinion about the matter".[62]

5.70 These submissions were mentioned in DP 26,[63] and the Commission noted that:

> Solicitors' liens can be a considerable source of tension in circumstances in which the client is already dissatisfied with the standard of service being provided. Solicitors have as much right to receive payment for their work as any other service-provider, but they do not deserve any *special* privileges in this regard. The dispute - and the relevant files and documents - belong to the client and not to the solicitor. Solicitors have access to the courts to recover unpaid fees, and are obviously in a better position than clients to make the running in a civil action. Serious consideration should be given to the abolition of solicitors' liens, or closer supervision by the courts. The legitimate interests of solicitors also may be protected in other ways, such as by giving the first solicitor in a personal injury case a charge for the amount of the taxed or agreed costs upon the judgment money.[64]

5.71 The submission of the Kingsford Legal Centre agreed with that of the CCLCG on this point, and called for the abolition of solicitors' liens.[65]

5.72 The Law Society's submission in response to DP 26 disagreed with the proposition that solicitors' liens ought to be abolished. The Law Society submitted that:

> A solicitor's lien for unpaid costs is an established common law right, which, should not in the opinion of the Law Society be abolished...There is already in Part 11 of the Legal Profession Act a mechanism for the taxation of solicitor and client costs and specific provision for a client to seek from the Court orders for the delivery of documents. While that existing system has received criticism on grounds of delay and its perceived cumbersome nature, the better solution to any problems involved in the delivery of documents may be sought in an improved procedure for costs review rather than to extinguish a long standing right which recognises the just entitlement of a solicitor to be paid for work done before the fruits of that work are delivered absolutely to a client.[66]

5.73 It is true that solicitors are not the only service-providers who may place a lien over property subject to the payment of outstanding fees - mechanics, repairers and bailees of goods have similar rights. However, the position of solicitors does stand alone in some important respects. First, members of the legal profession are

meant to be motivated by the "service ideal" - that is, by "a tradition of devoted and disinterested service ... directed towards general community or cultural benefit rather than to self-interest", as opposed to the purely commercial concerns of other trades, occupations and enterprises.[67] Indeed, the submission of the Law Society places heavy emphasis on law being one of "the learned professions", with a strong service ideal, as one of the main justifications for substantial self-regulation.[68] These are claims that mechanics, panel beaters and dry cleaners seldom make: such persons have a purely commercial relationship with their customers.

5.74 Second, the nature of the legal file kept by the solicitor is clearly distinguishable from other types of personal property or chattels - the file often will contain instruments which regulate legal rights and obligations between parties (such as contracts and wills), and material of a personal, perhaps confidential, nature which the client regards as belonging *in essence* to himself or herself, as well as containing some of the lawyer's own research and analysis. Third, the withholding of property by a repairer may cause inconvenience to a greater or lesser degree, a solicitor's lien may prevent a person from properly vindicating his or her legal rights in a court of law. It is commonly known that solicitors' liens also cause problems with the prosecution of appeals.

5.75 In New South Wales, the Law Society recorded only seven complaints about "Liens" in the period between January 1990 and June 1992; however, many more complaints of this type may have been characterised under other headings, such as "Failure to transfer documents" (146 complaints), "Not complying with undertaking" (90) or "No communication" (164).[69] No doubt there also are many other cases in which clients are upset at or confused about the imposition of a lien, but no formal complaint is lodged with Law Society.

5.76 The Victorian Lay Observer, Ms Jan King, has observed that the concept of the solicitor's lien is completely alien to most clients who encounter it; and that although complaints relating to liens are not large in number in Victoria, the issues are often significant, perhaps affecting the viability of a small business which is unable to recover through litigation moneys owed to it.[70]

5.77 The Law Society is correct to observe that a solicitor's bill may be taxed and a lien may be overcome through an action initiated by the client in the Supreme Court,[71] but it is also correct to note the concerns about the delay, cost and complexity of these procedures. Just above, the Commission endorses the moves towards the prevention of, and faster and more simple methods of resolving, fee disputes between lawyers and their clients. This will remove some of the sting from solicitors' liens but it will not eliminate all of the problems and concerns we have expressed. Most plainly, the lien sits very badly with the profession's own service ideal.

5.78 Consequently, the Commission recommends the abolition of solicitors' liens forthwith. No doubt solicitors will be able to develop methods short of civil litigation to protect their genuine interest in being paid for the fair value of their work, such as through mediation, or the lodgement of a guarantee with a court or tribunal, or the giving of an appropriate undertaking by the new solicitor who has taken over the file.

Clarification regarding "complaints" and "complainants"

72. The *Legal Profession Act* 1987 should be amended to clarify the following:

(a) The person or body who first comes forward to the Legal Services Ombudsman with allegations against a legal practitioner is the "complainant".

(b) The letter and/or complaint form, and any supporting material attached, which is used to commence an investigation into the conduct of a legal practitioner is the "complaint".

(c) Where a matter is referred to the Tribunal for a hearing, an "information" should be drawn and filed by the body which is prosecuting the matter, which itemises the particulars to be determined by the Tribunal. The prosecuting body is the "informant".

(d) The informant may be the Legal Services Ombudsman, the Law Society, or the Bar Association, or with the leave of the Tribunal, the complainant.

Commentary (Recommendation 72)

5.79 Both professional associations made representations to the Commission that some of the terminology used in the *Legal Profession Act* 1987 was confusing and caused problems in practice. The original letter or form making allegations of unsatisfactory professional conduct or professional misconduct which starts off the investigation process is referred to as the "complaint" in s 130, and the person making the allegations is the "complainant". However, where a Council decides to refer a matter or matters to the Standards Board or the Disciplinary Tribunal under s 134, the referred brief is also referred to as the "complaint", even though the Council's sensibly have developed the practice of aggregating a number of original complaints or parts of complaints, adding material produced in the course of the investigation and, perhaps, expressing a number of its own concerns. Given that it is the Council which sends the "complaint" for hearing and prosecutes the matter, the Council may fairly be referred to as the "complainant" as well. Further confusion is then caused where the Board or Tribunal awards compensation to the "complainant" - which could mean that it is a matter for the Council to seek to enforce the order at a later time, rather than the original complainant.

5.80 In its submission, the Bar Association pointed out some recent decisions of the Board and Tribunal state that the only "complaint" that can be referred for hearing is the original letter or form under s 130(2) and "it is not correct or appropriate for the Bar Council to break up or itemise different matters arising out of one letter of complaint or dismissing some and referring others."[72] This causes obvious difficulties since the post-investigation brief, drawn by lawyers, is the more appropriate document to base hearings around, and the original letter of complaint may list a number of unrelated allegations.

5.81 The Commission agrees with the Bar Association that it is appropriate for the Councils (and the Legal Services Ombudsman) to formulate and file with the Legal Services Tribunal a document that distils and itemises the particulars of the complaint, based on the original allegations and the material disclosed in the course of the investigation, and having regard to the statutory heads of misconduct.[73] This provides a proper basis for the hearing, which must be in everyone's interests, including those of the respondent practitioner, who can clearly ascertain what charges must be defended.

5.82 Accordingly, the Commission recommends that, in the *Legal Profession Act* 1987, all references to "complaint" should be to the original letter or form (and any supporting material) from the client or other person which initiates the complaints handling process, and all references to "complainant" should be to that initiating party. Where a professional Council or the Legal Services Ombudsman decides to (or is directed by the Conduct Review Panel to) refer a matter to the Legal Services Tribunal for a hearing, the document which is filed with the Tribunal containing the itemised "charges" and particulars should be referred to as the "information", and the authority which files the document and will prosecute the matter (the Council or the Ombudsman) before the Tribunal should be referred to as the "informant".

5.83 The use of this terminology and procedure should avoid any further confusion and allow for proper hearings. It meets the Bar Association's concern that "the private right of a complainant" not be confused with "the public and protective nature of disciplinary proceedings",[74] and accords with the simplified terms and procedures for originating process and hearings in the Local Courts recommended by the Justices Act Review.[75]

Where the person complained about is no longer a practitioner

73. As is currently the position, a complaint or information about a legal practitioner should be able to be dealt with even though the practitioner no longer holds a current practising certificate or is no longer on the Supreme Court roll.

Commentary (Recommendation 73)

5.84 Under the *Legal Profession Act* 1987, the disciplinary provisions of Part X apply to a person against whom a complaint about professional conduct has been made, even if the person is longer a legal practitioner.[76] The Commission believes that this should continue to be the position.

5.85 With the exception of judicial officers,[77] it is generally the case that a professional cannot escape disciplinary proceedings by voluntarily removing himself or herself from the roll of practitioners. This would deprive the disciplinary tribunal of the opportunity to consider the person's fitness to practice, which may have future relevance, and to determine whether any compensation should be awarded to the complainant.

5.86 In NSW, complaints against doctors and other health care professionals may be proceeded with notwithstanding the fact that the person complained about has ceased to practice.[78] In the United Kingdom, legislation in 1990 confirmed that the Solicitors Disciplinary Tribunal has jurisdiction over former solicitors.[79]

Clarification of transitional provisions

74. Schedule 8 of the *Legal Profession Act* 1987 should be amended to make clear that conduct which occurred prior to the entry into force of the Act may be dealt with by the complaints-handling system, subject to the general provisions on time limitations.

Commentary (Recommendation 74)

5.87 In DP 26, the Commission noted that the transitional provisions of the *Legal Profession Act* 1987 were somewhat unclear in relation to complaints about the conduct of legal practitioners which occurred before the entry into force of the Act (in January 1988). As a matter of practice, complaints which raise issues going to *professional misconduct* are being dealt with, since this was recognised prior to the Act by both the common law and the earlier legislation. However, the new lesser category of *unsatisfactory professional misconduct* was not expressly covered by earlier law, and there is less certainty about what to do with these complaints now. The *Legal Profession Transitional Regulation* 1987 appears to relate only to conduct which would constitute professional misconduct.[80]

5.88 This is not a major issue, as the number of complaints based on pre-1988 conduct is now small[81] and will diminish further as times goes by, and in any event the Commission has recommended a general limitation period of six years (Recommendation 12). However, it is likely that there still will be a few such complaints made in the next few years, and the legislative position should be clear. In DP 26, the Commission proposed that, subject to any general limitation period, complaints about pre-1988 conduct should be able to be dealt with by the disciplinary system.[82]

5.89 This issue was not widely discussed in the submissions, but the Registrar of the Disciplinary Tribunal, Mr Robert Bennett, agreed that this area needed clarification. The NSW Bar Association disagreed with the Commission's proposal, submitting that it called for "retrospective legislation [which] is almost always unfair, per se".[83]

5.90 With respect, it was the position before the Act that substandard professional conduct - such as poor communications, negligence, delay, discourtesy and so on - could be complained about. Indeed, as the Commission discovered in its earlier inquiry into the regulation of the legal profession, complaints about such matters comprised the overwhelming proportion of all complaints against lawyers before the 1987 - and they still do. While a legal practitioner was unlikely to be severely sanctioned for such conduct, it was recognised by the

professional associations that such conduct could warrant a reprimand or other action, and practitioners were, or should have been, aware that such conduct was unacceptable.

5.91 In 1979, the Law Society Council issued a Special Bulletin alerting members that "professional misconduct is not constrained within any legal definition of wrong-doing; it is enough that such conduct amount to grave impropriety affecting a practitioner's professional character and be indicative of a failure either to understand or to practice the precepts of honesty and fair dealing in relation to his clients". The Council specifically reminded solicitors that "culpable irresponsibility", "gross negligence" or "serious failure to attend to the matter promptly or to keep the client informed on significant developments and progress" could be referred for disciplinary action.

5.92 In the circumstances, the Commission believes that its recommendation amounts to a clarification of the transitional position rather than new or retrospective law. Those few prospective complainants who are not otherwise caught by the recommended general limitation period of six years should not be denied an opportunity for a hearing and a remedy. Lawyers are already required under the Act to defend allegations about pre-1988 activities which may amount to professional misconduct; it is not unfair to ask them to explain as well pre-1988 activities which may amount to unsatisfactory professional conduct, given that the conduct in question also would have been unacceptable by the standards of the time.

Reciprocal discipline

75. Legal practitioners in New South Wales should be under an obligation to inform the relevant professional Council of any disciplinary action taken against them in another jurisdiction or of any criminal conviction. Arrangements should be made between the various states and territories of Australia to inform all jurisdictions of any criminal conviction or disciplinary order made in respect of any legal practitioner, or any action taken by a professional Council or other body which affects a person's practising certificate or practising rights.

76. Any disciplinary order made in another Australian jurisdiction which removes the name of a person from the roll of legal practitioners, or which cancels, suspends, or places conditions upon a person's practising certificate, automatically should be given effect in New South Wales by the relevant authorities in relation to that person's rights of practice in this State.

77. The Legal Services Tribunal should have the power, upon application, to decline to give effect in New South Wales to a disciplinary order (of the kind referred to in Recommendation 76) made in another jurisdiction, on the grounds that having reviewed the record from the other jurisdiction the Tribunal is satisfied that:

the procedures which led to the making of the disciplinary order constituted a denial of natural justice in the particular case;

on the evidence, it would clearly be unsafe or unsatisfactory to allow the order to have effect in New South Wales;

giving effect to the order would result in grave injustice; or

the conduct in question warrants substantially different discipline in New South Wales.

Commentary (Recommendations 75-77)

5.93 Until fairly recently, there was little interstate mobility among Australian lawyers. Almost all practitioners worked in the same state in which that they received their initial legal qualifications, and very few law firms had branches which crossed state or territory boundaries.[84] This position has changed markedly in recent years, however. It is now the case that all of the leading firms of solicitors have offices in most capital cities (as well as overseas), with partners admitted in all jurisdictions.[85] Many NSW barristers also are briefed to handle matters interstate on a regular or, at least, occasional basis.

5.94 Thus, it is now important in practice as well as in theory to provide for reciprocal notification and enforcement of disciplinary action taken against legal practitioners. The American Bar Association has commented that:

> If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been ... determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.[86]

5.95 The Commission agrees with this assessment, and has recommended that there be an express obligation placed upon legal practitioners (and former practitioners) to be candid with the authorities in disclosing any disciplinary action taken against them as well as any criminal conviction (which may affect their fitness to practice). As well, the Commission recommends that a mechanism be put in place to ensure that all States and Territories receive notification of any disciplinary order or any action taken by a professional Council or other body which affects a person's practising certificate or practising rights.

5.96 The current practice in NSW is for the Registrar of the Legal Profession Disciplinary Tribunal to forward a copy of each judgment of, and the orders made by, the Standards Board and the Disciplinary Tribunal to the Prothonotary. A file is created in the Supreme Court for the practitioner concerned and the details of the matter are noted. In those cases in which a legal practitioner has been struck off the roll, a notice of this event is sent by the Prothonotary to the Chief Judge of the District Court, the Chief Magistrate, the Registrar General, and the Sheriff in NSW, as well as the Registry of the Supreme Court in every other Australian State and Territory.

5.97 It is *not* the case at present, however, that any widespread action or notification takes place when a legal practitioner's practising certificate is cancelled or suspended, or has conditions placed upon it. Consequently, the situation could arise where, following a disciplinary order or the decision of a professional Council, a legal practitioner effectively has lost the right to practice for a proscribed or indefinite period in another state, but may continue to practice in NSW. Similarly, a practitioner may have a condition imposed on the practising certificate in another state by a disciplinary tribunal or a professional Council which, for example, prohibits the person from accepting instructions in (say) family law matters. Absent reciprocal recognition of this condition, the practitioner would be at liberty to practice contrary to this condition in NSW, contrary to the public interest.

5.98 In Recommendation 76, the Commission proposes that orders or actions in other Australian jurisdictions affecting rights of practice - the striking off of a name from the roll of practitioners, or the cancellation, suspension, or imposition of a condition upon, a practising certificate - *automatically* ought to be given effect by the appropriate authority in NSW.[87] Other disciplinary orders made interstate - reprimands, fines and so on - should be noted in NSW but there is no need for enforcement in this state. The recommended scheme assumes the correctness and conclusiveness of the interstate action or order, and obviates the need for repeating the whole process in NSW.

5.99 In order to ensure that the legal practitioner is accorded natural justice, however, the Commission also recommends that he or she should be entitled to the opportunity to satisfy the Legal Services Tribunal (and ultimately the Supreme Court, on appeal) that effect should *not* be given to the disciplinary order or action in NSW for one of four specified reasons: (1) the procedures used in respect of the original order or action constituted a breach of natural justice; or (2) the evidence available manifestly did not justify the making of the disciplinary order or the action taken in respect of the person's practising certificate; or (3) enforcement of the

order in NSW would result in a grave injustice to the practitioner concerned; or (4) a substantially different sanction would have been applied in NSW. The onus of satisfying the Tribunal would lie upon the applicant practitioner, and the hearing should be limited to a review of the record of proceedings from the other jurisdiction.

FOOTNOTES

1. The Client Care program is established pursuant to Rule 15 of the Law Society of England and Wales. See DP 26, at paras 3.129-3.130, and 4.89-4.91.

2. On 28 October 1992, entitled "Communicating with Your Client & Client Care", presented by Mr Fred Smith of the Law Society's Professional Standards Department.

3. F Riley *New South Wales Solicitors Manual: A Commentary on the Law and Practice Relating to the Profession of the Solicitor in New South Wales*. (Hereafter, "Riley".)

4. Law Society submission of 31 July 1992, at paras 3.5 and 7.18. The Commission just has learned that the Law Society Council has approved the publication of a draft code of ethics at its meeting of 17 December 1992: see *Caveat* No 118, 21 December 1992. Submissions are called for by 31 March 1993.

5. B Maley "Professionalism and professional ethics", in D Edgar (ed) *Social Change in Australia* (1974) 397.

6. DP 26, at para 4.86.

7. Submission of 19 May 1992.

8. See D Weisbrot *Australian Lawyers* (1990) Ch 7.

9. The Ethnic Affairs Commission of New South Wales sponsored a "Cross-Cultural Issues in the Law Symposium" on 28 July 1992, focussing on criminal law. (Professor David Weisbrot, of the Law Reform Commission, was a member of the "reference group" which planned and organised the event.) The background paper for the Symposium, prepared by Dr Janet Chan, highlighted issues relating to "professional responsibility and cultural awareness", at 22-27. See also the Australian Law Reform Commission *Multiculturalism and the Law* (Report No 57, 1992).

10. Victoria. Law Reform Commission *Access to the law: Accountability of the Legal Profession* (Report No 48, 1992) (hereafter, "VLRC 48") at 40, Recommendation 11.

11. VLRC 48, at para 49.

12. DP 26, at para 4.99.

13. See Recommendation 40 and the accompanying commentary in Chapter 4, above.

14. DP 26, at para 4.101.

15. DP 26, at paras 4.93-4.95.

16. DP 26, at para 4.98.

17. Bar Association submission of 31 July 1992, at 14.

18. DP 26, at para 4.83.

19. Law Society of New South Wales *The legal profession disciplinary process: Trends and statistics* (October 1992). (Hereafter, "Law Society Trends and Statistics".)

20. The Digest, which commenced in 1992, is to be published six times annually.

21. Section 67(3)(d)-(e).

22. Such as conveyancing companies.

23. See ss 67(3)(c) and 168, regarding the funding of costs incurred in enforcing Parts 9 and 10 of the Act.

24. The Law Society also maintains another special trust fund, known as the Law Society's Solicitors Trust Accounts Fund, which accrues the interest income on residual funds held in solicitors' trust accounts. The trustees of this Account are the President and Treasurer of the Law Society and a nominee of the Attorney General. The fund is applied to purposes similar to those of the statutory interest account. See DP 26, at para 4.105.

25. Section 67(3)-(4).

26. Section 67(2)(b).

27. DP 26, at para 4.108.

28. DP 26, at para 4.106.

29. ABA Report, at 50.

30. American Bar Association Standing Committee on Professional Discipline *Model Rules for Lawyer Disciplinary Enforcement* (1989) r 8. (Hereafter, "ABA Model Rules".)

31. ABA Model Rules, commentary at 17.

32. ABA Model Rules, commentary at 18.

33. Submission of 10 August 1992, at 3.

34. Submission of 11 August 1992, at 5.

35. Submission of 23 December 1991, at para 9.

36. Submission of 31 July 1992, at para 7.20.

37. Submission of 31 July 1992, at 16-17.

38. DP 26, at para 4.113.

39. Law Society of New South Wales *Annual Report 1992* at 40.

40. The ABA Model Rules, r 8 on "Periodic Assessment of Lawyers", proposes two rates, with the higher rate coming in for a lawyer after five years from the date of his or her admission to practice. Most American jurisdictions have fee waiver programs for lawyers who can demonstrate hardship.

41. The Commission's budget for the two most recent financial years has been $992,000 per annum, which covers offices in the Sydney CBD, all salaries for Commissioners and about a dozen professional and support staff, and other associated library, equipment, publication and office expenses.

42. DP 26, at para 4.79.

43. ABA Model Rules, rr 16-17.

44. ABA Model Rules, at 33.

45. At para 2.81.

46. See eg NSW Bar Association Rules, rr 39 and 52.

47. See Part 11 of the Act.

48. For example, the Law Society received 104 complaints about "overcharging" in 1990, 102 in 1991, and 73 in the first six months of 1992. Further, other fee disputes may be categorised under other headings, such as "No communications", "Liens", and "Failure to transfer documents".

49. *Legal Profession Act* 1987, s 198.

50.. Section 208.

51. Sections 199-206.

52. See the *Supreme Court Rules*, Part 52, r56.

53. At para 4.117.

54. See Weisbrot, at 216-222, regarding the regulation of legal fees and costs, including taxation of bills of costs (at 221).

55. The South Australian Government also recently recommended the establishment of an extra-judicial procedure which would allow clients to obtain "a quick and informed decision as to whether the charge was reasonable." See *A White Paper: The Legal Profession* (August 1992) at 25:

56. At paras 4.120-4.121.

57. See (1991) 5 *Law Society's Gazette* 6. See the discussion of the Client Care system in Chapter 3.

58. Letter of 14 August 1992, at p5, from the Director General. The submissions of the Bar Association and the Combined Community Legal Centres Group also supported these propositions. The Law Society's submission did not address these issues.

59. See *Barratt v Gough-Thomas* [1950] 2 All ER 1048, at 1053. See Riley, at paras 2506 et seq, for a good discussion of general and particular solicitors' liens.

60. See s 208(1)(b).

61. ACA submission of 23 December 1991, at para 8.

62. Community Legal Centres submission of 28 February 1992, at 2.

63. At para 4.128.

64. At para 4.129.

65. Kingsford Legal Centre submission, 11 August 1992, at 6-7.

66. Law Society submission of 31 July 1992, at para 7.21.

67. See the discussion of this point in Weisbrot, at 4, 9, 16, 30, 196-198 and 215.

68. See eg the Law Society submission of 31 July 1992, at para 2.1.

69. Law Society Trends and Statistics, at Table 1.

70. Interviewed on ABC Radio National's *The Law Report No 165*, 10 March 1992.

71. Under the *Legal Profession Act* 1987 s 208.

72. Bar Association submission of 31 July 1992, at 25.

73. Bar Association submission of 31 July 1992, at 25-26.

74. Bar Association submission of 31 July 1992, at 25.

75. Justices Act Review Steering Committee *Report of the Justices Act Review Steering Committee* (1992) Part I. Professor David Weisbrot, of the Commission, served as a member of the Steering Committee.

76. Section 124.

77. *Judicial Officers Act* 1986 (NSW) s 20(1)(g) provides that the Judicial Commission shall dismiss a complaint if "the person complained about is no longer a judicial officer".

78. See the *Medical Practitioners Act* 1938 (NSW) s 28(6); Cf the *Health Care Complaints Bill* 1992 (NSW) cl 19(3).

79. *Courts and Legal Services Act* 1990 (UK) s 92, which amends s 47(1)(c) of the *Solicitors Act* 1974 (UK).

80. Clauses 9-10.

81. See DP 26, at para 4.132.

82. DP 26, at para 4.132.

83. NSW Bar Association submission, 31 July 1992, at p21.

84. See Weisbrot, at 61, 65-66 and 139.

85. Weisbrot, at 259-264 and 269-270.

86. ABA Model Rules, commentary accompanying r 22, at p45.

87. The Supreme Court, in relation to striking off the roll, and the Law Society or Bar Council in relation to practising certificates.

6. Summary of Recommendations

RECOGNITION OF THE MULTIPLE AIMS OF THE LEGAL PROFESSION'S DISCIPLINARY SYSTEM

1. Part 10 of the Legal Profession Act 1987 should expressly recognise that the multiple aims of the disciplinary system are: (1) to redress the consumer complaints of users of legal services; (2) to ensure compliance by individual legal practitioners with the necessary standards of honesty, diligence and competence; and (3) to maintain the ethical and practice standards of the legal profession as a whole at a sufficiently high level.

2. Fulfilment of the multiple aims of the disciplinary system requires a comprehensive, integrated approach, which provides for: community education about the legal system and the role of lawyers; assistance for complainants to facilitate access to the complaints system; the prompt, thorough investigation of complaints; the diversion of appropriate matters for consensual dispute resolution; the formal hearing of allegations of unsatisfactory professional conduct and professional misconduct; a flexible range of sanctions and remedies which satisfy the needs of complainants and the public interest in effective discipline; and education, counselling, and other assistance programs for lawyers.

THE LEGAL SERVICES OMBUDSMAN

3. An office of Legal Services Ombudsman should be established as an independent, statutory authority. The Legal Services Ombudsman should be appointed by the Governor in Council for a term not exceeding seven years, after which the person is eligible for reappointment.

4. It should be open to the Governor to appoint one or more persons (in the same manner) to the position of Deputy Legal Services Ombudsman if the workload of the office so requires.

5. The office should have a secretariat providing sufficient professional, support and technical services to discharge its statutory responsibilities promptly and effectively in the public interest.

6. A person is qualified to be appointed as the Legal Services Ombudsman if he or she is a person who is broadly familiar with the nature of the legal system and legal practice and possesses sufficient qualities of independence, fairness and integrity. The Legal Services Ombudsman need not be legally qualified, nor should legal qualifications or experience be a disqualifying factor; however, in the event of the appointment of a non-lawyer, legal advice should be available within the office.

7. The functions of the Legal Services Ombudsman should be to:

handle the initial intake of all complaints against legal practitioners - including non-lawyers who offer legal services, such as conveyancers;

provide complainants and potential complainants with the appropriate level of advice and assistance about making complaints or pursuing other avenues and remedies;

regularly monitor sources of public information, such as news and current affairs reports and court decisions, which may contain information about the conduct of legal practitioners;

Investigate directly complaints made against lawyers who currently serve or have recently served on one of the professional Councils or are otherwise associated with a Council or the complaints handling process, as well as those complaints which the Ombudsman believes should be handled directly in the interests of justice and public confidence;

refer all other complaints to the relevant professional Council for investigation (such reference may contain a recommendation to investigate, divert to mediation, or both);

commence an investigation or refer a matter to one of the professional Councils on his or her own initiative, such as where allegations have been aired publicly;

prosecute disciplinary matters before the Tribunal, following an investigation or upon the request of the Conduct Review Panel or a professional Council;

be responsible for community education about the regulation and discipline of the legal profession;

assume a general duty to assist in the enhancement of professional ethics and standards, through liaison with institutions which provide training and education for service providers, as well as through direct efforts, such as by sponsoring research, publishing, and holding seminars and workshops; and

report annually to Parliament through the Attorney General, and at least semi-annually to the professional Councils.

8. In the proper discharge of the functions of the office, the Legal Services Ombudsman should be entitled to:

have access, on a confidential basis, to all of the files and other records kept by the professional associations in relation to the assessment and investigation of complaints against lawyers and the disciplinary system generally;

have sufficient powers to conduct its investigations effectively, including the same powers available to the professional Councils in this respect;

have the power to dismiss a complaint after investigation, on the same bases available to the professional Councils in this respect;

attend and participate in any meeting of the professional Councils (or their committees) considering complaints;

attend the hearings of the Legal Services Tribunal as an observer;

attend any dispute resolution (mediation or conciliation) conference as an observer; and

protection from all liability for anything done in good faith in the course of executing his or her statutory responsibilities.

9. The Legal Services Ombudsman may, in the exercise of his or her discretion, take over the conduct of the investigation of a complaint which has been referred to one of the professional Councils, where the interests of justice so require. In such a case, the Legal Services Ombudsman should be entitled to uplift the file and any other relevant material from the Council.

10. The Legal Services Ombudsman should, on a regular basis, conduct surveys of the views and levels of satisfaction of complainants and respondent lawyers with the complaints handling system. Such surveys should be published in the Legal Services Ombudsman's Annual Report.

THE POSITION OF COMPLAINANTS

11. It should be open to any person to make a complaint alleging that a provider of legal services is guilty of conduct that may constitute unsatisfactory professional conduct or professional misconduct.

12. The lodgment of complaints should be subject to a limitation period of six years from the time of the conduct which is the subject of the complaint. It should be open to a complainant to seek leave from the Legal Services Tribunal to pursue a complaint outside the time limit, where the matter involves a question of professional misconduct.

13. A "Complainants' Charter of Rights", having statutory force, should be inserted into the Legal Profession Act 1987, in order to clarify the position of complainants (and respondent lawyers) and to emphasise the fairness and integrity of the system.

14. The Charter should provide that:

Complainants are entitled to receive sufficient advice and assistance in order to prepare a complaint in writing in the prescribed form, and to understand the nature of their rights and responsibilities in the disciplinary process.

Complainants are entitled to effective access to the office of Legal Services Ombudsman and other relevant institutions.

Complainants - and respondent legal practitioners - are absolutely immune from civil suit for all communications made to the officers of the agency responsible for the handling of complaints, for all communications made to the various disciplinary bodies exercising direct or delegated statutory powers, and for all statements made within the disciplinary proceedings.

Complainants must receive regular and adequate notice of the status of disciplinary proceedings at all stages of the proceedings. In general, a complainant should receive, contemporaneously, the same notices and orders the respondent receives as well as copies of the respondent's communications to the agency, except information that is subject to another client's privilege.

Complainants must be permitted a reasonable opportunity to rebut statements of the respondent before a complaint is dismissed.

Complainants must be notified in writing when a complaint has been dismissed (with or without a reprimand to the legal practitioner). The notice should include a concise recitation of the specific facts and reasoning upon which the decision to dismiss was made. The complainant should normally be given a copy of the investigator's report, unless there are good reasons for not doing so in a particular case (such as problems of confidentiality).

Complainants must be given proper notice of any disciplinary proceedings, and should have the right to attend any hearing. Complainants should have the right to appear as a party to the proceedings on the issue of compensation, and may appear as a party in respect of other matters with the leave of the Tribunal or Court, subject to the risk of costs.

Complainants have the right to have the dismissal of a complaint or any other adverse decision reviewed by the Legal Services Conduct Review Panel.

DISPUTE RESOLUTION

15. If a complaint does not raise issues of unsatisfactory professional conduct or professional misconduct, but is capable of consensual resolution, it should be open to the Legal Services Ombudsman, the Law Society and Bar Councils, and the Conduct Review Panel to refer the matter for conciliation or mediation.

16. If a complaint does involve an issue (or issues) of unsatisfactory professional conduct or professional misconduct, but also involves a consumer dispute which is capable of consensual dispute resolution (such as where an apology or compensation is called for), it should be open to refer the latter aspect for mediation or conciliation, while the disciplinary aspect proceeds through the formal disciplinary system. In such cases, the dispute resolution process should not have to wait for the disciplinary proceedings to conclude.

17. The Law Society and Bar Councils should maintain a list of mediators for this purpose, in consultation with the Legal Services Ombudsman and the Director of the Community Justice Centres.

18. Mediators on the list maintained by the professional Councils should be obliged to undertake a specific training program. The training program, as well as a Code of Conduct for mediation between lawyer and client, should be developed by the professional Councils in consultation with the Director of the Community Justice Centres and the Legal Services Ombudsman.

19. All confidential communications which are part of the mediation or conciliation process should be privileged, *except* for admissions or communications which reveal irregularities or dishonesty by a legal practitioner in respect of trust accounts or controlled funds.

20. In the event that conciliation or mediation fails to resolve the dispute, the complainant may apply to the Registrar of the Legal Services Tribunal to have the matter resolved by arbitration. In such cases, the Registrar or his or her nominee may award compensation not exceeding $6,000.

THE ROLE OF THE PROFESSIONAL COUNCILS

21. The Councils of the Law Society and the Bar Association should continue to be responsible for: the investigation of complaint matters (those forwarded by the Legal Services Ombudsman, as well as those matters in which a Council acts on its own initiative); diverting consumer complaints for dispute resolution; dismissing appropriate complaints (with or without a reprimand); determining which matters should be sent to the Legal Services Tribunal for hearing; and prosecuting disciplinary offences before the Tribunal.

22. The Councils must ensure that the investigation of complaints is accomplished in a prompt, active, thorough and professional manner. Sufficient resources and training (for members of the Council and its committees as well as for staff) must be provided to make this possible. An obligation on the part of the Councils (and the Legal Services Ombudsman) to investigate and process complaints expeditiously should be inserted into the *Legal Profession Act* 1987.

23. In the event that a legal practitioner unreasonably fails to reply to the allegations made in the complaint or to respond to requests for information, it should be open to a Council (or the Legal Services Ombudsman) to apply to the Registrar of the Legal Services Tribunal for an administrative penalty of up to $2000 to be assessed against the practitioner. (Nothing in this Recommendation is meant to derogate from the power of a Council to suspend or cancel a practitioner's practising certificate under s 35 of the *Legal Profession Act* 1987.)

24. The Councils should operate several Professional Conduct Committees (exercising delegated authority) in tandem, to speed up its handling of complaints, reduce the workload of individual Committee members, and increase the intensity of investigations.

25. The powers of a Council should be the same whether the investigation has arisen on the Council's own initiative or following a complaint forwarded by the Legal Services Ombudsman.

26. Following an investigation into any complaint, a Council must refer a matter to the Legal Services Tribunal for a hearing if "it appears to the Council that (a) the legal practitioner may be guilty of unsatisfactory professional conduct or professional misconduct, or (b) the interests of justice so require". (The same standard shall apply in respect of the investigations of the Legal Services Ombudsman.)

27. Following a referral by its Council to the Legal Services Tribunal, or upon the request of the Legal Services Ombudsman or the Legal Services Conduct Review Panel, the Law Society and the Bar Association should be responsible for preparing the information and prosecuting the matter before the Tribunal and the courts.

28. Where a Council has dismissed a complaint following investigation (with or without a finding of unsatisfactory professional conduct), it should nevertheless have the power to award compensation to the complainant with the consent of the legal practitioner, or to refer the matter for mediation (and ultimately arbitration) on the question of compensation, or to make an *ex gratia* award of compensation from a discretionary fund maintained by the professional Council for this purpose.

29. The Act should be clarified to ensure that the Councils must report on their activities to the Parliament through the Attorney General at least once per year. It should be standard practice for the Councils each to produce a detailed report at least once per year specifically dedicated to the regulation and discipline of the legal profession.

30. The present role of Councils in the setting of standards of professional ethics and conduct should continue.

THE LEGAL SERVICES TRIBUNAL

31. The Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal should be combined to form a Legal Services Tribunal. The Tribunal would hear complaints involving issues of unsatisfactory professional conduct or professional misconduct, or both.

32. The Legal Services Tribunal (the "Tribunal") should consist of: at least one judge, at least two barristers and two solicitors, and at least two lay persons, appointed by the Attorney General. The Attorney General should be able to appoint the barrister and solicitor members of the Tribunal without the need for a nomination from the relevant professional Council. One of the judicial members of the Tribunal should be appointed President of the Tribunal by the Attorney General.

33. The President of the Tribunal or his or her nominee should determine the membership of the Tribunal for the purposes of any particular hearing. The judicial member of the Tribunal should preside at the hearing, or in the absence of a judicial member, one of the barrister or solicitor members designated by the President or his or her nominee. The Tribunal should be comprised of equal numbers of independent members and barrister or solicitor members (depending upon whether the information concerns a barrister, a solicitor, or both), plus the presiding member, with a total of three or five members.

34. Hearings of the Tribunal should be conducted in public. The presiding member of the Tribunal may close, or limit the reporting of, the proceedings in those exceptional cases where the presence of the public would defeat the ends of justice. The determinations of the Tribunal should be put in writing, and should be published. (See Recommendation 67, below, regarding the special position of evidence related to privileged communications between client and lawyer.)

35. Having regard to the "protective" nature of the Tribunal's jurisdiction, the Tribunal should be flexible in its procedures, the rules of evidence do not apply, and it may adopt an inquisitorial style.

36. Notwithstanding Recommendation 35, when conducting a hearing into an information involving a question of professional misconduct, the Tribunal should be bound by the rules of evidence.

37. Prior to the commencement of the proceedings, the legal practitioner involved should be obliged to file a Reply to the information (that is, to "plead"), in order to narrow the issues for hearing.

38. Subject to considerations of natural justice in each case, the Tribunal should have the power to deal with matters of professional conduct which arise in the course of proceedings and should be able to order the joinder of informations against two or more practitioners for hearing.

39. The Tribunal should have the same powers as the Supreme Court to discipline legal practitioners, as well as those powers which are specifically enumerated by statute.

40. The enumerated powers of the Tribunal, in the *Legal Profession Act*, in respect of a barrister or solicitor, should include the powers to:

order that a person's name be removed from the Supreme Court's roll of practitioners;

cancel, or suspend for any period, a person's practising certificate;

place conditions upon a person's practising certificate, including, but limited to, conditions involving: supervision of the person's work by another practitioner, requiring the person to cease to accept instructions in a specified class (or classes) of legal work, or further education;

impose a fine of not more than $5,000 for a finding of unsatisfactory professional conduct, or not more than $50,000 for a finding of professional misconduct;

issue a public reprimand, unless special circumstances require a private reprimand;

order that the person undertake and successfully complete a specified course of further legal education;

or to do any combination of those things.

41. The Act should continue to specify that in relation to a solicitor, the Tribunal also should have the powers in relation to the supervision or management of the practice which are enumerated in section 149(2)(c)-(g) of the *Legal Profession Act* 1987.

42. Where the Tribunal determines that, whatever the shortcomings of the individual solicitor or solicitors involved, the evidence indicates a systemic problem in relation to a firm of solicitors, the Tribunal should have the power to join the law firm as a party to the proceedings and then to make appropriate orders in relation to the internal systems of management and supervision of the firm, aimed at rectifying the problem.

43. The Tribunal should be free to make a compensatory order (of the kind now specified in s 149(3), but without a specified upper limit) against the legal practitioner where the complainant has suffered loss as a result of the practitioner's conduct. Where such an order was not sought at the start of proceedings, the informant or the complainant may seek leave from the Tribunal to amend the information for this purpose. The Tribunal should be free to make a compensatory order without the consent of the legal practitioner involved.

44. The determinations of the Tribunal should be subject to judicial review only by the Court of Appeal. Appeal on matters of law should be as of right, but special leave should be required to appeal on matters of fact.

45. The Registrar of the Tribunal should have the power to arbitrate (or nominate an arbitrator) in relation to lawyer-client disputes which could not be settled by mediation, and to impose an administrative penalty of not more than $2,000 against a legal practitioner who unreasonably fails to provide information requested by one of the professional Councils or the Legal Services Ombudsman for the purposes of investigating a complaint.

EXTERNAL REVIEW

46. The Legal Profession Conduct Review Panel should be renamed the "Legal Services Conduct Review Panel" (the "Panel") and should be empowered to review the handling of any complaint which has not been referred to the Tribunal for a hearing. Such a review should commence upon an application from the complainant; or upon the request of the Attorney General, the Legal Services Ombudsman or a professional Council; or on the Panel's own motion.

47. The composition of the Panel should remain as provided in s 126 and Schedule 4 of the *Legal Profession Act* 1987, *except* that the Attorney General should be able to appoint the barrister and solicitor members without the need for nomination by the respective Council. It should continue to be the position that one of the independent members should be appointed Chairperson of the Panel by the Attorney General.

48. The appointment of all members of the Panel should follow a system of advertising, interviewing and selection on merit, in the manner normally associated with appointment to important public authorities.

49. The independent members of the Panel should normally be persons who are not *practising* lawyers. However, it should be open to the Attorney General to appoint a person who has legal qualifications so long as he or she does not hold a current practising certificate. The legislation should specify that the main requirements for appointment as an independent member of the Panel are that the person: (1) is independent of the legal profession, and (2) has sufficient experience and community standing to promote public confidence in the integrity of the system.

50. The independent members of the Panel should be entitled to receive a reasonable level of remuneration, having regard to the time commitment and complexity of the work involved, in order to attract and retain competent people.

51. The Panel should be allocated sufficient resources to ensure that it can carry out its functions promptly and effectively in the public interest. In particular, the Panel should have a sufficient budget to enable it to:

establish a small, full-time secretariat, to facilitate the work of the part-time Panel;

provide the necessary legal and technical advice and research to its members;

make possible the active investigation or re-investigation of complaints in appropriate cases;

conduct relatively informal hearings at which the parties may be heard; and

organise training programs for its members, especially the independent members.

52. The Panel should be able to undertake a review upon an application from the complainant; or upon the request of the Attorney General, the Legal Services Ombudsman or a professional Council; or on the Panel's own motion.

53. The Panel should be entitled to go beyond the file compiled by the professional Council or the Legal Services Ombudsman to conduct a thorough review of the complaint, which may involve further investigation or re-investigation, or asking the parties to appear before it. The Panel also should be able to ask that the Council or the Legal Services Ombudsman conduct further investigations into a complaint instead of or in addition to pursuing its own inquiries.

54. The Panel should be empowered to refer a matter back to a Council or to the Legal Services Ombudsman for further investigation, or to refer a matter *directly* to the Tribunal for a formal hearing, without the intervention of the Attorney General. Where the Panel refers a matter to the Tribunal for hearing, the Panel should nominate the Legal Services Ombudsman or the appropriate professional Council to prosecute the information.

55. The Panel should be empowered to refer a matter for dispute resolution (see also Recommendations 15 and 28) or to recommend the payment of compensation to a complainant in appropriate cases, from a discretionary fund maintained by the professional Councils for this purpose.

56. If the Panel upholds the decision of the Council or the Legal Services Ombudsman, it should provide the complainant with adequate reasons in writing for the Panel's decision.

57. The Panel should be obliged to report annually to Parliament through the Attorney General, and at least semi-annually to the professional Councils and the Legal Services Ombudsman.

EDUCATION, PREVENTION AND PROFESSIONAL STANDARDS

58. The Law Society should take immediate steps to adapt and introduce the "Client Care" program developed in England and Wales, which is directed towards the improvement of lawyer-client communications and relations, including the establishment of internal ethics committees and complaints handling procedures.

59. The Law Society and the Bar Association should collaborate on the production of a Legal Profession Code of Ethics and Professional Responsibility, to be completed and presented to the Attorney General within one year, which is oriented towards lawyers' obligations to clients and to the community.

60. The professional associations should ensure that more basic and continuing education about legal ethics and professional responsibility is available, including courses which are incidental to the practising certificate and disciplinary systems.

61. The professional associations should ensure that adequate counselling and assistance programs are provided for legal practitioners who seek help or are required to seek help to resolve personal, professional, or commercial difficulties.

62. Successful completion of a subject which adequately deals with the issues of legal ethics and professional responsibility should be compulsory for LLB students in University law schools in NSW (and for students in the Admission Board courses), and should be compulsory for admission to practise as a barrister or solicitor of the Supreme Court of New South Wales.

63. The professional Councils and the Legal Services Ombudsman should ensure that there is feedback from the disciplinary system to the legal profession in order to facilitate changes in (basic, practical or continuing) legal education or legal practice aimed at remedying common problems.

FUNDING

64. A graduated charge or levy on the annual practising certificate fees of legal practitioners should be imposed to fund at least the major portion of the complaints handling system, including the establishment and operation of the office of Legal Services Ombudsman. The charge or levy should be fixed by regulation by the Attorney General. The system should continue to have access to funds from the Statutory Interest Account and, if necessary, from Consolidated Revenue.

RELATED MATTERS

Issues of confidentiality and privilege

65. All files held by the Legal Services Ombudsman, the Law Society and the Bar Association, relating to the investigation of a complaint (or held by a mediator or arbitrator appointed for this purpose) should be immune from civil discovery and exempt from production under the *Freedom of Information Act* 1989.

66. All files held by the Legal Services Conduct Review Panel for the purposes of reviewing the actions and decisions of the Legal Services Ombudsman, the Law Society, or the Bar Association in relation to a complaint also should be immune from civil discovery and exempt from production under the *Freedom of Information Act* 1989.

67. To the extent that it is reasonably necessary in order to defend allegations made in a complaint or information, a legal practitioner should be entitled to disclose confidential information to the investigating body which might otherwise be the subject of the client's legal professional privilege. As with other such communications made to the Law Society, the Bar Association, the Legal Services Ombudsman or the Conduct Review Panel relating to a complaint, this information should be immune from civil discovery and exempt from production under the *Freedom of Information Act* 1989. In the event that the matter proceeds to a hearing before the Legal Services Tribunal, unless the client waives privilege, evidence which relates to privileged communications between client and lawyer should be taken in private or be subject to an order prohibiting publication.

Disputes about fees and costs

68. It should be a rule of practice that a legal practitioner is obliged to disclose clearly in writing, at the commencement of the lawyer-client relationship, all reasonably foreseeable fees, costs and disbursements, followed by a written fee agreement in Plain English.

69. Every bill of costs rendered by a legal practitioner should contain a standard, clear, brief statement informing the client what to do in the event of any question or problem, and what procedures are available for external review of the bill.

70. The system of taxation of bills of costs by the Supreme Court should be replaced by a two-phase process of mediation and arbitration, to be determined by the Attorney General's Working Party on Legal Costs. This process should be integrated into the general complaints-handling system recommended in this Report, with access through the office of the Legal Services Ombudsman.

Solicitors' liens

71. Solicitors' liens should be abolished.

Clarification regarding "complaints" and "complainants"

72. The *Legal Profession Act* 1987 should be amended to clarify the following:

(a) The person or body who first comes forward to the Legal Services Ombudsman with allegations against a legal practitioner is the "complainant".

(b) The letter and/or complaint form, and any supporting material attached, which is used to commence an investigation into the conduct of a legal practitioner is the "complaint".

(c) Where a matter is referred to the Tribunal for a hearing, an "information" should be drawn and filed by the body which is prosecuting the matter, which itemises the particulars to be determined by the Tribunal. The prosecuting body is the "informant".

(d) The informant may be the Legal Services Ombudsman, the Law Society, or the Bar Association, or with the leave of the Tribunal, the complainant.

Where the person complained about is no longer a practitioner

73. As is currently the position, a complaint or information about a legal practitioner should be able to be dealt with even though the practitioner no longer holds a current practising certificate or is no longer on the Supreme Court roll.

Clarification of transitional provisions

74. Schedule 8 of the *Legal Profession Act* 1987 should be amended to make clear that conduct which occurred prior to the entry into force of the Act may be dealt with by the complaints-handling system, subject to the general provisions on time limitations.

Reciprocal discipline

75. Legal practitioners in New South Wales should be under an obligation to inform the relevant professional Council of any disciplinary action taken against them in another jurisdiction or of any criminal conviction. Arrangements should be made between the various states and territories of Australia to inform all jurisdictions of any criminal conviction or disciplinary order made in respect of any legal practitioner, or any action taken by a professional Council or other body which affects a person's practising certificate or practising rights.

76. Any disciplinary order made in another Australian jurisdiction which removes the name of a person from the roll of legal practitioners, or which cancels, suspends, or places conditions upon a person's practising certificate, automatically should be given effect in New South Wales by the relevant authorities in relation to that person's rights of practice in this State.

77. The Legal Services Tribunal should have the power, upon application, to decline to give effect in New South Wales to a disciplinary order (of the kind referred to in Recommendation 76) made in another jurisdiction, on the grounds that having reviewed the record from the other jurisdiction the Tribunal is satisfied that:

the procedures which led to the making of the disciplinary order constituted a denial of natural justice in the particular case;

on the evidence, it would clearly be unsafe or unsatisfactory to allow the order to have effect in New South Wales;

giving effect to the order would result in grave injustice; or

the conduct in question warrants substantially different discipline in New South Wales.

Select Bibliography

ABEL, R L *The Legal Profession in England and Wales* (1988)
ADMINISTRATIVE REVIEW COUNCIL *Report No. 34: Access to Administrative Review By Members of Australia's Ethnic Communities* (1991)

AMERICAN BAR ASSOCIATION. Standing Committee on Professional Discipline *Model Rules for Lawyer Disciplinary Enforcement* (1989)

AMERICAN BAR ASSOCIATION *Report of the Commission on Evaluation of Disciplinary Enforcement to the American Bar Association* (May 1991)

BEATTY R "Handling customer complaints" (December 1992) *The Australian Standard* 35

BENNETT, J M *A History of the New South Wales Bar* (1969)

BURTON, G "A Banking Ombudsman for Australia" (1990) 1 *Journal of Banking and Finance Law and Practice* 29-55

CASTLES, A *An Introduction to Australian Legal History* (1971)

FISSE, B "Sentencing Options Against Corporations" (1990) 1 *Criminal Law Forum* 211-258

FORBES, J R *The Divided Legal Profession in Australia* (1979)

GILBERT, E "Profession in crisis?" (1989) 139 *New Law Journal* 583

HALL, M J "Gotcha! The care and feeding of the state's disciplinary watchdog" (August 1992) *California Lawyer* 44

LAW SOCIETY OF NEW SOUTH WALES *Discussion Paper: Specialist Accreditation* (June 1991)

LAW SOCIETY OF NEW SOUTH WALES *The legal profession disciplinary process: Trends and statistics* (October 1992)

LAW SOCIETY OF NEW SOUTH WALES *Annual Report 1992* (1992)

MACDOUGAL, R "Unsatisfactory Professional Conduct" (March 1991) *Law Society Journal* 42

MAHAN B "Lawyers Who Defend Lawyers" (April 1992) 12(4) *California Lawyer* 24-25

MALEY, B "Professionalism and professional ethics", in D Edgar (ed), *Social Change in Australia* (1974)

MORTIMER, JOHN *Rumpole on Trial* (1992)

NATIONAL CONSUMER COUNCIL *In Dispute with the Solicitor* (1985)

NEW SOUTH WALES. Attorney General's Department *The Structure and Regulation of the Legal Profession* (Issues Paper, November 1992)

NEW SOUTH WALES. Department of the Attorney General and Justice and the Bureau of Crime Statistics and Research *A Study of Complaints against Lawyers* (Research Report No 5, August 1979)

NEW SOUTH WALES. Committee of Inquiry Into Legal Education *Report of the Committee of Inquiry into Legal Education in New South Wales* (1979) ("the Bowen Report")

NSW Law Reform Commission: REPORT 70 (1993) - SCRUTINY OF THE LEGAL PROFESSION: COMPLAINTS AGAINST LAWYERS

NEW SOUTH WALES. Justices Act Review Steering Committee *Report of the Justices Act Review Steering Committee* (1992)

NEW SOUTH WALES. Department of Community Services *Improving services by listening and responding: Appeals and Complaints Mechanisms for Community Services in NSW* (November 1992)

NEW SOUTH WALES BAR ASSOCIATION *56th Annual Report for 1992* (1992)

NEW SOUTH WALES LAW REFORM COMMISSION *General Regulation* (DP 1, 1979)

NEW SOUTH WALES LAW REFORM COMMISSION *Complaints, Discipline and Professional Standards - Part 1* (DP 2, 1979)

NEW SOUTH WALES LAW REFORM COMMISSION *The Legal Profession - Background Paper III* (1980)

NEW SOUTH WALES LAW REFORM COMMISSION *The Structure of the Legal Profession* (DP 4(1) and 4(2), 1981)

NEW SOUTH WALES LAW REFORM COMMISSION *General Regulation and Structure* (LRC 31, April 1982)

NEW SOUTH WALES LAW REFORM COMMISSION *Complaints, Discipline and Professional Standards* (LRC 32, April 1982)

NEW SOUTH WALES LAW REFORM COMMISSION *Advertising and Specialisation* (LRC 33, July 1982)

NEW SOUTH WALES LAW REFORM COMMISSION *Solicitors' Trust Accounts* (LRC 44, December 1984)

NEW SOUTH WALES LAW REFORM COMMISSION *Alternative Dispute Resolution: Training and Accreditation of Mediators* (LRC 67, 1991)

NEW SOUTH WALES LAW REFORM COMMISSION *Complaints Against Lawyers* (DP 26, 1992)

PARLIAMENT OF NEW SOUTH WALES *Report of the Joint Committee on the Office of the Ombudsman* (April 1992)

PEARCE, D, E CAMPBELL AND D HARDING *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) ("the Pearce Report")

RILEY, F *New South Wales Solicitors Manual: A Commentary on the Law and Practice Relating to the Profession of the Solicitor in New South Wales*

SKORDAKI, E and T DIMMOCK *A Survey of Complainant Satisfaction Among Lay Complainants to the Solicitors' Complaints Bureau* (February 1990)

SMITH, R "A place of last resort" (1991) 141 *New Law Journal* 297 and 1495

SOUTH AUSTRALIA. Attorney General's Department, Policy and Research Division *The Legal Profession - A Green Paper* (October 1990)

SOUTH AUSTRALIA. Attorney General's Department *A White Paper: The Legal Profession* (August 1992)

STARKE, J G "Establishment of a non-governmental national banking ombudsman system" (1989) 63 *Australian Law Journal* 454-456

UNITED KINGDOM. Lord Chancellor's Department *The Work and Organisation of the Legal Profession* (Cmnd 570, January 1989)

TRADE PRACTICES COMMISSION *Study of the Professions: Legal Profession* (Issues Paper, July 1992)

UNITED KINGDOM. Lord Chancellor's Department *Legal Services: A Framework for the Future* (Cmnd 740, 1989)

UNITED KINGDOM. Monopolies and Mergers Commission *Barristers Services* (1976)

UNITED KINGDOM. Monopolies and Mergers Commission *Services of Solicitors in England and Wales* (1976)

UNITED KINGDOM. Monopolies Commission *Report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to supply of professional services* (1970)

UNITED KINGDOM. Royal Commission on Legal Services *Final Report* (1979) (the "Benson Report")

VICTORIA. Lay Observer to the Solicitors' Board and the Barristers Disciplinary Tribunal, *Annual Report 1991* (1991)

VICTORIA. Law Reform Commission *Accountability of the Legal Profession* (Discussion Paper 24, 1991)

VICTORIA. Law Reform Commission *Accountability of the Legal Profession* (Report No 48, 1992)

WEISBROT, D *Australian Lawyers* (1990)

WILKINS, D B "Who Should Regulate Lawyers" (1992) 105 *Harvard Law Review* 799-887

Appendix A

Survey of Complainants - draft questionnaire

As explained in the covering letter, this questionnaire relates to the complaint that you contacted the Law Society about in 1991. Your answers will be seen only by the independent researchers carrying out the survey, and will be treated as completely confidential. Please do NOT write in your name OR the name of the solicitor involved.

Please answer every question; mostly you just need to circle the relevant number or numbers.

Please return the completed questionnaire in the Freepost envelope provided - if possible by ...

1. How did you find out that it was possible to make a complaint to the Law Society about your solicitor? (*Please circle as many numbers as apply.)*

Newspapers	1
Radio	2
Television	3
Friends or relatives	4
Law Society or Bar Association	5
Your own solicitor	6
Another solicitor or barrister	7
Legal Aid office or a Community Legal Centre	8
Other	9
	(Please specify) _____ _____ _____

_____
_____
_____

2. Your complaint may have been about several different things. However, which **one** of the following **best** describes what your complaint was about? *(Please circle one number only.)*

Acting without your authority or failing to follow your instructions	01
Delay	02
Rudeness or dishonesty	03
Negligence/poor quality of work	04
Cost of services/overcharging	05
Conflict of interests or other unethical conduct	06
Failure to pay money owed to you or to someone else	07
Fraud or dishonesty	08
Poor communication	09
Other	10

(Please specify)
_____
_____
_____

_____
_____
_____

3a. Before making your complaint, did you seek information from staff at the Law Society?

Yes	1
No	2
Not sure	3

3(b) In making your complaint, did you get help from any of the following people or places?
(Please circle all the numbers that apply.)

Another solicitor	1
The Law Society	2
Legal Aid office or Community Legal Centre	3
Family or friends	4
Anyone else	5

(Please specify)

_____
_____
_____

_____
_____
_____

4. When you originally made your complaint, what did you hope to achieve? *(Please circle all the numbers that apply.)*

To get an apology	1
To get help in solving the difficulty I had with my solicitor	2
To get compensation or a reduction in fees	3
To get a better services for myself in future	4
To get the solicitor to improve his or her service to clients generally	5
To have the solicitor reprimanded or punished in some way	6
Other	7

(Please specify)

_____

I wasn't sure	8

5(a) Did the Law Society explain to you that you could seek compensation from the solicitor as one aspect of your complaint?

Yes	1
No	2
Not sure	3

5(b) Did you make a request for compensation?

Yes	1
No	2
Not sure	3

6. Did you ever take your complaint about your solicitor to any of the following? *(Please circle all the numbers that apply.)*

Ombudsman	1
Member of Parliament	2
ICAC	3
Consumer Claims Tribunal	3
Attorney General's Department	4
Other	6

(Please specify)

_____
_____
_____

_____
_____
_____

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7(a) What finally happened with your complaint? *(Please circle all the numbers that apply.)*

My complaint was dismissed	1 *(Please answer Q7(b))*
The matter was settled by mediation or by the intervention of the Law Society	2}
I received compensation or a reduction in fees	3}
The solicitor was reprimanded	4}
The solicitor had to attent a disciplinary hearing	6} *(Please go to Q8)*
Other	7} (Please specify) _____ _____ _____ _____ _____ _____

7(b) **IF YOUR COMPLAINT WAS DISMISSED:** How satisfied were you with the reasons given for dismissing your complaint? *(Circle one number.)*

Very satisfied	1
Fairly satisfied	2
Not sure, hard to say	3
Fairly dissatisfied	4
Very dissatisfied	5

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8. This question contains a list of statements relating to the Law Society complaints procedure and your experience of it. *Please circle **one** number on each line* to show how strongly you agree or disagree with the relevant statement.

		Agree strongly	Agree	Hard to say	Disagree	Strongly disagree
(a)	When I first contacted the Law Society, the information I was given about the complaints procedure was clear.....	1	2	3	4	5
(b)	Staff at the Law Society generally treated me in a courteous and professional manner.....	1	2	3	4	5
(c)	On the whole my complaint was handled promptly and efficiently.....	1	2	3	4	5
(d)	I found the complaints procedure difficult to understand.....	1	2	3	4	5
(e)	The Law Society kept me informed about what was happening with my complaint.....	1	2	3	4	5
(f)	I felt that the Law Society handled my complaint in a far way.....	1	2	3	4	5
(g)	I felt uneasy in complaining about my solicitor to the Law Society.....	1	2	3	4	5
(h)	The Law Society took a genuine interest in my complaint and tried to help.....	1	2	3	4	5
(i)	Involving the Law Society in my complaint was a waste of time.....	1	2	3	4	5
(j)	I was reasonably satisfied with the outcome of my complaint.....	1	2	3	4	5
(k)	Once I had made my complaint I felt that I was left out of the complaints proceedings.....	1	2	3	4	5
(l)	If my friends or relatives had a problem with a solicitor, I would recommend that they use the Law Society complaints procedure.....	1	2	3	4	5
(m)	The Law Society procedure does little to help individuals who have complaints.....	1	2	3	4	5

9. The Law Reform Commission is considering other possible ways that complaints against solicitors might be handled in the future.

(a) In your opinion, would it be better for future complaints to be handled *(please circle one number only)*

By the Law Society?	1
By a new body independent body?	2
Not sure	3

(b) If a new body were set up to deal with complaints, should that body consist of *(please circle one number only)*

Only lawyers?	1
Mostly lawyers?	2
Equal numbers of lawyers and non lawyers?	3
Mostly non lawyers?	4
Only non lawyers?	5
Not sure	6

10. Overall, in the light of your experience in making your complaint and having it dealt with,

(a) What would you say were the **most satisfactory** things about that experience?

(b) And what were the least satisfactory things?

(c) Is there any other comment you wish to make about the complaints procedure?

And just a few final questions:

11. What language do you usually speak at home?

12. Do you have any difficulty reading or writing in English?

Yes	1
No	2

13. What is the highest level of education you have completed?

Primary school	1
Secondary school	2
Trade or technical qualification	3
Tertiary education	4

Many thanks for your help.

Please return the completed questionnaire in the Freepost envelope provided.