New South Wales
Law Reform Commission

Report
99

Complaints against lawyers: an interim report

April 2001

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New South Wales
Law Reform Commission

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

Complaints against lawyers: an interim report

We make this interim Report pursuant to the reference to this Commission dated 3 March 2000.



The Hon Justice Michael Adams
Chairperson

Professor Margaret Allars

His Hon Judge Christopher Armitage

Snr Deputy President Lea Drake

Professor Reg Graycar

Ms Philippa Smith

April 2001

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Terms of reference

On 3 March 2000, the Attorney General, the Hon J W Shaw QC, MLC asked the Law Reform Commission:

> *to review the procedures for dealing with complaints against legal practitioners under Part 10 of Legal Profession Act 1987, taking into account recent case law on the operation of Part 10 and the practical experience of the operation of the statutory provisions.*

Participants

Pursuant to s 12A of the Law Reform Commission Act 1967 (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

*The Hon Justice Michael Adams**
Professor Margaret Allars
His Hon Judge Christopher Armitage
Snr Deputy President Lea Drake
Professor Reg Graycar
Ms Philippa Smith

(denotes Commissioner-in-Charge)*

Officers of the Commission

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Ms Lauren Walker

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Ms Rebecca Young

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Ms Wendy Stokoe

LIST OF RECOMMENDATIONS

Recommendation 1 (page 47)

Section 38J of the *Legal Profession Act 1987* (NSW) should be amended to provide that advertising which is false, misleading or deceptive or breaches the *Trade Practices Act 1974* (Cth) or the *Fair Trading Act 1987* (NSW) or any similar legislation may amount to either unsatisfactory professional conduct or professional misconduct.

Recommendation 2 (page 53)

The *Legal Profession Act 1987* (NSW) should be amended to provide that contravention of the Act or the *Legal Profession Regulation 1994* (NSW) is capable of being either unsatisfactory professional conduct or professional misconduct.

Recommendation 3 (page 53)

Part 10 of the *Legal Profession Act 1987* (NSW) should include a list of all conduct identified in the Act as professional misconduct or unsatisfactory professional conduct and all conduct which the Act states may amount to misconduct.

Recommendation 4 (page 65)

The time limit for making complaints against practitioners in s 137 of the *Legal Profession Act 1987* (NSW) should be increased to six years from the time the conduct is alleged to have occurred.

Recommendation 5 (page 66)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to give the Tribunal the power to extend the time limit in relation to a particular complaint on the application of the Legal Services Commissioner, the Law Society or the Bar Association. The practitioner should also be permitted to be a party to an application for an extension of time.

Recommendation 6 (page 67)

The Tribunal should also have the power to permit the Legal Services Commissioner, the Law Society or the Bar Association to conduct a preliminary investigation to establish whether or not there is any substance to a complaint. Failure to co-operate with a preliminary investigation of this nature should constitute professional misconduct.

Recommendation 7 (page 70)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to provide that, where a complaint is investigated by an independent investigator under s 151, the independent investigator must report to the Legal Services Commissioner, and that the Legal Services Commissioner must make a decision under s 155 on the complaint.

Recommendation 8 (page 72)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to enable the Legal Services Commissioner, the Law Society and the Bar Association to investigate, and make determinations about, additional complaints that arise in the course of an investigation into a complaint, without the need to initiate a separate complaint and conduct a separate investigation.

Recommendation 9 (page 77)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to permit the Legal Services Commissioner, the Law Society and the Bar Association to give undertakings to maintain the confidentiality of information subject to client legal privilege which has been waived and disclosed during the course of an investigation.

Recommendation 10 (page 77)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to permit the Tribunal to make confidentiality orders in relation to information subject to client legal privilege where the privilege has been waived.

Recommendation 11 (page 85)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to give the Legal Services Commissioner powers of entry, search and seizure without notice when considering complaints. The Legal Services Commissioner should be required to obtain a search warrant before exercising these powers.

Recommendation 12 (page 87)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to give the Legal Services Commissioner, the Law Society and the Bar Association the power to require a solicitor to hand over files which are subject to solicitor client lien. The client should then be able to inspect the files at the offices of Legal Services Commissioner, the Law Society or the Bar Association in order to decide whether to make a complaint against the solicitor. Where files are held by a solicitor in regional or rural New South Wales, they could be handed over to another local solicitor acting as the agent of the Council or Legal Services Commissioner. This would make it easier for the client to inspect the file without having to travel to Sydney. Part 10 should expressly state that the exercise of this power does not waive the solicitor client lien.

Recommendation 13 (page 88)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to provide that a notice requiring co-operation by a practitioner with an investigation can be served either personally, at the practitioner's last place of business or residence as recorded with the Law Society or Bar Association or in a manner that is reasonably calculated to bring the notice to the attention of the practitioner and that is approved by the Tribunal.

Recommendation 14 (page 89)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to permit the transfer of a complaint by the Legal Services Commissioner to the Law Society or the Bar Association at any time by consent of the Law Society or the Bar Association.

Recommendation 15 (page 92)

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to provide that proceedings under Part 10 are not invalidated by a formal defect or an irregularity in the making or referral of the complaint to the Tribunal or the decision-making of the Commissioner, the Law Society or the Bar Association unless the court or Tribunal before which the objection on that ground is made is of the opinion that substantial injustice has been caused by the defect or irregularity and that injustice cannot be remedied by an order of the court or Tribunal.

Recommendation 16 (page 100)

In deciding to dismiss a complaint under s 155(3)(b) of the *Legal Profession Act 1987* (NSW) on the grounds of a practitioner's previous good record, the Legal Services Commissioner or relevant Council should also, in making their decision, have regard to all the circumstances of the case and be required to record their decision.

Recommendation 17 (page 102)

When the Legal Services Commission or relevant Council is satisfied that there is a reasonable likelihood that a practitioner will be found guilty of unsatisfactory professional conduct (but not professional misconduct) they should be able to impose a reprimand without the practitioner's consent.

Recommendation 18 (page 109)

Formal mediation of consumer disputes should continue to be permitted and the Legal Services Commission should be able to order mediation in appropriate cases. The mediation should be conducted by such persons as the Legal Services Commission considers appropriate and failure to comply with an order for mediation, without reasonable excuse, should amount to professional misconduct on the part of a practitioner.

Recommendation 19 (page 110)

Upon failure of a mediation, the mediator should certify that mediation has failed. This certification may be used as evidence that mediation has been attempted should mediation be a required stage in the bringing of the matter before another appropriate body.

Recommendation 20 (page 113)

That express provision should be made that the failure to carry out an undertaking to a Council or the Legal Services Commissioner may amount to professional misconduct or unsatisfactory professional conduct.

Recommendation 21 (page 116)

That it be made clear in legislation that the exception in s 7(5) of the *Consumer Claims Act 1998* (NSW) applies only to matters that can be referred to costs assessment under Part 11 of the *Legal Profession Act 1987* (NSW).

Recommendation 22 (page 118)

That the Legal Services Commissioner and Councils must, if during the course of an investigation they discover conduct of a legal practitioner that would constitute an offence, refer the conduct to any relevant law enforcement or prosecution authority. This referral to another authority would not prevent questions of professional misconduct or unsatisfactory professional conduct continuing to be dealt with under Part 10.

Recommendation 23 (page 120)

The Legal Services Commissioner and Councils should be able, in their discretion, to refer a matter to costs assessment outside of the usual 12 month period in circumstances where the complainant was not previously aware of a right to request a costs assessment. Such a reference to costs assessment must be made within six months of the complainant becoming aware of his or her right to request a costs assessment.

Recommendation 24 (page 120)

1. Consideration should be given to requiring practitioners to include on the bill of costs a general statement about the avenues for review, contact details and time limits for review.
2. Consideration should also be given to making failure to comply with this requirement capable of amounting to unsatisfactory professional conduct.

Recommendation 25 (page 122)

The Legal Services Commissioner should, when reviewing a decision of one of the Councils, be able to refer a matter to costs assessment but only if the time limits otherwise prescribed in relation to costs assessment are adhered to.

Recommendation 26 (page 124)

The Legal Services Commissioner or affected practitioner should be able to request a review of the decision of a Council to dismiss a complaint on the grounds of the previous good record of the practitioner or to impose a reprimand. The review should be by way of a full hearing before the Tribunal.

Recommendation 27 (page 126)

Complainants should have the right to seek a review when a Council is satisfied that there is no reasonable likelihood that the Legal Services Division of the Administrative Decisions Tribunal will make a finding of professional misconduct or unsatisfactory professional conduct. Such a review should be conducted by the Legal Services Commissioner and in such manner as the Legal Services Commissioner considers appropriate.

Recommendation 28 (page 132)

That the government consider and consult on the proposal that a bench of the Legal Services Division of the Administrative Decisions Tribunal comprise a serving or retired District Court Judge or retired Supreme Court Judge as the presiding member and one or two lay members.

Recommendation 29 (page 136)

It should be made clear that two or more practitioners can, subject to directions of the Legal Services Division of the Administrative Decisions Tribunal, be joined at the commencement of proceedings in the one information and that a joint hearing may be conducted against a barrister and solicitor provided the Councils and Legal Services Commissioner agree.

Recommendation 30 (page 141)

A practitioner should be able to consent to being removed from the roll of practitioners provided the practitioner is prepared to agree to a record of the grounds for the complaint and an agreed statement of facts. The required records and statements should be entered before a three member sitting of the Legal Services Division of the Administrative Decisions Tribunal.

Recommendation 31 (page 147)

Section 168 of the *Legal Profession Act 1987* (NSW) should be repealed so that the Legal Services Division of the Administrative Decisions Tribunal is not bound by the rules of evidence in any proceedings so long as the rules of natural justice are followed. The privilege against self incrimination in other proceedings must also be preserved.

Recommendation 32 (page 155)

Section 170(1) of the *Legal Profession Act 1987* (NSW) should be repealed so that hearings of the Legal Services Division of the Administrative Decisions Tribunal will, subject to the exercise of the Tribunal's discretion, be held in public. A specific provision should be included to the effect that in making a determination under s 75(2) of the *Administrative Decisions Tribunal Act 1997* (NSW) the Legal Services Division of the Administrative Decisions Tribunal should have regard to the client legal privilege of the complainant and other witnesses before the Tribunal.

Recommendation 33 (page 163)

1. The Legal Services Division of the Administrative Decisions Tribunal should be empowered to order the payment of costs of, and incidental to, any hearing under Part 10.
2. Orders for costs should be subject to the discretion of the Legal Services Division of the Administrative Decisions Tribunal;
3. In the event that the Legal Services Division of the Administrative Decisions Tribunal is satisfied that a practitioner is not guilty, an order for costs should be made against the Public Purpose Fund, but only when the Tribunal is satisfied that special circumstances exist warranting such an order. In considering whether special circumstances exist the Tribunal should have regard to the length and complexity of the proceedings.
4. The Legal Services Division of the Administrative Decisions Tribunal should be empowered either to fix the amount of costs itself or to order that costs be assessed.

Recommendation 34 (page 167)

The Legal Services Division of the Administrative Decisions Tribunal should have the power to order compensation on the basis of findings made by the Tribunal as part of the disciplinary hearing. Any questions of compensation requiring substantial submissions or evidence should be referred to an appropriate alternative forum for determination.

Recommendation 35 (page 169)

The Legal Services Division of the Administrative Decisions Tribunal should have the power to make such other orders as it thinks fit following a hearing.

Recommendation 36 (page 171)

Appeals to an Appeal Panel of the Administrative Decisions Tribunal should be abolished for all matters under Part 10.

Recommendation 37 (page 178)

1. A hearing of the Supreme Court into the conduct of a legal practitioner (whether the matter has been before the Legal Services Division of the Administrative Decisions Tribunal or not) should:
   (a) be conducted in such manner as the Court considers appropriate; and
   (b) not be bound by the rules of evidence as to the admission of relevant material.
2. Where a hearing has already been conducted before the Legal Services Division of the Administrative Decisions Tribunal, the hearing may in the discretion of the Court be conducted by way of rehearing on the material that was before the Tribunal.
3. Consideration should be given to whether hearings of the Supreme Court into the conduct of a legal practitioner (whether the matter has been before the Legal Services Division of the Administrative Decisions Tribunal or not) should be conducted by a single Judge.

Recommendation 38 (page 180)

The Legal Services Commissioner should have the right to appear and be heard, by legal representative, in the Supreme Court. This right should be in relation to questions of conduct of practitioners, as well as in relation to Tribunal decisions that the Councils have chosen not to challenge.

Recommendation 39 (page 183)

Consideration should be given to removing the distinction drawn in Pt 65 r 7(3A) and (3B) of the *Supreme Court Rules 1970* (NSW) so that persons may inspect, without restriction, all orders made by the Legal Services Division of the Administrative Decisions Tribunal in relation to the conduct of practitioners.

Recommendation 40 (page 183)

The Legal Services Commissioner should have the power to establish a publicly accessible register recording orders made in relation to proven complaints against practitioners.

1. Introduction

- Terms of reference
- Background
- The course of this reference

TERMS OF REFERENCE

1.1 On 3 March 2000, the Attorney General, the Hon J W Shaw QC, MLC asked the New South Wales Law Reform Commission:

> *to review the procedures for dealing with complaints against legal practitioners under Part 10 of Legal Profession Act 1987, taking into account recent case law on the operation of Part 10 and the practical experience of the operation of the statutory provisions.*

1.2 In accordance with these terms of reference the Commission's review has focussed on the procedures for dealing with complaints in Part 10 of the Legal Profession Act 1987 (NSW). This was clearly set out in the Issues Paper[1] and the Attorney General agreed to the Commission's approach. However, several submissions to this review raised concerns about aspects of the co-regulatory model of investigating complaints. These concerns principally related to the categories of misconduct (including negligence), the objectivity and independence of the investigative procedures and the role of the Law Society and Bar Association in them. Details of these issues are set out in Chapter 7.

1.3 The Commission has made no recommendations in relation to these fundamental issues. However, taking account of the submissions received and recent announcements by the Attorney General relating to amendments to the disciplinary system,[2] the Commission considers there is merit in a more wide ranging inquiry being undertaken. This Report is therefore being published as an interim report and the Commission will be consulting with the Attorney General on the scope of the additional work that needs to be undertaken for the Commission to respond comprehensively to its terms of reference.

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1. *New South Wales Law Reform Commission, Complaints Against Lawyers: Review of Part 10 (Issues Paper 18, 2000).*
2. *NSW, Parliamentary Debates (Hansard) Legislative Assembly, 7 March 2001 at 12359.*

BACKGROUND

The Commission's previous review

1.4 In 1993, the Law Reform Commission published a Report, Scrutiny of the Legal Profession: Complaints Against Lawyers (Report 70).[3] *This Report found that the existing complaints handling system was inadequate. It identified a number of problems including delays, inadequate investigations, a perception that the system lacked independence, and a failure to provide consumer redress or to address ethical issues and professional standards.*

1.5 The Commission recommended the adoption of a more consumer-oriented complaints system. It recommended the introduction of an independent statutory office of Legal Services Ombudsman, responsible for receiving all complaints and monitoring investigations conducted by the Law Society and Bar Council, and a Legal Services Tribunal, responsible for hearing misconduct complaints.

1.6 The Commission's recommendations were implemented in 1994, although the government decided to call the new office the Legal Services Commissioner (LSC).

Part 10 of the Legal Profession Act 1987 (NSW)

1.7 The current Part 10 of the Legal Profession Act 1987 (NSW), which implemented the recommendations in Report 70, was inserted in 1993 by the Legal Profession Reform Act 1993 (NSW). The Act commenced on 1 July 1994.

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3. New South Wales Law Reform Commission, Scrutiny of the Legal Profession: Complaints Against Lawyers (Report 70, 1993).

Subsequent amendments and reviews

Reports and reviews

1.8 ***Performance Audit Report.*** *The Legal Profession Act 1987 (NSW)[4] required a "special" audit into the activities of the LSC, the Bar Council and the Law Society Council (the Councils) that were paid for by the then Statutory Interest Account. At the time of the review in 1997, the Statutory Interest Account held interest from money deposited in clients' trust accounts.[5] The Performance Audit Report was published in June 1997.[6] It recommended a number of changes relating to the management of the various funds derived from interest on clients' trust accounts. The Report also identified a number of conflicts of interest arising from the Law Society's involvement in the system. Some of the recommendations of the Performance Audit Report were addressed by legislation in 1998.[7]*

1.9 ***National Competition Policy Review.*** *In 1998 the New South Wales Attorney General's Department conducted a review of the Legal Profession Act 1987 (NSW). The review was undertaken to meet two separate requirements:*

- *the requirement of the Australian Governments' Competition Principles Agreement to identify any potentially anti-competitive restrictions in legislation and consider whether they are in the public interest; and*

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4. Legal Profession Act 1987 (NSW) s 67. This section was repealed in 1998 and is now covered by Legal Profession Act 1987 (NSW) s 69J.

5. The Statutory Interest Account held interest from some monies deposited in the Statutory Deposit Account, while the Solicitors' Trust Account Funds held interest from monies deposited with non-Statutory Deposit Account trust accounts. The Statutory Interest Account and the Solicitors' Trust Account Funds have now been combined in the Public Purpose Fund.

6. New South Wales, Audit Office, The Law Society Council, the Bar Council and the Legal Services Commissioner: A Review of Activities Funded by the Statutory Interest Account (Performance Audit Report, 1997).

7. Legal Profession Amendment Act 1998 (NSW).

- *the statutory requirement that the amendments made by the Legal Profession Reform Act 1993 (NSW), which include the whole of Part 10 of the Act, be reviewed within four years of their commencement.*[8]

1.10 The Department released an issues paper in August 1998 and published its report in November 1998.[9] *The main conclusion in relation to the complaints and disciplinary system was:*

> *The disciplinary scheme does not have an anti-competitive effect because all members of the profession are subject to the scheme. It is possible that the cost of the scheme affects the ability of legal practitioners to compete with non-lawyer service providers within the legal services market. However, the scheme serves the public interest by assuring independence and impartiality, openness and accountability, and external scrutiny and review of the profession. The review of the conduct of practitioners also serves an educative role.*[10]

1.11 However, some more specific recommendations were made. These are mentioned, where appropriate, in relevant parts of this Report.

Legislative amendments

1.12 There have been numerous amending Acts dealing with Part 10 of the Legal Profession Act 1987 (NSW). In summary, these amendments:

- *brought complaints against conveyancers and complaints against notaries under Part 10;*[11]
- *allowed fresh evidence to be introduced on appeals from the Legal Services Division of the Administrative Decisions Tribunal (the Tribunal);*[12]

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8. Legal Profession Act 1987 (NSW) Sch 8 Pt 1 cl 1B.
9. New South Wales, Attorney General's Department, National Competition Policy Review of the Legal Profession Act 1987 (Report, 1998).
10. National Competition Policy Review at 56.
11. Conveyancers Licensing Act 1995 (NSW) (commenced 1 February 1996); and Public Notaries Act 1997 (NSW) (commenced 26 June 1998).
12. Courts Legislation Further Amendment Act 1995 (NSW) (commenced 8 March 1996).

- *simplified and strengthened some of the provisions relating to mediation and the bringing of complaints to the Tribunal;*[13]
- *subjected holders of National Practising Certificates to Part 10;*[14]
- *abolished the Legal Services Tribunal and introduced the Legal Services Division of the Administrative Decisions Tribunal;*[15]
- *allowed the Tribunal to make orders for costs;*[16]
- *subjected locally registered foreign lawyers to Part 10;*[17]
- *implemented changes recommended by the Performance Audit Report including requiring the Councils and the LSC to develop performance criteria;*[18]
- *allowed information gathered in the complaints process to be disclosed to the Chief Commissioner of State Revenue;*[19]
- *dealt with problems arising from the High Court's decision in Barwick v Law Society of New South Wales;*[20] *and*
- *made changes that were necessary for the introduction of incorporated legal practices.*[21]

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13. *Legal Profession Amendment Act 1996 (NSW) (commenced 1 April 1997).*
14. *Legal Profession Amendment (National Practising Certificates) Act 1996 (NSW) (commenced 1 July 1997).*
15. *Administrative Decisions Legislation Amendment Act 1997 (NSW) (commenced 6 October 1998).*
16. *Courts Legislation Further Amendment Act 1997 (NSW) (commenced 2 February 1998).*
17. *Legal Profession Amendment (Practice of Foreign Law) Act 1998 (NSW) (commenced 1 July 1999).*
18. *Legal Profession Amendment Act 1998 (NSW) (commenced 5 March 1998).*
19. *State Revenue Legislation (Miscellaneous Amendments) Act 1998 (NSW) (commenced 2 November 1998).*
20. *(2000) 74 ALJR 419. Legal Profession Amendment (Complaints and Discipline) Act 2000 (NSW) (commenced 14 July 2000).*
21. *Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) (not yet commenced).*

Legal challenges

1.13 Some recent major cases that have highlighted problems with Part 10 include Barwick v Law Society of New South Wales,[22] Murray v Legal Services Commissioner[23] and Carson v Legal Services Commissioner.[24] In Barwick, the High Court examined the requirement under Part 10 that complaints must be investigated before Tribunal proceedings can be instituted. The Court considered how this procedure applies to new allegations against the practitioner which arise during the course of an investigation or a hearing into other complaints. The Court criticised the drafting of Part 10, finding it difficult to ascertain the legislative intention and resolve ambiguities.

1.14 In Murray, the New South Wales Court of Appeal the obligation to provide the lawyer under investigation with a copy of the complaint and an opportunity to respond to it.

1.15 In Carson v Legal Services Commissioner, the New South Wales Court of Appeal ordered that disciplinary proceedings against a practitioner be permanently stayed because of the LSC's "gross and inexcusable" delay in conducting an investigation and failure to satisfy the requirements of procedural fairness. The Court of Appeal also found that the proceedings were "untenable" and "foredoomed to fail".[25]

Remedial legislation

1.16 The New South Wales Government introduced remedial legislation in response to the High Court's decision in Barwick v Law Society of New South Wales.[26] This legislation, which commenced operation on 14 July 2000, aimed to overcome some of

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22. (2000) 74 ALJR 419.
23. (1999) 46 NSWLR 224.
24. [2000] NSWCA 308.
25. Carson v Legal Services Commissioner [2000] NSWCA 308.
26. Legal Profession Amendment (Complaints and Discipline) Act 2000 (NSW).

the problems arising from the High Court's decision and to make some minor changes to improve the operation of Part 10, pending the review by the New South Wales Law Reform Commission.[27]

THE COURSE OF THIS REFERENCE

Preliminary consultation

1.17 After receiving the terms of reference and completing some preliminary research, the Commission met with the Legal Services Commissioner, Steve Mark, and several of his staff; and the Bar Association's Executive Director, Philip Selth, and Professional Affairs Director, Helen Barrett. The Commission also had a preliminary discussion with the Chief Executive Officer of the Law Society, Mark Richardson.

1.18 The Commission invited submissions from regulatory agencies that administer Part 10 and groups representing legal consumers. The Commission received a number of useful preliminary submissions, which are listed at Appendix B.

1.19 The Victorian Department of Justice is currently reviewing the Legal Practice Act 1996 (Vic),[28] *which regulates the legal profession in Victoria, including the complaints handling system. In July 2000, the Executive Director of the Commission, Peter Hennessy, met with Peter Sallmann, Victorian Crown Counsel, and Richard Wright, Associate Director, Victorian Civil Justice Review Project, who are conducting the review. The Executive Director also met with the Victorian Legal Ombudsman and the Executive Director of the Law Institute of Victoria to discuss the regulation of complaints in Victoria.*

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27. *New South Wales, Parliamentary Debates (Hansard) Legislative Assembly, 31 May 2000, Second Reading Speech at 6236.*
28. *P A Sallmann and R T Wright, Legal Practice Act Review (Victoria, Department of Justice, Issues Paper, 2000); and P A Sallmann and R T Wright, Legal Practice Act Review (Victoria, Department of Justice, Discussion Paper, 2001).*

Issues Paper 18

1.20 Following receipt of preliminary submissions, the Commission published Issues Paper 18 in October 2000. The Issues Paper was circulated to a large number of persons identified as being potentially interested in the subject, including: legal consumer and advocacy groups; regulators and professional associations throughout Australia and overseas; members of the Tribunal; Judges; practitioners; consumers; and legal academics. A poster was also distributed to court houses across the State drawing people's attention to the existence of the review and inviting submissions. The Commission received a number of submissions which are referred to throughout this paper and are listed at Appendix A.

This Report

1.21 This Report consists of seven chapters.

- ***Chapter 1*** *is an introduction which sets out the Commission's terms of reference for this review, background to the reference, and the course of the review.*
- ***Chapter 2*** *outlines how the current system for dealing with complaints against lawyers works.*
- ***Chapter 3*** *deals with definitions of misconduct and the threshold for referring matters to the Tribunal.*
- ***Chapter 4*** *makes recommendations concerning the procedure for investigating and otherwise dealing with complaints under Part 10.*
- ***Chapter 5*** *makes recommendations concerning the outcome of investigations into complaints against lawyers.*
- ***Chapter 6*** *makes recommendations relating to the operation of the Tribunal.*
- ***Chapter 7*** *considers broad regulatory and consumer issues.*

2. Operation of Part 10

- Making a complaint
- Parties to a complaint
- Scope of complaints
- Initial role of the LSC
- Investigation of complaints
- Determinations
- Review by the LSC of Council decisions
- Mediation
- The Tribunal
- Tribunal Appeal Panel
- Appeals to the Supreme Court
- Complaints arising during an investigation
- Dealing with complaints outside Part 10

2.1 This Chapter gives an overview of the system for complaints against lawyers established by Part 10 of the Legal Profession Act 1987 (NSW).

MAKING A COMPLAINT

2.2 In New South Wales a complaint against a lawyer must be made to the Legal Services Commissioner (the "LSC"). If a complaint is made to either the Bar Council or the Law Society Council (the "Councils"), it must be forwarded to the LSC.[1]

2.3 A complaint must:

- *be in writing;*[2]
- *identify the complainant and the practitioner complained against;*[3] *and*
- *provide particulars of the conduct complained of.*[4]

2.4 In 1999/2000, 2,901 written complaints were received by the LSC. These included 2,554 complaints about solicitors, 162 against barristers and 13 against licensed conveyancers. In addition to this, 9,089 telephone enquiries were dealt with by legal staff at the Office of the Legal Services Commissioner (OLSC).[5]

2.5 Complaints must usually be made within three years of the date on which the conduct is alleged to have occurred.[6] *However, a complaint may be received outside the three year period provided a determination is made that:*

> *(a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay, or*

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1. *Legal Profession Act 1987 (NSW) s 135.*
2. *Legal Profession Act 1987 (NSW) s 136(1).*
3. *Legal Profession Act 1987 (NSW) s 136(2)(a).*
4. *Legal Profession Act 1987 (NSW) s 136(2)(b).*
5. *OLSC, Annual Report 1999/2000 at 7 and 27.*
6. *Legal Profession Act 1987 (NSW) s 137.*

(b) *the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.*[7]

2.6 The LSC is responsible for determining whether to accept complaints made to him about conduct which allegedly occurred more than three years earlier. When a complaint about conduct which allegedly occurred more than three years earlier is made by a Council, that Council must determine whether to accept the complaint.[8] *Determinations as to whether to accept out of time complaints cannot be challenged.*[9] *In 1999/2000, 46 out of a total of 2,901 written complaints received by the LSC were rejected as being out of time.*[10]

2.7 Complaints must be about one or more of the following:

- *unsatisfactory professional conduct;*[11]
- *professional misconduct;*[12] *and*
- *a consumer dispute which need not necessarily amount to professional misconduct or unsatisfactory professional conduct.*[13]

2.8 Aspects of complaints that involve unsatisfactory professional conduct or professional misconduct may ultimately be dealt with as misconduct matters before the Legal Services Division of the Administrative Decisions Tribunal (the "Tribunal"). Consumer disputes cannot be dealt with by the Tribunal.

Withdrawal of complaints

2.9 Complaints can be withdrawn but only if they are withdrawn in writing.[14] *Complaints cannot be withdrawn once proceedings*

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7. Legal Profession Act 1987 (NSW) s 137(2).
8. Legal Profession Act 1987 (NSW) s 137(3).
9. Legal Profession Act 1987 (NSW) s 137(4).
10. OLSC, Annual Report 1999/2000 at 28.
11. Legal Profession Act 1987 (NSW) s 127(2).
12. Legal Profession Act 1987 (NSW) s 127(1).
13. Legal Profession Act 1987 (NSW) s 143.
14. Legal Profession Act 1987 (NSW) s 140.

have been instituted in the Legal Services Division of the Administrative Decisions Tribunal (the "Tribunal"). The LSC or Council to whom the complaint was referred may reject the withdrawal of the complaint if satisfied that the complaint may involve misconduct. The withdrawal of a complaint does not stop the making of another complaint with respect to the same allegations.

Compensation

2.10 A complainant may request compensation within six years of the misconduct which caused the alleged loss. If the misconduct issue is referred to the Tribunal, the Tribunal must decide what compensation order to make when it has completed its hearing.[15] *The claim, which must be in writing, may be made at any time before the "disposal of the complaint" but not once proceedings have been instituted in the Tribunal unless the Tribunal grants leave.*[16]

PARTIES TO A COMPLAINT

Complainants

2.11 Any person (including a Council and the LSC) may make a complaint relating to the conduct of a legal practitioner.[17]

2.12 People who make complaints fall into a wide variety of categories. The greatest number of complaints are lodged by current clients of the legal practitioner complained against. The next largest category is complaints lodged by previous clients followed by those lodged by opposing clients. Other complainants include other legal practitioners (either on their own behalf or on behalf of clients), the LSC, judicial officers, the Law Society, people associated with the administration of a deceased estate and witnesses.

15. *Legal Profession Act 1987 (NSW) s 171D. See para 2.49.*
16. *Legal Profession Act 1987 (NSW) s 138.*
17. *Legal Profession Act 1987 (NSW) s 134.*

Table 2.1: Chief sources of complaints against legal practitioners, 1999/2000[18]

Sources of complaints	Solicitors	Barristers	Lic. conv.
Current clients	37%	23%	69%
Previous clients	20%	14%	0%
Opposing clients	12%	10%	0%

2.13 Of the telephone enquiries received by the OLSC, approximately 71% came from clients of legal practitioners, 8.2% came from a friend or relative of a client and 6.2% from an opposing client.[19]

Persons complained against

2.14 Complaints can be made about the conduct of solicitors, barristers,[20] licensed conveyancers[21] and public notaries.[22] Judicial officers cannot be the subject of a complaint under Part 10 even in relation to conduct that occurred when they were legal practitioners,[23] although it is not clear where acting judges stand in this regard.[24] Some legal practitioners cannot currently be the subject of complaints under Part 10 in relation to conduct that took place

18. *OLSC, Annual Report 1999/2000 at 27.*
19. *OLSC, Annual Report 1999/2000 at 25.*
20. *Legal Profession Act 1987 (NSW) s 128(1).*
21. *As part of a system jointly administered by the OLSC and the Department of Fair Trading: See Conveyancers Licensing Act 1995 (NSW) s 82. The Department of Fair Trading is currently conducting a review of the regulation of conveyancers, including the operation and application of Part 10 in respect of conveyancers: New South Wales, Department of Fair Trading, Review of the Conveyancers Licensing Act 1995 (Issues Paper, 2000).*
22. *Public Notaries Act 1997 (NSW) s 14.*
23. *Legal Profession Act 1987 (NSW) s 128(2). Complaints against Judicial Officers in New South Wales are dealt with in accordance with Judicial Officers Act 1986 (NSW): see Bruce v Cole (1998) 45 NSWLR 163.*
24. *OLSC, Preliminary Submission at 11-12.*

when they were acting in a number of what could be termed "quasi-judicial" positions. These include:

- *arbitrators;*[25]
- *commercial arbitrators;*[26]
- *mediators;*[27]
- *referees;*[28] *and*
- *costs assessors.*[29]

2.15 There are no, or inadequate, mechanisms for dealing with complaints for each of these categories under their respective statutes. The OLSC has received complaints in relation to people acting in these offices, but has been unable to deal with them because they were not acting as legal practitioners at the time and are therefore outside the LSC's jurisdiction.[30]

2.16 The largest number of complaints made against solicitors are made against sole practitioners. Fewer complaints are made against partners and fewer again against employed solicitors. Yet employed solicitors represent a larger proportion of the profession than either partners or sole practitioners. The Professional Standards Department of the Law Society (PSD) has offered some

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25. See Arbitration (Civil Actions) Act 1983 (NSW) s 5.

26. See Commercial Arbitration Act 1984 (NSW).

27. See, for example, District Court Act 1973 (NSW) s 164E; Fair Trading Tribunal Act 1998 (NSW) Sch 3; Land and Environment Court Act 1979 (NSW) s 61H; and Supreme Court Act 1970 (NSW) s 110K.

28. Supreme Court Rules 1970 (NSW) Pt 72.

29. See Legal Profession Act 1987 (NSW) s 173(1) and Pt 11 Div 6, especially s 208S.

30. A number of submissions have suggested extending the scope of the complaints system to cover various people including judges, costs assessors and legal practitioners acting as arbitrators, mediators and referees: see, for example, B Golder, Preliminary Submission at 1-2; and NSW Legal Reform Group, Preliminary Submission at para 6.3; W Lawrence, Preliminary Submissions; while others have suggested the powers of the Judicial Commission might be extended to cover such situations: NSW Bar Association, Preliminary Submission 1 at para 66.

suggestions as to why sole practitioners attract proportionately more complaints:

> *This may be explained by the fact that more people tend to procure the services of smaller suburban firms. It also highlights particular problems often faced by the sole practitioner including cost and time pressures, increasing specialisation, changes to technology in the workplace and constant changes to the law.*[31]

Table 2.2: Complaints against types of solicitors, 1999/2000[32]

Type of solicitor	Proportion of complaints against	Proportion of whole profession
Employed solicitors	13.7%	34%
Partners	29%	19%
Sole practitioners	38.2%	17%

2.17 Similar trends may also be observed in relation to the location of solicitors' practices. Sydney CBD practices involve more than half of all practising solicitors in New South Wales, yet they attract fewer complaints than suburban and rural solicitors.

Table 2.3: Complaints against solicitors by location, 1999/2000[33]

Location of practice	Proportion of complaints against	Proportion of whole profession
Sydney CBD	26%	56.5%
Sydney suburbs	36%	29.0%
Rural areas	27%	14.5%

31. *Law Society of NSW, Professional Standards Department, Annual Report 1998/1999 at 14. See also Law Society of NSW, Professional Standards Department, Annual Report 1999/2000 at 11.*
32. *Law Society of NSW, Professional Standards Department, Annual Report 1999/2000 at 11-12.*
33. *Law Society of NSW, Professional Standards Department, Annual Report 1999/2000 at 12.*

SCOPE OF COMPLAINTS

2.18 The following table, published in the OLSC's most recent Annual Report, illustrates, in broad terms, the scope of complaints received by the LSC and dealt with by the Councils.

Table 2.4: Nature of formal complaints and consumer disputes[34]

Nature of complaint†	1999/2000	1998/1999
General cost complaint/query	12.6%	10.2%
Negligence	12.5%	16.0%
Communication	12.4%	14.5%
Ethical matters	9.4%	6.0%
Overcharging	9.3%	10.5%
Delay	8.7%	7.3%
Misleading conduct	6.8%	6.4%
Trust fund	6.1%	5.6%
Document transfer, liens	4.6%	4.5%
Cost disclosure	4.0%	4.2%
Instructions not followed	3.1%	4.4%
Conflict of interests	2.7%	2.4%
Failure to honour undertakings	1.8%	1.1%
Quality of service	1.6%	2.1%
Document handling	1.2%	1.0%
Pressure to settle	1.2%	1.5%
Fraud (not trust fraud)	0.8%	1.6%
Compliance matters	0.8%	0.6%

† *One complaint may cover more than one complaint type.*

Consumer disputes and misconduct

2.19 The OLSC's Annual Reports do not distinguish between complaints in relation to unsatisfactory professional conduct and professional misconduct on the one hand, and consumer disputes on

34. OLSC, Annual Report 1999/2000 at 26.

the other. The LSC makes no distinction when he first receives a written complaint and it is only in the process of dealing with it that the complaint is classified. In some cases a complaint that on its face discloses a consumer issue may turn out, on investigation, to involve issues of unsatisfactory professional conduct or professional misconduct. In others, a matter identified as a conduct issue by a client may, on investigation, turn out to be a consumer dispute. Some matters will, inevitably, involve both conduct and consumer issues. Only conduct issues may be brought before the Tribunal. Some issues relating to the consumer aspects of complaints are dealt with in Chapters 5 and 7.

INITIAL ROLE OF THE LSC

2.20 Once the LSC receives a complaint, the LSC identifies the main issues involved and ultimately characterises it as a complaint relating to unsatisfactory professional conduct, professional misconduct or a consumer dispute. The LSC may request further particulars or a statutory declaration to verify the information already provided.[35] If these requests are not complied with, the LSC may dismiss the complaint.[36] In 1999/2000, 253 complaints (including 211 against solicitors, 21 against barristers and 1 against a licensed conveyancer) were dismissed because further particulars were not provided.[37]

2.21 The LSC may then decide to:

- *investigate the complaint;*
- *refer the complaint to the appropriate Council (if this is done the complaint must be referred "so far as practicable" within 21 days of the receipt of the complaint or further particulars requested by the LSC);[38]*

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35. Legal Profession Act 1987 (NSW) s 136(3).
36. Legal Profession Act 1987 (NSW) s 139(1).
37. OLSC, Annual Report 1999/2000 at 29.
38. Legal Profession Act 1987 (NSW) s 141.

- *dismiss the complaint on the grounds that it is "vexatious, misconceived, frivolous or lacking in substance";*[39] *or*
- *if the complaint involves a consumer dispute, deal with the consumer dispute by "mediation";*[40]

Table 2.5: Action taken by LSC at initial stage, 1998/1999[41]

Action taken	Number of total complaints	Percentage of total complaints	Number against solicitors	Number against barristers	Number against lic. conv.
Deal with consumer dispute by "mediation"	1,382	48.0%	1,320	57	5
Refer to Council	849	29.6%	788	59	2
Dismiss complaint	197	6.9%	177	20	0
Investigate complaint	62	2.2%	51	5	6

2.22 The LSC and Councils have also recently been given the power to dismiss a complaint at any stage (including after investigation) where they are "satisfied that it is in the public interest to do so".[42] *The circumstances under which a complaint may be dismissed on this basis include situations where the complaint is about a legal practitioner who has retired from practice or who is already prevented from practising.*[43]

INVESTIGATION OF COMPLAINTS

2.23 Formal investigation is most often carried out by the relevant Council once a complaint has been referred to it by the LSC.

39. *Legal Profession Act 1987 (NSW) s 139(2).*
40. *Legal Profession Act 1987 (NSW) s 144.*
41. *OLSC, Annual Report 1998/1999 at 54. 1998/1999 figures are used in this chapter where the figures in the OLSC's Annual Report 1999/2000 either fail to identify the required category sufficiently, or contradict the figures in the Law Society of NSW, Professional Standards Department, Annual Report 1999/2000.*
42. *Legal Profession Act 1987 (NSW) s 155A(1).*
43. *Legal Profession Act 1987 (NSW) s 155A(2).*

The Councils can delegate the power to investigate as well as other powers under the Act.[44] The LSC may also decide to retain and investigate some complaints on his own account. Of the 752 complaints referred to the Law Society Council in 1998/1999, 698 were referred for investigation by the Council, and, of the 59 complaints referred to the Bar Council, 57 were referred for investigation.[45] The OLSC handled 2,057 files in the same period, but only 62 involved investigation as opposed to some type of formal or informal mediation.[46]

2.24 At the initial stage the LSC, or the Councils (on receipt of a complaint from the LSC) may:

- *if the matter is a consumer dispute, refer it to mediation;[47]*
- *dismiss the complaint if further particulars are not supplied or the particulars are not verified;[48]*
- *refer matters to a costs assessor;[49] or*
- *investigate the complaint.*

2.25 The initial investigations for the Law Society Council are conducted by the Professional Standards Department (the "PSD"). The PSD makes the initial investigation and reports the facts and evidence to the Professional Conduct Committee for decision. The investigation is usually carried out by one of two sub-committees drawn from, and overseen by, the "joint" Professional Conduct Committee. The joint Committee usually consists of 24 members and includes Councillors, volunteer practitioners and lay members. A quorum for the joint Committee is three Councillors and one lay member.[50]

2.26 Complaints referred to the Bar Council for investigation are

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44. Legal Profession Act 1987 (NSW) s 51(2) and 54(1A).
45. OLSC, Annual Report 1998/1999 at 5.
46. OLSC, Annual Report 1998/1999 at 54.
47. Legal Profession Act 1987 (NSW) s 144.
48. Legal Profession Act 1987 (NSW) s 139(1).
49. Legal Profession Act 1987 (NSW) s 153.
50. Law Society of NSW, Professional Standards Department, Annual Report 1998/1999 at 18.

distributed by the Professional Affairs Director to one of four Professional Conduct Committees established by the Bar Council. Each Committee usually consists of around a dozen barristers, two lay members and an academic member and is chaired by a Senior Counsel who is a member of the Bar Council. Each committee investigates complaints referred to it and ultimately produces a report which usually includes a recommendation to the Bar Council as to what action it should take.[51]

Supervisory role of the Legal Services Commissioner

2.27 The LSC may take over the investigation of a complaint from a Council.[52] *While the OLSC's Annual Reports do not provide statistics on the use of this power, in 1999/2000 30 complaints handled by the Law Society were "referred to, or finalised by" the LSC.*[53]

DETERMINATIONS

2.28 The Councils or LSC must ultimately decide whether there is a "reasonable likelihood" that the Tribunal will be "comfortably satisfied" that the practitioner is guilty of either unsatisfactory professional conduct or professional misconduct.

2.29 If the Councils or the LSC conclude that there is no "reasonable likelihood" of a finding of unsatisfactory professional conduct or professional misconduct, the complaint must be dismissed.[54] *In 1999/2000, 902 complaints were dismissed for this reason (374 by the LSC and 528 by the Councils).*[55]

2.30 If the Councils or the LSC conclude that there is a "reasonable

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51. J Gormly, "Conduct of Complaints Against Barristers" [1998] Stop Press (No 48) at 1; NSW Bar Association, Annual Report 1999 at 16-24.
52. Legal Profession Act 1987 (NSW) s 147A.
53. OLSC, Annual Report 1999/2000 at 29.
54. Legal Profession Act 1987 (NSW) s 155(4).
55. OLSC, Annual Report 1999/2000 at 29.

likelihood" of a finding of professional misconduct, the complaint must be referred to the Tribunal.[56]

2.31 If the Councils or the LSC conclude that there is a "reasonable likelihood" of a finding of unsatisfactory professional conduct, the Council or LSC may:

- *dismiss the complaint because of the practitioner's previous good record – 22 such dismissals occurred in 1998/1999;*[57]
- *reprimand the practitioner with consent – 42 such reprimands were issued in 1998/1999;*[58] *or*
- *refer the complaint to the Tribunal.*[59]

2.32 In 1999/2000, the Bar Council referred 5 complaints to the Tribunal on the basis of unsatisfactory professional conduct or professional misconduct,[60] *while the Law Society referred 17 such complaints.*[61] *Five matters were referred to the Tribunal by the LSC in the same period.*[62] *If the complaint is dismissed or the practitioner reprimanded, payment of compensation may still be required.*[63] *The LSC issued reprimands with orders for compensation in two instances in 1998/1999.*[64] *No reprimands with compensation are recorded for 1999/2000.*

56. *Legal Profession Act 1987 (NSW) s 155(2).*
57. *Legal Profession Act 1987 (NSW) s 155(3)(b). OLSC, Annual Report 1998/1999 at 11, 57, 58.*
58. *Legal Profession Act 1987 (NSW) s 155(3)(a). OLSC, Annual Report 1998/1999 at 11, 57, 58.*
59. *Legal Profession Act 1987 (NSW) s 155(2).*
60. *NSW Bar Association, Annual Report 2000 at 30.*
61. *OLSC, Annual Report 1999/2000 at 29.*
62. *OLSC, Annual Report 1999/2000 at 29.*
63. *Legal Profession Act 1987 (NSW) s 155(5).*
64. *OLSC, Annual Report 1998/1999 at 11.*

REVIEW BY THE LSC OF COUNCIL DECISIONS

2.33 If a Council dismisses a complaint, issues a reprimand or omits allegations originally made when referring a complaint to the Tribunal, the complainant may request that the LSC review the decision.[65] A Council may also request a review of its own decision and the LSC may also initiate a review.[66] A review may also be requested if a Council does not notify the complainant of a decision within six months of the complaint being referred to the Council (the failure to notify is deemed to be a dismissal).[67] However, the LSC may postpone the review if there is good reason for the Council's delay.[68] A request for a review must be made in writing within two months of the decision of the Council being notified to the complainant.[69] In 1999/2000 149 requests for reviews were made. The majority related to decisions of the Law Society Council.[70]

2.34 The LSC has established an expert review panel consisting of senior practitioners, legal academics and retired judges.[71] In conducting the review, the LSC must consult with the relevant Council.[72] The Council must comply with the directions of the LSC and assist in the review or re-investigation.[73]

2.35 As a result of the review the LSC can:

- *confirm the Council's decision to dismiss the complaint or issue a reprimand;[74]*
- *refer the matter to mediation;[75]*

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65. Legal Profession Act 1987 (NSW) s 158(1).
66. Legal Profession Act 1987 (NSW) s 159(2).
67. Legal Profession Act 1987 (NSW) s 158(4).
68. Legal Profession Act 1987 (NSW) s 158(5).
69. Legal Profession Act 1987 (NSW) s 158(2) and s 158(3).
70. OLSC, Annual Report 1999/2000 at 31.
71. OLSC, Annual Report 1998/1999 at 47.
72. Legal Profession Act 1987 (NSW) s 159(3).
73. Legal Profession Act 1987 (NSW) s 160(4) and s 161.
74. Legal Profession Act 1987 (NSW) s 160(1)(a).
75. Legal Profession Act 1987 (NSW) s 160(1)(b).

- *direct a reinvestigation of any complaint or part of a complaint by the Council or the OLSC;*[76]
- *issue a reprimand if the practitioner consents to the reprimand;*[77] *or*
- *institute proceedings before the Tribunal or direct the Council to do so.*[78]

2.36 Of the 130 reviews finalised in 1999/2000, the LSC confirmed the dismissal of 107 complaints against solicitors and 7 against barristers and the reprimand of 1 solicitor; and directed 5 reinvestigations by the Law Society. No reprimands were issued on review, nor were any proceedings instituted before the Tribunal as the result of a review.[79]

MEDIATION

2.37 When a complaint is referred to the appropriate Council, the LSC can recommend that some or all of the complaint be referred to mediation.[80] *A Council or LSC may, when dealing with a complaint, refer a consumer dispute for mediation.*[81] *Mediation of a consumer dispute is broadly defined in Part 10. It is:*

> *not limited to formal mediation procedures and extends to encompass preliminary assistance in dispute resolution, such as the giving of informal advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute.*[82]

2.38 If the consumer aspect of a complaint is mediated, the complaint goes no further. However, any part of the investigation

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76. Legal Profession Act 1987 (NSW) s 160(1)(c), (c1) and (c2).
77. Legal Profession Act 1987 (NSW) s 160(1)(c3).
78. Legal Profession Act 1987 (NSW) s 160(1)(d).
79. OLSC, Annual Report 1999/2000 at 31.
80. Legal Profession Act 1987 (NSW) s 141(2).
81. Legal Profession Act 1987 (NSW) s 144.
82. Legal Profession Act 1987 (NSW) s 145A.

that relates to unsatisfactory professional conduct or professional misconduct must continue notwithstanding the mediation.[83] *The mediator may, without disclosing any information obtained in the course of the mediation, recommend that the LSC or a Council investigate the conduct of a practitioner.*[84] *The LSC may also refer a complaint to mediation after he has finished reviewing a Council's decision.*[85]

2.39 Of the 2,901 complaints received against legal practitioners in 1999/2000, 103 were referred to the relevant Council for mediation (101 in relation to solicitors and 1 in relation to barristers).[86] *In the same period some 975 complaints against practitioners*[87] *handled by the OLSC involved some type of formal or informal mediation.*

THE TRIBUNAL

2.40 A complaint must be referred to the Tribunal if the relevant Council or the LSC decides that there is a "reasonable likelihood" of a finding of professional misconduct. A complaint may also be referred to the Tribunal if there is a "reasonable likelihood" of a finding of unsatisfactory professional conduct. In 1999/2000, the LSC referred 5 practitioners to the Tribunal, the Law Society Council referred 17 solicitors and the Bar Council referred two barristers.[88] *Fifty six matters were before the Tribunal on 1 July 1999. By 30 June 2000 a further 35 matters had been filed and 49 matters had been disposed of, leaving 42 matters pending.*[89]

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83. Legal Profession Act 1987 (NSW) s 144(2).
84. Legal Profession Act 1987 (NSW) s 147(2).
85. Legal Profession Act 1987 (NSW) s 160(1)(b).
86. OLSC, Annual Report 1999/2000 at 27.
87. 896 in relation to solicitors; 37 in relation to barristers; and 3 in relation to licensed conveyancers: OLSC, Annual Report 1999/2000 at 27.
88. OLSC, Annual Report 1999/2000 at 29.
89. ADT, Annual Report 1999/2000 at 20.

Composition

2.41 The composition of the Tribunal varies depending on whether the complaint is about a barrister or solicitor. The Tribunal consists of one judicial member, one barrister member and one lay member in the case of complaints against barristers. In relation to complaints against solicitors, the Tribunal consists of a judicial member, a solicitor member and a lay member.[90] *However, the terms used in the Act are not necessarily those used in practice. The judicial members and barrister members for complaints against barristers are drawn from a pool of practitioners referred to as "non presidential judicial (barrister) members" and the judicial members and solicitor members for complaints against solicitors are drawn from a pool of "non presidential judicial (solicitor) members".*[91] *The lay members are drawn from a pool of "non presidential judicial (lay) members".*[92] *In judgments of the Tribunal, the members are often referred to as the "presiding judicial member", "the judicial member" and "member" respectively.*[93] *The presiding judicial member is sometimes the Deputy President (Legal Services).*

Parties

2.42 When a complaint is brought to the Tribunal, the LSC or the relevant Council becomes the informant.[94] *The complainant cannot be the informant before the Tribunal. The legal practitioner complained against, the relevant Council, the LSC, the Attorney General and the complainant can all appear before the Tribunal,*[95] *but complainants must get leave from the Tribunal to appear.*[96]

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90. Administrative Decisions Tribunal Act 1997 (NSW) Sch 2 Pt 3 cl 4.

91. The current membership of these pools is detailed in New South Wales, Law Almanac 2000 (LBC Information Services, Sydney, 2000) at 83.

92. Law Almanac 2000 at 83.

93. See, for example, Law Society of New South Wales v Hurley [1999] NSWADT 140.

94. Legal Profession Act 1987 (NSW) s 167(1).

95. Legal Profession Act 1987 (NSW) s 169(1).

96. Unless they are applying for compensation, in which case they may

Anyone else may only appear subject to the Tribunal giving them leave. Those appearing may do so in person or they may be represented by a legal practitioner.[97]

Commencing proceedings

2.43 When the statement commencing proceedings before the Tribunal (referred to as an "information") is filed the practitioner must then file a reply to the allegations raised.[98] *The Tribunal may, on application of the LSC or Council who laid the information, vary the information to omit or add allegations.*[99]

Hearings

2.44 Hearings before the Tribunal are generally conducted in public.[100] *However, a matter relating to unsatisfactory professional conduct will usually be heard in private unless the presence of the public is found to be "in the public interest or the interests of justice".*[101]

Decisions

2.45 If the Tribunal is satisfied that the practitioner is not guilty, the Tribunal must dismiss the complaint. In 1999/2000, of the 49 Tribunal outcomes, six complaints were dismissed.[102]

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appear as of right: Legal Profession Act 1987 (NSW) s 169(2).

97. *Legal Profession Act 1987 (NSW) s 169(4).*
98. *Legal Profession Act 1987 (NSW) s 167(3).*
99. *Legal Profession Act 1987 (NSW) s 167A(1).*
100. *In accordance with s 75 of the Administrative Decisions Tribunal Act 1997 (NSW): Legal Profession Act 1987 (NSW) s 170(2).*
101. *Legal Profession Act 1987 (NSW) s 170(1).*
102. *OLSC, Annual Report 1999/2000 at 31.*

2.46 If the practitioner is found guilty of professional misconduct, the Tribunal can order that the practitioner be removed from the roll of practitioners.[103] *Five practitioners were removed from the roll in 1999/2000.*[104] *In addition, if the practitioner is found guilty of either professional misconduct or unsatisfactory professional conduct, the Tribunal can:*

- *order that the practitioner's practising certificate be cancelled;*[105]
- *order that the practitioner not be issued with a practising certificate until a specified time has elapsed;*[106]
- *fine the practitioner up to $50,000 for professional misconduct and up to $5,000 for unsatisfactory professional conduct (to be paid to the Public Purpose Fund*[107]*);*[108]
- *issue a public or private reprimand;*[109] *and*
- *require the practitioner to undertake and complete a specified legal education course.*[110]

2.47 The outcomes of matters heard by the Tribunal in 1998/1999 are outlined in the following table.[111]

103. Legal Profession Act 1987 (NSW) s 171C(1)(a).
104. OLSC, Annual Report 1999/2000 at 31.
105. Legal Profession Act 1987 (NSW) s 171C(1)(b).
106. Legal Profession Act 1987 (NSW) s 171C(1)(c).
107. Legal Profession Act 1987 (NSW) s 171I.
108. Legal Profession Act 1987 (NSW) s 171C(1)(d).
109. Legal Profession Act 1987 (NSW) s 171C(1)(e)
110. Legal Profession Act 1987 (NSW) s 171C(1)(f).
111. OLSC, Annual Report 1999/2000 at 31.

Table 2.6: Results of Tribunal proceedings, 1 July 1999 to 30 June 2000

Results of proceedings	Number
No jurisdiction/withdrawn†	19
Dismissed	6
Removed from roll	5
Reprimanded and fined	5
Restricted practising certificate/reprimanded and fined	3
s 48I and s 48K orders[112]	3
Suspended from practice	3
Fined	2
Reprimanded	2
Suspended from practice/reprimanded and fined	1
TOTAL	49

† Matters affected by the Barwick decision of the High Court.

2.48 The relatively low number of dismissals probably reflects the requirement that there be a "reasonable likelihood" of a finding of unsatisfactory professional conduct or professional misconduct before Tribunal proceedings can be initiated by the relevant Council or LSC.

Compensation

2.49 The Tribunal can order a lawyer found guilty of misconduct to pay compensation. Compensation can be either in the form of a payment by the lawyer, a waiver of fees or the repayment of fees already paid. The evidence necessary for the Tribunal to make a decision about compensation must be provided by the complainant because the Councils and LSC have no standing in relation to compensation. The compensation can be up to $10,000 or more if the practitioner and complainant both consent.[113] No compensation

112. Legal Profession Act 1987 (NSW) s 48I and s 48K place restrictions on who a practitioner may associate with or employ.

113. Legal Profession Act 1987 (NSW) s 171D.

need be paid if the complainant has received or is entitled to receive compensation by court order or from the Fidelity Fund.[114]

Costs

2.50 Costs orders can be made against a practitioner who is found guilty of professional misconduct or unsatisfactory professional conduct.[115] *If the practitioner is found not guilty, the practitioner's costs may be met (but only in "special circumstances") from the Public Purpose Fund.*[116]

TRIBUNAL APPEAL PANEL

2.51 Any order or decision of the Tribunal may be appealed to a Tribunal Appeal Panel:[117]

- *on a question of law, as of right; and*
- *in relation to the merits of a decision, by leave from the Appeal Panel.*[118]

2.52 An Appeal Panel must consist of one presidential judicial member, one other judicial member and one non-judicial member.[119] *In practice these will most likely be the Deputy President (Legal Services), a member who is a legal practitioner, and a lay member of the Tribunal.*

2.53 The appeal must be made within 28 days of the Tribunal furnishing the parties with written reasons.[120] *As at 30 June 2000, only seven appeals had been lodged from the Tribunal to the Appeal*

114. Legal Profession Act 1987 (NSW) s 171D(3).
115. Legal Profession Act 1987 (NSW) s 171E(1).
116. Legal Profession Act 1987 (NSW) s 171E(2).
117. Legal Profession Act 1987 (NSW) s 171F.
118. Administrative Decisions Tribunal Act 1997 (NSW) s 113(2).
119. Administrative Decisions Tribunal Act 1997 (NSW) s 24.
120. Administrative Decisions Tribunal Act 1997 (NSW) s 113(3).

Panel since the commencement of the new arrangements in October 1998.[121]

APPEALS TO THE SUPREME COURT

2.54 An appeal can be made to the Supreme Court against a decision of the Appeal Panel, but only in relation to a question of law.[122]

COMPLAINTS ARISING DURING AN INVESTIGATION

2.55 Under the current scheme, the same procedural requirements must be followed in relation to additional complaints that arise during the course of an investigation as are followed with respect to the initial complaint. An additional complaint that arises during an investigation of a legal practitioner must therefore be separately initiated, investigated and a decision made about whether to refer it to the Tribunal, before it can be included with an already existing complaint or set of complaints. A formal investigative stage, between initiation of the a complaint and referral to the Tribunal, must take place to satisfy the requirements of Part 10 in relation to the investigation of complaints.[123]

DEALING WITH COMPLAINTS OUTSIDE PART 10

2.56 Not all complaints against lawyers are handled under Part 10. Complaints can also be handled by the courts or internally by firms of practitioners and other similar organisations, either government or private.

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121. One in 1998/1999 and six in 1999/2000: ADT, Annual Report 1998/1999 at 37; ADT, Annual Report 1999/2000 at 21.

122. Administrative Decisions Tribunal Act 1997 (NSW) s 119(1).

123. See Legal Profession Act 1987 (NSW) Pt 10 Div 5. See also Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 61-64.

Supreme Court

2.57 The Supreme Court retains an inherent jurisdiction with respect to the disciplining of practitioners,[124] and also, with other courts, has a general role in deciding negligence claims against practitioners. The Bar Council decided to apply to the Supreme Court to strike off one barrister in 1998/1999.[125] The Supreme Court is strongly in favour of retaining its ultimate authority in relation to fitness for practice by determining who should be on the roll of legal practitioners.[126]

Internal resolution

2.58 Some major organisations that employ solicitors have internal complaints management systems which may keep some matters out of the system established by Part 10. For example, the Legal Aid Commission has a mechanism for dealing with and resolving complaints from its clients. This mechanism has been described by the Audit Office as "comprehensive" and includes systems for monitoring client satisfaction.[127] The Office of the Director of Public Prosecutions has a Service Relations Office which provides a point of contact for complaints and suggestions and "seeks to identify the causes of dissatisfactions and tries to eliminate them".[128]

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124. A role expressly preserved by Legal Profession Act 1987 (NSW) s 171M(1). See Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 118.

125. Information supplied by the NSW Bar Association (26 June 2000).

126. J Spigelman, Preliminary Submission at 1; But see IP 18 at para 6.28-6.29 in relation to appeals from decisions of the Tribunal.

127. New South Wales, Audit Office, Key Performance Indicators (Performance Audit Report, 1998) at 54. As at the end of June 1999 there has been no external reporting of this system.

128. New South Wales, Office of the Director of Public Prosecutions, Annual Report 1998/1999 at 63.

3. Misconduct

- Current definitions
- Are the current definitions satisfactory?
- Referring complaints to the Tribunal

3.1 The Legal Services Commissioner (the "LSC"), Law Society Council and Bar Council must refer a complaint to the Legal Services Division of the Administrative Decisions Tribunal (the "Tribunal") if satisfied that there is a reasonable likelihood that the practitioner will be found guilty of professional misconduct or unsatisfactory professional conduct.[1] A complaint may be referred to the Tribunal if the Council or LSC is satisfied that there is a reasonable likelihood that the practitioner will be found guilty of unsatisfactory professional conduct, but not professional misconduct.[2] This Chapter considers the definitions of unsatisfactory professional conduct and professional misconduct, and the "reasonable likelihood" threshold.

CURRENT DEFINITIONS

Unsatisfactory professional conduct

3.2 Section 127 of the Legal Profession Act 1987 (NSW) (the "LPA") provides that:

> *unsatisfactory professional conduct includes conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner or interstate practitioner.*

Professional misconduct

3.3 Section 127(1) states that professional misconduct includes:[3]

- *Unsatisfactory professional conduct that involves a substantial or consistent failure to reach reasonable standards of competence and diligence.*

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1. *Legal Profession Act 1987 (NSW) s 155(2).*
2. *Legal Profession Act 1987 (NSW) s 155(3).*
3. *Legal Profession Act 1987 (NSW) s 127(1).*

- *Conduct not in connection with legal practice which would justify a finding that a practitioner is not of good fame and character, or is not a fit and proper person to remain on the roll of legal practitioners.*

3.4 The following also constitute professional misconduct:[4]

- *Practising as a solicitor or barrister without holding a current practising certificate (wilfully and without a reasonable excuse).*[5]
- *Having an associate whom the practitioner knows has been disqualified from practice, or knows has been convicted of an indictable offence and does not hold a current practising certificate (in certain circumstances).*[6]
- *Failing to co-operate with a trust account inspection or investigation or hindering, delaying or obstructing a trust account inspection or investigation.*[7]
- *Wilful failure to hold money received on behalf of others in a trust account and wilful failure to deposit trust account money with the Law Society.*[8]
- *Wilful failure to keep accounting records or to produce accounting records or other information in connection with an audit.*[9]
- *Non-compliance with a notice requiring information, documents or other cooperation with an investigation or a review of a Council decision (without a reasonable excuse).*[10]
- *Deliberately charging grossly excessive costs, deliberate misrepresentation as to costs*[11] *and non-compliance with a notice requiring the production of documents in relation to a*

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4. See Legal Profession Act 1987 (NSW) s 127(3).
5. Legal Profession Act 1987 (NSW) s 25(4).
6. Legal Profession Act 1987 (NSW) s 48K.
7. Legal Profession Act 1987 (NSW) s 55. See para 4.46-4.47.
8. Legal Profession Act 1987 (NSW) s 61(7) and s 64(5).
9. Legal Profession Act 1987 (NSW) s 62(4) and s 63(5).
10. Legal Profession Act 1987 (NSW) s 152(4) and s 159(4).
11. Legal Profession Act 1987 (NSW) s 208Q(2).

costs assessment or a costs assessment review (without a reasonable excuse).[12]

3.5 Legislation enacted late in 2000 provides for the incorporation of legal practices in New South Wales.[13] *This legislation includes provisions dealing with professional misconduct which relate specifically to incorporated legal practices.*[14] *These provisions are expected to commence operation in mid 2001, following the drafting of regulations, which is currently under way.*[15]

Conduct which may amount to misconduct

3.6 Certain other conduct may amount to misconduct. For example, deliberately misleading or obstructing an investigation is capable of being (and usually will constitute) professional misconduct.[16] *Non-disclosure of estimated costs, and breach of Bar Council or Law Society Council Rules may amount to either professional misconduct or unsatisfactory professional conduct.*[17]

12. *Legal Profession Act 1987 (NSW) s 207(6) and s 208KD(5).*
13. *Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW).*
14. *Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) s 3 and Sch 1, inserting s 47E(3) and s 47E(4) into the Legal Profession Act 1987 (NSW). See para 4.30-4.37.*
15. *Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) s 3 and Sch 1, inserting s 47T into the Legal Profession Act 1987 (NSW).*
16. *Legal Profession Act 1987 (NSW) s 152(5). See also s 127(3).*
17. *Legal Profession Act 1987 (NSW) s 182(4), s 183 and s 57D. See also Parts 3B, 3C and s 55, which regulate the entitlement of interstate lawyers to practice in New South Wales under the national practising certificates scheme, and local registration of foreign lawyers; s 172X, dealing with misconduct by solicitors corporations; and s 208KD.*

ARE THE CURRENT DEFINITIONS SATISFACTORY?

3.7 In Issues Paper 18 ("IP 18"), the Commission asked whether the current definitions are satisfactory. (Issue 4)

Negligence

Negligence and misconduct in New South Wales

3.8 The definition of unsatisfactory professional conduct under Part 10 refers to conduct below the standard of competence and diligence that the public is entitled to expect of a reasonably competent practitioner. Professional misconduct includes substantial or consistent failure to reach reasonable standards of competence and diligence.[18]

3.9 The relationship between professional negligence and misconduct has been considered by the Tribunal. In Pitsikas, the Tribunal found that unsatisfactory professional conduct would not necessarily cover mere negligence by a practitioner.[19] *The Tribunal commented that negligence may or may not constitute unsatisfactory professional conduct. Subsequently, in Re a Barrister, the Tribunal found, by a majority, that in most cases professional negligence by a practitioner would also constitute unsatisfactory professional conduct.*[20] *The majority expressly disagreed with Pitsikas.*

3.10 There is a considerable body of case law which deals with the particular circumstances in which negligence will amount to misconduct. For example, negligent supervision of the firm's dealing with money entrusted by clients has been held to constitute misconduct.[21] *Serious delay in completing work, concealing this from the client and accepting money for costs and fees connected with the work constitutes both negligence and misconduct.*[22] *Failing*

18. *See para 3.2-3.4.*
19. *Pitsikas (1995) 1 LPDR 5.*
20. *Re a Barrister (1998) 3 LPDR 1.*
21. *Re Mayes [1974] 1 NSWLR 19.*
22. *Re R [1927] SASR 58.*

to keep a client informed of the state of their affairs amounts to both negligence and misconduct.[23]

3.11 Despite this, the OLSC's web site states that the LSC will usually decline to deal with a complaint involving professional negligence, and advises that if negligence results in the client suffering a significant measurable loss, the client should consider suing the practitioner for negligence.[24]

Submissions

3.12 Several submissions argued that many consumers are reluctant to commence legal proceedings against a practitioner for negligence, because they think that it will be difficult and expensive to win a case against a practitioner, and because they are averse to the idea of hiring another practitioner and to the legal profession in general.[25] *It was also argued that many consumers simply will not have the resources to fund litigation in situations where the defence will often be funded by a professional liability insurer.*[26] *A number of submissions argued that Part 10 should be amended to clarify that negligence is capable of constituting unsatisfactory professional conduct.*[27] *One submission argued that negligence should always constitute unsatisfactory professional conduct.* [28]

3.13 Other submissions opposed the inclusion of negligence in the definition of unsatisfactory professional conduct.[29]

Other jurisdictions

3.14 The definition of unsatisfactory professional conduct in the

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23. Re a Solicitor (1992) 110 FLR 9 (ACT, Full Court).

24. New South Wales, Office of the Legal Services Commissioner "Quality of service" (as at 21 February 2001) «www.lawlink.nsw.gov.au/olsc1.nsf/pages/complaint7».

25. See Confidential Submission 1; G Taylor, Submission at 1-2; OLSC, Submission at 19.

26. See IP 18 para 4.19.

27. P Breen, Preliminary Submission para 2.4; OLSC, Submission at 10 and 19; NSW Legal Reform Group, Submission at 4.

28. See G Taylor, Submission at 1-2.

29. Law Society of NSW, Submission at 8; NSW Bar Association, Submission at 26-28; J Gormly, Submission at 4; G Molloy, Oral Submission.

Australian Capital Territory, South Australia, Tasmania and Victoria is similar to the New South Wales definition.[30] In South Australia, Tasmania and Victoria, the definition of professional misconduct includes substantial or recurrent failure to meet the standard of conduct observed by competent practitioners of good repute.[31]

3.15 In the Northern Territory, where there is only one category of misconduct, it includes neglect constituting a gross breach of duty to a client.[32] In Queensland, the definition of unprofessional conduct or practice includes serious neglect and failure to maintain reasonable standards of competence or diligence.[33] The complaints and discipline scheme in Queensland also covers malpractice, although this term is not defined.[34] Finally, in Western Australia, the complaints and discipline system also includes neglect.[35] This term is not defined.

The Commission's view

3.16 It is clear under the common law, including the recent decision of the Tribunal in Re a Barrister,[36] that negligence is capable of constituting misconduct. The Commission does not consider that it is necessary to amend Part 10 to clarify this. The common law also provides considerable guidance on the circumstances in which negligence will constitute misconduct. In a serious case, in which the practitioner's negligence amounts to a wilful breach of professional standards in disregard of the practitioner's duty to the client, it will almost certainly amount to professional misconduct. These principles are not in any real sense

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30. *Legal Practitioners Act 1970 (ACT) s 37; Legal Practitioners Act 1981 (SA) s 5(1); Legal Profession Act 1993 (Tas) s 56.*
31. *Legal Practitioners Act 1981 (SA) s 5(1) (in South Australia the most serious category of misconduct is known as unprofessional conduct); Legal Profession Act 1993 (Tas) s 56; Legal Practice Act 1996 (Vic) s 137 (in Victoria the most serious category of misconduct is known simply as misconduct).*
32. *Legal Practitioners Act (NT) s 45(2)(b).*
33. *Queensland Law Society Act 1952 (Qld) s 3B.*
34. *Queensland Law Society Act 1952 (Qld) s 5E(6).*
35. *Legal Practitioners Act 1893 (WA) s 28A(1).*
36. *Re a Barrister (1998) 3 LPDR 1.*

controversial or subject to doubt. The Commission considers that the LSC needs to re-evaluate his policy of declining to deal with complaints about negligence to reflect the law that negligent conduct which happens to satisfy the requirements of the tort of negligence may also amount to unsatisfactory professional conduct or professional misconduct.

3.17 Consumer redress is an express object of Part 10.[37] This provision implements the Commission's previous recommendation that Part 10 should be more consumer oriented.[38] The law should facilitate redress for a client who has suffered loss due to professional negligence by a practitioner which does not amount to misconduct. This Report includes recommendations addressing this issue. Chapter 5 of this Report recommends that the powers of the LSC should be expanded to enable the LSC to compel a practitioner and client involved in a consumer dispute to attend mediation.[39]

Disclosure of estimated costs

Disclosure of costs in New South Wales

3.18 Part 11 of the LPA deals with disclosure by practitioners to clients of matters relating to costs. It provides that non-disclosure of estimated costs may amount to misconduct.[40]

3.19 Under Part 11, a client has the right to be given information about how a practitioner will charge for legal services, and an estimate of the likely cost.[41] If the client is not given information about how costs will be charged, the client need not pay the bill until it has been assessed by a costs assessor. Costs assessment in this situation is at the practitioner's expense.[42]

3.20 A client who disputes a bill of costs for legal services can refer the dispute to the LSC or a Council for mediation if the amount in

37. Legal Profession Act 1987 (NSW) s 123(a).
38. NSWLRC Report 70 at para 3.24-3.31, 4.2, 4.8-4.13.
39. See para 5.25-5.41 and Recommendation 18.
40. Legal Profession Act 1987 (NSW) s 182(4).
41. Legal Profession Act 1987 (NSW) s 174(1)(a), s 175 and s 177.
42. Legal Profession Act 1987 (NSW) s 174(1)(b) and s 182.

dispute is less than $2,500.[43]

3.21 A client or practitioner can also apply to the Supreme Court for the assessment of the whole or part of a bill of costs.[44] *Applications are referred to costs assessors.*[45] *The costs assessor may require the client, the practitioner or any other person to produce any relevant documents and information about the instructions given by the client to the practitioner, the work performed, or the basis on which the costs in dispute were ascertained.*[46] *The costs assessor must give both the client and the practitioner a reasonable opportunity to make written submissions, and give due consideration to them, before determining an application for costs assessment.*[47]

3.22 The costs assessor must consider whether or not it was reasonable for the practitioner to perform the work, whether or not the work was carried out in a reasonable manner and whether the disputed costs were fair and reasonable.[48] *If satisfied that the disputed costs are unfair or unreasonable, the costs assessor must substitute a fair and reasonable amount. The costs assessor can confirm the disputed costs if satisfied that they are reasonable.*[49]

3.23 The client can apply for costs assessment even if he or she has wholly or partly paid the disputed costs.[50] *If the amount in dispute is less than $2,500, the Supreme Court can refer the dispute back to the LSC.*[51]

Disclosure of costs and misconduct

3.24 Part 10 provides that deliberately charging excessive costs,

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43. Legal Profession Act 1987 (NSW) s 198B.
44. Legal Profession Act 1987 (NSW) s 199, s 200 and s 201.
45. Legal Profession Act 1987 (NSW) s 206.
46. Legal Profession Act 1987 (NSW) s 207.
47. Legal Profession Act 1987 (NSW) s 208.
48. Legal Profession Act 1987 (NSW) s 208A(1) and s 208B.
49. Legal Profession Act 1987 (NSW) s 208A(2).
50. Legal Profession Act 1987 (NSW) s 199(2). In this cases a time limit of 12 months from the date that the bill was given to the client is imposed: Legal Profession Regulation 1994 (NSW) cl 25.
51. Legal Profession Act 1987 (NSW) s 198B(2).

deliberate misrepresentations about costs, and non-compliance with a notice requiring the production of documents in connection with a costs assessment constitute professional misconduct.[52] *Failure to provide a costs estimate may amount to unsatisfactory professional conduct.*[53]

Submissions

3.25 A significant proportion of complaints received by the LSC relate to non-disclosure of costs. However, there is no case law or statutory guidance on when non-disclosure of costs amounts to misconduct. The OLSC submitted that the LPA should be amended to clarify that non-disclosure of costs without a reasonable excuse amounts to misconduct.[54] *However, other submissions opposed this. The Bar Association argued that the consequences of non-disclosure discussed in paragraphs 3.19 to 3.23 above are adequate.*[55]

Other jurisdictions

3.26 Disclosure of estimated costs is required in most Australian jurisdictions.[56] *The relationship between non-disclosure and misconduct is not expressly dealt with in the legislation regulating the disciplinary system for lawyers in other jurisdictions. However, in Tasmania and Victoria, contravention of the relevant Act, Regulations or practice rules constitutes misconduct.*[57] *In Queensland and Victoria, as in New South Wales, non-disclosure hinders the lawyer's ability to recover costs and access to costs assessment.*[58]

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52. *See para 3.3.*
53. *See para 3.4.*
54. *OLSC, Preliminary Submission at 18.*
55. *NSW Bar Association, Submission at 27; C Wall, Submission at 6.*
56. *Queensland Law Society Act 1952 (Qld) s 48; Legal Practice Act 1996 (Vic) s 86; Law Society of the Australian Capital Territory Professional Conduct Rules r 3.1, 3.4 and 40.1; Law Society of South Australia Professional Conduct Rules r 9.14; Tasmania, Rules of Practice 1994 r 13 and 14; Western Australia, Professional Conduct Rules r 10.3.*
57. *Legal Profession Act 1993 (Tas) s 56; Legal Practice Act 1996 (Vic) s 137.*
58. *Queensland Law Society Act 1952 (Qld) s 48J and Pt 2A Div 6A; Legal Practice Act 1996 (Vic) s 91.*

The Commission's view

3.27 Part 11 expressly provides that non-disclosure of estimated costs may amount to unsatisfactory professional conduct. Where a client complains to the LSC about non-disclosure of estimated costs, the LSC must investigate the complaint and determine whether or not he is satisfied that there is a reasonable likelihood that the practitioner will be found guilty of unsatisfactory professional conduct. If satisfied of this, the LSC can dismiss the complaint, reprimand the practitioner (if he or she consents) or refer the complaint to the Tribunal.[59]

3.28 The Commission's view is that amending the LPA to clarify that non-disclosure of costs without a reasonable excuse amounts to misconduct would not increase the power of the LSC over practitioners who fail to disclose estimated costs. If cost details are not provided in advance the client has the right to dispute such costs and/or seek a costs assessment. The same investigative process that is currently required would still have to be undertaken. One advantage of amending this section may be to assist in the transparency of rights and responsibilities for practitioners and clients.

Advertising

Advertising legal services in New South Wales

3.29 Legal practitioners may advertise their services.[60] *Advertisements must not be false, misleading or deceptive, or breach the Trade Practices Act 1974 (Cth), the Fair Trading Act 1987 (NSW) or any other similar legislation.*[61]

3.30 The LPA does not state that advertising which is false,

59. Legal Profession Act 1987 (NSW) s 155(2) and (3).

60. Legal Profession Act 1987 (NSW) s 38J(1).

61. Legal Profession Act 1987 (NSW) s 38J(2) See also s 48ZY, which regulates advertising by locally registered foreign lawyers, and s 47I, inserted by the Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) s 3 and Sch 1, which relates to advertising by incorporated legal practices. Section 47I has not yet commenced: see para 3.5.

misleading or deceptive, or breaches consumer protection legislation, is or may amount to misconduct. It was submitted that the LPA should be amended to provide that this may amount to unsatisfactory professional conduct or professional misconduct and can, therefore, be dealt with under Part 10.[62]

Other jurisdictions

3.31 Advertising of legal services is permitted in all Australian jurisdictions.[63] *There is no provision in any other Australian jurisdiction stating that advertising which is false, misleading or deceptive or breaches consumer protection legislation is, or may amount to, misconduct.*

Recommendation

3.32 Where a practitioner advertises legal services in a manner which is false, misleading or deceptive, this raises a question about the practitioner's honesty.[64] *Advertising legal services in a manner which breaches the provisions of the Trade Practices Act 1974 (Cth) or the Fair Trading Act 1987 (NSW) dealing with unconscionable*

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62. *OLSC, Submission at 11-12. See also OLSC, Submission to National Competition Policy Review at 9-10. The Law Society also supported increasing the level of restriction on advertising, without indicating whether breach of increased restriction should constitute misconduct: Law Society of NSW, Submission at 8. See also OLSC, Advertising and the Disciplinary Process under the Legal Profession Act 1987 (Policy Paper, 1998).*
63. *Law Society of the Australian Capital Territory Professional Conduct Rules r 39; ACT Barristers Rules r 116 and 117; Legal Practitioners Act 1970 (ACT) s 191ZI; Law Society of the NT Professional Conduct Rules r 3; NT Bar Rules r 43; Legal Practitioners Act (NT) s 135U; Queensland Law Society Rules 1987 r 80; Queensland Barristers Rules r 115, 116; Law Society of South Australia Professional Conduct Rules r 3; Tasmania, Rules of Practice 1994 r 7; Legal Profession Act 1993 (Tas) s 17(3); Victoria, Solicitors' (Professional Conduct and Practice) Rules r 2; Western Australia, Professional Conduct Rules r 4, Sch 5; Western Australia Bar Association Conduct Rules r 29.*
64. *Misleading or deceptive conduct in the course of trade or commerce is prohibited by the Trade Practices Act 1974 (Cth) s 52 and the Fair Trading Act 1987 (NSW) s 42.*

conduct[65] or false representations[66] also raises a question about the practitioner's probity. The Commission's view is that honesty directly relates to the question of misconduct. Accordingly, the Commission recommends that the LPA should be amended to provide that advertising which breaches these fair trading laws may amount to either unsatisfactory professional conduct or professional misconduct.

Recommendation 1

Section 38J of the *Legal Profession Act 1987* (NSW) should be amended to provide that advertising which is false, misleading or deceptive or breaches the *Trade Practices Act 1974* (Cth) or the *Fair Trading Act 1987* (NSW) or any similar legislation may amount to either unsatisfactory professional conduct or professional misconduct.

Protecting whistleblowers

Protecting whistleblowers in New South Wales

3.33 Whistleblowing is a colloquial term describing the actions of a person who publicly discloses harmful activities occurring in an organisation, such as criminal offences or corruption.[67] The Protected Disclosures Act 1994 (NSW) provides protections to public servants who disclose information about corruption, maladministration or serious and substantial waste in the public sector. A person who makes a protected disclosure is not liable to disciplinary action because of the disclosure.[68] It is an offence to take disciplinary

65. *Trade Practices Act 1974 (Cth) Pt 4A; Fair Trading Act 1987 (NSW) s 43.*
66. *Trade Practices Act 1974 (Cth) s 53; Fair Trading Act 1987 (NSW) s 44.*
67. *NSW Professional Standards Council, Whistleblowing in the Professions (Report, 2001) at 6-7.*
68. *Protected Disclosures Act 1994 (NSW) s 21.*

proceedings in reprisal for making a protected disclosure.[69] *The Protected Disclosures Act 1994 (NSW) also applies outside the public service in relation to government work performed under contract by private practitioners.*[70]

Protecting whistleblowers in the legal profession

3.34 The Professional Standards Council has recently considered the extension of whistleblowing principles to the regulation of the private sector, including the legal profession.[71] *The Council discussed the integration of whistleblowing principles and protections within existing complaints and discipline systems in the professions. The Council argued that the inclusion of specific protections for whistleblowers may actively encourage members of a profession to come forward with their concerns, and demonstrate the profession's commitment to evaluating complaints fairly.*[72] *The Council has not yet made any formal recommendations for the incorporation of whistleblower protections into the regulation of the professions.*

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69. Protected Disclosures Act 1994 (NSW) s 20. The Public Sector Management Act 1988 (NSW) s 66 also states that this is a breach of discipline.

70. NSW Professional Standards Council, Whistleblowing in the Professions (Consultative Paper, 2000) at 7.

71. Professional Standards Council (Consultation Paper, 2000); Professional Standards Council, (Report, 2001).

72. NSW Professional Standards Council, Whistleblowing in the Professions (Report, 2001) at 23.

Submissions

3.35 One submission favoured the incorporation of protections for whistleblowers into the complaints system.[73] Neither the Law Society nor the Bar Association favoured the extension of whistleblowing principles to the legal profession.[74] The Bar Association argued that attempts by a practitioner to conceal misconduct or victimise an employee who discloses misconduct would, of itself, constitute misconduct. Moreover, a practitioner who suspects on reasonable grounds that a solicitor has dealt with trust money in a manner that may be dishonest or irregular is required to notify the President of the Law Society as soon as practicable.[75]

The Commission's view

3.36 While attempts by a practitioner to conceal misconduct or victimise an employee who discloses misconduct would constitute misconduct under Part 10, the Commission notes the Council's argument that the inclusion of specific protections for whistleblowers may actively encourage practitioners to come forward with their concerns about misconduct by other practitioners. The Council's work so far is at a preliminary stage, designed to encourage debate in the professions and the community. The Commission does not express a final view on this issue at this stage. The Commission does, however, emphasise the inherent conflict between protecting a whistleblower by keeping the identity of the whistleblower secret and providing procedural fairness to the practitioner against whom the whistleblower has made an allegation.

Are two categories of misconduct required?

Categories of misconduct in New South Wales

3.37 Prior to the enactment of the LPA the only type of misconduct was professional misconduct at common law.[76] The introduction of unsatisfactory professional conduct in 1987

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73. See R S Cuddy, Submission at 1.

74. Law Society of NSW, Submission at 9; NSW Bar Association, Submission at 27.

75. Legal Profession Regulation 1994 (NSW) cl 69.

76. Prothonotary of the Supreme Court of New South Wales v Costello [1984] 3 NSWLR 201 at 207.

reflected Parliament's intention that an additional but lower level of professional misconduct should be the subject of sanction.[77]

Submissions

3.38 One submission pointed out that the two categories of misconduct are dealt with in the same way under Part 10.[78] *It was argued that complaints relating to unsatisfactory professional conduct should be dealt with in a different, less serious procedure, to reflect the fact that unsatisfactory professional conduct is less serious than professional misconduct. For example, the LSC or the Councils, or a single member of the Tribunal could deal with unsatisfactory professional conduct.*[79] *On the other hand, the Law Society submitted that the two categories of misconduct should be replaced with a single classification of "unprofessional conduct", incorporating elements of both categories.*[80]

Other jurisdictions

3.39 Most other Australian jurisdictions have two categories of misconduct.[81]

The Commission's view

3.40 The Commission accepts that it is appropriate and procedurally convenient to recognise two separate categories of misconduct in Part 10. In Chapter 5, the Commission recommends that where the LSC or Council is satisfied that there is a reasonable likelihood that a practitioner will be found guilty of unsatisfactory professional conduct but not professional misconduct, they should be able to reprimand the practitioner without the practitioner's consent.[82]

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77. *Pitsakis (1995) 1 LPDR 5 at 9.*
78. *See para 3.48 and 6.8-6.103.*
79. *J Gormly, Submission at 2-3.*
80. *Law Society of NSW, Submission at 8.*
81. *Legal Practitioners Act 1970 (ACT) s 37; Queensland Law Society Act 1952 (Qld) s 3B, s 5E(6) and s 5F; Legal Practitioners Act 1981 (SA) s 5(1); Legal Profession Act 1993 (Tas) s 56; Legal Practice Act 1996 (Vic) s 137.*
82. *See para 5.16-5.22 and Recommendation 17.*

Contravening the Act, Regulation or practice rules

3.41 The LPA does not expressly state that a practitioner who contravenes a provision of the Act or a clause of the Legal Profession Regulation 1994 (NSW) is, or may be, guilty of misconduct. Contravention of the Solicitors Rules' or Barristers' Rules is capable of constituting either unsatisfactory professional conduct or professional misconduct.[83]

Submissions

3.42 The OLSC argued that breach of the LPA or the Legal Profession Regulation 1994 (NSW) should also constitute unsatisfactory professional conduct.[84] *The OLSC pointed out that medical practitioners who contravene the Medical Practice Act 1992 (NSW) or the Medical Practice Regulation 1998 (NSW) are guilty of unsatisfactory professional conduct.*[85]

Other jurisdictions

3.43 In the Northern Territory, wilful or reckless contravention of the Legal Practitioners Act 1974 (NT), regulations or rules constitutes professional misconduct.[86] *In Victoria, contravention of the Legal Practice Act 1996 (Vic), regulations or rules is unsatisfactory conduct and wilful or reckless contravention is misconduct.*[87] *In Tasmania the definition of professional misconduct includes contravention of the Legal Profession Act 1993 (Tas), regulations or rules. No distinction is drawn between wilful, reckless, negligent or inadvertent contravention.*

Recommendations

3.44 Although the Medical Practice Act 1992 (NSW) is broadly analogous to the LPA, there are some significant differences in both the nature of the professional groups regulated and the legislative framework that governs them. The Commission does not consider that the LPA should be amended to provide that a contravention of

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83. Legal Profession Act 1987 (NSW) s 57D(4).
84. OLSC, Submission at 17-18.
85. Medical Practice Act 1992 (NSW) s 36(1)(b).
86. Legal Practitioners Act (NT) s 45.
87. Legal Practice Act 1996 (Vic) s 137.

the Act or the Legal Profession Regulation 1994 (NSW) should constitute unsatisfactory professional conduct simply on the basis that a comparable provision exists in the Medical Practice Act 1992 (NSW).

3.45 The LPA is a lengthy and complex piece of legislation consisting of 15 parts and 421 sections. It covers a wide range of matters including admission to practice, practice as a lawyer and the issue, refusal, suspension and cancellation of practising certificates. It covers professional indemnity insurance. It deals with the functions and responsibilities of the Bar Association, the Law Society and the Legal Profession Advisory Council. It also covers trust accounting requirements. The Act deals with the appointment of receivers to solicitors' property and the appointment of managers to solicitors' practices. It covers solicitor corporations. It regulates disclosure of costs, costs agreements and costs assessment. The Act also regulates interstate practitioners under the national practising certificates scheme and local registration of foreign practitioners. When the Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) commences operation it will also cover incorporated legal practices. The Legal Profession Regulation 1994 (NSW) also covers many of these areas. The LPA has been amended by 38 pieces of legislation since it was enacted in 1987.

3.46 In light of the length, complexity and coverage of the LPA, the Commission considers that it would be unreasonable and unfair if every contravention of any requirement of the LPA automatically constituted misconduct. However the Commission's view is that the definitions in Part 10 should be amended to make it clear that contravention of the LPA or the Legal Profession Regulation 1994 (NSW) is capable of being either unsatisfactory professional conduct or professional misconduct. It may then be possible to further identify conduct that amounts to misconduct.

Recommendation 2

The *Legal Profession Act 1987* (NSW) should be amended to provide that contravention of the Act or the *Legal Profession Regulation 1994* (NSW) is capable of being either unsatisfactory professional conduct or professional misconduct.

3.47 In addition to the definitions of unsatisfactory professional conduct and professional misconduct in Part 10, other Parts of the LPA identify numerous conduct as misconduct, or state that it may amount to misconduct. This is confusing and unwieldy. The Commission recommends that Part 10 should include a section or schedule which draws together a list of all conduct identified throughout the LPA as professional misconduct or unsatisfactory professional conduct and all conduct which the LPA states may amount to misconduct.

Recommendation 3

Part 10 of the *Legal Profession Act 1987* (NSW) should include a list of all conduct identified in the Act as professional misconduct or unsatisfactory professional conduct and all conduct which the Act states may amount to misconduct.

REFERRING COMPLAINTS TO THE TRIBUNAL

Threshold for referral in New South Wales

3.48 A complaint about a practitioner must be referred to the Tribunal if the Council or LSC is satisfied that there is a reasonable likelihood that the practitioner will be found guilty of professional misconduct.[88] *If satisfied that there is a reasonable*

88. Legal Profession Act 1987 (NSW) s 155(1) and (2).

likelihood that the practitioner will be found guilty of unsatisfactory professional conduct, but not professional misconduct, the Council or LSC may refer the complaint to the Tribunal but may also dismiss the complaint or reprimand the practitioner.[89]

3.49 In IP 18, the Commission asked whether Part 10 of the LPA should prescribe a threshold for referring complaints to the Tribunal and, if so, whether the current "reasonable likelihood" threshold is appropriate. (Issue 26)

Submissions

3.50 A number of submissions argued that the threshold for referring complaints to the Tribunal should be lowered.[90] *The OLSC submitted that the current test requires the LSC to prejudge the Tribunal in its deliberations. It was argued that this places an "unreasonable strain" on the LSC, especially in relation to complaints involving novel issues not previously considered by the Tribunal, and where the evidence of the complainant and the practitioner conflict. In Murray v Legal Services Commissioner, Justice Sheller commented that under the current threshold the Council or LSC is required to attempt to predict the outcome of a hearing in the Tribunal.*[91] *It was submitted by the OLSC and others that an appropriate threshold for referring complaints to the Tribunal would be whether the evidence establishes a case to answer.*[92]

3.51 The Law Society submitted that an appropriate test would be whether a real question of conduct has arisen which the Tribunal should determine. Another submission argued that an appropriate threshold is whether the evidence is capable of satisfying the

89. *Legal Profession Act 1987 (NSW) s 155(1) and (3).*
90. *OLSC, Submission at 9, 30; C P Wall, Submission at 7; F Combe, Submission at 10; P Breen, Submission at 6; Law Society of NSW, Submission at 14.*
91. *Murray v Legal Services Commissioner (1999) 46 NSWLR 224 at 247.*
92. *P Breen, Submission at 6; F Combe, Submission at 10; OLSC, Submission at 30.*

Tribunal beyond reasonable doubt that the practitioner is guilty of misconduct.[93]

3.52 On the other hand, some submissions argued that the current threshold is appropriate for disciplinary proceedings.[94] *The prediction required by the current test is not unique to disciplinary proceedings involving practitioners and is widely used in the criminal jurisdiction both by prosecutorial authorities and committing magistrates.*[95]

Other jurisdictions

3.53 There is no statutory threshold for referral in most Australian jurisdictions.[96] *In Tasmania, the Law Society Council is permitted to apply to the Disciplinary Tribunal for a hearing and determination into any matter which the Council considers may amount to misconduct or constitutes a course of conduct which ought to be determined by the Tribunal.*[97] *In Victoria, the threshold is identical to the threshold under Part 10.*[98] *The Victorian Legal Ombudsman has reported having no difficulty in applying it.*[99]

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93. *C P Wall, Submission at 7. This is the test used in committal proceedings for criminal cases: see Justices Act 1902 (NSW) s 41(2).*
94. *R S Cuddy, Submission at 6; NSW Bar Association, Submission at 44; Law Society of NSW, Submission at 18.*
95. *See for example the threshold applied by Magistrates in committal proceedings: Justices Act 1902 (NSW) s 41. See also NSW Bar Association, Submission at 45.*
96. *See Legal Practitioners Act 1970 (ACT) s 50; Legal Practitioners Act (NT) s 47(1)(d) and s 50; Queensland Law Society Act 1952 (Qld) s 5J(d); Legal Practitioners Act 1981 (SA) s 82; Legal Practitioners Act 1893 (WA) s 28C.*
97. *Legal Profession Act 1993 (Tas) s 60.*
98. *Legal Practice Act 1996 (Vic) s 151.*
99. *Victorian Legal Ombudsman, Submission at 44.*

The Commission's view

3.54 The statutory threshold for referring complaints to the Tribunal acts as a filter to ensure that insubstantial complaints do not proceed to the Tribunal for hearing. This saves the Tribunal time and resources. The threshold does not require the LSC or Council to predict whether the practitioner will be found guilty of misconduct, but rather, whether there is a reasonable likelihood of such a finding. This does not require a conclusion that a finding adverse to the practitioner will more probably than not be made. In a case of conflicting evidence, where there is no substantial reason for disbelieving the complainant's case, (aside from the denial of the practitioner), the statutory test will usually be satisfied. The Tribunal is responsible for determining questions of fact where the evidence of the complainant and the practitioner conflict. The threshold is lower than the standard of proof for civil cases. The Commission's view is that the current threshold is appropriate.

4. The complaints handling process

- Time limit
- Complaints against law firms
- Investigations
- Procedural fairness
- Investigative powers
- Transfer of complaints
- Non-compliance with Part 10

4.1 This Chapter deals with issues that arise during the investigation of complaints about lawyers, including the time limit for making complaints, whether complaints against law firms (as opposed to individual practitioners) should be dealt with under Part 10 and issues relating to investigations. This Chapter also considers the requirements of procedural fairness, the investigative powers of the Legal Services Commissioner (the "LSC"), the Law Society Council and the Bar Council, the transfer of complaints and the effect of non-compliance with the procedural requirements of Part 10 of the Legal Profession Act 1987 (NSW) (the "LPA").

TIME LIMIT

4.2 While complaints can be made at any time, a complaint cannot be made more than three years after the conduct is alleged to have occurred unless a determination is made to accept it. Determinations are made by the LSC, except where a Council makes a complaint. In this case the Council also determines whether or not to accept the complaint.[1]

4.3 There are two grounds for determining to accept a complaint about conduct which occurred more than three years earlier. First, the complaint may be accepted where it is just and fair to deal with the complaint having regard to the length of the delay and the reasons for delay in making the complaint.[2] *Secondly, the complaint may be accepted where it involves an allegation of professional misconduct, and it is in the public interest to deal with the complaint.*[3]

4.4 In the Issues Paper (IP 18), the Commission asked whether there should be a time limit for making complaints, and if so, whether the time limit should apply to complaints initiated by the

1. *Legal Profession Act 1987 (NSW) s 137. The time limit was amended in 2000 as a result of the decision of the High Court in Barwick v Law Society of NSW (2000) 74 ALJR 419.*
2. *Legal Profession Act 1987 (NSW) s 137(2)(a).*
3. *Legal Profession Act 1987 (NSW) s 137(2)(b).*

Councils and the LSC, how long the time limit should be and when time should start to run (Issues 5-8).

Should there by a time limit?

4.5 Arguably, misconduct is always relevant to a practitioner's fitness to practise, regardless of when it occurred. On this view, the time lapse between alleged misconduct and the complaint should not affect the power to conduct an investigation, although it may be relevant to the sanction imposed if the complaint is upheld.[4]

4.6 Several submissions argued that no time limit should be imposed. It was argued that a time limit is unfair because it sometimes takes time, often many years, to identify clearly the grounds for a complaint, especially for lay complainants.[5] *Other submissions claimed that the LSC and Councils misuse the time limit.*[6]

4.7 On the other hand, imposing a time limit on complaints has several functions. First, a time limit protects practitioners against potential oppression and injustice in the case of delayed complaints.[7] *Indirectly, this also contains the cost of legal services,*

4. *New South Wales Law Reform Commission, Scrutiny of the Legal Profession: Complaints Against Lawyers (Report 70, 1993) at para 4.68-4.69.*
5. *Confidential Submission 1; F Combe, Submission at 5; C Berkemeier, Submission at 1-2; NSW Legal Reform Group, Submission at 4.*
6. *For Legally Abused Citizens Inc, Submission 2 at 3; F Combe, Submission at 5; G Taylor, Submission at 6.*
7. *Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 96 per Kirby J. See also Walton v Gardiner (1993) 177 CLR 378. In this case the High Court upheld the decision of the NSW Court of Appeal that disciplinary proceedings against several doctors should be permanently stayed because of long delays (ranging from 13 to 21 years) between the conduct complained of and complaints. The Court held that the delays were so unfairly and unjustly oppressive as to amount to abuse of process by the Medical Tribunal.*

which would increase if practitioners were exposed to liability unlimited as to time and required to insure accordingly.

4.8 Secondly, the time limit serves an evidentiary purpose, since investigating complaints about conduct alleged to have occurred a very long time earlier is hampered by difficulties in gathering evidence and assessing its reliability. Related to this is the practical need to limit the obligation on practitioners to preserve potential evidence.

4.9 Time limits also reflect the expectation that people will be reasonably diligent in making complaints and provide an incentive for this.[8] The Legal Aid Commission argued that the time limit should be retained because strict time limits currently apply to summary criminal matters which, arguably, attract more serious sanctions than complaints against practitioners heard by the Legal Services Division of the Administrative Decisions Tribunal (the "Tribunal").[9]

How long should the time limit be?

4.10 A longer limitation period (mostly of six years but ranging from five to seven years) was supported in a number of submissions.[10] It was submitted that in many instances, misconduct may not become apparent within three years. This could occur because of the nature of the legal service provided. For example, litigation often takes longer than three years to complete.[11] Other submissions pointed out that complainants from culturally and linguistically diverse backgrounds, people with disabilities and

8. *Report 70 at para 4.68-4.69; M(K) v M(H) (1992) DLR (4th) 289 at 301.*
9. *Legal Aid Commission, Submission at 3.*
10. *M Fullerton, Submission at 3; B Barac, Submission at 1-2; R S Cuddy, Submission at 4; N R Cowdery, Submission at 2; NSW Legal Reform Group, Submission at 5; Victorian Legal Ombudsman, Submission at 22; P Breen, Submission at 3. See also IP 18 at para 4.30.*
11. *Medical Consumers Association, Inc, Submission at 8; B Barac, Submission at 2; NSWLRC IP 18 at para 4.30.*

people who are unfamiliar with the options for complaining about lawyers may take longer than three years to respond to conduct that may give rise to a complaint.[12]

4.11 Two submissions argued that the time limit for making complaints should not be increased.[13] *It was submitted that increasing the time limit would compromise fair hearings, due to problems obtaining and assessing evidence. This is especially so as retainer agreements commonly authorise solicitors to dispose of files after seven years from giving instructions, or after completion of instructions and retirement of the file.*

4.12 The Commission's previous Report on the system for dealing with complaints against lawyers recommended that the time limit for complaints should be six years.[14] *The exposure draft version of the bill to introduce Part 10 into the LPA included a six year time limit.*[15] *It is not clear why the time limit was subsequently altered.*

4.13 Part 6 of the LPA deals with solicitors' obligations in relation to money received on behalf of clients (trust accounting). The Law Society is empowered to appoint an inspector or investigator to conduct an inspection or investigation of a solicitor's trust accounts.[16] *Solicitors are required to maintain trust accounting records for six years.*[17] *This means that the time limit for trust account inspections and investigations is effectively six years.*

When should time start to run?

4.14 The time limit for making complaints starts on the date when the conduct is alleged to have occurred.[18] *An alternative, which was supported in a number of submissions, would be for time to run*

12. *B Barac, Submission at 2; Medical Consumers Association, Inc, Submission at 8; NSWLRC IP 18 at para 4.30.*
13. *Legal Aid Commission, Submission at 3; R S Cuddy, Submission at 4.*
14. *NSWLRC Report 70 Recommendation 12.*
15. *Legal Profession Reform Bill 1993 (NSW) cl 139(1).*
16. *Legal Profession Act 1987 (NSW) s 55.*
17. *Legal Profession Regulation 1994 (NSW) cl 28(4).*
18. *Legal Profession Act 1987 (NSW) s 137(1).*

from the time that the complainant became aware of the alleged misconduct.[19] *There is of course an analogous debate at common law.*[20]

4.15 Where the existence of a cause of action based on fraud (or the identity of a person against whom a cause of action for fraud is available) is fraudulently concealed, time starts to run from the date on which the fraud was discovered, or could, with reasonable diligence, have been discovered.[21] *It was argued that a complaint against a practitioner is analogous to a cause of action for fraud.*[22] *The Commission does not accept that the analogy between complaints against lawyers and civil actions for fraud is appropriate.*[23]

4.16 It was also argued that a time limit which ran from the time that the complainant became aware of the alleged misconduct would be fairer to consumers of legal services and would reflect the fact that consumers often need time to understand that misconduct has occurred and seek appropriate guidance as to the options for making a complaint and obtaining redress.[24]

4.17 Other submissions argued that the date on which time starts to run should not be changed.[25] *It was argued that the current*

19. *Legal Aid Commission, Submission at 3; M Fullerton, Submission at 3; B Barac, Submission at 2; C Wall, Submission at 6; Medical Consumers Association Inc, Submission at 8; NSW Legal Reform Group, Submission at 5; For Legally Abused Citizens Inc, Submission 2 at 5. See NSWLRC Report 70 at para 4.67; NSWLRC IP 18 at para 4.32.*
20. *See M(K) v M(H) (1992) DLR (4th) 289 at 301.*
21. *Limitation Act 1969 (NSW) s 55.*
22. *For Legally Abused Citizens Inc, Submission 2 at 5.*
23. *The types of complaints dealt with under Part 10 are described at para 2.18-2.19.*
24. *NSW Legal Reform Group, Submission at 5.*
25. *Law Society of NSW, Submission at 9; NSW Bar Association, Submission at 28; Victorian Legal Ombudsman, Submission at 24; R S Cuddy, Submission at 4.*

discretion to waive the time limit adequately covers any unfairness in its application.[26]

Complaints made by the LSC and the Councils

4.18 In Barwick v Law Society of New South Wales the High Court considered the status of a complaint initiated by the Law Society Council about conduct which occurred outside the time limit.[27] *The Law Society Council had not obtained a determination from the LSC waiving the time limit (as was then required by Part 10).*[28] *The Council argued that the time limit should not apply to complaints initiated by the LSC or a Council because the very fact that the complaint was initiated by the LSC or Council was sufficient to ensure that it was properly brought.*[29] *The Court rejected this argument, holding that complaints initiated by the Law Society Council were also subject to the time limit.*[30]

4.19 Part 10 was amended in response to this decision to provide that where a Council makes a complaint which is out of time, the Council must decide whether to waive the time limit. Similarly, where the LSC makes an out of time complaint, the LSC must make the relevant determination.[31]

4.20 Consistently with its argument in Barwick, which was rejected by the High Court, the Law Society submitted that there should be no time limit on complaints made by the Councils or the LSC.[32] *The Bar Association also argued that complaints by the LSC*

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26. See para 4.2-4.3.
27. Barwick v Law Society of New South Wales (2000) 74 ALJR 419.
28. See Legal Profession Act 1987 (NSW) s 138 (subsequently amended: see para 4.19).
29. Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 88 per Kirby J.
30. Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 72 per Gleeson CJ, Gaudron and McHugh JJ; at para 97 per Kirby J; at para 143, 171 per Callinan J.
31. Legal Profession Act 1987 (NSW) s 137(3).
32. Law Society of NSW, Submission at 9.

and the Councils should not be subject to any time limit.[33] *Other submissions argued that the time limit should apply to all complainants, including those made by the LSC and the Councils.*[34]

Other jurisdictions

4.21 There is no statutory time limit on complaints in the Australian Capital Territory, the Northern Territory, South Australia, Tasmania or Western Australia. In Queensland, complaints must be made within 3 years of the conduct complained of.[35] *In Victoria, the time limit is 6 years from the date that the conduct allegedly occurred, except in relation to costs disputes, where the time limit is 6 months.*[36]

Recommendations

4.22 The Commission's view is that there should be a time limit on making complaints. A time limit protects practitioners against the oppression and injustice of delayed complaints. It also protects consumers from the increased cost of services that would be associated with requiring practitioners to insure for an indeterminate period. A time limit also reflects the evidentiary difficulties associated with dealing with very old complaints and creates an incentive to consumers to make timely complaints.

4.23 The Commission recommends that the time limit for complaints should be increased from three years to six years. Increasing the time limit to six years would better reflect the time needed by many complainants to identify misconduct and obtain information about their options for redress. This applies particularly (though not exclusively) to complainants engaged in litigation, people from culturally and linguistically diverse backgrounds and people with disabilities.

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33. NSW Bar Association, Submission at 28.
34. NSW Legal Reform Group, Submission at 4. See also M Fullerton, Submission at 3.
35. Queensland Law Society Act 1952 (Qld) s 5E(5).
36. Legal Practice Act 1996 (Vic) s 123 and s 139.

4.24 The Commission does not accept that time should run from the date on which the complainant first becomes aware of the alleged misconduct. The Commission is satisfied that the discretion to waive the time limit for making complaints provides adequate protection against unfairness in situations where a complainant needs longer than six years to identify the alleged misconduct and obtain information about the process for making a complaint.

4.25 Nor does the Commission accept that the time limit should be removed in its application to complaints made by the Councils and the LSC. The Commission's view is that the purposes of a time limit discussed in paragraphs 4.7-4.9 above apply in relation to all complaints, including complaints made by the Councils and the LSC.

Recommendation 4

The time limit for making complaints against practitioners in s 137 of the *Legal Profession Act 1987* (NSW) should be increased to six years from the time the conduct is alleged to have occurred.

4.26 The Commission recommends that the Tribunal should have power to extend the time limit for complaints under Part 10. The Commission's view is that a fairly conducted Tribunal hearing on the question of extending the time limit would be more appropriate than leaving the question to the LSC and the Councils. This would ensure consistency with the extensive body of common law on the circumstances in which a discretion to extend a time limit should be exercised.[37] It should be noted that in Chapter 6, the Commission recommends that the Government should consider

37. See Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344. One of the paramount considerations is whether the applicant can demonstrate an exceptional explanation for the delay and show that an extension is fair and equitable in the circumstances because the delay was not reprehensible or oppressive. The longer the delay, the higher the expectation of an explanation.

altering the composition of the Tribunal.[38]

4.27 The LSC and the Councils should be permitted to apply to the Tribunal for an order that the time limit be extended in relation to a particular complaint for a specific period. The Tribunal should also have the power to permit the LSC or relevant Council to conduct a preliminary investigation to establish whether or not there is any substance to a complaint. Failure to co-operate with a preliminary investigation of this nature should constitute professional misconduct in the same way as provided for in the investigation of timely complaints. The practitioner should also be permitted to be a party to an application for an extension of time.

4.28 Where a complaint is made following a conviction for a criminal offence involving behaviour capable of constituting professional misconduct, or in respect of which a custodial sentence is imposed, the reasons for imposing a time limit are less convincing. Stringent rules ensure the fairness of criminal trials and the standard of proof, of course, is beyond reasonable doubt. Necessarily, there will have been a substantial and independent investigation preceding the trial. A complaint that follows a conviction does not depend on the motives or idiosyncrasies of a complainant. However, the Commission considers that the Tribunal's power to extend time in appropriate cases makes it unnecessary to provide for an exception in these circumstances.[39]

Recommendation 5

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to give the Tribunal the power to extend the time limit in relation to a particular complaint on the application of the LSC, the Law Society or the Bar Association. The practitioner should also be permitted to be a party to an application for an extension of time.

38. *See para 6.4-6.7 and Recommendation 28.*
39. *See also para 4.45-4.47.*

Recommendation 6

The Tribunal should also have the power to permit the LSC, the Law Society or the Bar Association to conduct a preliminary investigation to establish whether or not there is any substance to a complaint. Failure to co-operate with a preliminary investigation of this nature should constitute professional misconduct.

COMPLAINTS AGAINST LAW FIRMS

4.29 Complaints under Part 10 must relate to the conduct of an individual practitioner. It is not currently possible to make a complaint against a firm of lawyers.[40]

4.30 Legislation enacted late in 2000 provides for the incorporation of legal practices in New South Wales.[41] *This legislation is expected to commence operation in mid 2001 following the drafting of regulations, which is currently under way.*[42]

4.31 The legislation provides that an incorporated legal practice (ILP) must have at least one solicitor director who is responsible for the management of legal services provided by the ILP in New South Wales.[43] *A solicitor director must ensure that appropriate management systems are implemented and maintained to ensure that the ILP complies with the professional obligations of solicitors, ensure that the conduct of other directors and employed solicitors that contravenes or is likely to contravene professional obligations is promptly reported to the Law Society Council, and take all*

40. *Legal Profession Act 1987 (NSW) s 3 and s 134(1).*
41. *Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW).*
42. *See Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) s 3 and Sch 1, inserting s 47T into the Legal Profession Act 1987 (NSW).*
43. *Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) s 3 and Sch 1, inserting s 47E(1) and (2) into the Legal Profession Act 1987 (NSW).*

reasonable action to deal with misconduct by employed solicitors.[44] *A solicitor director must not remain as a director of an ILP if it becomes apparent that the provision of legal services by the ILP will result in breaches of the professional obligations of solicitors.*[45] *Non-compliance with these obligations constitutes professional misconduct.*

4.32 In IP 18 the Commission asked how complaints against firms and ILPs should be dealt with (Issue 9).

4.33 Several submissions argued that Part 10 should cover complaints against law firms as well as individuals.[46] *The Office of the LSC (the "OLSC") submitted that where legal work is performed by several practitioners in a firm over a period of time, it can be difficult to establish misconduct by an individual practitioner. It was also argued that Part 10 should cover complaints against firms in order to address misconduct which is not attributable to an individual practitioner, but rather indicates systemic improper practice. These submissions emphasised the consumer redress aspect of the complaints system.*

4.34 Other submissions argued that personal culpability is an essential element of misconduct.[47] *These submissions focused on the disciplinary function of the complaints system.*

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44. Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) s 3 and Sch 1, inserting s 47E(3) into the Legal Profession Act 1987 (NSW).

45. Legal Profession Amendment (Incorporated Legal Practices) Act 2000 (NSW) s 3 and Sch 1, inserting s 47E(4) into the Legal Profession Act 1987 (NSW).

46. OLSC, Submission at 29; NSW Legal Reform Group, Submission at 5; Victorian Legal Ombudsman, Submission at 25; P Breen, Submission at 4.

47. NSW Bar Association, Submission at 30; R S Cuddy, Submission at 1; Law Society of NSW, Submission at 9. See also Re Chakeras (Victoria, Legal Profession Tribunal, No T0037/2000, 14 April 2000, unreported).

Other jurisdictions

4.35 In the Australian Capital Territory, the Northern Territory, Queensland and Western Australia, complaints must be made against individual lawyers.[48] In Victoria complaints may be made about individual lawyers, law firms which are partnerships, and incorporated firms.[49] In South Australia and Tasmania complaints may be made against individual lawyers and companies.[50]

The Commission's view

4.36 It is well established at common law that supervisory failure by a practitioner may constitute misconduct. For example, a partner's failing to supervise the financial controls in a partnership, to ensure that proper financial systems were in place, and leaving financial management to another partner in circumstances giving rise to apprehension about the partner's misuse of a joint trust account, has been held to amount to misconduct.[51] Failing to supervise the activities of an unqualified clerk has also been held to amount to misconduct.[52] Finally, failing to exercise a reasonable standard of supervision and attention to the affairs of the firm as a whole has also been held to amount to misconduct.[53]

4.37 The Commission's view is that Part 10 should focus on the conduct of individual practitioners. This is consistent with the approach taken in relation to ILPs, which focuses on management and supervision by a solicitor director.

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48. *Legal Practitioners Act 1970 (ACT) s 3 and s 50; Queensland Law Society Act 1952 (Qld) s 3 and s 5E; Legal Practitioners Act 1893 (WA) s 3 and s 25.*
49. *Legal Practice Act 1996 (Vic) s 3 and s 137. See Re Chakeras (Victoria, Legal Profession Tribunal, No T0037/2000, 14 April 2000, unreported).*
50. *Legal Practitioners Act 1981 (SA) s 5 and s 76; Legal Profession Act 1993 (Tas) s 3, s 56 and s 57.*
51. *Re Mayes [1974] 1 NSWLR 19; Re a Solicitor [1960] VR 617.*
52. *Law Society of New South Wales v Foreman (1991) 24 NSWLR 490.*
53. *Re Johnston (1979) 32 ACTR 37 sub nom Re a Barrister and Solicitor (1979) 40 FLR 26.*

INVESTIGATIONS

Independent investigations

4.38 While complaints are generally investigated by the Councils, or, in some cases, by the LSC, Part 10 also provides that a Council may request the LSC appoint an independent investigator. The independent investigator must report to the Council. The Council is then required to make a decision on the complaint.[54] *In a preliminary submission, the Bar Association pointed out that Councils have no input into the investigation and no monitoring role once an independent investigator has been appointed.*[55]

4.39 In IP 18 the Commission asked whether independent investigators should be required to report to the LSC, and whether the LSC should be required to decide how to deal with complaints investigated by independent investigators (Issue 12). Submissions received in response to IP 18 generally supported this.[56] *The Commission recommends that independent investigators should be required to report to the LSC, rather than the Council. The LSC, rather than the Council, should be required to make a decision on a complaint which has been investigated by an independent investigator. This process would increase the level of independence in relation to these complaints.*

Recommendation 7

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to provide that, where a complaint is investigated by an independent investigator under s 151, the independent investigator must report to the LSC, and that the LSC must make a decision under s 155 on the complaint.

54. *Legal Profession Act 1987 (NSW) s 151.*
55. *NSW Bar Association, Preliminary Submission 2 at 2.*
56. *F Combe, Submission at 6; B Barac, Submission at 2; Law Society of NSW, Submission at 10; NSW Bar Association, Submission at 33; Victorian Legal Ombudsman, Submission at 28.*

Additional complaints

Current procedure

4.40 Informations laid in the Tribunal must contain allegations specifically nominated in a complaint and investigated in accordance with Division 5 of Part 10.[57] *Therefore, whenever an additional complaint arises during the course of an investigation, the LSC or relevant Council is required to make an additional complaint and conduct a further investigation. An additional complaint may relate to alleged conduct which occurred more than three years earlier. In this situation, for the additional complaint to proceed, the LSC or Council must also make a determination to waive what is currently the 3 year time limit.*[58]

4.41 The Tribunal can vary an information to include additional allegations.[59] *Variation is not precluded because the alleged conduct which is sought to be added occurred more than three years earlier.*[60]

Problems with the procedure

4.42 The High Court has criticised the procedural requirements for dealing with additional complaints.[61] *A number of preliminary submissions also argued that the requirements are highly technical and artificial, create procedural difficulties in the administration of Part 10, waste resources and cause unnecessary delays.*[62] *In IP 18 the Commission asked whether the requirements should be modified (Issue 13).*

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57. *Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 60-64 per Gleeson CJ, Gaudron, McHugh JJ; at para 115 per Kirby J; at para 156 per Callinan J.*
58. *This Report recommends that the time limit should be amended: see Recommendations 4-6 and para 4.2-4.28.*
59. *Legal Profession Act 1987 (NSW) s 167A.*
60. *Legal Profession Act 1987 (NSW) s 167A(3).*
61. *Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 80, 113, 115 per Kirby J.*
62. *OLSC, Preliminary Submission at 3-4; Law Society of NSW, Preliminary Submission Issue 3; NSW Bar Association, Preliminary Submission 1 at para 4 and 18-28.*

4.43 Submissions generally supported the amendment of Part 10 to effect a clear division between making complaints, investigations and the jurisdiction of the Tribunal, so that investigations were not confined to matters raised in the original complaint.[63]

Recommendation

4.44 The Commission views the current requirements in relation to additional complaints as excessively technical and artificial. The Commission recommends that Part 10 should be amended to effect a clear division between complaints and investigations. The LSC and the Councils should be empowered to investigate, and make determinations about, additional complaints that arise in the course of an investigation without the need to initiate a separate complaint and conduct a separate investigation. However, the Commission emphasises that the LSC and Councils must ensure that the rules of procedural fairness are applied to all complaints, including additional complaints.

Recommendation 8

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to enable the LSC, the Law Society and the Bar Association to investigate, and make determinations about, additional complaints that arise in the course of an investigation into a complaint, without the need to initiate a separate complaint and conduct a separate investigation.

The requirement for a formal investigation

4.45 A formal investigation must always be undertaken before the LSC or a Council can refer a matter to the Tribunal.[64] *In a preliminary submission, the OLSC suggested that situations arise*

63. *N R Cowdery, Submission at 2; Law Society of NSW, Submission at 10; OLSC, Submission at 23. See also NSWLRC IP18 at para 4.42-4.45.*
64. *Legal Profession Act 1987 (NSW) Pt 10 Div 5.*

where the LSC or relevant Council can be satisfied that there is sufficient evidence to institute Tribunal proceedings against a practitioner without having to undertake a formal investigation into a complaint.[65] In IP 18 the Commission asked whether the LSC and the Councils should be able to institute Tribunal proceedings other than by conducting an investigation into a complaint (Issue 14).

4.46 Submissions generally supported streamlining the investigative process in certain circumstances, on the basis of expedience.[66] It was submitted that the requirement for an investigation should be dispensed with where a practitioner has been convicted of a criminal offence.[67] Submissions also argued that the need for a Part 10 investigation should be dispensed with in relation to complaints arising from an audit of a solicitor's records by a trust account inspector.[68]

4.47 The Commission's view is that where a practitioner has been convicted of a criminal offence, or a trust account inspector's report identifies misconduct, the requirement that the LSC or Council conduct an investigation can often be satisfied by evaluating the judgment of the court or the inspector's report, providing the practitioner with a copy of the complaint and giving the practitioner an opportunity to respond to it. However, the investigative stage cannot be completely eliminated without compromising the requirements of procedural fairness.

Client legal privilege

4.48 Confidential communications between a practitioner and client are not admissible as evidence in court. This is known as

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65. OLSC, Preliminary Submission, Appendix at 8.
66. F Combe, Submission at 7; For Legally Abused Citizens Inc, Submission 1 at 3 and Submission 2 at 8; OLSC, Submission at 24; Law Society of NSW, Submission at 11; NSW Legal Reform Group, Submission at 6.
67. OLSC, Submission at 24; Law Society of NSW, Submission at 11.
68. OLSC, Submission at 24; Law Society of NSW, Submission at 11.

client legal privilege.[69] The purpose of the privilege is to preserve the confidentiality of communications between practitioner and client and thereby encourage clients to make full and frank disclosure to their lawyers of the circumstances that are relevant to their case.[70] This privilege belongs to the client and accordingly it may only be waived by the client, not by the practitioner, except on instructions.[71]

Exceptions to client legal privilege

4.49 There are two limited exceptions to client legal privilege under Part 10. First, practitioners must comply with a requirement to answer questions or produce information or documents if the client is the complainant or the client consents to the disclosure.[72] Secondly, practitioners may disclose information to the LSC, a Council or the Tribunal in breach of client legal privilege if it is necessary to rebut an allegation in a complaint.[73]

4.50 In IP 18 the Commission asked for submissions on the exceptions to client legal privilege in Part 10 (Issue 15).

Submissions

4.51 Submissions generally favoured extending the existing exceptions to client legal privilege, arguing that this would improve the ability of the Councils and the LSC to investigate complaints and obtain evidence against practitioners who have committed misconduct.[74] For example, it was submitted that under the current

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69. Evidence Act 1995 (NSW) s 117-126.

70. Grant v Downs (1976) 135 CLR 674 at 685.

71. Baker v Campbell (1983) 153 CLR 52 at 85.

72. Legal Profession Act 1987 (NSW) s 171S(1).

73. Legal Profession Act 1987 (NSW) s 171S(2).

74. N R Cowdery, Submission at 2; For Legally Abused Citizens Inc, Submission 2 at 5; Law Society of NSW, Submission at 11; NSW Bar Association, Submission at 34; OLSC, Submission at 26; NSW Legal Reform Group, Submission at 6; Victorian Legal Ombudsman, Submission at 31; but see R S Cuddy, Submission at 5 and P Breen, Submission at 4. See also NSWLRC IP 18 at para 4.49-4.51. The Bar Association's support for extending the exception to client legal privilege was conditional: the Bar argued that privileged information should not be available in relation to consumer disputes.

exception the Councils and the LSC are not able to investigate complaints where it is alleged that a lawyer and a client have been jointly involved in misconduct. In this situation, the client can obstruct an investigation by refusing to waive client legal privilege.[75]

4.52 One submission argued that the exceptions to client legal privilege should not be expanded.[76] *This submission relied on the undoubted law that evidence of communications made or documents prepared by a lawyer and client in furtherance of a fraud, offence or act which gives rise to a civil penalty is not protected by client legal privilege.*[77] *It was also argued that the powers of trust account inspectors are adequate to enable the Law Society to conduct investigations.*[78] *This submission argued that the privilege is an important right which should be preserved.*

Other jurisdictions

4.53 Regulators in all Australian jurisdictions can require a lawyer who is the subject of a complaint to co-operate with an investigation.[79] *In Tasmania, a lawyer cannot rely on legal professional privilege as a reason for failure to co-operate with an investigation into their conduct unless the written consent of the client is provided.*[80] *Victorian lawyers cannot rely on legal professional privilege as a reason for failure to co-operate with an investigation.*[81]

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75. *OLSC, Submission at 26.*
76. *R S Cuddy, Submission at 5.*
77. *Evidence Act 1995 (NSW) s 125.*
78. *This Reports recommends that the investigative powers of the LSC, the Law Society and the Bar Association should be strengthened: see Recommendations 11-13 and para 4.62-4.76.*
79. *Legal Practitioners Act (NT) s 47; Legal Practitioners Act 1970 (ACT) s 54; Queensland Law Society Act 1952 (Qld) s 5G; Legal Practitioners Act 1981 (SA) s 76; Legal Profession Act 1993 (Tas) s 58; Legal Practice Act 1996 (Vic) s 149; Legal Practitioners Act 1893 (WA) s 31D. See also para 4.68.*
80. *Legal Profession Act 1993 (Tas) s 58.*
81. *Legal Practice Act 1996 (Vic) s 149.*

Recommendation

4.54 The Commission considers that the public interest served by client legal privilege as explained by the majority of the High Court in Baker v Campbell[82] and Carter v Northmore[83] is of fundamental importance in the administration of justice and does not accept that the exceptions to the privilege in Part 10 should be extended. If the privilege (rightly) will not be qualified even to prosecute for serious criminal offences, it is difficult to see how it is appropriate to remove it in disciplinary proceedings.

4.55 A number of practical problems, moreover, would arise if disclosure were permitted. It would be virtually impossible in any case for a lawyer to assure the client of confidentiality, since there would always be a risk that a complaint made by another person could require exposure of otherwise privileged communications. It is worth noting that in some areas of emotionally charged litigation, such as family law disputes, allegations of misconduct are often made by one party against the lawyers retained by the other party. It would be completely inappropriate to enable this device to be used to obtain exposure of that party's privileged communications.

4.56 A more appropriate way of addressing this issue would be to encourage waiver of client legal privilege by providing for restrictions on the use of information that is subject to client legal privilege and is disclosed in the course of an investigation under Part 10. This could be done by amending Part 10 to provide that the LSC and Councils can give undertakings to maintain the confidentiality of information subject to client legal privilege. Such information would be disclosed to investigators and the Tribunal, but not to the complainant. The Tribunal could also be empowered to make confidentiality orders in relation to information that is subject to client legal privilege. The powers of the Tribunal are discussed in Chapter 6, which includes a recommendation that the Tribunal should not be bound by the rules of evidence.[84]

4.57 Section 171P of the LPA deals with the improper disclosure of

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82. (1983) 153 CLR 52.
83. (1995) 183 CLR 121.
84. See para 6.36-6.50 and Recommendation 31.

information obtained in the administration of Part 10. Improper disclosure is an offence punishable by a fine of $1,100 or up to six months' imprisonment. Disclosure of information subject to client legal privilege in contravention of an undertaking or Tribunal order would constitute improper disclosure.

Recommendation 9

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to permit the Legal Services Commissioner, the Law Society and the Bar Association to give undertakings to maintain the confidentiality of information subject to client legal privilege which has been waived and disclosed during the course of an investigation.

Recommendation 10

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to permit the Tribunal to make confidentiality orders in relation to information subject to client legal privilege where the privilege has been waived.

4.58 The Commission is unaware of any case in which a practitioner has sought to use s 171S(2) of the LPA to disclose confidential communications of clients other than the complainant. In its earlier Report, the Commission recommended that a practitioner who must disclose a communication otherwise subject to client legal privilege in his or her defence should be permitted to do so. It is clear from the discussion that the only confidential communications covered by this recommendation concerned those confidential to the complainant. The provision, however, on one reading, appears to remove the privilege of clients other than those making the complaint and, possibly, of practitioners other than the one under investigation where he or she needs to do so to rebut an allegation in the complaint. Such a destruction of client legal

privilege is a fundamental change to the common law as clearly and authoritatively declared in the High Court. It is most unlikely that it was intended by the drafter to have this effect. Certainly, this is not what the Commission recommended. In Baker v Campbell,[85] Chief Justice Gibbs (in a dissenting judgment) cited with apparent approval English authority for the proposition, which was acknowledged as novel, that legal professional privilege would give way to establish a defence in a criminal trial.[86] This view was decisively rejected by the High Court in Carter v Northmore[87] where it was held (by majority) that a person who has possession of documents subject to client legal privilege which is not waived cannot be compelled to produce them on subpoena issued on behalf of an accused person in criminal proceedings even though it may establish the innocence of the accused or materially assist the defence. In that case, Justice Brennan concluded that:

> *(as) the purpose of the privilege is to facilitate the application of the rule of law in the public interest, it is not possible to allow the interest of an individual accused to destroy the privilege which is conferred to advance that public interest.[88]*

4.59 It would be inappropriately anomalous if a person charged with a serious (or, indeed, any) criminal offence could not require a disclosure in breach of client legal privilege to defend the charge but a practitioner defending disciplinary proceedings could do so. Of course, the privilege of the complainant is in a completely different category. It is almost certainly waived under the common law, at all events, by making a complaint which cannot be fairly evaluated without disclosure of the privileged communication.[89] Section 171S(2) should be amended to make it clear that the only matter which may be disclosed despite the client legal privilege is matter otherwise subject to the privilege of the complainant.

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85. (1983) 153 CLR 52.
86. (1983) 153 CLR 52 at 68.
87. Carter v Northmore (1995) 183 CLR 121.
88. Carter v Northmore (1995) 183 CLR 121 at 130.
89. Attorney General (NT) v Maurice (1986) 161 CLR 475.

PROCEDURAL FAIRNESS

4.60 One of the express objects of Part 10 is to ensure that the rules of procedural fairness are applied to all disciplinary proceedings against practitioners.[90] It is uncontentious that practitioners should be afforded procedural fairness throughout the complaints process – the common law would require this even if the LPA was silent. The threshold question is what aspects of procedural fairness should be specified in Part 10 for the purpose of clarity.[91]

4.61 In IP 18 the Commission asked what should be required by Part 10 in order to clarify the requirement of procedural fairness to the practitioner and the complainant when the LSC or a Council decides how to deal with a complaint (Issue 16).[92]

Providing the practitioner with a copy of the complaint

4.62 In Murray v Legal Services Commissioner,[93] the New South Wales Court of Appeal held that procedural fairness requires that before a decision is made under s 155 of the LPA, the practitioner who is the subject of the complaint must be given a copy of the complaint and an opportunity to respond to it. Failure to do so vitiates the institution of Tribunal proceedings.

4.63 Several submissions criticised this requirement.[94] Most complaints made to the LSC are by lay persons. It was submitted that complaints may include unnecessary or irrelevant material or personal and offensive comments which make it difficult for practitioners to respond appropriately and inhibit further investigation and dispute resolution. Some complaints contain allegations that may be summarily dismissed and require no

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90. Legal Profession Act 1987 (NSW) s 125(a).
91. Kioa v West (1985) 159 CLR 550.
92. See also para 5.2-5.62 for other outcomes of investigations.
93. Murray v Legal Services Commissioner (1999) 46 NSWLR 224.
94. N R Cowdery, Submission at 2; OLSC, Submission at 21; NSW Legal Reform Group, Submission at 6; Law Society of NSW, Submission at 11. See also NSWLRC IP 18 at para 4.54-4.56.

response from the practitioner.

4.64 It was also submitted that some legal consumers do not have the skills or resources to formulate their complaints well and their submissions to the complaints handling authority should, therefore, remain confidential.[95]

4.65 According to these submissions, procedural fairness should be satisfied by providing the practitioner with a document setting out the substance of the complaint.

4.66 Others argued that practitioners should receive a full copy of the original complaint in all cases.[96] *It was submitted that fairness requires that the practitioner should receive a full copy of the original complaint, and that summarising a complaint may change or misrepresent a complainant's grounds for concern and lead to the dismissal of the complaint on grounds other than those intended in the original complaint. At all events, it would be virtually impossible to prevent the subpoena of and access to the complaint by a practitioner in any ensuing Tribunal proceedings.*

The Commission's view

4.67 The Commission considers that practitioners should be given a full copy of the original complaint in order to satisfy the requirement of procedural fairness. Practitioners should also be given a summary document clarifying the aspects of the complaint that will be investigated so that they can respond appropriately.

Notifying the parties of the decision

4.68 The LSC or Council must keep a record of its decision about every complaint and notify the complainant and the practitioner of its decision in writing, with reasons. This includes decisions to refer a complaint to the Tribunal.[97] *In IP 18 the Commission asked*

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95. NSW Legal Reform Group, Submission at 6.

96. For Legally Abused Citizens Inc, Submission 1 at 3; R S Cuddy, Submission at 5; Legal Aid Commission, Submission at 3; Victorian Legal Ombudsman, Submission at 32; F Combe, Submission at 7.

97. Legal Profession Act 1987 (NSW) s 171J; Murray v Legal Services

whether this requirement should be modified (Issue 17).

4.69 When a complaint is referred to the Tribunal, the practitioner must also be served with copies of the information and affidavits.[98] Several submissions argued that this is sufficient notice to practitioners and that the additional notice requirement under Part 10 creates unnecessary duplication.[99]

4.70 Another submission criticised the current form of written notification to complainants, arguing that the legal language and citations used are difficult for complainants to understand.[100]

The Commission's view

4.71 The Commission's view is that the current notice requirement should be retained. The requirement gives practitioners about whom a complaint is referred to the Tribunal time to prepare for the upcoming hearing. Complainants are also entitled to be informed about the outcome of their complaint, in language that is clear and easy to understand.

INVESTIGATIVE POWERS

Compelling practitioners to co-operate

Under Part 10

4.72 The LSC and Councils have the power to issue notices compelling any practitioner to co-operate with an investigation.[101] Non-compliance with a notice requiring co-operation with an investigation, without a reasonable excuse, constitutes professional

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Commissioner (1999) 46 NSWLR 224; Law Society of New South Wales v M [2000] NSWADT 137.

98. *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998 (NSW) Chapter 3 Part 3 Div 2.*
99. *OLSC, Submission at 22; N R Cowdery, Submission at 2; Law Society of NSW, Submission at 12; Law Society of NSW, Submission at 12; NSW Bar Association, Submission at 35-36. See also J A Loveday, Submission at 2. Compare Victorian Legal Ombudsman, Submission at 33-34.*
100. *NSW Legal Reform Group, Submission at 6.*
101. *Legal Profession Act 1987 (NSW) s 152(1), (1A) and (3).*

misconduct.[102] *Misleading or obstructing an investigation is capable of amounting to professional misconduct.*[103] *The LSC has the same investigative powers when reviewing Council decisions.*[104]

4.73 In IP 18 the Commission asked whether this power and the sanctions for non-compliance with it are adequate (Issues 18 and 19).

Submissions

4.74 Numerous submissions submitted that this power should be strengthened.[105] *A number of submissions expressed concern that the current investigative powers do not protect investigations against the risk of unscrupulous practitioners interfering with evidence, either by producing false records or destroying real ones. These submissions argued that the LSC and Councils should be empowered to attend the office of a practitioner under investigation and inspect documents without notice.*[106]

4.75 It was also submitted that the procedure is ineffective in making practitioners co-operate with investigations.[107] *The OLSC estimates that it may take a year or more before the LSC is able to obtain sufficient information from a practitioner using the notification procedure. This causes complainants and OLSC staff significant dissatisfaction.*[108]

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102. Legal Profession Act 1987 (NSW) s 152(4).
103. Legal Profession Act 1987 (NSW) s 152(5).
104. Legal Profession Act 1987 (NSW) s 159(4). See also para 5.75-5.86 on the question of the LSC reviewing decisions of the Councils.
105. F Combe, Submission at 8; N R Cowdery, Submission at 3; C Wall, Submission at 4 and 7; OLSC, Submission at 25-27; Victorian Legal Ombudsman, Submission at 35; For Legally Abused Citizens Inc, Submission 2 at 5-6; P Breen, Submission at 5; NSW Legal Reform Group, Submission at 6; NSW Bar Association, Submission at 36-38; R S Cuddy, Submission at 6; Law Society of NSW, Submission at 12.
106. C Wall, Submission at 4; Victorian Legal Ombudsman, Submission at 35; NSW Bar Association, Submission at 36; OLSC, Submission at 26.
107. Law Society of NSW, Preliminary Submission Issue 10.
108. OLSC, Submission at 25-27.

4.76 These submissions favoured strengthening the sanctions for practitioners who do not comply with a notice requiring co-operation. It was submitted that the practising certificate of a practitioner who fails to comply with a notice should be cancelled[109] or suspended until the lawyer co-operates with the investigation.[110] Another submission argued that the Tribunal should be permitted to draw adverse inferences against a practitioner who failed to co-operate with a notice.[111]

4.77 The Victorian Legal Ombudsman also emphasised the importance of vigilance in enforcing the sanctions for non-compliance with an investigation, arguing that as a result of strict enforcement of the disciplinary sanctions in Victoria, she has experienced few problems in securing co-operation with investigations.[112]

Other jurisdictions

4.78 Regulators in all Australian jurisdictions can require a lawyer who is the subject of a complaint to co-operate with an investigation.[113] In the Northern Territory, the Australian Capital Territory and South Australia it is an offence to wilfully delay or obstruct an investigation into a complaint.[114] It is also an offence in the Australian Capital Territory, the Northern Territory and South Australia for a lawyer to refuse to co-operate with an investigation, without a reasonable excuse.[115] In the Northern Territory,

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109. NSW Bar Association, Submission at 36-38.

110. C Wall, Submission at 7; Law Society of NSW, Submission at 12; NSW Bar Association, Submission at 36-38; NSW Legal Reform Group, Submission at 6.

111. C Wall, Submission at 7.

112. Victorian Legal Ombudsman, Submission at 35.

113. Legal Practitioners Act 1970 (ACT) s 54; Legal Practitioners Act (NT) s 47; Queensland Law Society Act 1952 (Qld) s 5G; Legal Practitioners Act 1981 (SA) s 76; Legal Profession Act 1993 (Tas) s 58; Legal Practice Act 1996 (Vic) s 149; Legal Practitioners Act 1893 (WA) s 31D.

114. Legal Practitioners Act (NT) s 47B; Legal Practitioners Act 1970 (ACT) s 117; Legal Practitioners Act 1981 (SA) s 76.

115. Legal Practitioners Act 1970 (ACT) s 54 and s 57; Legal Practitioners Act (NT) s 47B; Legal Practitioners Act 1981 (SA) s 76.

Queensland, Tasmania, Victoria and Western Australia failure to co-operate with an investigation is dealt with as misconduct.[116] *In Western Australia it can also amount to contempt of court.*[117]

Recommendation

4.79 Except as mentioned below, the Commission has concluded that the powers of the LSC and the Councils in respect of investigations are adequate and that the asserted shortcomings could be dealt with by a more rigorous application of the present regime. The Commission recommends that the LSC should have powers of entry, search and seizure without notice when investigating complaints. The requirement that a search warrant must be obtained would provide a check to ensure that the power of search is used appropriately. The Health Care Complaints Commission has similar powers for the purpose of investigating complaints about the professional conduct of health practitioners.[118]

4.80 Where a complaint is being investigated by a Council and it appears that a search of premises is appropriate, it should refer the matter to the LSC to obtain a warrant and conduct the search and seizure if appropriate. It is inappropriate, in the Commission's view, to give powers of search to private institutions or persons.

4.81 Where there is no complaint, but the LSC or a Council has a reasonable suspicion that professional misconduct has been committed and it is reasonably necessary to conduct a search for the purpose of considering whether a complaint should be instituted, it should also be possible, in an appropriate case, for a search warrant to be obtained.

4.82 The Commission's preferred view is that applications for search warrants should be heard by the Tribunal. This would require the development of administrative structures and procedures to deal with search warrant applications. Alternatively,

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116. Legal Practitioners Act (NT) s 45; Queensland Law Society Act 1952 (Qld) s 5H; Legal Profession Act 1993 (Tas) s 56 and s 58; Legal Practice Act 1996 (Vic) s 137; Legal Practitioners Act 1893 (WA) s 31D.

117. Legal Practitioners Act 1893 (WA) s 31D.

118. Health Care Complaints Act 1993 (NSW) s 32-38.

the Supreme Court has existing administrative structures and procedures to deal with the issue of warrants.

Recommendation 11

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to give the LSC powers of entry, search and seizure without notice when considering complaints. The LSC should be required to obtain a search warrant before exercising these powers.

Waiving the solicitor client lien

Solicitor client lien

4.83 Solicitors are permitted to withhold all files, documents and personal property of a client until the client pays their costs in full, unless the Supreme Court orders the solicitor to give up the documents.[119]

Solicitor client lien and Part 10

4.84 Sometimes a solicitor will claim solicitor client lien over the file of a client who has made a complaint. This prevents the client from gaining access to the file. The Councils and the LSC can compel a solicitor to waive the lien if satisfied that it is "necessary for the orderly transaction of the client's business".[120]

Submissions

4.85 The OLSC submitted that the power to compel a solicitor to waive the lien if satisfied that it is "necessary for the orderly transaction of the client's business" may not cover the situation where a complainant requires the file in order to determine whether to take any action against a lawyer, including whether to make a

119. See NSWLRC Report 70 at para 5.69; Legal Profession Act 1987 (NSW) s 209C. For a discussion of the scope of the lien, see Halsbury's Laws of Australia (Butterworths, 1997) Volume 16 at [250-1030]-[250-1065].

120. Legal Profession Act 1987 (NSW) s 152(2) and (3).

complaint under Part 10.[121] *Other submissions argued that the solicitor's lien should be suspended during an investigation,*[122] *or abolished.*[123]

Recommendation

4.86 The Commission recommends that the Councils and the LSC should be given the power to require a solicitor to hand over files which are subject to solicitor client lien to the Council or LSC. The client should then be able to inspect the files at the offices of the Council or LSC in order to decide whether to make a complaint against the solicitor. Where files are held by a solicitor in regional or rural New South Wales, they could be handed over to another local solicitor acting as the agent of the Council or LSC. This would make it easier for the client to inspect the file without having to travel to Sydney. Part 10 should expressly state that the exercise of this power does not waive the solicitor client lien.

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121. OLSC, Preliminary Submission at 6-7.

122. NSW Legal Reform Group, Submission at 6. See Legal Practitioners Act 1893 (WA) s 31(4).

123. OLSC, Submission at 27; P Breen, Submission at 5. The Commission has previously recommended that the solicitor client lien should be abolished. See NSWLRC Report 70 Recommendation 71 and para 5.69-5.78.

Recommendation 12

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to give the LSC, the Law Society and the Bar Association the power to require a solicitor to hand over files which are subject to solicitor client lien. The client should then be able to inspect the files at the offices of LSC, the Law Society or the Bar Association in order to decide whether to make a complaint against the solicitor. Where files are held by a solicitor in regional or rural New South Wales, they could be handed over to another local solicitor acting as the agent of the Council or LSC. This would make it easier for the client to inspect the file without having to travel to Sydney. Part 10 should expressly state that the exercise of this power does not waive the solicitor client lien.

Service of notice requiring co-operation

4.87 A notice requiring a practitioner to co-operate with an investigation must be served personally on the practitioner.[124] *In IP 18 the Commission asked whether the service requirement should be modified (Issue 20).*

4.88 Many submissions supported relaxing the service requirement. It was submitted that it should be adequate to serve notice personally, or by ordinary post, at the practitioner's last place of business or residence as recorded with the Law Society or Bar Association;[125] *or in a manner reasonably calculated to bring the notice to the attention of the practitioner and approved by the Tribunal.*[126] *This would address the problem of the inability of the*

124. *Legal Profession Act 1987 (NSW) s 152(1) and (3).*
125. *C Wall, Submission at 7; Law Society of NSW, Submission at 12-13; NSW Bar Association, Submission at 38; Victorian Legal Ombudsman, Submission at 37.*
126. *N R Cowdery, Submission at 3; Law Society of NSW, Submission at 13; NSW Bar Association, Submission at 38; NSW Legal Reform Group, Submission at 7.*

LSC or Councils to serve notice personally on practitioners whose whereabouts is unknown. The Commission recommends that the service requirement should be relaxed.

Recommendation 13

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to provide that a notice requiring co-operation by a practitioner with an investigation can be served either personally, at the practitioner's last place of business or residence as recorded with the Law Society or Bar Association or in a manner that is reasonably calculated to bring the notice to the attention of the practitioner and that is approved by the Tribunal.

TRANSFER OF COMPLAINTS

Review of transfers

4.89 The LSC may take over the investigation of a complaint from a Council if he considers it appropriate to do so,[127] and may refer a complaint to a Council after commencing an investigation.[128] The LSC may also, with the consent of a Council, refer a complaint to the Council after completing an investigation into the complaint (including after the institution of Tribunal proceedings).[129]

4.90 In IP 18 the Commission asked whether complainants should be entitled to a review of a decision to transfer a complaint (Issue 21). The Commission observed that this would increase the time taken to complete the complaints handling process.[130]

127. Legal Profession Act 1987 (NSW) s 147A(1).
128. Legal Profession Act 1987 (NSW) s 141(4).
129. Legal Profession Act 1987 (NSW) s 147A(1A). Section 167B provides for the substitution of informants.
130. NSWLRC IP 18 at para 4.70.

4.91 Most submissions did not support the availability of a review in such circumstances, arguing that the transfer mechanisms merely facilitate the division of labour and a right to review would increase delays.[131] *The Commission agrees with these submissions and accordingly, does not make a recommendation for the introduction of a review of decisions to transfer a complaint.*

Transfer outside the time limit

4.92 There is no provision in Part 10 for the referral of a complaint by the LSC to a Council outside the time limit. At present, the LSC and Councils have an informal arrangement for the transfer of a complaint to a Council at any time with the consent of the Council. In IP 18 the Commission asked whether this informal arrangement should be given a statutory basis in Part 10 (Issue 11).

4.93 Submissions agreed that the informal arrangement should be given a statutory basis, arguing that Part 10 should facilitate the resolution of complaints wherever possible.[132] *The Commission agrees with these submissions and recommends that the informal arrangement which exists for the transfer of a complaint to a Council at any time by consent should be afforded statutory recognition.*

Recommendation 14

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to permit the transfer of a complaint by the LSC to the Law Society or the Bar Association at any time by consent of the Law Society or the Bar Association.

131. *N R Cowdery, Submission at 3; Law Society of NSW, Submission at 13; NSW Bar Association, Submission at 39; P Breen, Submission at 5-6; C Wall, Submission at 7. But see C Berkemeier, Submission at 3; NSWLRC IP 18 at para 4.70.*
132. *N R Cowdery, Submission at 2; Law Society of NSW, Submission at 10; NSW Bar Association, Submission at 32. See also OLSC, Preliminary Submission, Appendix at 3.*

NON-COMPLIANCE WITH PART 10

4.94 Non-compliance with the procedures for the investigation of complaints under Part 10 may deprive the Tribunal of jurisdiction over a complaint. The recent cases of Carson v Legal Services Commissioner,[133] Law Society of New South Wales v M,[134] Barwick v Law Society of New South Wales[135] and Murray v Legal Services Commissioner[136] illustrate this.

4.95 In Carson v Legal Services Commissioner, the New South Wales Court of Appeal ordered that disciplinary proceedings against a solicitor be permanently stayed as a result of an abuse of process by the LSC that consisted of the commencement of disciplinary proceedings which were so clearly untenable that they were "foredoomed to fail",[137] inexcusable delay in conducting an investigation[138] and failure to satisfy the requirements of procedural fairness.[139]

4.96 In Law Society of New South Wales v M, the Tribunal held that it had no jurisdiction to hear disciplinary proceedings against a solicitor as a result of the LSC's failure to give the solicitor reasons for deciding to refer a complaint against him to the Tribunal.[140]

4.97 In Barwick v Law Society of New South Wales the High Court held that the Tribunal did not have jurisdiction to hear disciplinary proceedings against a solicitor as a result of failure by the Law

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133. Carson v Legal Services Commissioner [2000] NSWCA 308 (3 November 2000).
134. Law Society of New South Wales v M [2000] NSWADT 137.
135. Barwick v Law Society of New South Wales (2000) 74 ALJR 419.
136. Murray v Legal Services Commissioner (1999) 46 NSWLR 224.
137. Carson v Legal Services Commissioner [2000] NSWCA 308 (3 November 2000) per Sheller JA at para 258.
138. Carson v Legal Services Commissioner [2000] NSWCA 308 (3 November 2000) per Sheller JA at para 265.
139. Carson v Legal Services Commissioner [2000] NSWCA 308 (3 November 2000) per Sheller JA at para 46.
140. The LSC is required to give reasons under s 171J of the Legal Profession Act 1987 (NSW). See para 4.58-4.61.

Society to investigate complaints, non-compliance by the Law Society with the time limit for complaints and misuse by the Tribunal of its power to amend informations.

4.98 Finally, in Murray v Legal Services Commissioner the Court of Appeal held that the LSC's decision to institute Tribunal proceedings against a solicitor were void because the LSC denied the solicitor procedural fairness during his investigation into a complaint about the solicitor.

4.99 In IP 18 the Commission asked whether the consequences of non-compliance with the procedural requirements of Part 10 should be changed (Issue 22-24).

4.100 Submissions supported amending Part 10 to allow practitioners to waive the procedural requirements, and to provide for deemed waiver in certain circumstances.[141]

4.101 In Barwick v Law Society of New South Wales Justice Kirby commented that:[142]

> *Jurisdiction over the professional conduct and competence of legal practitioners exists for the fundamental purpose of protecting the public. In such circumstances the serious delays in disposing of the allegations against Mr Barwick (and the other legal practitioner involved) must occasion grave concern. The interests of the public, of complainants and of the legal practitioners themselves require that such matters be dealt with lawfully and fairly but also with more efficiency and expedition than has been the case here. ... Unhappily, the recent experience of this Court suggests that such delays may represent the norm, not an exception.*

4.102 The Commission considers that a practitioner should not be able to rely on non-compliance by the LSC, the Law Society or the Bar Association with the procedural requirements of Part 10 to invalidate Tribunal proceedings unless the procedural irregularity

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141. Law Society of NSW, Submission at 13; NSW Bar Association, Submission at 40; Victorian Legal Ombudsman, Submission at 40.

142. Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 80 per Kirby J.

has caused the practitioner substantial injustice. To permit procedural defects to invalidate Tribunal proceedings when no substantial injustice has resulted creates unnecessary complexity and inefficiency in the administration of Part 10 and contributes to the serious delays referred to by Justice Kirby.

4.103 Accordingly the Commission recommends that Part 10 should be amended to provide that disciplinary proceedings against practitioners are not invalidated by non-compliance by the LSC, the Law Society or the Bar Association with the procedural requirements for investigating and referring complaints to the Tribunal, unless this has resulted in substantial injustice. The Commission's recommendation is adapted from the Bankruptcy Act 1966 (Cth) s 306(1).

4.104 The Commission has also considered whether this recommended provision should extend to procedural irregularities occurring in the Tribunal itself. The Commission has concluded that this would create an undesirable inconsistency between the basis for appeal or judicial review of decisions of the Tribunal in the Legal Services Division and the basis for appeal or review applying in other Divisions, where no such limitation applies.

Recommendation 15

Part 10 of the *Legal Profession Act 1987* (NSW) should be amended to provide that proceedings under Part 10 are not invalidated by a formal defect or an irregularity in the making or referral of the complaint to the Tribunal or the decision-making of the Commissioner, the Law Society or the Bar Association unless the court or Tribunal before which the objection on that ground is made is of the opinion that substantial injustice has been caused by the defect or irregularity and that injustice cannot be remedied by an order of the court or Tribunal.

5. Powers of the LSC and Councils after an investigation

- General issues
- Dealing with conduct aspects of a complaint
- Dealing with consumer aspects of a complaint
- Referral to other authorities
- Referral to costs assessment
- Review by the LSC of Council decisions

5.1 This Chapter deals with the options available once an investigation into a complaint has been carried out by the LSC or the Councils.[1]

GENERAL ISSUES

Outcomes of investigations

5.2 One of the general issues raised in this chapter is whether the LSC or relevant Council should be able to make enforceable orders at the end of the investigative stage. Powers currently available to the LSC or Councils at this stage include:

- *allowing the complaint to be mediated if the parties agree;*
- *reprimanding the practitioner with respect to unsatisfactory professional conduct (such a reprimand may only be made with the consent of the practitioner);*
- *dismissing the complaint, which has no adverse effect on the practitioner and therefore does not require enforcement.*

5.3 The LSC and Councils are responsible for receiving, investigating and prosecuting complaints about conduct while the Tribunal is responsible for determining complaints and imposing disciplinary sanctions (which are capable of enforcement). The fact that many of the remedies available to the LSC and Council require some form of consent on the part of the practitioner highlights the limited role of those bodies and emphasises the separation of roles between them and the Tribunal. It is presumed that if a practitioner does not consent to an outcome in relation to a conduct matter, the matter will then be referred to the Tribunal. Similar distinctions operate in other Australian schemes, for example, those in Western Australia and South Australia.

1. *Except for the decision to refer a complaint to the Tribunal, which is dealt with in Chapter 3.*

The Western Australian system

5.4 The Western Australian provisions[2] relating to the conduct of practitioners were enacted following a 1983 report which recommended that there be a body to investigate complaints and a tribunal to discipline practitioners in relation to matters arising from such investigations.[3] However, the inquiry also recommended that there be a limited jurisdiction, where appropriate, for the complaints handling body to deal with "minor disciplinary matters" and that these powers only be exercised with the practitioner's consent.[4] The powers that may be exercised with the practitioner's consent (and notwithstanding that no finding has been made against the practitioner) include:[5]

- *imposing a fine of not more than $500;*
- *issuing a reprimand;*
- *ordering that the practitioner seek and implement advice relating to the management and conduct of the practitioner's practice;*
- *ordering that the practitioner reduce or refund certain fees and charges; and*
- *ordering that the practitioner pay all or part of the costs incurred by the complainant or the investigating body in relation to the investigation.*

5.5 Even though no order can be made without the consent of the practitioner, an appeal lies to the Supreme Court in relation to any such order.[6] Conciliation is also possible at the investigative stage,

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2. *Legal Practitioners Act 1893 (WA) Pt 4.*
3. *Western Australia, Inquiry into the Future Organisation of the Legal Profession in Australia (Report, 1983) at 63.*
4. *Western Australia, Inquiry into the Future Organisation of the Legal Profession in Australia (Report, 1983) at 83.*
5. *Legal Practitioners Act 1893 (WA) s 28A.*
6. *Legal Practitioners Act 1893 (WA) s 28A(5). Presumably the right could be exercised by a complainant or professional association, there being no apparent reason why the practitioner would want to.*

and effect may be given to negotiated settlements provided the parties agree.[7]

The South Australian system

5.6 In South Australia the Legal Practitioners Conduct Board investigates complaints (in relation to conduct issues only) and lays charges, while the Legal Practitioners Disciplinary Tribunal takes disciplinary action against practitioners found to have engaged in unsatisfactory or unprofessional conduct.[8] *This division of functions was made clearer by amendments introduced in 1998.*[9] *The 1998 amendments gave the Board a limited jurisdiction in relation to "relatively minor" matters. Like Western Australia, the Board's jurisdiction requires the consent of the practitioner, thereby emphasising the distinction between the roles of the two bodies.*[10] *The powers that may be exercised, with the practitioner's consent, include:*[11]

- *issuing a reprimand;*
- *making an order imposing conditions on the practitioner's practising certificate that relate to the practitioner's legal practice or require the practitioner to undertake further education, training or counselling;*
- *ordering payment to a specified person; and*
- *ordering that the practitioner "refrain from doing a specified act in connection with legal practice".*

5.7 The Board may also investigate allegations of overcharging and, as the result of an investigation, may recommend that a

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7. Legal Practitioners Act 1893 (WA) s 28B.

8. Legal Practitioners Act 1981 (SA) Pt 6. See also South Australia, Parliamentary Debates (Hansard) House of Assembly, 3 June 1998, the Hon M H Armitage, Minister for Government Enterprise, Second Reading Speech at 1069.

9. Legal Practitioners (Miscellaneous) Amendment Act 1998 (SA). See C Cocks, "Act Changes Lawyer Discipline" (1999) 21(9) Bulletin (The Law Society of South Australia) 20.

10. Legal Practitioners Act 1981 (SA) s 77AB(1).

11. Legal Practitioners Act 1981 (SA) s 77AB(1)(c)-(e).

practitioner reduce charges or refund amounts to complainants.[12] *Conciliation is also possible at the investigation stage, and effect may be given to negotiated settlements provided the parties agree.*[13] *Failure to comply with the terms of such an agreement amounts to unprofessional conduct.*[14]

Proposals made in submissions

5.8 Some proposals discussed in this chapter would allow the LSC and Councils to make orders (without consent) that would be enforceable against practitioners who have been complained against. These include:

- *orders for compulsory mediation;*
- *reprimands without consent;*
- *orders for compensation; and*
- *enforceable undertakings.*

The Commission favours retaining a reasonably clear distinction between the roles of the investigative bodies (the LSC and the Councils) and the determinative body (the Tribunal). The introduction of any of the powers listed above may, to some extent, blur the distinct roles of the different bodies. However, there are practical problems associated with maintaining a complete separation of functions. For example, the Commission is concerned to ensure that the workload of the Tribunal is not substantially increased to the extent that it would hamper the expeditious treatment of serious conduct matters. In such circumstances it may be that certain minor conduct matters can be more appropriately dealt with by giving the investigative bodies power to deal with the matters without referring them to the Tribunal.

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12. Legal Practitioners Act 1981 (SA) s 77A(5)(b).
13. Legal Practitioners Act 1981 (SA) s 77B.
14. Legal Practitioners Act 1981 (SA) s 77B(6).

DEALING WITH CONDUCT ASPECTS OF A COMPLAINT

5.9 The following powers are available to the LSC and Councils for dealing with the less serious conduct aspects of a complaint:

- *dismissal on the grounds of previous good record; and*
- *imposition of a reprimand.*

Dismissal on the grounds of previous good record

5.10 The LSC or Councils may dismiss a complaint because of a practitioner's previous good record even though they are satisfied that there is a reasonable likelihood that the Tribunal will find that a practitioner has engaged in unsatisfactory professional conduct (but not professional misconduct). There must also have been no other material complaints against the practitioner if the complaint is to be dismissed for this reason.[15]

5.11 This provision, however, is inadequate in two ways. First, it does not expressly require that consideration be given to the seriousness or otherwise of the alleged unsatisfactory professional conduct. The dismissal of a complaint on the grounds of a practitioner's previous good record might be inappropriate where the circumstances of the alleged unsatisfactory professional conduct are very serious. Dismissals in inappropriate cases could be seen as being too lenient on practitioners.[16] *Secondly, the provision does not expressly require that any record be kept of such dismissals. This means that the Councils and LSC may not have reliable records to assist in determining whether a practitioner has a good record or not.*

5.12 The only other jurisdiction in Australia with a comparable provision is the Northern Territory. The Law Society of the Northern Territory may:

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15. Legal Profession Act 1987 (NSW) s 155(3)(b).
16. See B Barac, Submission at 1.

> *Where it finds a complaint proved, but is of the opinion that it is justified in doing so having regard to the circumstances of the case and the record of the legal practitioner against whom the complaint was made, record the finding but take no further action in the matter.*[17]

The Northern Territory requirements of a consideration of the circumstances of the case (and, therefore, the seriousness of the conduct) and that the "finding" of the Society in relation to the conduct of the practitioner be recorded (allowing some record to be available should the question of a practitioner's previous good record come up again) seem to be useful provisions.

5.13 The Commission believes that it is appropriate that the Councils and LSC retain the power to dismiss a complaint involving possible unsatisfactory professional conduct without referring it to the Tribunal so long as it is a minor matter. This is desirable for the sake of the efficiency of the system. Only 24 matters were referred to the Tribunal in 1999/2000. If matters currently dismissed by the LSC and Councils on the grounds of previous good record were also required to be determined by the Tribunal, this would lead to an effective doubling of matters that the Tribunal would have to deal with in any given year.[18]

5.14 When the LSC or Councils find that there is a reasonable likelihood that a practitioner has engaged in unsatisfactory professional conduct (but not professional misconduct), the LSC and Councils should continue to be able to dismiss the complaint on the grounds of the practitioner's previous good record (provided there have been no other material complaints against the practitioner). However, in doing so, the LSC and Councils must have regard to the circumstances of the case (which will include a consideration of the seriousness of the conduct) and keep a record of any such finding so that assessments of a practitioner's previous record can be made in future.

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17. Legal Practitioners Act (NT) s 47(1)(ba).

18. Twenty two such dismissals occurred in 1998/1999.

5.15 Reviews of a decision to dismiss a complaint on the grounds of the previous good record of a practitioner are dealt with later in this chapter.[19]

Recommendation 16

In deciding to dismiss a complaint under s 155(3)(b) of the *Legal Profession Act 1987* (NSW) on the grounds of a practitioner's previous good record, the Legal Services Commissioner or relevant Council should also, in making their decision, have regard to all the circumstances of the case and be required to record their decision.

Reprimands

5.16 The LSC and Councils can reprimand practitioners in certain circumstances.[20] *Reprimands can only be issued where the LSC or relevant Council, after completing an investigation into a complaint, is satisfied that there is a reasonable likelihood that the practitioner will be found guilty of unsatisfactory professional conduct, but not professional misconduct. The practitioner must consent to the reprimand. While some complainants may generally be satisfied with the issue of a reprimand against a practitioner, the utility of reprimands lies in their ability to enforce standards of conduct that should be adhered to by practitioners.*

5.17 In Issues Paper 18 ("IP 18") the Commission asked whether, and in what circumstances, the LSC and Councils should be given the power to impose reprimands on practitioners without their consent (Issue 29). The Commission also asked whether the power could also apply to instances of professional misconduct of a "less substantial nature".

19. *Para 5.78-5.81.*
20. *Legal Profession Act 1987 (NSW) s 155(3)(a).*

5.18 Some submissions supported the power to reprimand a practitioner but argued against the requirement that the practitioner must consent.[21] *It was argued that the consent requirement defeated the purpose of a disciplinary system.*[22] *The Law Society supported the availability of the power of reprimand both with and without consent (with a right to have the decision reviewed by the Tribunal).*[23] *The Bar Association supported the availability of reprimands without consent provided they were restricted to the Councils and not exercised by the LSC (unless exercised as part of a review of an earlier Council decision) given that there are currently no provisions allowing for a review of decisions of the LSC.*[24]

5.19 One argument for retaining the consent requirement is to preserve some distinction between the roles of the Tribunal and the LSC and Councils. The Victorian Legal Ombudsman pointed out that the LSC would be exercising what amounted to judicial power in imposing reprimands unless the practitioner consented. The only appropriate course, once a finding of unsatisfactory professional conduct is found to be reasonably likely, would be to institute proceedings before the Tribunal.[25] *The Bar Association also proposed that if a practitioner does not consent to a reprimand the only course of action available should be to refer the matter to the Tribunal for determination.*[26]

5.20 It has already been noted that in 1999/2000 only 24 matters were referred to the Tribunal. If all matters currently subject to a reprimand (with the consent of the practitioner) were to be referred to the Tribunal, approximately 42 additional matters[27] *would be*

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21. C P Wall, Submission at 8; F Combe, Submission at 11.
22. B Barac, Submission at 2; NSW Legal Reform Group, Submission at 9.
23. Law Society of NSW, Submission at 14-16.
24. NSW Bar Association, Submission at 47.
25. Victorian Legal Ombudsman, Submission at 47.
26. NSW Bar Association, Submission at 43.
27. In 1998/1999 42 reprimands were issued: OLSC, Annual Report 1998/1999 at 11, 57, 58. No comparable figures have been issued by the OLSC for 1999/2000.

brought before the Tribunal each year, an increase of close to 200% of the Tribunal's current case load. This is a strong reason for maintaining the option of the investigative bodies' power to issue a reprimand with respect to unsatisfactory professional conduct.

5.21 However, the Commission considers that the current requirement that the practitioner consent before a reprimand can be issued should be dispensed with. Clearly a reprimand should be available in appropriate cases of unsatisfactory professional conduct whether the practitioner consents or not.

5.22 Reviews of decisions to impose a reprimand are discussed later in this Chapter.[28]

Recommendation 17

When the Legal Services Commission or relevant Council is satisfied that there is a reasonable likelihood that a practitioner will be found guilty of unsatisfactory professional conduct (but not professional misconduct) they should be able to impose a reprimand without the practitioner's consent.

DEALING WITH CONSUMER ASPECTS OF A COMPLAINT

5.23 The Commission considers that consumer aspects of a complaint should be dealt with by the LSC, while conduct issues should continue to be dealt with by either the LSC or the relevant Council. When investigating a complaint, the Councils should be able to refer consumer aspects of a complaint back to the LSC. Of course, the LSC's ability to deal with consumer issues effectively will depend in part on the availability of adequate resources.

5.24 The following sections deal with the powers that may be appropriate for the LSC to exercise in dealing with the consumer

28. See para 5.78-5.81.

aspects of a complaint:

- *referring a matter to mediation;*
- *requiring a practitioner to enter into an enforceable undertaking; and*
- *awarding compensation.*

Referral to mediation

5.25 The LSC currently has no power under Part 10 to require the parties to a complaint to attend mediation.[29] In IP 18 the Commission asked whether the LSC should be given a power to compel the parties to a complaint to attend a mediation session (Issue 32).

5.26 It is generally agreed that conciliation or mediation is not an appropriate way to resolve conduct issues. The Law Society does not support compulsory mediation in relation to matters that could be construed as conduct matters on the grounds that this is not the means by which the public could be protected or practitioners disciplined.[30] The Victorian Legal Ombudsman supports a power to compel parties to attend a compulsory mediation conference only in relation to consumer issues on the grounds that it would not be appropriate to mediate conduct matters.[31] A similar view has been reached in relation to the South Australian system:[32]

> *A "successful" conciliation only resolves the issues between the complainant and practitioner. It does not, and cannot, interfere with the function of the Committee to deal with the issue of unprofessional conduct according to the Act. Whether or not the parties reach an agreement, the Committee's investigation of any unprofessional conduct continues. Conciliation and investigation are not mutually exclusive.[33]*

5.27 This was also the view of the New South Wales Law Reform Commission in 1993 when the Commission recommended that

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29. OLSC, Preliminary Submission at 17-18.
30. Law Society of NSW, Submission at 17.
31. Victorian Legal Ombudsman, Submission at 50.
32. See Legal Practitioners Act 1981 (SA) s 77B.
33. I Nicholls, "Complaints: Are They Negotiable?" (1996) 18(4) Bulletin (The Law Society of South Australia) 25.

consumer disputes capable of consensual resolution be referred for mediation or conciliation. The Commission also recommended that it be possible to refer the consumer aspects of a complaint to mediation while the conduct aspects of the complaint continued to be dealt with through the formal disciplinary system.[34]

5.28 The Bar Association, while acknowledging the need to keep disciplinary considerations separate from those relating to the mediation of a consumer dispute,[35] *also supported the relevant Council having the power to order a confidential process of mediation to see if a speedy, informal and fair resolution of a complaint could be arrived at before making a decision to refer to the Tribunal. The Council could then, depending on the circumstances of the case, decide to dismiss the complaint on the grounds that either the differences between the complainant and the practitioner had been resolved or that the complainant had declined to take part in the mediation.*[36]

5.29 The Commission considers that mediation is not an appropriate way to resolve conduct issues, particularly given that the general purpose of the disciplinary system is the protection of the public.

Nature of "mediation" in the current system

5.30 Mediation of consumer disputes is currently dealt with under Division 4 of Part 10. However, the term "mediation" is very broadly defined for the purposes of Part 10 and encompasses aspects of dispute resolution that would not usually be considered as "mediation". The types of dispute resolution encompassed by the term "mediation" in Part 10 can be divided into two broad

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34. New South Wales Law Reform Commission, Scrutiny of the Legal Profession: Complaints Against Lawyers (Report 70, 1993) at para 4.107-4.111.

35. On the basis that the private interests involved in a conciliation may conflict with the public interest considerations that govern disciplinary proceedings: NSW Bar Association, Submission at 48.

36. NSW Bar Association, Submission at 48-49. See also the Tasmanian system which provides for compulsory conferences with some of the characteristics of the Bar Association's proposals: Legal Profession Act 1993 (Tas) s 59.

categories:

- *informal complaint resolution; and*
- *formal mediation.*

5.31 ***Informal complaint resolution.*** *This form of dispute resolution is provided for by s 145A of the Legal Profession Act 1987 (NSW) which states that "mediation" is not limited to formal mediation but:*

> *extends to encompass preliminary assistance in dispute resolution, such as the giving of informal advice designed to ensure that the parties are fully aware of their rights and obligations and that there is full and open communication between the parties concerning the dispute.*

It mostly involves dealing with consumer issues, often at the preliminary stage following receipt of a complaint. The OLSC's Annual Report states that in 1999/2000 1,235 complaints were resolved by the OLSC:

> *through conciliation and mediation, for example by brokering a satisfactory compromise between the complainant and the practitioner in a series of letters and/or phone calls.*[37]

Such activity is often useful in that it can, for example, resolve issues as the subject matter of a complaint is examined and refined by reference to both parties.

5.32 ***Formal mediation.*** *Formal mediation usually involves a face to face meeting of the parties to a dispute with a mediator. This is the form of mediation envisaged by several provisions in Part 10, for example, the requirement that the LSC is to maintain a list of mediators to deal with consumer disputes*[38] *and requirements as to the confidentiality of the mediation process.*[39] *In 1999/2000 only eight formal mediations were arranged by either*

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37. OLSC, Annual Report 1999/2000 at 8. A further 772 matters were resolved by the Councils through informal means: OLSC, Annual Report 1999/2000 at 29.

38. Legal Profession Act 1987 (NSW) s 146(1).

39. Legal Profession Act 1987 (NSW) s 147.

the LSC or the Councils.[40]

5.33 The recommendations in this part of the Report relate only to the future use of formal mediation.

Compulsory mediation

5.34 Some submissions generally supported the availability of a power to make parties to a consumer dispute attend mediation.[41] *For example, the OLSC argued that, if used in appropriate cases, mediation:*

- *may provide a tangible outcome for consumers whose complaints may not otherwise be adequately dealt with by the system;*
- *can be an educative tool in helping both practitioners and complainants to understand the others' positions; and*
- *may be an effective way of filtering issues that may disclose grounds for further disciplinary proceedings.*[42]

5.35 Another submission disagreed with the power to order compulsory attendance at conciliation conferences irrespective of the nature of the complaint, on the grounds that conciliation or mediation should not be forced on anyone in what may be an adversarial situation.[43]

5.36 The value of compulsory attendance at mediation has received some consideration by the courts in New South Wales. In 1992 Justice Giles considered the arguments for and against:

> *Conciliation or mediation is essentially consensual and the opponents of enforceability contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent can not be enforced; equally, they say that there can be no loss to the other party if*

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40. OLSC, Annual Report 1999/2000 at 29.

41. F Combe, Submission at 11; G Taylor, Submission at 6; C Berkemeier, Submission at 4; OLSC, Submission at 32; NSW Legal Reform Group, Submission at 9.

42. OLSC, Submission at 32. See OLSC, Annual Report 1999/2000 at 13.

43. C P Wall, Submission at 8.

> *for want of co-operation and consent the consensual process would have led to no result. The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to co-operation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, in particular where a skilled conciliator or mediator is interposed between the parties. What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come.*[44]

5.37 Of course, Justice Giles' discussion was in the context of litigation in the higher courts which will usually involve such things as formal mediation under rules and parties who are legally represented. The circumstances may be somewhat different in relation to a consumer dispute. Since similar outcomes of co-operation and consent may nevertheless arise in the consumer context, the Commission believes that the LSC needs to be able to order the parties to attend mediation in situations where the LSC considers it appropriate. The LSC will be able to form a view as to whether it is appropriate to order the parties to attend mediation based, amongst other things, on observations made during the complaint resolution stage following the initial receipt of a complaint.

5.38 There are clear advantages if the parties ordered to attend mediation are able to conclude the mediation successfully, especially since there may be greater costs to the legal system if more formal court or tribunal proceedings are pursued. However, there is also the question of whether there are adequate resources available to the OLSC to administer a system of mediation that is used more often than the current one because the parties can be ordered to attend. While the Commission can recommend what it sees as the most appropriate legal structure for dealing with consumer disputes with legal practitioners, ultimately it is a matter for government whether it chooses to make the resources available.

5.39 Section 92 of the Anti-Discrimination Act 1977 (NSW) has

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44. Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194 at 206.

been suggested as a model for a power that might be included in Part 10.[45] *The President of the Anti-Discrimination Board can require the parties to a complaint to attend a conciliation conference and failure to comply is an offence. Section 92 provides:*

> *(1) Where the President is of the opinion that a complaint … may be resolved by conciliation, the President shall endeavour to resolve the complaint by conciliation.*
>
> *(2) The President may, by notice in writing, require the complainant and the respondent, or either of them, to appear before the President, either separately or together, for the purpose of endeavouring to resolve the complaint by conciliation.*
>
> *(3) A person shall not fail to comply with the terms of a notice under subsection (2).*

5.40 However, if this model is followed it will need to be made clear that only the consumer aspects of a complaint can be resolved by mediation. Secondly, it may not be appropriate to make failure to comply with such an order an offence. A more appropriate provision would be to make failure, without reasonable excuse, to comply with an order of the LSC amount to professional misconduct on the part of a practitioner.

5.41 Who should conduct a compulsory mediation? One submission suggested that the conciliator in each case be a senior practitioner who is familiar with the type of practice conducted by the practitioner against whom the complaint has been made.[46] *However, some consumers may not be comfortable with a mediation conducted by members of the legal profession and may prefer a more neutral mediator. The Commission acknowledged this in Report 70.*[47] *The Commission also noted that in some cases, for example disputes about discourtesy or poor communication, a mediator with a legal background would not be necessary to the proceedings, whereas in others, an understanding of the operation*

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45. OLSC, Submission at 32.

46. A Fegent, Submission at 3.

47. New South Wales Law Reform Commission, Scrutiny of the Legal Profession: Complaints Against Lawyers (Report 70, 1993) at para 4.115.

of a legal practice might be highly desirable. In such circumstances the Commission suggested that perhaps an academic lawyer, retired judge, government lawyer, or some other lawyer who is not readily associated with the interests of the professional associations, could act as a mediator.[48] *However, no specific recommendation was made except that lists of mediators be maintained by the professional associations and that they could contain both lawyers and non-lawyers.*[49] *The Commission now also notes that the mediation could be conducted by a member of the staff of the OLSC.*

Recommendation 18

Formal mediation of consumer disputes should continue to be permitted and the Legal Services Commission should be able to order mediation in appropriate cases. The mediation should be conducted by such persons as the Legal Services Commission considers appropriate and failure to comply with an order for mediation, without reasonable excuse, should amount to professional misconduct on the part of a practitioner.

5.42 Another submission suggested that a consumer matter could be referred to an arbitrator upon the failure of a mediation conducted by the LSC.[50] *However, the Commission is not convinced, at least on the grounds of efficiency and the availability of resources, that an extra stage of enforceable arbitration is currently desirable following the failure of a mediation. There are other avenues that can be pursued if a mediation fails to resolve a consumer dispute.*

5.43 Consumer issues that are unsuccessfully mediated will most

48. New South Wales Law Reform Commission, Scrutiny of the Legal Profession: Complaints Against Lawyers (Report 70, 1993) at para 4.115.

49. New South Wales Law Reform Commission, Scrutiny of the Legal Profession: Complaints Against Lawyers (Report 70, 1993) at para 4.117.

50. NSW Bar Association, Submission at 47-48

likely be either:

- *issues relating to the payment or repayment of fees; or*
- *issues relating to the satisfactory completion of legal work.*

5.44 ***Fees.*** *Matters relating to the payment or repayment of fees (leaving aside questions of costs assessment) are better dealt with by the appropriate court or the Fair Trading Tribunal (Consumer Claims Division). In these cases the mediator of the unsuccessful mediation should issue a certificate that mediation has failed so that mediation need not be attempted again before the matter can be brought before another appropriate body.*

Recommendation 19

Upon failure of a mediation, the mediator should certify that mediation has failed. This certification may be used as evidence that mediation has been attempted should mediation be a required stage in the bringing of the matter before another appropriate body.

5.45 ***Satisfactory completion of legal work.*** *There are three circumstances to be considered when a dispute about the satisfactory completion of legal work is not successfully mediated. The first is where both consumer and conduct issues have been identified at the beginning of the process. Mediation of the consumer aspect, whether successful or not, can have no effect on the conduct aspect which must, in any case, continue to be investigated by the LSC or Councils.*[51]

5.46 The second circumstance is where conduct issues are identified in the course of a mediation. Whether the mediation is successful in relation to the consumer issue or not, the mediator may refer to the conduct issue to the appropriate Council and the LSC.[52]

5.47 Finally, the failure by a practitioner to remedy unsatisfactory

51. Legal Profession Act 1987 (NSW) s 144(2).
52. Legal Profession Act 1987 (NSW) s 147(2).

legal work following a mediation may amount to unsatisfactory professional conduct.

5.48 While the matters that arise in a mediation in the circumstances outlined above should remain confidential, there is nothing to prevent the LSC and Councils from fully investigating the conduct issues. The LSC and Councils will still have the material from the original complaint and the practitioner's responses on which to base any further investigation and possible reference to the Tribunal. No recommendation is required to give effect to these arrangements as the procedures are already in place in the current system.

Enforceable undertakings

5.49 The resolution of many consumer or conduct complaints by the Councils and the LSC may involve practitioners agreeing to take specific steps, such as transferring a file or lodging court documents.[53] In this context, the undertakings entered into are designed to resolve a particular consumer dispute and require the agreement of the practitioner in question. Such agreements usually result from some form of mediation (formal or informal) either between the practitioner and the LSC or Councils, or between the practitioner and the complainant. There is said to be, at present, no effective mechanism for the enforcement of such agreements.[54] In IP 18 the Commission asked whether the LSC and Councils should be given the power to enter enforceable undertakings with practitioners in relation to complaints (Issue 27).

5.50 An example of such a power can be found in s 87B of the Trade Practices Act 1974 (Cth) which provides that the Australian Competition and Consumer Commission (ACCC) may accept a written undertaking in connection with its functions. The undertaking

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53. OLSC, Preliminary Submission at 16-17.

54. OLSC, Preliminary Submission at 16-17. Although the Law Society does have some power to attach conditions, with consent, to a practising certificate (presumably with respect to conduct issues): Law Society of NSW, Submission at 15.

may only be varied or withdrawn with the consent of the ACCC. If the ACCC considers that the terms of an undertaking have been breached, it can apply for a court order requiring compliance or ordering compensation.

5.51 It is well established that legal practitioners who fail to carry out undertakings to other practitioners in the course of their legal work may be proceeded against in a number of ways:[55]

- *by disciplinary proceedings for professional misconduct;*
- *by use of the summary jurisdiction of the Supreme Court to compel practitioners to comply with undertakings; and*
- *by the jurisdiction of the courts to enforce legally binding obligations, for example, those arising under contract law or statute.*

5.52 There appears to be no reason why the obligations owed to other practitioners with respect to undertakings should not also be owed to the relevant Council or the LSC, at least so far as questions of professional conduct are concerned. The Commission accordingly recommends that what it considers to be implicit should be made explicit by providing that failure to carry out an undertaking to a Council or the LSC may amount to professional misconduct or unsatisfactory professional conduct. The availability of disciplinary proceedings for misconduct should prove sufficient to ensure the enforcement of undertakings given by practitioners and will render unnecessary the enactment of a power similar to that found in s 87B of the Trade Practices Act 1974 (Cth).

Recommendation 20

That express provision should be made that the failure to carry out an undertaking to a Council or the Legal Services Commissioner may amount to professional misconduct or unsatisfactory professional conduct.

55. *Wade v Licardy (1993) 33 NSWLR 1 at 6. See also Re a Solicitor (1992) 110 FLR 9 at 20 (failure to honour an undertaking to another practitioner may amount to professional misconduct).*

Compensation

5.53 The power to award compensation is a way of resolving individual consumer disputes where the consumer has suffered some monetary loss. While compensation orders may be made as part of the mediation of consumer disputes,[56] or by the Tribunal,[57] the LSC and Councils do not currently have any enforceable power to order practitioners to pay compensation to complainants.

5.54 Other options for a complainant seeking compensation are to bring civil proceedings against the practitioner, either in a court or in the Fair Trading Tribunal (Consumer Claims Division), or to apply to the Fidelity Fund.[58] These options, however, may not be favoured by many lay complainants given the cost and complexity involved.[59]

5.55 In IP 18 the Commission asked whether the LSC should be given power to order practitioners to pay compensation to complainants (Issue 28). The Commission also considered possible restrictions on the exercise of that power, for example, by setting a statutory maximum amount of compensation.

5.56 Some submissions supported giving the LSC the power to order compensation for reasons that included:

- *some complainants do not have the resources to pursue compensation through other channels;[60]*
- *complainants have sometimes already lost faith in the legal system and are therefore averse to the idea of having to hire another lawyer to take further legal action to recover*

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56. The mediation of consumer disputes is dealt with in the Legal Profession Act 1987 (NSW) Pt 10 Div 4.
57. Legal Profession Act 1987 (NSW) s 171D. On the adequacy of the Tribunal's compensation power, see IP 18 at para 6.22-6.27.
58. Established under Part 7 of the Legal Profession Act 1987 (NSW).
59. See Mr Gunay, Submission.
60. Mr Gunay, Submission; F Combe, Submission at 10; OLSC, Submission at 34.

damages;[61]

- *some complainants may seek a relatively small amount in compensation compared to the time and expense involved in pursuing it through traditional channels;*[62]

5.57 Other submissions did not support the LSC having the power to award compensation and raised a number of issues including:

- *employed solicitors may not personally be civilly liable and should therefore not be liable to pay compensation;*[63]
- *questions of compensation in individual cases should be kept separate from issues of conduct (which relate to the protection of the public and maintenance of professional standards);*[64]
- *there are opportunities for compensation in other forums;*[65] *and*
- *the power to order compensation is like the exercise of judicial power*[66] *and, therefore, is not appropriate for an investigatory body like the LSC.*

Some of these submissions, however, did not distinguish between compensation as a means of resolving a consumer dispute and compensation as a means of resolving a conduct issue.

61. OLSC, Submission at 34.
62. OLSC, Submission at 35.
63. Legal Aid Commission, Submission at 4.
64. Law Society of NSW, Submission at 15.
65. Law Society of NSW, Submission at 15.
66. Victorian Legal Ombudsman, Submission at 46.

5.58 The Law Society supported the LSC having power to order compensation but only in relation to matters that were purely consumer matters and then only once mediation had been completed. The Society also submitted that any agreement as to payment arising from a mediation could be registered under the Local Courts (Civil Claims) Act 1970 (NSW).[67]

5.59 The Bar Association proposed that compensation (up to a prescribed sum) should only be awarded in consumer disputes by an arbitrator appointed following the failure of a mediation conducted by the LSC. The arbitrator would, on their proposal, be appointed to determine all consumer issues in dispute between the parties[68] *in circumstances where mediation had not resolved a dispute.*[69]

5.60 On the other hand, the OLSC proposed that the LSC should have power to award compensation in consumer disputes.[70] *The OLSC also proposed that a limit should be imposed on the granting of compensation, namely $25,000, the current jurisdictional limit for the Consumer Claims Division of the Fair Trading Tribunal, that an order for compensation should be registered with a local court, and that the LSC's jurisdiction to award compensation be subject to an appeal to the Tribunal.*[71]

5.61 The Commission does not consider it desirable to impede or complicate the LSC or Council's investigative role by requiring them to consider compensation in individual cases.[72] *Under the current structure, compensation as a consumer issue is more appropriately dealt with in other ways. It may, for example, be agreed upon following either formal or informal mediation of a consumer*

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67. *Law Society of NSW, Submission at 8, 16. See Local Courts (Civil Claims) Act 1970 (NSW) s 21O concerning agreements arising from mediation; and s 71 concerning arbitration awards.*
68. *NSW Bar Association, Submission at 47.*
69. *The proposal for formal arbitration after a failed mediation is rejected at para 5.42.*
70. *If its proposals concerning negligence are not adopted: OLSC, Submission at 34.*
71. *OLSC, Submission at 35*
72. *The Commission reaches a similar conclusion with respect to the disciplinary role of the Tribunal at para 6.97.*

dispute or it may be taken up in an appropriate alternative forum – either the Fair Trading Tribunal (Consumer Claims Division) or one of the courts.

5.62 There may, however, be a bar to the consideration of some matters before the Fair Trading Tribunal. Section 7(5) of the Consumer Claims Act 1998 (NSW) provides that:

> *A matter arising in relation to the fairness or reasonableness of the costs charge by a barrister or solicitor for an item of business transacted by the barrister or solicitor is not within the jurisdiction of the Tribunal.*

This provision was originally introduced into the Consumer Claims Tribunals Act 1987 (NSW)[73] as part of the costs assessment regime introduced by the Legal Profession Reform Act 1993 (NSW).[74] On the assumption that matters requiring costs assessment will ultimately be dealt with under the costs assessment regime, there would seem to be nothing to prevent all other consumer aspects of complaints against lawyers being brought before the Fair Trading Tribunal where appropriate. However, the Commission considers that the position could usefully be clarified to make it clear that the exception in s 7(5) of the Consumer Claims Act 1998 (NSW) applies only to matters that can be referred to costs assessment under Part 11 of the Legal Profession Act 1987 (NSW).

Recommendation 21

That it be made clear in legislation that the exception in s 7(5) of the *Consumer Claims Act 1998* (NSW) applies only to matters that can be referred to costs assessment under Part 11 of the *Legal Profession Act 1987* (NSW).

73. *Consumer Claims Tribunals Act 1987 (NSW) s 10(5). The Consumer Claims Tribunals Act 1987 (NSW) was repealed by the Consumer Claims Act 1998 (NSW).*
74. *See Legal Profession Reform Act 1993 (NSW) Sch 6.*

REFERRAL TO OTHER AUTHORITIES

5.63 A number of submissions expressed concern that the investigative process might, in some cases, reveal conduct which constitutes an offence under the criminal law or other statutes and that this conduct was not being brought to the attention of the relevant authorities.[75]

5.64 In South Australia the Legal Practitioners Act 1981 (SA) provides that the Legal Practitioners Conduct Board must, in the course of, or at the conclusion of an investigation:

> *report any suspected unprofessional conduct that would constitute an offence to all relevant law enforcement and prosecution authorities.*[76]

This is in addition to reaching a conclusion as to the likelihood of a finding of unprofessional conduct.

5.65 The Commission considers that there is sufficient public concern about the accountability of legal practitioners to the general laws that govern society[77] *to justify the inclusion of an express provision along the lines of the South Australian provision. The Commission would prefer the New South Wales provision to refer to "any relevant law enforcement or prosecution authority" and considers that this would include authorities such as the Australian Securities and Investments Commission and the Australian Taxation Office. The investigation and referral to the Tribunal of matters relating to professional misconduct or unsatisfactory professional conduct could continue notwithstanding the referral of matters to other relevant authorities.*

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75. NSW Legal Reform Group, Submission at 2; For Legally Abused Citizens, Submission 2 at 7.

76. Legal Practitioners Act 1981 (SA) s 77(4).

77. See also, Sydney Morning Herald (26 February 2001) at 1 and 4; (27 February 2001) at 1 and 4; and (28 February 2001) at 12.

Recommendation 22

That the Legal Services Commissioner and Councils must, if during the course of an investigation they discover conduct of a legal practitioner that would constitute an offence, refer the conduct to any relevant law enforcement or prosecution authority. This referral to another authority would not prevent questions of professional misconduct or unsatisfactory professional conduct continuing to be dealt with under Part 10.

REFERRAL TO COSTS ASSESSMENT

5.66 This section relates to costs assessment issues where they arise within the context of Part 10. Under the costs assessment regime established by Part 11 of the Legal Profession Act 1987 (NSW), legal practitioners are required to disclose to clients an estimate of the likely costs of services provided, including revised disclosure of any significant increases in costs.[78] The Commission has received a number of other submissions in relation to legal costs.[79] Indeed, a substantial number of complaints received by the LSC relate to the failure of practitioners to advise their clients of significant increases in estimated costs.[80] However, since costs assessment is regulated by Part 11 any fundamental changes to the costs assessment regime cannot be considered within the Commission's current terms of reference.

Time limit for referral

5.67 The LSC and Councils can refer complaints for costs assessment.[81] Under Part 11, applications for costs assessment must

78. *Legal Profession Act 1987 (NSW) s 175 and s 177.*
79. *See V Morris, Submission; For Legally Abused Citizens Inc, Submission 2 at 4; OLSC, Submission at 39-40; and B Barac, Submission at 3.*
80. *OLSC, Preliminary Submission at 18.*
81. *Legal Profession Act 1987 (NSW) s 153.*

be made within 12 months after the bill was given to the complainant.[82] *In IP 18 the Commission asked whether the time limit for costs assessment should apply to matters referred to costs assessors by the LSC or Councils (Issue 30).*

5.68 Some submissions argued that the time limits for costs assessment should not apply to matters referred to costs assessors by the LSC or Councils.[83] *One submission supported the extension of the time limit for costs assessment to the completion of a complaint.*[84] *Others rejected any extension of the time limit in relation to costs matters referred by the LSC or Councils on the following grounds:*

- *the Act currently applies time limits in relation to bringing matters to a costs assessor and these should not be circumvented by making a complaint to the LSC;*[85]
- *intertwining disciplinary questions with disputes about assessments of costs would be detrimental to both procedures;*[86] *and*
- *twelve months is an adequate time for a client to seek to have a bill assessed.*[87]

5.69 However, it should be noted that an extension of time for costs assessment is not automatic on lodging a complaint with the LSC. Any extension granted is at the discretion of the LSC or relevant Council. It may prove useful to legal consumers to have the LSC or relevant Council assess whether, for example, a complainant was unaware of his or her rights to request a costs assessment in relation to a practitioner's bill. An appropriate limit on the ability of the LSC and Councils to refer a matter to costs assessment outside of the usual 12 month period would be to allow the referral

82. *Legal Profession Act 1987 (NSW) s 199(2) and Legal Profession Regulation 1994 (NSW) cl 25.*
83. *F Combe, Submission at 11. See also NSW Legal Reform Group, Submission at 9.*
84. *C P Wall, Submission at 8.*
85. *Law Society of NSW, Submission at 16.*
86. *NSW Bar Association, Submission at 47.*
87. *Victorian Legal Ombudsman, Submission at 48.*

to be made within six months of the complainant becoming aware of his or her rights to request a costs assessment, provided the complainant had not previously been aware of such a right.

5.70 The Commission also considers that practitioners should be required to inform clients of their general rights to seek review of a bill of costs. This should be done by practitioners including on the bill of costs a general statement about the avenues for review, contact details and time limits for review. Failure to comply with this requirement should be capable of amounting to unsatisfactory professional conduct.[88] However, as bills of costs are regulated by Part 11 of the Legal Profession Act 1987 (NSW) which is outside the scope of this reference, and as the Commission has not consulted on this question, the Commission recommends that further consideration be given to including this requirement in Part 11.

Recommendation 23

The Legal Services Commissioner and Councils should be able, in their discretion, to refer a matter to costs assessment outside of the usual 12 month period in circumstances where the complainant was not previously aware of a right to request a costs assessment. Such a reference to costs assessment must be made within six months of the complainant becoming aware of his or her right to request a costs assessment.

Recommendation 24

1. **Consideration should be given to requiring practitioners to include on the bill of costs a general statement about the avenues for review, contact details and time limits for review.**

88. See also Recommendations 2 and 3 and para 3.41-3.47.

2. Consideration should also be given to making failure to comply with this requirement capable of amounting to unsatisfactory professional conduct.

Referral during a review

5.71 There is no provision in Part 10 for the LSC to refer a complaint to a costs assessor when the LSC is reviewing the decision of a Council.[89] This means that in order to refer a complaint to a costs assessor in the course of a review, the LSC must first re-investigate the complaint. In IP 18 the Commission asked whether the power of the LSC to refer complaints to a costs assessor should also apply when the LSC is conducting a review of a complaint initially dealt with by a Council (Issue 31).

5.72 Some submissions generally supported giving the LSC the power to refer complaints to a costs assessor when conducting a review of a complaint initially dealt with by a Council.[90] Others did not think that a power to refer to costs assessment should be used as a means of circumventing time limits that are otherwise imposed on clients by the Act.[91]

5.73 The Bar Association suggested that if a person with expertise as a costs assessor were required to assist in investigating a complaint, that person could probably be retained for that purpose within the context of Part 10 without the need to invoke Part 11 procedures.[92]

5.74 Assuming that the time limit provisions[93] are adhered to, there seems to be no reason why the LSC should not, when

89. See Legal Profession Act 1987 (NSW) Pt 10 Div 6.
90. F Combe, Submission at 11; OLSC, Preliminary Submission Appendix at item 12.
91. Law Society of NSW, Submission at 16; Victorian Legal Ombudsman, Submission at 49.
92. NSW Bar Association, Submission at 47.
93. Legal Profession Act 1987 (NSW) s 199(2) and Legal Profession Regulation 1994 (NSW) cl 25. See also Recommendation 23.

reviewing a decision of one of the Councils, have the power to refer a matter to costs assessment.

Recommendation 25

The Legal Services Commissioner should, when reviewing a decision of one of the Councils, be able to refer a matter to costs assessment but only if the time limits otherwise prescribed in relation to costs assessment are adhered to.

REVIEW BY THE LSC OF COUNCIL DECISIONS

5.75 Complainants are entitled to have the LSC review decisions made by the Councils about conduct matters.[94] *This is currently the only review mechanism available to complainants that relates to investigations and is consistent with the LSC's role as supervisor of the complaints system. In 1999/2000 149 reviews were requested.*[95] *A substantial majority of reviews undertaken by the LSC confirmed the initial decision of the relevant Council.*[96]

5.76 In IP 18 the Commission asked whether this right to a review of Council decisions should be restricted in any way (Issue 25).

5.77 Not all decisions of the Councils following the investigative stage require review. For example, when a Council is satisfied that there is a reasonable likelihood that the Tribunal will find a practitioner has engaged in professional misconduct, the Council must refer the matter to the Tribunal for determination.[97] *No review of the Council's decision is necessary because the question of whether there has in fact been professional misconduct will be*

94. *Legal Profession Act 1987 (NSW) Pt 10 Div 6.*
95. *OLSC, Annual Report 1999/2000 at 31.*
96. *See OLSC, Annual Report 1999/2000 at 8 and 31; Law Society of NSW, Professional Standards Department, Annual Report 1999/2000 at 18; Law Society of NSW, Preliminary Submission Issue 6.*
97. *Legal Profession Act 1987 (NSW) s 155(2).*

fully tested by hearing in the Tribunal. The same applies in circumstances where a Council is satisfied that there is a reasonable likelihood of a finding of unsatisfactory professional conduct and decides to refer the matter to the Tribunal rather than making use of the other available options.[98] *If the Tribunal considers the referral (by the LSC or a Council) to have been inappropriate, the Tribunal can dismiss the complaint and in special circumstances order costs in favour of the practitioner.*[99]

Dismissing a complaint because of a practitioner's good record or issuing a reprimand

5.78 The first group of Council decisions that may warrant review are those where a Council is satisfied that there is a reasonable likelihood that the Tribunal will find a practitioner has engaged in unsatisfactory professional conduct and decides not to refer the matter to the Tribunal but rather to:

- *dismiss the complaint on the grounds of the previous good record of the practitioner;*[100] *or*
- *issue a reprimand.*[101]

5.79 The power to dismiss or reprimand at this stage is necessary for the efficient operation of the system, in particular to avoid a substantial increase in the business of the Tribunal.[102] *However, there is no reason for such decisions of a Council to be unreviewable.*

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98. See Legal Profession Act 1987 (NSW) s 155(3).

99. See para 6.78 and 6.86-6.90.

100. Currently covered by Legal Profession Act 1987 (NSW) s 155(3)(b). See para 5.10-5.15.

101. Currently covered by Legal Profession Act 1987 (NSW) s 155(3)(a). See para 5.16-5.22.

102. In 1998/1999 67 unsatisfactory professional conduct matters were dealt with by the Councils and LSC without referring them to the Tribunal. Only 24 matters relating to either professional misconduct or unsatisfactory professional conduct were brought before the Tribunal in 1999/2000. See also para 5.13 and 5.20.

5.80 The Commission believes that the appropriate way to review such a decision is for the LSC or the practitioner affected to be able to bring the matter before the Tribunal for a full hearing of the matter. In such cases the relevant Council has already been satisfied that there is a reasonable likelihood that the Tribunal will find the practitioner has engaged in unsatisfactory professional conduct. The practitioner would have an interest in pursuing this avenue where he or she was of the view either that there was in fact no relevant unsatisfactory professional conduct or that the imposition of a reprimand was too harsh; the LSC, as a representative of the complainant and the independent supervisor of the complaints system, would have an interest in pursuing this avenue where the LSC considered that the dismissal of the complaint or the imposition of the reprimand by the relevant Council was too lenient in the circumstances. As the independent supervisor, the LSC's ability to bring such matters to the Tribunal is an important check on the perceived power of the professional Councils.

Recommendation 26

The Legal Services Commissioner or affected practitioner should be able to request a review of the decision of a Council to dismiss a complaint on the grounds of the previous good record of the practitioner or to impose a reprimand. The review should be by way of a full hearing before the Tribunal.

Dismissing a complaint because it did not meet the threshold requirement

5.81 The second group of Council decisions that require review are those where a Council is satisfied that there is no reasonable likelihood that the Tribunal will find a practitioner has engaged in either professional misconduct or unsatisfactory professional misconduct. On reaching this conclusion a Council is bound to

dismiss the complaint.[103] Such a decision is different to those already described in that it raises the question of whether the threshold for reference of a matter to the Tribunal has been met. The appropriate body to conduct a review of the threshold question is the LSC as the independent supervisor of the complaints system. Such a review would be at the request of a complainant who believed that a Council should have been satisfied that the threshold had been met. It would not be appropriate for other bodies such as the Tribunal or a Court[104] to undertake a review of such threshold questions. In any case, providing such an avenue for review of Council decisions would have serious resource implications.

5.82 In 1999/2000 528 complaints were dismissed by the Councils on the grounds that they were not satisfied there was a reasonable likelihood of a finding of either unsatisfactory professional conduct or professional misconduct.[105] Even the 149 reviews that were actually requested in 1999/2000[106] would put significant strains on the functioning of the Tribunal or a court if they were to be given the power to review Council decisions. The LSC is already charged with making decisions as to the reasonable likelihood of findings of professional misconduct or unsatisfactory professional conduct and the review of such decisions is consistent with the LSC's role as the independent supervisor of the complaints system. There was no evidence available to the Commission that suggested this supervision was inadequate.

5.83 The Bar Association submitted that the review should involve a fresh consideration of the complaint against the practitioner, that is, it should not be reliant only on the material that was originally before the relevant Council.[107] The Bar Association also suggested that the LSC should not be obliged to conduct any particular form

103. Legal Profession Act 1987 (NSW) s 155(4).
104. One submission suggested the District Court could conduct such reviews: C Wall, Submission at 7.
105. OLSC, Annual Report 1999/2000 at 29.
106. OLSC, Annual Report 1999/2000 at 31.
107. NSW Bar Association, Submission at 42.

of hearing for the purpose of conducting the review.[108] *The Commission agrees that, as the independent reviewer of the conclusions of the Councils, the LSC should be able to conduct the review in such manner as it thinks fit.*

Recommendation 27

Complainants should have the right to seek a review when a Council is satisfied that there is no reasonable likelihood that the Legal Services Division of the Administrative Decisions Tribunal will make a finding of professional misconduct or unsatisfactory professional conduct. Such a review should be conducted by the Legal Services Commissioner and in such manner as the Legal Services Commissioner considers appropriate.

Limiting the right to seek review

5.84 Should any limits be placed on the right to review these Council decisions? Some submissions supported restricting the right to seek a review by the LSC of a Council decision by various means including:

- *requiring the payment of a small fee for the conduct of the review;*[109]
- *requiring that the complainant provide a reason for seeking the review;*[110]
- *allowing the LSC to dismiss summarily an application for review that does not disclose a ground for reconsideration;*[111]

108. NSW Bar Association, Submission at 42.

109. N R Cowdery, Submission at 3; NSW Bar Association, Submission at 42.

110. N R Cowdery, Submission at 3; NSW Bar Association, Submission at 42; Law Society of NSW, Submission at 14. The Law Society suggested that the reasons for requesting a review should be provided by way of statutory declaration.

111. N R Cowdery, Submission at 3; Law Society of NSW, Submission at 14; P Breen, Submission at 6.

and

- *deeming an application for review that is not determined within a specified time limit to have been dismissed (unless the LSC, on notice to all relevant parties, otherwise determines).*[112]

5.85 One submission pointed out that requiring the payment of a small fee to obtain a review would create difficulties of collection, accounting and (possibly) refund, making the system administratively complex and expensive.[113]

5.86 The Commission does not believe that there should be any restrictions on the right to seek review by the LSC when Councils are satisfied that there is no reasonable likelihood of a finding of either unsatisfactory professional conduct or professional misconduct. Review by the LSC of such Council decisions is an important part of the LSC's role as supervisor of the current complaints system. It is particularly important because it satisfies complainants that the matter has been examined by a body that is independent of the professional associations. This independent supervisory function performed by the LSC also provides the rationale for there being no avenue of review against decisions of the LSC when the LSC decides to retain an investigation rather than referring it to the relevant Council.[114]

112. NSW Bar Association, Submission at 42.
113. Law Society of NSW, Submission at 14.
114. It may, however, be possible, where appropriate, to seek judicial review of a decision of the LSC. But see L Beard, Submission 1.

6. The Tribunal

- Composition
- Procedure
- Outcomes
- Appeals
- Records of disciplinary action

6.1 This Chapter deals with particular issues relating to the operation of the Legal Services Division of the Administrative Decisions Tribunal. The Tribunal was established on 6 October 1998[1] when it replaced the former Legal Services Tribunal. In this Chapter, the Legal Services Division of the Administrative Decisions Tribunal is referred to as the Tribunal, while the Administrative Decisions Tribunal as a whole is referred to as the ADT.[2]

6.2 The Tribunal deals with a very small number of all the complaints that pass through the system. One submission suggested that a detailed examination of the procedures and practices of the Tribunal is largely irrelevant to most consumers of legal services who are interested in obtaining redress for loss caused by the defective delivery of legal services.[3] The majority of such matters are unlikely ever to come before the Tribunal even on some of the proposed extended definitions of professional misconduct and unsatisfactory professional conduct.

6.3 A review of the operation of the Administrative Decisions Tribunal is currently being undertaken by the New South Wales Parliament's Committee on the Office of the Ombudsman and Police Integrity Commission.[4] The Committee has received submissions, conducted a public hearing in November 2000[5] and

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1. *When the Administrative Decisions Legislation Amendment Act 1997 (NSW) took effect.*
2. *The Legal Services Tribunal was established under the now repealed Part 10 Div 7 of the Legal Profession Act 1987 (NSW). Part 10 Div 7 was originally inserted by Sch 2(2) of the Legal Profession Reform Act 1993 (NSW). It was repealed when the Administrative Decisions Legislation Amendment Act 1997 (NSW) took effect.*
3. *Medical Consumers Association Inc, Submission at 10.*
4. *In accordance with Administrative Decisions Tribunal Act 1997 (NSW) s 146: See NSW, Parliamentary Debates (Hansard) Legislative Council, 20 June 2000 at 7047.*
5. *Parliament of New South Wales, Report of the Proceedings Before Committee on the Office of the Ombudsman and the Police Integrity Commission Review of Administrative Decisions Tribunal (Sydney, 17 November 2000).*

issued a discussion paper in March 2001.[6] *The discussion paper includes comments on some areas that are relevant to this review including the Rules of the Tribunal, membership of the Tribunal and resources available to the Tribunal.*

COMPOSITION

6.4 The composition of the Tribunal currently varies depending on whether the legal practitioner complained against is a barrister or solicitor. In the case of complaints against barristers the Tribunal consists of one judicial member (a barrister), one barrister member and one lay member. When hearing complaints against solicitors, the Tribunal consists of a one judicial member (a solicitor), a solicitor member and a lay member.[7] *The presiding judicial member is sometimes the Deputy President (Legal Services), who is currently a barrister. The Tribunal is, therefore, always composed of a majority of legal practitioners.*

6.5 The Commission did not specifically raise the issue of the composition of the Tribunal in IP 18. However, since the publication of IP 18 the question of the composition of the Tribunal has been raised publicly.[8] *The Attorney General has asked the Commission to consider the issue and to give an indication of a preferred option subject to the Attorney General, on receipt of this Report, consulting on any proposals.*

6.6 Because the Tribunal will almost always be composed of a majority of practitioners, it is open to the allegation that it is not

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6. *Parliament of New South Wales, Committee on the Office of the Ombudsman and the Police Integrity Commission, Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal (Discussion Paper, 2001).*
7. *Administrative Decisions Tribunal Act 1997 (NSW) Sch 2 Pt 3 cl 4.*
8. *P Barry, "As Caesar judges Caesar, bankrupt barristers go on their merry way" Sydney Morning Herald (27 February 2001) at 4; NSW, Parliamentary Debates (Hansard) Legislative Assembly, 7 March 2001 at 12359.*

carrying out its task impartially. For this reason the Commission presently considers that it would be preferable if the Tribunal were to comprise a Judge (as the presiding officer) and one or two lay members. The Judge could be either a serving or retired District Court Judge or a retired Supreme Court Judge who is eligible for appointment as an acting Judge. The Commission does not presently consider it necessary that practising lawyers be represented on the Tribunal, since a Judge is well able to assess any technical question of professional practice that might arise. Moreover, it will always be possible to bring in expert evidence of such matters where a party, or the Tribunal, thinks it might be useful. Including a Judge on the Tribunal would mirror similar arrangements with respect to other professional tribunals. The Medical Tribunal consists of a District Court Judge, two medical practitioners (because of the highly technical nature of some of the material before the Tribunal) and one lay person.[9]

6.7 The Commission's current view assumes that the professional bodies will continue to be involved in the investigation of complaints before they are brought to the Tribunal. If, however, the professional bodies ceased to be involved in the investigative stage, there may be an argument for the professions to be represented on the Tribunal by the inclusion of one practitioner on any sitting of the Tribunal in addition to a lay member and the presiding Judge.

Recommendation 28

That the government consider and consult on the proposal that a bench of the Legal Services Division of the Administrative Decisions Tribunal comprise a serving or retired District Court Judge or retired Supreme Court Judge as the presiding member and one or two lay members.

9. Medical Practice Act 1992 (NSW) s 147(3).

PROCEDURE

Practice rules

6.8 Since the new Tribunal commenced operation on 6 October 1998 its procedure has been governed by interim rules set out in the Administrative Decisions Tribunal Rules (Transitional) Regulation 1998 (NSW) which incorporates the rules which were part of the former Legal Profession Tribunal Rules 1995 (NSW). Some simple forms have also been provided.[10]

6.9 The various divisions of the ADT are able to "adopt their own procedures by way of rules or informally, through directions or guidelines".[11] *A Rules Committee has also been established to make rules with respect to practice and procedure.*[12] *The need for the rules of the Legal Services Division to be refined and settled in consultation with key stakeholders has also been canvassed in the recently released Discussion Paper of the Committee on the Office of the Ombudsman and the Police Integrity Commission.*[13]

6.10 In Issues Paper 18 ("IP 18") the Commission asked whether the current practice rules for proceedings before the Tribunal are adequate (Issue 33).

Gaps in the Tribunal's powers

6.11 The Tribunal does not currently have the power to:

- *deal with proceedings summarily;*
- *adjourn proceedings for mediation;*

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10. *For example, there is a form for replies in the Legal Services Division: ADT, Annual Report 1998/1999 at 28.*
11. *ADT, Annual Report 1998/1999 at 13.*
12. *Its first meeting was on 26 May 1999: ADT, Annual Report 1998/1999 at 27.*
13. *Parliament of New South Wales, Committee on the Office of the Ombudsman and the Police Integrity Commission, Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal (Discussion Paper, 2001) at 16-22.*

- *make costs orders generally;*
- *make orders for a formal apology to the complainant; and*
- *make orders for practitioners to undergo counselling as to their professional obligations.*[14]

6.12 While considering that the Tribunal's current practice rules are generally adequate, the Law Society supported adding the powers listed above.[15] *However, the Law Society also wished to include the proviso that the adjournment of proceedings for mediation would be solely for mediation between the informant before the Tribunal (that is, the LSC or the relevant Council) and the practitioner.*[16]

6.13 The Bar Association confirmed its support for supplementing the Tribunal's powers as outlined above and elaborated:[17]

- *that the power to deal with proceedings summarily should involve staying or dismissing proceedings in whole or in part on the grounds of: public interest; the complaint being made more than three years previously; or that the allegations were "vexatious, misconceived, frivolous or lacking in substance";*
- *that the Tribunal should be given the power to dismiss proceedings if it is satisfied that the practitioner "is generally competent and diligent" and that "no other material complaints have been made against him or her";*[18]
- *that the Tribunal should be given the power to order that a practitioner enter into an enforceable undertaking as to future conduct.*

6.14 The Bar Association also proposed that it be made clear that

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14. NSW Bar Association, Preliminary Submission 1 at para 37-38.
15. Law Society of NSW, Submission at 17.
16. Law Society of NSW, Submission at 17.
17. NSW Bar Association, Submission at 50.
18. Similar to powers held by the LSC and Councils under Legal Profession Act 1987 (NSW) s 155(3)(b).

two practitioners can, subject to directions of the Tribunal, be joined at the commencement of proceedings in the one information and that a joint hearing may be conducted against a barrister and solicitor provided the Councils and the LSC agree.[19]

6.15 ***Summary dismissal.*** *Both the LSC and the Councils currently have the power to dismiss a complaint on the grounds of public interest*[20] *or because the complaint was made more than three years previously*[21] *or the allegations were "vexatious, misconceived, frivolous or lacking in substance".*[22] *This power can be exercised during the course of an investigation. Given that this screening process is already in place there does not appear to be an adequate reason for allowing these issues to be considered again at the commencement of proceedings before the Tribunal.*

6.16 Any changes in circumstances that might give rise to the need for the Tribunal to dismiss a matter summarily can be dealt with under existing provisions. It is currently open to one of the Councils or the LSC to apply to the Tribunal to dismiss a matter that has already been instituted before the Tribunal if the relevant Council or the LSC has subsequently decided to dismiss the complaint.[23]

6.17 It is not appropriate that the Tribunal dismiss a matter that has been referred to it following a process of investigation, without the Tribunal fully hearing the matter and making findings in relation to the matters raised. The Commission can see no reason why questions of conduct, once referred to the Tribunal, should not be fully aired. The practitioner's previous good conduct can still be taken into account when the Tribunal considers the appropriate orders to hand down once findings about the practitioner's conduct have been made. The Tribunal is, in any case, not precluded from deciding to take no action following a full hearing of a matter.

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19. NSW Bar Association, Submission at 51.
20. Legal Profession Act 1987 (NSW) s 155A(1).
21. Legal Profession Act 1987 (NSW) s 137(2).
22. See Legal Profession Act 1987 (NSW) s 139(2).
23. See Legal Profession Act 1987 (NSW) s 155A(3).

6.18 ***Adjournment for mediation.*** *A number of submissions strongly opposed the mediation of conduct matters.*[24] *The public interest aspects of investigating and enforcing conduct within the legal profession render it inappropriate for questions of conduct to be negotiated between the parties as if they were conducting private litigation. The Commission opposes mediation of conduct disputes elsewhere in this report.*[25] *On that basis, the Commission does not consider it necessary for the Tribunal to have the power to adjourn proceedings for mediation.*

6.19 ***Joinder of proceedings.*** *The Commission agrees that it should be made clear that two practitioners can, subject to directions of the Tribunal, be joined in the one information and that a joint hearing may be conducted against a barrister and solicitor provided the Councils and LSC agree. Joinder of proceedings is especially desirable in relation to the efficient use of the Tribunal's resources in situations where the same course of conduct may be relevant to proceedings against two or more practitioners.*

Recommendation 29

It should be made clear that two or more practitioners can, subject to directions of the Legal Services Division of the Administrative Decisions Tribunal, be joined at the commencement of proceedings in the one information and that a joint hearing may be conducted against a barrister and solicitor provided the Councils and Legal Services Commissioner agree.

6.20 ***Other orders.*** *The Bar Association's proposals with respect to costs orders, orders for formal apologies to complainants, orders for counselling as to professional obligations; and orders as to future conduct are dealt with where they arise in the course of this*

24. Law Society of NSW, Submission at 17; and Victorian Legal Ombudsman, Submission at 50.

25. See para 5.29.

Chapter.[26]

Dealing with less complicated matters

6.21 ***Directions hearings.*** *Directions hearings are held every six to eight weeks to set timetables for the preparation of matters for hearing before the Tribunal.*[27] *This time-frame may be too long for some less complex matters.*

6.22 In IP 18 the Commission asked whether there should be a means of expeditiously listing and disposing of less complex cases before the Tribunal (Issue 34).

6.23 It has been said that, prior to the formation of the ADT, the preparation of matters was dealt with on an individual basis, rather than by means of a series of fixed directions hearings.[28] *Individual treatment on an informal basis worked well because both practitioners and the Councils were represented by experienced practitioners who were able to identify issues, sort out evidence between themselves, and prepare the matters for hearing.*[29]

6.24 Some submissions supported expeditious listing and disposal of less complicated matters.[30] *One submission proposed that directions hearings should only be held when considered necessary. The necessity for directions could be determined by the Tribunal referring to the views of the LSC or the practitioner against whom proceedings have commenced.*[31]

6.25 The Tribunal already has the power to issue directions on a case by case basis. No new provisions are, therefore, required.[32]

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26. See para 6.78-6.90 and 6.100-6.103.
27. ADT, Annual Report 1998/1999 at 28.
28. S Cuddy, Preliminary Submission at 3.
29. S Cuddy, Preliminary Submission at 3.
30. R S Cuddy, Submission at 7; F Combe, Submission at 11; Law Society of NSW, Submission at 17.
31. Victorian Legal Ombudsman, Submission at 52.
32. See also the comments in Parliament of New South Wales, Committee on the Office of the Ombudsman and the Police Integrity

6.26 ***Removal from the roll by consent.*** *Even where legal practitioners admit the facts of the case against them, the normal process of removing them from the roll must be followed. In IP 18 the Commission asked whether it should be possible to remove a practitioner from the roll with that practitioner's consent "without the need for a detailed enquiry by the Tribunal"[33] (Issue 35).*

6.27 Submissions generally supported allowing practitioners to consent to being removed from the roll of practitioners.[34]

6.28 The grounds for complaint and the necessary evidence must be recorded (probably by an agreed statement of facts) if such consent orders are to be allowed, since the information will be necessary should the practitioner seek readmission to the profession in the future.[35] Applications for readmission (like those for admission to practice) are determined by the Supreme Court. Usually there are two or three applications for readmission every year.[36] However, it was also suggested that a practitioner could agree not to seek readmission to the roll,[37] or that inability to seek readmission should be an inevitable result of agreeing to be removed from the register without a hearing.[38]

6.29 The Bar Association suggested the following conditions for removing a practitioner from the roll by consent:

Commission, Parliamentary Inquiry into the Jurisdiction and Operation of the Administrative Decisions Tribunal (Discussion Paper, 2001) at 21.

33. *Law Society of NSW, Preliminary Submission Issue 9. See also Law Society of NSW, Submission at 13.*
34. *R S Cuddy, Submission at 7; C Wall, Submission at 8; F Combe, Submission at 11; Law Society of NSW, Submission at 13, 17; NSW Bar Association, Submission at 40; Victorian Legal Ombudsman, Submission at 53.*
35. *See R S Cuddy, Submission at 7; W V Windeyer, Submission at 2; Law Society of NSW, Submission at 13.*
36. *W V Windeyer, Submission at 2.*
37. *See C Wall, Submission at 8.*
38. *Victorian Legal Ombudsman, Submission at 53.*

- *that the parties to the Tribunal agree to the existence of facts underlying the admission(s) of misconduct made by the practitioner;*
- *that the Tribunal be satisfied that the agreement and any admissions have been "freely, fairly and reasonably made";*
- *that the practitioner gives an enforceable undertaking that he or she will not re-apply for admission as a practitioner; and*
- *that the practitioner certifies, on oath, that he or she has not been guilty of any misconduct other than that already disclosed.*[39]

6.30 Nothing in the Legal Profession Act 1987 (NSW) currently, by itself, prevents the readmission of a person who has been previously struck from the roll of practitioners. Section 11 of the Act simply requires that:

> *A candidate, however qualified in other respects, must not be admitted as a legal practitioner unless the Admission Board is satisfied that the candidate is of good fame and character and is otherwise suitable for admission.*

6.31 The courts have, in the past, held that the onus is on the applicant for readmission to prove that, notwithstanding the conduct leading to the practitioner's removal from the roll, he or she has become a person suitable for admission.[40] *However, one of the factors the Court will consider in examining the merits of each case is the circumstances of the misconduct originally committed.*[41] *This clearly places the applicant for readmission in a more disadvantageous position than an original applicant, given that there is already a finding that they have engaged in conduct that makes them unsuitable for practice. The High Court has held that:*

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39. NSW Bar Association, Submission at 40.

40. See Incorporated Law Institute of New South Wales v Meagher (1909) 9 CLR 655 at 692 (Higgins J).

41. In re a Solictor (1910) 10 SR (NSW) 373; Ex parte Lenehan (1948) 77 CLR 403; Dawson v Law Society of New South Wales (NSW CA, No 590/1988, 21 December 1989, unreported) at 9-16 (Kirby P).

> *A solicitor may be restored to the roll after he has been struck off but the power to reinstate should be exercised with the greatest caution and only upon solid and substantial grounds.*[42]

It is, therefore, important that the circumstances of the misconduct that a practitioner admits to are recorded in an agreed form for future reference. In particular an agreed statement of facts will constitute an admission of the conduct which can be tendered if the former practitioner seeks readmission. Such a record is, of course, only necessary if readmission remains a possibility.

6.32 The Commission rejects any proposals for automatic disqualification from readmission if a practitioner agrees to be removed from the roll by consent, noting in particular the statement of Justice Kirby:

> *There is no public interest in denying forever the chance of redemption to former practitioners. On the contrary the public is better served if, in appropriate cases, those who have offended, once they have affirmatively proved reform, are afforded a second chance, under whatever conditions and after whatever time the Court considers appropriate.*[43]

6.33 Given that removal from the roll of practitioners has not necessarily been permanent in the past and that the Court supports the continued availability of readmission in certain circumstances, it would be anomalous that a practitioner who chooses to assist the Tribunal by not opposing a complaint should be placed in a less advantageous position than someone who has been removed from the roll after making the Tribunal go through an entire hearing.

6.34 The question remains whether a practitioner must agree to a statement of facts before a consent removal is granted. If a practitioner refuses to agree to a statement of facts, the Tribunal

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42. Ex parte Lenehan (1948) 77 CLR 403 at 422. See also Ex parte Wachsmann (1949) 50 SR (NSW) 34 at 37.

43. Dawson v Law Society of New South Wales (NSW CA, No 590/1988, 21 December 1989, unreported) at 16 (Kirby P)

must continue to hear the matter to conclusion and make appropriate findings. A practitioner should not be able to pre-empt a hearing by consenting to being removed from the roll but declining to agree on the material facts.

6.35 In IP 18 the Commission noted that the required statements could be entered into by means of a simplified process, perhaps conducted before a registrar[44] or a single member of the Tribunal. No additional suggestions were made in submissions responding to these proposals. However, the Commission is now of the view that the required statements should be entered into formally before the body that has the power to make the order removing the practitioner from the roll. In this case the body that has the power to make the order is a fully constituted three member bench of the Tribunal.

Recommendation 30

A practitioner should be able to consent to being removed from the roll of practitioners provided the practitioner is prepared to agree to a record of the grounds for the complaint and an agreed statement of facts. The required records and statements should be entered before a three member sitting of the Legal Services Division of the Administrative Decisions Tribunal.

The rules of evidence

6.36 Section 168 of the Legal Profession Act 1987 (NSW) provides that the rules of evidence apply to proceedings that involve a question of professional misconduct. In all other cases, including those relating only to unsatisfactory professional conduct, the general position under s 73 of the Administrative Decisions Tribunal Act 1997 (NSW) applies. That is, the Tribunal, subject to

44. S Cuddy, Preliminary Submission at 5.

the rules of natural justice,[45] *is not bound by the rules of evidence except that the privilege against self incrimination in other proceedings is preserved.*[46]

6.37 In IP 18 the Commission asked whether the rules of evidence should apply to all Tribunal proceedings (Issue 36).

6.38 One submission supported the general application of the rules of evidence on the grounds that a practitioner's professional reputation and livelihood may be at stake as a result of the proceedings (especially in relation to more serious matters).[47]

6.39 Others suggested that the rules of evidence should not apply for a number of reasons, including that:

- *some relevant material may be excluded;*[48] *and*

45. *Administrative Decisions Tribunal Act 1997 (NSW) s 73(2).*
46. *Administrative Decisions Tribunal Act 1997 (NSW) s 73A, inserted by Administrative Decisions Tribunal Legislation Amendment Act 2000 (NSW) Sch 1[10]. It would appear that the privilege against self incrimination does not apply in relation to disciplinary proceedings that can be classed as protective (rather than punitive), this includes proceedings against doctors and legal practitioners: Bowen-James v Walton (NSW CA, No 40432/1991, 5 August 1991, unreported) at 11-12.*
47. *C Wall, Submission at 8.*
48. *For Legally Abused Citizens Inc, Submission 2 at 6; Medical Consumers Association Inc, Submission at 10.*

- *the rules of evidence are already not applied in other disciplinary bodies, for example, the Police Tribunal.*[49]

6.40 The Bar Association proposed retaining the current position, namely that the rules of evidence apply only to proceedings that deal with professional misconduct. The Bar Association also proposed that when the rules of evidence apply in Tribunal proceedings, the Tribunal should nonetheless have the power, similar to that in s 82 of the Supreme Court Act 1970 (NSW), to dispense with the rules of evidence and to direct that admissions be made in respect of questions not bona fide or reasonably in dispute.[50] *The Court's power to dispense with the rules of evidence, however, arises only with respect to proof of matters not bona fide in dispute or with respect to such rules as "might cause expense and delay". It is not clear how this might apply in proceedings before the Tribunal.*

6.41 The issue of whether the rules of evidence should apply to all Tribunal proceedings was canvassed extensively in relation to the National Competition Policy Review in 1998. The Review received submissions from the OLSC, the Bar Association and Law Society. The OLSC submitted that the rules of evidence should not apply to matters before the Tribunal.[51] *The Bar Association suggested that the application of the rules of evidence be retained subject to some exceptions relating to client legal privilege and confidentiality.*[52] *The Law Society's position was that "the Tribunal should not be subject to the rules of evidence in any matter".*[53] *The Report of the National Competition Policy Review merely concluded that "consideration should be given to removing the distinction in the*

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49. For Legally Abused Citizens Inc, Submission 2 at 6. According to the Police Service Act 1990 (NSW) s 192(2) of the Royal Commissions Act 1923 (NSW) applies to proceedings before the Police Tribunal.

50. NSW Bar Association, Submission at 55.

51. New South Wales, Attorney General's Department, National Competition Policy Review of the Legal Profession Act 1987 (Report, 1998) at 53; OLSC Submission to the National Competition Policy Review at 13-14.

52. National Competition Policy Review at 53.

53. National Competition Policy Review at 53.

application of evidentiary rules" without saying which result would be preferred.[54]

6.42 The distinction between matters involving professional misconduct as opposed to unsatisfactory professional conduct is largely irrelevant in practice, given that most matters are pleaded in the alternative as either professional misconduct or unsatisfactory professional conduct.[55] *The Law Society, in its preliminary submission to this review, said that, given the "nature of the determination of the Tribunal", it might be "more appropriate for the rules of evidence to be applied in all instances".*[56]

6.43 It is desirable, for the sake of consistency and to avoid confusion, that the application (or non-application) of the rules of evidence be the same for all matters brought before the Tribunal.

6.44 Because the disciplinary system is concerned with the protection of the public it is important that the Tribunal be able to consider all the evidence that fairly and rationally bears on the question of the conduct of a practitioner. The New South Wales Court of Appeal has had occasion to consider the provisions of the Medical Practice Act 1992 (NSW)[57] *that state that the Medical Tribunal is not bound by the rules governing the admission of evidence. The Court held that:*

> *it is in our view perfectly consistent with concepts of procedural fairness to apply a provision such as in [the Medical Practice Act 1992 (NSW)] to admit evidence which may not be legally admissible but which, nonetheless, possesses "rational persuasive power" in respect of an issue material to the proceeding.*[58]

This view was affirmed in another case that also related to very

54. *National Competition Policy Review at 56.*
55. *National Competition Policy Review at 53.*
56. *Law Society of NSW, Preliminary Submission Issue 1.*
57. *Sch 2 cl 1.*
58. *Bowen-James v Walton (NSW CA, No 40432/1991, 5 August 1991, unreported) at 6.*

serious charges of criminal misconduct against a medical practitioner.[59]

6.45 The only substantive argument put to the Commission in favour of the application of the rules of evidence in disciplinary proceedings is that the outcome of a hearing before the Tribunal can have a serious impact on the professional career of a legal practitioner and that legal practitioners should, therefore, be entitled to the protections offered by the rules of evidence.[60] *However, as already pointed out, other tribunals and boards that determine the future careers of other professionals and officers are not bound by the rules of evidence. These boards and tribunals include the:*

- *Chiropractors and Osteopaths Tribunal;*[61]
- *Dental Technicians Registration Board;*[62]
- *Dental Board;*[63]
- *Medical Tribunal;*[64]
- *Nurses Tribunal;*[65]
- *Pharmacy Board of New South Wales;*[66]

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59. *Zaidi v Health Care Complaints Commission (1998) 44 NSWLR 82 at 93 (Mason P).*
60. *A similar argument was put to the High Court in an unsuccessful application for leave to appeal in 1999: Zaidi v Health Care Complaints Commission (High Court of Australia, No S109/1998, 16 April 1999, transcript, unreported). See also the evidence of O'Connor DCJ in Parliament of New South Wales, Report of Proceedings Before Committee on the Office of the Ombudsman and the Police Integrity Commission Review of Administrative Decisions Tribunal (Sydney, 17 November 2000) at 7.*
61. *Chiropractors and Osteopaths Act 1991 (NSW) Sch 3 cl 1.*
62. *Dental Technicians Registration Act 1975 (NSW) s 20(4) which states that the Royal Commissions Act 1923 (NSW) applies to proceedings before the Board.*
63. *Dentists Act 1989 (NSW) s 46(2) which states that the Royal Commissions Act 1923 (NSW) applies to proceedings before the Board.*
64. *Medical Practice Act 1992 (NSW) Sch 2 cl 1.*
65. *Nurses Act 1991 (NSW) Sch 2 cl 1.*

- *Podiatrists Registration Board;*[67]
- *Psychologists Registration Board;*[68] *and*
- *Police Tribunal.*[69]

6.46 There is no valid reason why legal practitioners should be treated any differently to, say, doctors or police officers, given that findings of misconduct against them can be equally harmful to their future careers and earning capacity. There is also the public interest in the adequate investigation of complaints involving possible professional misconduct.

6.47 The Commission, therefore, recommends that the Tribunal should not be bound by the rules of evidence in any proceedings provided the rules of natural justice are followed. The privilege against self incrimination in other proceedings must also be preserved.

6.48 General formulations stating that a tribunal is not bound by the rules of evidence include:

- *The Administrative Appeals Tribunal Act 1975 (Cth): "the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate".*[70]
- *The Medical Practice Act 1992 (NSW): "In proceedings before it … the Tribunal is not bound to observe the rules of law governing the admission of evidence, but may inform itself of any matter in such manner as it thinks fit".*

66. *Pharmacy Act 1964 (NSW) s 19G(1)(e).*
67. *Podiatrists Act 1989 (NSW) s 15(6).*
68. *Psychologists Act 1989 (NSW) s 15(6).*
69. *Police Service Act 1990 (NSW) s 192(2) which states that the Royal Commissions Act 1923 (NSW) applies to proceedings before the Board.*
70. *Administrative Appeals Tribunal Act 1975 (Cth) s 33(1)(c).*

6.49 Provisions of the type included in the Administrative Appeals Tribunal Act 1975 (Cth) have the advantage of a body of case law to support them. For example, it would seem that, even without stating it, natural justice applies notwithstanding that a tribunal is not bound by the rules of evidence.[71] *However, other formulations state that natural justice applies. The current provision in relation to hearings before the Tribunal into unsatisfactory professional conduct (as well as to hearings of the ADT generally) includes a proviso that the ADT is subject to the rules of natural justice:*

> *The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.*[72]

6.50 The general ADT provision is sufficiently similar to the other well established provisions and the express statement that the ADT is "subject to the rules of natural justice" merely states what is already implied. Given that the operation of the Legal Services Division is usually governed by the provisions that relate to the ADT generally, it is desirable that there be as little divergence as possible between the proceedings before the Legal Services Division of the ADT and the other divisions. The application of this general ADT provision can be achieved simply by repealing s 168 of the Legal Profession Act 1987 (NSW).

Recommendation 31

Section 168 of the *Legal Profession Act 1987* (NSW) should be repealed so that the Legal Services Division of the Administrative Decisions Tribunal is not bound by the rules of evidence in any proceedings so long as the rules of natural justice are followed. The privilege against self incrimination in other proceedings must also be preserved.

71. *See Minister for Immigration and Ethnic Affairs v Pochi (1980) 31 ALR 666 at 690; and M Allars, Introduction to Australian Administrative Law (Butterworths, Sydney, 1990) at para 6.77-6.80.*
72. *Administrative Decisions Tribunal Act 1997 (NSW) s 73(2).*

Public hearings

6.51 Generally, hearings before the ADT are open to the public.[73] However, s 170(1) of the Legal Profession Act 1987 (NSW) provides that "a hearing (or part of a hearing) relating only to a question of unsatisfactory professional conduct" is to be held in the absence of the public unless the Tribunal "is of the opinion that the presence of the public is in the public interest or the interests of justice".

6.52 In IP 18 the Commission asked whether any hearings of the Tribunal should be conducted in the absence of the public (Issue 37) and considered a number of options, including giving the Tribunal an unfettered discretion to close hearings,[74] and requiring that hearings be open to the public unless the Tribunal finds a specific reason to order a closed hearing.[75]

6.53 Some submissions favoured Tribunal proceedings being held in public (barring exceptional circumstances),[76] for a number of reasons, including:

- *it is important that justice is seen to be done;[77]*
- *many of the issues dealt with by the Tribunal are public interest matters;[78] and*
- *holding sessions in private is over-protective of individuals and not in the interests of transparency and public accountability.[79]*

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73. Administrative Decisions Tribunal Act 1997 (NSW) s 75.
74. See National Competition Policy Review at 53.
75. OLSC, Preliminary Submission at 12. See also OLSC, Submission at 38.
76. Victorian Legal Ombudsman, Submission at 55.
77. C Wall, Submission at 8; Medical Consumers Association Inc, Submission at 10.
78. C Berkemeier, Submission at 4.
79. OLSC, Submission at 38; NSW Legal Reform Group, Submission at 10.

6.54 Some of the circumstances justifying closed hearings were identified as being:

- *the sort of cases where other Court proceedings are closed, for example, to protect the identity of an informant or to protect a victim;*[80]
- *where a person's life might be in danger;*[81]
- *where a party or witness needs to be protected from personal harm or from suffering damage as the direct result of a public hearing;*[82] *and*
- *wherever the Tribunal believes it is appropriate to do so (without limiting the discretion by examples).*[83]

6.55 The Bar Association, while accepting that proceedings should, prima facie, be conducted in public, proposed maintaining the current position, namely that proceedings should be closed to the public when the Tribunal is dealing with allegations of unsatisfactory professional conduct or "professional misconduct at the lower end of the scale".[84] *The Bar Association further proposed that all Tribunal proceedings should be closed until such time as an order has been made that the proceedings be conducted in public, and then only after the practitioner has had an opportunity to make submissions on the question.*[85]

6.56 The Commission also points to the consideration that hearings will often involve disclosure of confidential communications subject to client legal privilege.

6.57 The general principle in New South Wales is that justice is to be administered openly and departures from this general principle

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80. C Wall, Submission at 8.
81. F Combe, Submission at 12.
82. OLSC, Submission at 38.
83. Law Society of NSW, Submission at 18.
84. NSW Bar Association, Submission at 56.
85. NSW Bar Association, Submission at 56.

should occur only in exceptional circumstances.[86] *There have been many judicial statements in support of this position:*

> *It is a deeply rooted principle that justice must not be administered behind closed doors - court proceedings must be exposed in their entirety to the cathartic glare of publicity. There are limited exceptions to the observance of this principle but these are well defined and sparingly allowed. Statutes are made by public processes. They are judicially administered in public proceedings. It is only thus that the right of representation and of due hearing of all legitimate submissions can be seen to have been accorded to parties subjected to the judicial process. Moreover publicity of proceedings is one of the great bastions against the exercise of arbitrary power as well as a re-assurance that justice is administered fairly and impartially.*[87]

On this basis there is no convincing reason why proceedings of the Tribunal should not as a general rule be open, especially since they deal with questions of conduct of officers of the Court and the matters are clearly relevant to the administration of justice in New South Wales.

6.58 Having a starting point of a closed hearing for legal practitioners in respect of proceedings for unsatisfactory professional conduct may also be overly protective of the legal profession. Most other professional disciplinary regimes begin with the presumption of an open hearing for all disciplinary matters, unless the tribunal or board directs otherwise. Such tribunals and boards include the:

- *Chiropractors and Osteopaths Tribunal;*[88]

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86. See, for eg, Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47 at 50-55; David Syme & Co Ltd v General Motors-Holden's Ltd [1984] 2 NSWLR 294 at 299-300.

87. R v Brady (NSW CCA, 29 July 1977, unreported) (Street CJ). See also David Syme & Co Ltd v General Motors-Holden's Ltd [1984] 2 NSWLR 294 at 300.

88. Chiropractors and Osteopaths Act 1991 (NSW) s 46(3).

- *Dental Technicians Registration Board;*[89]
- *Dental Board;*[90]
- *Medical Tribunal;*[91]
- *Nurses Tribunal;*[92]
- *Optical Dispensers Licensing Board;*[93]
- *Board of Optometrical Registration;*[94] *and*
- *Pharmacy Board of New South Wales.*[95]

6.59 These bodies are generally granted a broad discretion to order a closed sitting. However, some boards or tribunals may only order a closed sitting in limited circumstances. For example, the Appeal Panel of the Thoroughbred Racing Board:

> *is to sit as in open court when hearing the appeal but may sit in private if the Appeal Panel considers it necessary to do so in the public interest or to protect the safety of any person.*[96]

6.60 The Fair Trading Tribunal must hold its hearings in public, except that:

> *If the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may make any one or more of the following orders:*

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89. Dental Technicians Registration Act 1975 (NSW) s 20(3).
90. Dentists Act 1989 (NSW) s 46(1).
91. Medical Practice Act 1992 (NSW) s 161(2).
92. Nurses Act 1991 (NSW) s 61(3).
93. Optical Dispensers Act 1963 (NSW) s 25(3).
94. Optometrists Act 1930 (NSW) s 15(5).
95. Pharmacy Act 1964 (NSW) s 19H(1)(a).
96. Thoroughbred Racing Board Act 1996 (NSW) s 43(4).

> *(a) an order that the hearing be conducted wholly or partly in private,*
>
> *(b) an order prohibiting or restricting the publication of the names and addresses of witnesses appearing before the Tribunal,*
>
> *(c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,*
>
> *(d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.*[97]

6.61 In general, other divisions of the ADT conduct public hearings, though there is a statutory discretion as follows:

> *However, if the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may (of its own motion or on the application of a party) make any one or more of the following orders:*
>
> *(a) an order that the hearing be conducted wholly or partly in private,*
>
> *(b) an order prohibiting or restricting:*
>
> *(i) the disclosure of the name, address, picture or any other material that identifies, or may lead to the identification of, any person (whether or not a party to proceedings before the Tribunal or a witness summoned by, or appearing before, the Tribunal), or*
>
> *(ii) the doing of any other thing that identifies, or may lead to the identification of, any such person,*

97. Fair Trading Tribunal Act 1998 (NSW) s 30(2).

> *(b1) an order prohibiting or restricting the publication or broadcast of any report of proceedings before the Tribunal,*
>
> *(c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,*
>
> *(d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.*[98]

6.62 If the provision establishing the special arrangements with respect to closed hearings for the Legal Services Division were repealed,[99] *the general ADT position, quoted above, would apply to all hearings of the Legal Services Division.*

Publishing names of parties and witnesses

6.63 Since 2000 there has been no general restriction on the publication of names of parties and witnesses before the Tribunal.[100] *However, in IP 18 the Commission considered the possibility that the publication of decisions of the Tribunal in full may cause embarrassment to third parties and former clients of solicitors and asked in what circumstances should the names of parties and witnesses to proceedings should be disclosed to the public (Issue 38).*

6.64 Submissions made a number of suggestions as to the circumstances in which the names of parties and witnesses may be

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98. Administrative Decisions Tribunal Act 1997 (NSW) s 75(2).

99. Legal Profession Act 1987 (NSW) s 170(1).

100. Such restrictions are now limited to proceedings in the Community Services Division of the ADT; appeals from a decision of the Community Services Division to an Appeal Panel; and such other proceedings as may be prescribed: Administrative Decisions Tribunal Act 1997 (NSW) s 126(1A), inserted by Administrative Decisions Tribunal Legislation Amendment Act 2000 (NSW) Sch 1[13].

disclosed to the public including:

- *the same circumstances that apply in any normal civil action in a court of law;*[101] *and*
- *that practitioners names be disclosed only if an adverse finding is made by the Tribunal.*[102]

6.65 The Law Society also submitted that the names of witnesses should not be publicly disclosed.[103]

6.66 The OLSC, however, proposed that full publicity, subject to certain necessary restrictions, should be given to the names of witnesses to ensure a transparent process that is open to the public.[104]

6.67 The Legal Practice Act 1996 (Vic) provides that the Tribunal may order, among other things, "that any information that might enable a party or another person who has appeared at a hearing to be identified – must not be published except in the manner and to the persons specified in the order".[105]

6.68 Client legal privilege is also an important matter to consider. It is relevant for both complainants and other witnesses before the Tribunal.[106] *The ability to order the suppression of names of complainants and other witnesses, without denying public access to hearings or the general reporting of proceedings, is important both for protecting a client's privacy and for limiting the opportunities for intimidation by threatening to reveal material subject to client legal privilege during the course of a hearing before the Tribunal.*

The Commission's conclusion

6.69 The Commission is of the view that all hearings of the

101. F Combe, Submission at 12.
102. Law Society of NSW, Submission at 18.
103. Law Society of NSW, Submission at 18.
104. OLSC, Submission at 38.
105. Legal Practice Act 1996 (Vic) s 413(3). See Victorian Legal Ombudsman, Submission at 56.
106. See also Recommendations 9 and 10 and para 4.48-4.57.

Tribunal should be held in public, subject to a broad discretion to order a closed hearing of the type currently exercised in relation to other ADT hearings. This would be achieved simply by repealing the provision that makes the special provision for the Legal Services Division.[107] *The Commission considers that the current provision allowing the ADT to order a closed hearing if it is satisfied that it is desirable to do so "for any other reason" is sufficient to cover the circumstances in which submissions considered it was appropriate to order a closed hearing.*[108]

6.70 Finally, because of the importance of client legal privilege as a particular right of clients of a practitioner, the Commission proposes a new provision to the effect that, in making a determination under s 75(2) of the Administrative Decisions Tribunal Act 1997 (NSW) the Tribunal should have regard to the client legal privilege of both the complainant and other witnesses before the Tribunal.

Recommendation 32

Section 170(1) of the *Legal Profession Act 1987* (NSW) should be repealed so that hearings of the Legal Services Division of the Administrative Decisions Tribunal will, subject to the exercise of the Tribunal's discretion, be held in public. A specific provision should be included to the effect that in making a determination under s 75(2) of the *Administrative Decisions Tribunal Act 1997* (NSW) the Legal Services Division of the Administrative Decisions Tribunal should have regard to the client legal privilege of the complainant and other witnesses before the Tribunal.

107. *Legal Profession Act 1987 (NSW) s 170(1).*
108. *See para 6.54 above.*

Advisory opinions

6.71 The OLSC has submitted that the "reasonable likelihood test" for referral of matters to the Tribunal makes it necessary for the Councils and LSC to refer to previous decisions of the Tribunal for guidance in relation to pending matters. Because there are not many decisions of the Tribunal and their range cannot cover all possible situations, the Councils and LSC may be left with little assistance in determining whether a particular situation can satisfy the reasonable likelihood test. In relation to this alleged problem[109] the Commission asked whether it should be possible to bring "test cases" before the Tribunal and that Tribunal be given the power to make declaratory orders as to whether particular conduct breaches relevant standards (Issue 39).

6.72 The particular form of declaratory order being considered is in the nature of an "advisory opinion". An advisory opinion is defined as "a pronouncement made by a court, not in the course of actual litigation, at the request and for the guidance of a public body, as to its rights, powers, duties, etc, in a particular matter".[110]

6.73 The Tribunal is essentially a body that exercises judicial power in relation to the matters brought before it. The courts, in general have an unlimited discretion to issue declaratory orders,[111] however, it is also generally the case that the courts will not make declarations on matters that are purely theoretical or hypothetical.[112]

6.74 The OLSC, in supporting the availability of advisory opinions, suggested that individual practitioners would then not have to endure hearings aimed at establishing a principle that extends beyond the individual case and that advisory opinions

109. See para 3.48-3.54.
110. I Zamir, The Declaratory Judgment (2nd edition, Sweet & Maxwell, London, 1993) at para 4.043.
111. See Supreme Court Act 1970 (NSW) s 75.
112. See Bruce v Commonwealth Trademarks Label Association (1907) 4 CLR 1569.

would make practitioners more certain as to what conduct constitutes unsatisfactory professional conduct and professional misconduct.[113]

6.75 Other submissions suggested that advisory opinions should not be available.[114] *Both the Victorian Legal Ombudsman and the Law Society of New South Wales suggested that advisory opinions were not necessary because they had experienced no problems with applying the "reasonable likelihood" test.*[115]

6.76 Other reasons in support of this position include:

- *issuing advisory opinions would be contrary to the Tribunal's function which is to determine disciplinary proceedings and to make relevant determinations of fact and law;*[116]
- *the Tribunal's processes are unsuited to such a broader regulatory function and the Legal Profession Act 1987 (NSW) already provides for the making of rules of conduct after a process of consultation;*[117]
- *the Tribunal should not be allowed to usurp the role of the Supreme Court as the authority ultimately responsible for defining and maintaining the standards to be met by*

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113. OLSC, Submission at 31.

114. Law Society of NSW, Submission at 18; NSW Bar Association, Submission at 56; Victorian Legal Ombudsman, Submission at 57.

115. Victorian Legal Ombudsman, Submission at 57; and Law Society of NSW, Submission at 18. See also para 3.52-3.53.

116. Law Society of NSW, Submission at 18. It has been argued in other contexts that the issuing of advisory opinions may associate judicial bodies too closely in the eyes of the public with bodies that will later appear before them as parties: I Zamir, The Declaratory Judgment (2nd edition, Sweet & Maxwell, London, 1993) at para 4.046. Such arrangements, although spoken of in the context of Chapter 3 of the Constitution (Cth), have been seen as "tending to sap [judges'] independence and impartiality": Attorney General v The Queen (1957) 95 CLR 529 at 541.

117. NSW Bar Association, Submission at 56. See Legal Profession Act 1987 (NSW) Pt 4 Div 4.

practitioners;[118]

- *there is a danger that, as there may be no opposing party, the Tribunal will make a decision on inadequately or incompletely argued submissions;*[119] *and*
- *an advisory opinion may still cause confusion and uncertainty in the minds of litigants who may be doubtful as to whether the facts of the case under consideration come within its ambit.*[120]

6.77 In light of these objections and the fact that investigative bodies other than the LSC have had no trouble in applying the "reasonable likelihood" test,[121] *the Commission is not convinced that the Tribunal should be empowered to issue advisory opinions.*

Costs orders

6.78 Costs orders may be made by the Tribunal against a practitioner who is found guilty of professional misconduct or unsatisfactory professional conduct or (if special circumstances so warrant) against the Public Purpose Fund if the Tribunal is satisfied the practitioner is not guilty.

6.79 In IP 18 the Commission asked whether the current provisions relating to costs before the Tribunal should be altered in any way (Issue 40) and considered a number of issues which generally relate to the position of practitioners who are found by the Tribunal to be not guilty of professional misconduct or unsatisfactory professional conduct, including whether:

- *the Tribunal should be given the power to award costs against*

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118. NSW Bar Association, Submission at 56-57.
119. I Zamir, The Declaratory Judgment (2nd edition, Sweet & Maxwell, London, 1993) at para 4.046.
120. I Zamir, The Declaratory Judgment (2nd edition, Sweet & Maxwell, London, 1993) at para 4.046.
121. See also para 3.52 and 3.53.

the LSC or the Law Society or Bar Association;

- *the Tribunal's powers with respect to costs should extend to interlocutory proceedings;*
- *the power to award costs when a practitioner is found not guilty should not be limited to "special circumstances"; and*
- *the costs to be awarded should be determined by an assessor rather than the Tribunal.*[122]

6.80 One submission supported these proposals.[123] *The Law Society supported giving the Tribunal the power to order costs generally but suggested that a successful practitioner should be entitled to an order for costs against the Public Purpose Fund.*[124] *The Bar Association proposed that an award of costs in favour of a practitioner should also be available when proceedings are only dismissed in part.*[125] *The Law Society and Bar Association both supported the determination of costs being made by an assessor rather than the Tribunal.*[126]

6.81 The Victorian provisions relating to costs orders are as follows:

> *(1) The Tribunal may order the payment of the costs of and incidental to any hearing under this Division.*
>
> *(2) Subject to this section, the costs are in the discretion of the Tribunal.*
>
> *(3) The Tribunal must not make an order for costs against an RPA,*[127] *the Board or the Legal Ombudsman unless satisfied that special circumstances make it appropriate*

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122. NSW Bar Association, Preliminary Submission 1 at para 37.
123. R S Cuddy, Submission at 7.
124. Law Society of NSW, Submission at 19.
125. NSW Bar Association, Submission at 57.
126. NSW Bar Association, Submission at 57; Law Society of NSW, Submission at 19.
127. A recognised professional association under Legal Practice Act 1996 (Vic) s 299.

to do so.

(4) The Full Tribunal may fix the amount of costs itself or order that bills of costs be assessed or settled by the registrar or a deputy registrar.[128]

The Victorian Legal Ombudsman suggests that these provisions are working satisfactorily.[129]

6.82 The Victorian and New South Wales approaches to costs before legal disciplinary tribunals are quite different to those in relation to costs, for example, before the New South Wales Medical Tribunal:

> *The Tribunal may order the complainant, if any, the registered medical practitioner concerned, or any other person entitled to appear (whether as of right or because leave to appear has been granted) at any inquiry or appeal before the Tribunal to pay such costs to such person as the Tribunal may determine.*[130]

The Court of Appeal has held that the power to order costs conferred on the Medical Tribunal is very broad and extends to the ordering of indemnity costs as well as party and party costs.[131]

6.83 The Victorian provisions go some way towards dealing with the substance of the issues outlined above. The Commission accordingly supports subsections (1) and (2) so far as they broaden the discretion of the Tribunal to make costs orders in relation to proceedings before it. Subsection (4) usefully allows the Tribunal to assess costs or to order that they be assessed outside the Tribunal.

6.84 However, with respect to subsection (3) the Public Purpose Fund is not available to meet a costs order in favour of a successful practitioner, and the "special circumstances" test is preserved.

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128. Legal Practice Act 1996 (Vic) s 162.
129. Victorian Legal Ombudsman, Submission at 58.
130. Medical Practice Act 1992 (NSW) Sch 2 cl 13(1).
131. Walton v McBride (1995) 36 NSWLR 440 at 464 (Powell JA) and 474-475 (Cole JA), but see Kirby P's dissent at 446-451.

6.85 The question of the availability of the Public Purpose Fund and whether the Tribunal should be given the power to award costs against the LSC or the Law Society or Bar Association is a difficult one. Given the primacy accorded to the protection of the public in the current disciplinary system, it would not be desirable for an institution with meagre resources, like the Bar Association, to have to be concerned about costs in cases that may be lengthy, complex or otherwise expensive to run. Provisions allowing for costs to be awarded against, say the Bar Association, might, therefore, hamper, if not prevent, the bringing of some complaints before the Tribunal. The Law Reform Commission is, therefore, not convinced that the current arrangements with respect to the Public Purpose Fund being made available to meet the costs of successful practitioners should be altered.

Special circumstances

6.86 As to the question whether special circumstances exist warranting an order for costs in favour of a successful practitioner, the Tribunal has not often been called upon to decide the issue. In the matter of Legal Services Commissioner v di Suvero[132] *the Tribunal considered previous decisions of the Tribunal relating to costs and noted that while it was not governed by principles applied in the courts, it could be guided by decisions of courts where indemnity costs were awarded against a party who had "maintained proceedings that had no real prospect of success".*[133] *In that case the Tribunal held that the factors warranting the finding of special circumstances were:*

1. *At best this was a complaint which could have gone either way and accordingly the Commissioner could not have been satisfied to the requisite standard that it had reasonable likelihood of success;*

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132. [1999] NSWADT 138.

133. Legal Services Commissioner v di Suvero [1999] NSWADT 138 at para 14.

2. *The proceedings were delayed and protracted by the actions of the Commissioner to the detriment of the Barrister.*

6.87 The Law Reform Commission is not convinced that there is a reason for overturning what appears to be a reasonably well accepted approach to granting costs when a practitioner successfully defends proceedings before the Tribunal, especially if professional liability insurance is available to practitioners in such cases.

6.88 The compulsory insurance policies available to members of the Bar Association currently extend to the payment of costs where a barrister successfully defends proceedings before the Tribunal. No barrister need be out of pocket so long as he or she has fulfilled the obligations under the relevant insurance policy. However, the insurance policies available to members of the Bar are currently under review and it is possible that from 1 July 2001 the current position may not be preserved.[134] The situation will need to be reviewed once the extent of any changes becomes known.

6.89 The payment of costs where a solicitor successfully defends proceedings before the Tribunal is not presently covered by the LawCover professional indemnity insurance scheme. However, there is an optional product – professional practice insurance – that is available to cover the costs of solicitors who are brought before various tribunals, including the ADT. This optional product has been available now for the past year.[135]

6.90 Given that not all practitioners will necessarily be insured against the costs of successfully defending proceedings before the Tribunal, the Commission is of the view that in considering whether special circumstances exist the Tribunal should have

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134. Possible outcomes include: coverage for costs in Tribunal matters becoming optional; and the amounts covered being reduced: Information provided by Helen Barrett, Director, Professional Conduct Department, NSW Bar Association (5 March 2001).

135. Information provided by Matthew Gosling, General Manager, Business Development/Insurance, LawCover (12 March 2001).

regard to the length and complexity of the proceedings. While it may be acceptable for a successful practitioner to bear the cost of one day's appearance before the Tribunal in a simple case, it may not be acceptable for a successful practitioner to bear the cost of, say, one week's hearing before the Tribunal in a case that involved lengthy preparation.

Recommendation 33

1. **The Legal Services Division of the Administrative Decisions Tribunal should be empowered to order the payment of costs of, and incidental to, any hearing under Part 10.**

2. **Orders for costs should be subject to the discretion of the Legal Services Division of the Administrative Decisions Tribunal.**

3. **In the event that the Legal Services Division of the Administrative Decisions Tribunal is satisfied that a practitioner is not guilty, an order for costs should be made against the Public Purpose Fund, but only when the Tribunal is satisfied that special circumstances exist warranting such an order. In considering whether special circumstances exist the Tribunal should have regard to the length and complexity of the proceedings.**

4. **The Legal Services Division of the Administrative Decisions Tribunal should be empowered either to fix the amount of costs itself or to order that costs be assessed.**

OUTCOMES

Compensation

Compensation to consumers

6.91 The Tribunal may award compensation in limited circumstances, namely, in situations where the practitioner is found guilty of professional misconduct or unsatisfactory professional conduct and where compensation is not available from other sources. The amount of compensation that the Tribunal can order is limited to $10,000 although a greater amount of compensation may be awarded if the practitioner consents.[136]
This means that generally consumers have to pursue compensation by other processes, such as by way of:

- *an action in the Supreme Court for professional negligence;*
- *an application to the Fidelity Fund (in the case of solicitors);*
- *mediation as a consumer dispute by the LSC or the relevant Council; or*
- *an application to the Fair Trading Tribunal (Consumer Claims Division).*

This may explain why compensation orders are rarely made by the Tribunal.[137]

6.92 Obviously, some consumers will not have the resources to pursue many of the alternative avenues and may find it frustrating that compensation can be claimed through the complaints system only in very limited circumstances.[138]

6.93 In IP 18 the Commission asked what powers the Tribunal should have in relation to compensation (Issue 41) and considered suggestions that the jurisdiction of the Tribunal to make compensation orders could be increased by:

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136. Legal Profession Act 1987 (NSW) s 171D.
137. OLSC, Preliminary Submission at 14.
138. OLSC, Annual Report 1998/1999 at 23.

- *giving the Tribunal a small claims jurisdiction without, if necessary, the need to commence proceedings for professional misconduct and unsatisfactory professional conduct (that is, in relation to small costs disputes and minor claims concerning poor service or negligence);*[139] *and*
- *allowing compensation in favour of a person who otherwise has no standing to be a complainant before the Tribunal (because, for example, their complaint has been dismissed, but the relevant Council has pursued a different but related matter before the Tribunal).*[140]

The Commission also asked who should be able to apply to the Tribunal for compensation (Issue 42).

6.94 Some submissions opposed any consideration of both disciplinary and compensation issues by the one body on a number of grounds including:

- *it is unfair that a practitioner who is required to co-operate with the Tribunal with regard to disciplinary matters may make admissions that can be used against him or her in any compensation proceedings that follow;*[141]
- *employed solicitors may not personally be civilly liable;*[142]

139. *OLSC, Annual Report 1997/1998 at 23; OLSC Annual Report 1998/1999 at 23; OLSC, Preliminary Submission at 15; Law Society of NSW, Preliminary Submission Issue 14; National Competition Policy Review at 55. See also NSW Bar Association, Preliminary Submission 1 at para 39.*
140. *See Law Society of NSW, Preliminary Submission Issue 14.*
141. *R S Cuddy, Submission at 6.*
142. *Legal Aid Commission, Submission at 4.*

- *Tribunal proceedings are quasi-criminal and considerations of compensation should not be brought to bear on the proceedings;*[143]
- *compensation would be more appropriately dealt with as a consumer dispute;*[144] *and*
- *there are procedural difficulties involved in bringing a claim for compensation in addition to the disciplinary hearing.*[145]

6.95 The OLSC, in its submission, acknowledged that the power to compensate sits uneasily with the Tribunal's other functions and suggested that:

> *The power to award compensation sits most comfortably with an independent body that is capable of serving the interests of legal practitioners and their clients without exclusive allegiance to either.*[146]

The OLSC has, therefore, suggested that the LSC would be the appropriate person to award compensation to complainants.[147]

6.96 The Victorian Legal Ombudsman emphasised the need to keep consumer redress and disciplinary functions separate.[148]

6.97 The Commission is of the view that it is not desirable to have issues relating to the question of compensation distorting the public protection aspects of disciplinary hearings before the Tribunal. Compensation orders, at the end of a hearing, would be appropriate only if such orders reasonably or incidentally arose from matters canvassed as part of the disciplinary procedure. That is, in situations where the order for compensation could be

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143. Legal Aid Commission, Submission at 4.
144. Law Society of NSW, Submission at 19; NSW Bar Association, Submission at 57.
145. Law Society of NSW, Submission at 19.
146. OLSC, Submission at 36.
147. This ties in with other proposals by the OLSC to include negligence within the definition of misconduct: See para 5.60 and para 3.8-3.17.
148. Victorian Legal Ombudsman, Submission at 59-60.

based on already existing findings. However, if something more is required by way of, for example, submissions or evidence, then the most appropriate course would be for the question of compensation to be dealt with as a separate matter. One possible option might be to have compensation determined by the ADT sitting in its fair trading jurisdiction if the jurisdiction of the Fair Trading Tribunal moves to the ADT.[149]

Recommendation 34

The Legal Services Division of the Administrative Decisions Tribunal should have the power to order compensation on the basis of findings made by the Tribunal as part of the disciplinary hearing. Any questions of compensation requiring substantial submissions or evidence should be referred to an appropriate alternative forum for determination.

Compensation to practitioners

6.98 One submission suggested that the Tribunal should be able to award a practitioner compensation against a complainant if the original allegation is not proven against the practitioner and it is shown that the allegation was knowingly false, malicious or fraudulent.[150] *Another submission drew attention to the fact that practitioners cannot charge fees for answering complaints and that therefore, in the case of false complaints, practitioners may be unfairly at a loss as the result of a complaint.*[151]

6.99 This issue was not raised in IP 18. It is noted in this regard that the broad provisions of the Medical Practice Act 1992 (NSW) with respect to costs could be interpreted as extending beyond legal

149. *Sch 5 cl 7 of the Fair Trading Tribunal Act 1998 (NSW) has not yet commenced.*
150. *P Nagle, Submission at 1-2.*
151. *A Fegent, Submission at 2.*

costs to other costs (including costs incurred by loss of earnings).[152] *Express provision could be made to clarify any doubts as to such a broad interpretation of "costs" in relation to the provisions of the Legal Profession Act 1987 (NSW). The Commission makes no recommendation on this issue.*

Other orders

6.100 The Bar Association has proposed that the Tribunal be empowered to:

- *make orders for a formal apology to the complainant;*[153]
- *make orders for counselling as to the legal practitioner's professional obligations;*[154] *and*
- *order that a practitioner enter into an enforceable undertaking as to future conduct.*[155]

The Law Society generally supported the inclusion in the Act of these powers.[156]

6.101 The Tribunal has few powers in relation to the future conduct of practitioners, short of cancelling or suspending a practising certificate, although it does currently also have the power to require a practitioner to undertake and complete a specified course of legal education[157] *and, in relation to solicitors only, it can subject a solicitor's practice to periodic inspection,*[158] *order that a solicitor "seek advice in relation to the management of the solicitor's practice … from the person specified in the order",*[159] *and order that a solicitor "cease to accept instructions in relation to the class of*

152. Walton v McBride (1995) 36 NSWLR 440 at 474-475 (Cole JA).
153. NSW Bar Association, Preliminary Submission 1 at para 37-38.
154. NSW Bar Association, Preliminary Submission 1 at para 37-38.
155. NSW Bar Association, Submission at 50.
156. Law Society of NSW, Submission at 17.
157. Legal Profession Act 1987 (NSW) s 171C(1)(f).
158. Legal Profession Act 1987 (NSW) s 171C(2)(b).
159. Legal Profession Act 1987 (NSW) s 171C(2)(c).

legal services specified in the order".[160]

6.102 There is a degree of overlap between some of the Bar Association's proposals and the provisions that already exist. For example, the power to order that a solicitor seek advice in relation to practice management could be incorporated in the proposed general power to order counselling as to professional obligations. The power to order that a solicitor not accept instructions in relation to a particular class of legal services could be incorporated in a power to require a practitioner to enter undertakings as to future conduct.

6.103 No submissions were received on this issue apart from those from the Bar Association and the Law Society. Given the variety of new options proposed and the overlap with already existing options, the Commission favours giving the Tribunal the additional power to make such other orders as it thinks fit. This will allow the Tribunal to develop further appropriate remedies in addition to those suggested by the Bar Association.

Recommendation 35

The Legal Services Division of the Administrative Decisions Tribunal should have the power to make such other orders as it thinks fit following a hearing.

APPEALS

6.104 The following recommendations relating to appeals from the Tribunal assumes that the current composition of the Tribunal remaining unchanged. The composition of the Tribunal was not raised directly in IP 18 and has not been fully considered as part of the current review.[161] *Any changes in the composition of the Tribunal, for example the removal of members of the legal*

160. Legal Profession Act 1987 (NSW) s 171C(2)(f).
161. See para 6.4-6.7.

profession and making a District Court Judge the chairperson, may have implications for how appeals are managed in future.

To the Appeal Panel of the Tribunal

6.105 Appeals from a first instance decision of the Tribunal are made to an Appeal Panel of the Tribunal. The Appeal Panel's constitution closely resembles the constitution of the Tribunal at first instance. At first instance the Tribunal is usually constituted in its Legal Services Division by three members, two being legally qualified and the third a lay member.[162] *An Appeal Panel is constituted by the Deputy President (Legal Services) (or in the event that this member sat in the Division, by another legally qualified member), a member who is a legal practitioner, and a lay member of the Tribunal.*[163] *In IP 18 the Commission questioned the need for appeals to be heard by a similarly constituted Appeal Panel and asked whether the appeals process from decisions of the Tribunal was adequate (Issue 44).*

6.106 A number of submissions agreed that appeals to the Appeal Panel as it currently stands are not necessary.[164]

162 Administrative Decisions Tribunal Act 1997 (NSW) Sch 2 Pt 3 cl 4 (where the legal practitioner is neither a barrister nor a solicitor, the Tribunal is constituted by one legally qualified member and one lay member).

163. Administrative Decisions Tribunal Act 1997 (NSW) s 24.

164. R S Cuddy, Submission at 7; C Wall, Submission at 9; W V Windeyer, Submission at 2; Law Society of NSW, Submission at 19; NSW Bar Association, Submission at 58; Victorian Legal Ombudsman, Submission at 62.

6.107 One submission suggested that an appeal to the District Court (where leave is necessary to call further evidence) might be a cheaper, quicker and more appropriate avenue of appeal.[165] *This could, however, be construed as undermining the Supreme Court's inherent jurisdiction with respect to legal practitioners.*

6.108 As at 30 June 2000, only seven appeals had been lodged with the Appeal Panel since the establishment of the Tribunal in 1998.[166] *Two of these appeals have been determined by the Appeal Panel. In the first the Appeal Panel affirmed the decision of the Tribunal not to allow the complainant to be joined as a party in the Tribunal*[167] *and in the second a finding by the Tribunal of professional misconduct was affirmed.*[168]

6.109 The Commission agrees that an appeal to an Appeal Panel which is constituted in the same way as the Tribunal at first instance is not necessary and accordingly recommends that appeals not be available to the Appeal Panel. This would entail repeal of s 171F of the Legal Profession Act 1987 (NSW) and modification in the Legal Profession Act, for the purposes of this class of appeals, of the general appeal provision in s 119(1) of the Administrative Decisions Tribunal Act 1997 (NSW) (which refers to appeals from the Appeal Panel to the Supreme Court).

Recommendation 36

Appeals to an Appeal Panel of the Administrative Decisions Tribunal should be abolished for all matters under Part 10.

165. C Wall, Submission at 9.
166. One in 1998/1999 and six in 1999/2000: ADT, Annual Report 1998/1999 at 37; ADT, Annual Report 1999/2000 at 21.
167. Rajski v Ball [2000] NSWADTAP 7.
168. Mitry v New South Wales Bar Association [2000] NSWADTAP 9.

To the Supreme Court

6.110 Currently an appeal to the Supreme Court from the decision of an Appeal Panel is available only in relation to a question of law. By contrast, an appeal to an Appeal Panel of the Tribunal is available as of right in relation to a question of law and, in relation to the merits of a decision, by leave only. This arrangement, under the Administrative Decisions Tribunal Act 1997 (NSW),[169] appears to exclude the Supreme Court from hearing appeals on the merits from a Tribunal decision. This is difficult to reconcile with the Supreme Court's inherent jurisdiction in relation to individual practitioners' fitness to practise, a jurisdiction expressly preserved by the Legal Profession Act 1987 (NSW).[170]

6.111 Accordingly the Commission asked in IP 18 whether the Supreme Court should have jurisdiction to hear appeals on the merits of a decision of the Tribunal and, if so, under what circumstances (Issue 43).

6.112 A number of submissions supported a greater role for the Supreme Court, in particular, as a venue for hearing appeals from the Tribunal.[171] Others generally supported appeals on the merits being available to the Supreme Court.[172] One submission proposed that appeals be available to the Supreme Court on the merits, by leave if necessary, on the grounds that a consideration of whether a practitioner is a fit and proper person to remain on the roll involves questions of fact rather than law and therefore, if it is essential that the Court retain ultimate control over practitioners (as officers of the Court), the Court should not be limited to hearing appeals on questions of law.[173]

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169. Administrative Decisions Tribunal Act 1997 (NSW) s 113(2) and s 119.

170. Legal Profession Act 1987 (NSW) s 171M. See also Re B [1981] 2 NSWLR 372; Law Society of New South Wales v Foreman (1994) 34 NSWLR 408. See also J Spigelman, Preliminary Submission.

171. R S Cuddy, Submission at 7; Law Society of NSW, Submission at 19.

172. F Combe, Submission at 13.

173. W V Windeyer, Submission at 1.

6.113 One submission opposed appeals to the Supreme Court on the merits of a decision and supported appeals on questions of law on the grounds of "fairness and efficiency".[174]

6.114 The Bar Association submitted that appeals from the Tribunal to the Supreme Court should be governed by s 75A of the Supreme Court Act 1970 (NSW).[175] *Section 75A governs appeals to the Supreme Court by way of re-hearing. It is important to note in this regard that re-hearings are not the same as retrials (or "de novo" hearings) in that, notwithstanding the court's power to take further evidence on appeal,*[176] *an appeal on re-hearing is conducted on the transcript of evidence from the original hearing and witnesses are not called.*[177] *The Bar Association sees this as an important point that there should not be a de novo appeal (or retrial) on the grounds that it can be unfair to parties to impose on them an expensive re-hearing and expose the practitioner (and witnesses) to a form of "double jeopardy".*[178]

6.115 The Commission is of the view that at least one layer of merits review is necessary. Since appeals on the merits will no longer be available to an Appeal Panel, such appeals, as well as appeals on questions of law, should be available to the Supreme Court. This is especially so since the Supreme Court has an inherent jurisdiction to deal with professional discipline of practitioners and, for that purpose, has jurisdiction to consider, on the merits, any allegation of misconduct.

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174. *Victorian Legal Ombudsman, Submission at 61.*
175. *NSW Bar Association, Submission at 58.*
176. *See Supreme Court Act 1970 (NSW) s 75A(7) and (8).*
177. *See, for eg, Da Costa v Cockburn Salvage and Trading Pty Ltd (1970) 124 CLR 192 at 208. Three forms of appeal have been identified by the High Court, namely an appeal stricto sensu (whether the judgment appealed was right when given), an appeal by way of rehearing and a hearing de novo: Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616 at 619-621 (Mason J).*
178. *NSW Bar Association, Submission at 58.*

6.116 As formulated before 1996, s 171F of the Legal Profession Act 1987 (NSW) provided that an appeal to the Supreme Court (in practice to the Court of Appeal) against the Legal Services Tribunal's determination of a complaint was:

> *to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence received at the original hearing … .*[179]

This provision was repealed by the Courts Legislation Further Amendment Act 1995 (NSW) which effectively left appeals from determinations of the Tribunal to be conducted by way of rehearing only in accordance with s 75A of the Supreme Court Act 1970 (NSW). The reasons given at the time for the repeal of s 171F were that:

- *practitioners were using the hearing before the Tribunal as a "dry run" before the hearing in the Supreme Court;*
- *allowing fresh evidence to be admitted and different cases to be put before the Court of Appeal was a waste of resources;*
- *appeals from other professional conduct tribunals could not be by way of de novo hearing in the Court of Appeal.*[180]

6.117 Alongside statutory appeal provisions as they have been formulated from time to time, the Supreme Court has an inherent jurisdiction with respect to the fitness of practitioners to practise (currently exercised by the Court of Appeal).[181] *This inherent jurisdiction is expressly preserved by the Legal Profession Act 1987 (NSW).*[182]

6.118 The question arises as to the nature of a hearing in the

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179. Legal Profession Act 1987 (NSW) s 171F(4) (repealed).

180. NSW, Parliamentary Debates (Hansard) Legislative Assembly, 22 November 1995, the Hon P Whelan, Minister for Police, Second Reading Speech at 3770.

181. Supreme Court Rules 1970 (NSW) Pt 65A r 2(10).

182. Section 171M(1). See Barwick v Law Society of New South Wales (2000) 74 ALJR 419 at para 118 per Kirby J.

Supreme Court, given that it has a statutory appellate jurisdiction and an inherent jurisdiction with respect to discipline of legal practitioners. Where an appeal lies to the Supreme Court from an administrative authority, a provision that the appeal is to be by way of re-hearing generally means the appeal takes the form of a hearing de novo.[183] *However the question ultimately depends on the construction of the relevant statutory provisions.*[184] *In 1999 the High Court held that the express preservation of the Supreme Court's inherent jurisdiction in Part 10 related only to the Supreme Court's power "to deal directly with cases other than appeals… where it is appropriate or necessary to invoke the inherent powers and jurisdiction of the Court".*[185] *An appeal from the Tribunal was a different jurisdiction of the Court and governed by s 75A of the Supreme Court Act 1970 (NSW). Irrespective of the Court's inherent jurisdiction, an appeal was not at large, the Court being confined to the complaint which was before the Tribunal.*[186] *This leaves a divide between the Court's powers with respect to its inherent jurisdiction*

183 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616 at 621.*

184. *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616 at 621; Veghelyi v Council of Law Society of New South Wales (1989) 17 NSWLR 669; Law Society of New South Wales v Foreman (1994) 34 NSWLR 408 at 440, 471 (where, in an appeal by way of a re-hearing under the previous provision in the Legal Profession Act, the Court held that it had a discretion to pay regard to the evidence before the Tribunal and form its own view). Note that in appeals from the Legal Practitioners Admission Board to the Supreme Court, under the Legal Profession Act 1987 (NSW) s 14(4) the appeal is to be by way of re-hearing and it is expressly provided that fresh evidence, or evidence in addition to or in substitution for the evidence before the Admissions Board, may be given in the appeal.*

185. *Walsh v Law Society of New South Wales (1999) 198 CLR 73 at 96. Although it should be noted that this was in relation to the Legal Services Tribunal and Part 10 Div 8 of the Legal Profession Act 1987 (NSW). Provision for appeals from the Tribunal is now made by Administrative Decisions Tribunal Act 1997 (NSW) s 119.*

186. *Walsh v Law Society of New South Wales (1999) 198 CLR 73 at 93-97.*

regarding practitioners and the Court's powers in hearing appeals from determinations of the Tribunal under Part 10 of the Act.

6.119 At present the Supreme Court is bound by the rules of evidence both in conducting a fresh hearing and in admitting further evidence on a rehearing. By contrast, the Tribunal, if the Commission's recommendations are adopted, will not be bound by the rules of evidence in admitting material at its hearings. In any case the Tribunal is presently not bound by the rules of evidence with respect to questions of unsatisfactory professional conduct.[187]

6.120 Given the desirability of preserving the Supreme Court's inherent jurisdiction and also giving it the same flexibility as the Tribunal to admit relevant material, the Commission has decided the preferred course of action will be to permit the Court:

- *where there is an appeal from the Tribunal, to conduct a rehearing of the complaint before the Tribunal on the material before the Tribunal and also to admit fresh evidence without being bound by the rules of evidence; and*
- *where there is a hearing as part of the Court's inherent jurisdiction, to admit evidence without being bound by the rules of evidence.*

This will give the Supreme Court greater flexibility in exercising its jurisdiction with respect to practitioners' fitness to practise. This overcomes the constraints upon the Court with respect to admission of evidence,[188] *rendering the appeal equivalent to merits review. It does, however, leave an appeal confined to the complaints*

187. See para 6.36-6.50 and Recommendation 31.

188. As was apparent in Walsh v Law Society of New South Wales (1999) 198 CLR 73.

determined by the Tribunal,[189] in a way similar to the jurisdiction of any merits review body. It remains possible for the inherent jurisdiction of the Court to be invoked alongside the statutory appellate jurisdiction, widening the scope of the matters before the Court.

6.121 Currently proceedings that relate to a practitioner's conduct under the Court's inherent jurisdiction are assigned to the Court of Appeal while proceedings that arise under the Legal Profession Act 1987 (NSW) are assigned to the Common Law Division of the Court. The Commission is of the view that there is merit in considering whether all conduct matters should be heard by a Judge of the Supreme Court at first instance, rather than by the Court of Appeal on the grounds that a Court constituted by a single judge may be the more appropriate forum for receiving any necessary new material. A hearing before a single Judge would involve less expense than airing such matters in the Court of Appeal. However, this issue was not raised directly in IP 18 and no submissions have been received on it. In the Commission's view additional consideration needs to be given to this question and appropriate consultation undertaken, including with the Supreme Court.

6.122 The form that a hearing takes (for example, when the matter has already been before the Tribunal, by way of rehearing or fresh hearing) should be determined in the Court's discretion following receipt of submissions by the parties before the Court. The Court should, in exercising its discretion, be alive to the possibility that practitioners may be using the hearings before the Tribunal as "dry runs" and make such orders as to the conduct of proceedings as may be appropriate in the circumstances.

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189. Consistently with Walsh v Law Society of New South Wales (1999) 198 CLR 73. It is likely that the Administrative Decisions Tribunal Act 1997 (NSW) s 119(1) would be interpreted in a similar fashion to the statutory appeal provision considered in Walsh's case, as confining the scope of the appeal to the decision before the Tribunal on the information lodged in the Tribunal).

Recommendation 37

1. **A hearing of the Supreme Court into the conduct of a legal practitioner (whether the matter has been before the Legal Services Division of the Administrative Decisions Tribunal or not) should:**

(a) be conducted in such manner as the Court considers appropriate; and

(b) not be bound by the rules of evidence as to the admission of relevant material.

2. **Where a hearing has already been conducted before the Legal Services Division of the Administrative Decisions Tribunal, the hearing may in the discretion of the Court be conducted by way of rehearing on the material that was before the Tribunal.**

3. **Consideration should be given to whether hearings of the Supreme Court into the conduct of a legal practitioner (whether the matter has been before the Legal Services Division of the Administrative Decisions Tribunal or not) should be conducted by a single Judge.**

The LSC's right to appear in the Supreme Court

6.123 The Legal Profession Act 1987 (NSW) grants the Bar Council and the Law Society the right to appear and be heard, by legal representative, in the Supreme Court when it exercises any of its functions in relation to barristers and solicitors respectively.[190] *This includes appeals from the disciplinary process to the Court of Appeal as well as the exercise of the Supreme Court's inherent jurisdiction in relation to legal practitioners generally. The rights conferred on the Bar Council and Law Society are absolute and allow the two organisations to participate fully in relevant*

190. Legal Profession Act 1987 (NSW) s 51(1)(b) and 54(1)(b).

proceedings without the need to seek the leave of the Court.[191] *The OLSC has submitted that the LSC should also have an absolute right to appear in the Supreme Court.*[192]

6.124 The High Court has said that the specific privilege granted to the professional bodies "does not affect the Court's power to determine how the proceedings are to be conducted, including who may participate and with respect to what issues".[193] *This means that the LSC can always apply to appear and be heard in any relevant case.*

6.125 Given that there are circumstances where it will be desirable for the LSC to appear and the professional bodies have decided not to, it seems unnecessary to require the LSC to seek leave in every case. The ability to appear is also consistent with the LSC's supervisory role within the disciplinary system. Granting the LSC a right to appear and be heard in the Supreme Court (like the rights currently enjoyed by the Bar Council and the Law Society) will provide certainty about the ability of the LSC to appear and participate fully in matters before the Supreme Court. Therefore there appears to be no good reason why the LSC should not have the same right as the professional bodies to appear and be heard in the Supreme Court in relation to matters concerning the conduct of legal practitioners.

191. *Wentworth v New South Wales Bar Association (1992) 176 CLR 239 at 253-254.*
192. *OLSC, Preliminary Submission Appendix, item 2.*
193. *Wentworth v New South Wales Bar Association (1992) 176 CLR 239 at 253.*

Recommendation 38

The Legal Services Commissioner should have the right to appear and be heard, by legal representative, in the Supreme Court. This right should be in relation to questions of conduct of practitioners, as well as in relation to Tribunal decisions that the Councils have chosen not to challenge.

RECORDS OF DISCIPLINARY ACTION

6.126 It has been put to the Commission that there is no adequate or accessible register maintained that records disciplinary action taken against practitioners. This is particularly so in relation to restrictions placed on a practitioner's practice as the result of disciplinary action, or undertakings made by a practitioner in the course of disciplinary action.[194] *At one extreme, this failure adequately to record and make available such information can lead to a practitioner ignoring the orders of the Tribunal with impunity.*

6.127 Two solutions have been proposed to this problem:

- *That the Tribunal be required to maintain a publicly available register of orders made against practitioners as the result of disciplinary action; and*
- *That the professional associations be required to endorse practising certificates with any relevant orders or undertakings.*[195]

Clients would, of course, need to know to look to the practitioner's current practising certificate for the second point to be effective.

194. C Wall, Submission at 2.
195. See C Wall, Submission at 3.

6.128 One other submission supported publishing the names of practitioners against whom complaints have been upheld.[196]

6.129 One such scheme in the United States is the National Lawyer Regulatory Data Bank administered by the American Bar Association's Center for Professional Responsibility. This database contains information about sanctions imposed on lawyers as the result of disciplinary hearings and may be accessed by members of the public on a user pays basis.[197]

6.130 These proposals can be compared with the OLSC's suggestion that a register be established that records all complaints made against practitioners and their outcomes, regardless of whether professional misconduct or unsatisfactory professional conduct has been proved. The OLSC sees this as another mechanism for improving consumer standards within the legal profession, stating that this would "act as an incentive for individual practitioners, as well as the profession generally, to develop appropriate mechanisms to reduce the number of complaints".[198] *However, insufficient thought has been given to protecting practitioners against malicious complaints by consumers involved in personal disputes, or even by competing lawyers. It is probably not sufficient to say, as the OLSC does, that "the onus would then fall on the OLSC and the professional bodies to explain why some practitioners attract more complaints than others".*[199]

6.131 Access to records of Tribunal determinations, even without a register, is currently more difficult than it need be. The Supreme Court Rules 1970 (NSW) place restrictions on the ability of persons to inspect orders (reflecting determinations of the Tribunal) filed in the Supreme Court in relation to the conduct of practitioners.

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196. NSW Legal Reform Group, Submission at 9.

197. American Bar Association, Center for Professional Responsibility, "National Lawyer Regulatory Data Bank" (as at 16 February 2001) «www.abanet.org/cpr/databank.html».

198. See OLSC, Submission at 38.

199. OLSC, Submission at 38.

A person may not inspect, without the leave of the Court, any order made by the Tribunal[200] where there has been a finding of unsatisfactory professional conduct,[201] but a person may inspect such an order when there has been a finding of professional misconduct.[202]

6.132 It is clearly desirable that members of the public and the profession should have access to all orders of the Tribunal regardless of whether they relate to findings of unsatisfactory professional conduct or professional misconduct. Maintaining the distinction between the treatment of matters involving unsatisfactory professional conduct and professional misconduct would also be inconsistent with other recommendations made in this Chapter. Consideration should, therefore, be given to removing the distinction currently drawn in the Supreme Court Rules 1970 (NSW) so that any person may inspect Tribunal orders without being restricted to cases where there has been a finding of professional misconduct.

6.133 Inspecting Tribunal orders that have been filed in the Supreme Court may not be the most efficient way of ensuring enforcement of the orders of the Tribunal or of providing information to consumers. The suggestion of establishing a register to record orders made in relation to proven complaints against practitioners has merit, both in terms of enforcement of the outcomes of disciplinary proceedings and also, to an extent, in terms of providing readily accessible consumer information about individual practitioners. The proposed register should be administered by the LSC as this is consistent with the LSC's role as supervisor of the complaints system.

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200. Referred as the "Legal Services Tribunal", the Rules not yet having taken account of the jurisdiction now being handled by the Legal Services Division of the ADT: Supreme Court Rules 1970 (NSW) Pt 65 r 7(3A) and (3B).

201. Supreme Court Rules 1970 (NSW) Pt 65 r 7(3A). The Rules refer to orders made under Legal Profession Act 1987 (NSW) s 171C.

202. Supreme Court Rules 1970 (NSW) Pt 65 r 7(3B).

Recommendation 39

Consideration should be given to removing the distinction drawn in Pt 65 r 7(3A) and (3B) of the *Supreme Court Rules 1970* (NSW) so that persons may inspect, without restriction, all orders made by the Legal Services Division of the Administrative Decisions Tribunal in relation to the conduct of practitioners.

Recommendation 40

The Legal Services Commissioner should have the power to establish a publicly accessible register recording orders made in relation to proven complaints against practitioners.

7. Regulatory issues

- Types of regulation
- Consumer redress
- Legal profession in other jurisdictions
- Complaints handling standards

7.1 Part 10 of the Legal Profession Act 1987 (NSW) establishes a co-regulatory model for dealing with complaints about lawyers. This Chapter considers different models for dealing with complaints, ranging from self regulation to independent regulation. The Chapter discusses the involvement of the Law Society and the Bar Association in the complaints process and consumer protection. The Chapter outlines different models which were suggested by submissions, and the models used for dealing with complaints about lawyers in other jurisdictions. This Chapter also discusses some of the methods by which complaints systems can be evaluated.

7.2 This Chapter contains no recommendations. As noted in Chapter 1, this is an Interim Report which focuses on procedural questions about the current system for dealing with complaints about lawyers. However, the Commission considers that there is merit in reviewing more fundamental aspects of the current co-regulatory model. The Commission will consult with the Attorney General about the scope of the additional work to be done in the next stage of this review. It will also require further consultation with consumers of legal services, the LSC and the professional associations.

TYPES OF REGULATION

Self regulation

7.3 Self regulation describes a group of people regulating or controlling their own activities, including admission to the group, setting professional standards, and disciplining members.[1] *Self regulation is common for professional groups.*

1. *See W H Hurlburt, The Self-Regulation of the Legal Profession in Canada and in England and Wales (Law Society of Alberta and Alberta Law Reform Institute, 2000) at 1.*

7.4 Self regulation gives primacy to the idea of professional independence free from interference. Factors such as public accountability and consumer protection may not be adequately accommodated in predominantly self regulatory models.

Banking Ombudsman Scheme

7.5 The Banking Ombudsman Scheme is a self regulatory scheme for dealing with complaints about banks. The Scheme, which is funded by banks, employs an independent Ombudsman who is selected by a Council consisting of equal numbers of consumer and bank representatives. The Australian Banking Industry Ombudsman deals with complaints by individuals (and in some cases, small businesses) about specific banking services. Complaints can be resolved by agreement or by recommendation by the Banking Ombudsman. The Banking Ombudsman may also make an award of up to $150,000 for financial loss caused by the actions of a bank.[2]

Co-regulation

7.6 Co-regulatory regimes allow organisations outside the profession, such as government and community agencies, to be involved in the regulation of the profession.[3] *This allows public interest considerations, such as protection from anti-competitive practices, and consumer protection issues to be taken into account and balanced with those of the profession.*

Part 10 of the Legal Profession Act 1987 (NSW)

7.7 The complaints and disciplinary system established by Part 10 of the Legal Profession Act 1987 (NSW) is co-regulatory. The system is established by legislation. The Law Society Council and the Bar Council, which are the professional bodies representing practitioners, conduct most investigations. The Office of the Legal

2. *Australian Banking Industry Ombudsman (as at 28 March 2001) «www.abio.org.au».*
3. *New South Wales Law Reform Commission, Complaints Against Lawyers: Review of Part 10 (Issues Paper 18, 2000) ("IP18") at para 3.5.*

Services Commission is an independent statutory agency which supervises and monitors the professional bodies. Complaints about lawyers are heard by the Legal Services Division of the Administrative Decisions Tribunal, which is a quasi-judicial body.

Health Care Complaints Commission

7.8 Complaints about health practitioners in New South Wales[4] are dealt with by a co-regulatory scheme involving the registration authorities which regulate and represent various health professions and the Health Care Complaints Commission (the "HCCC"), an independent statutory authority. Complaints must be made to and investigated by the HCCC. The HCCC is required to notify the relevant registration authority about complaints and consult with the registration authority. After investigating a complaint the HCCC must either prosecute the complaint before a disciplinary body or refer it to the Director of Public Prosecutions, intervene in proceedings on foot before a disciplinary body, refer the complaint to the relevant registration authority with a recommendation, comment to the health practitioner or terminate the complaint.[5]

Telecommunications Industry Ombudsman Scheme

7.9 The Telecommunications Industry Ombudsman Scheme is a co-regulatory scheme for resolving disputes between telecommunications carriers and internet service providers and their customers. The scheme is established by legislation under which membership of, and compliance with, the scheme is compulsory.[6] The Scheme is funded by members on the basis of the number and comparative percentage of complaints made to the Telecommunications Industry Ombudsman.[7] The Scheme deals

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4. *This includes complaints about a wide range of services, including hospital, medical, nursing, dental, psychiatric, pharmaceutical and community health services: Health Care Complaints Act 1993 (NSW) s 4.*
5. *Health Care Complaints Act 1993 (NSW) Pt 2.*
6. *Telecommunications (Consumer Protects and Service Standards) Act 1999 (Cth) Pt 6.*
7. *Telecommunications Industry Ombudsman, Annual Report 1998/1999 at 10.*

with complaints by individuals and small businesses about the provision of services, billing and breaches of the industry's Customer Service Guarantee, industry codes and standards. Complaints can be resolved by agreement. The Telecommunications Industry Ombudsman can make binding determinations of up to $10,000 and recommendations of up to $50,000 compensation for financial loss caused by a telecommunications carrier or internet service provider.[8]

Independent regulation

7.10 Independent regulatory regimes involve the regulation of a profession or industry by an independent body, often established by government. Professional bodies have no involvement in this form of regulation.

Submissions

7.11 In IP 18 the Commission asked what the appropriate role for the professional bodies in the complaints system should be (Issue 1).There was strong support for co-regulation among the OLSC and the Councils.[9] *The Law Society argued that the current system is effective and meets the criteria for good complaints handling outlined in IP 18.*[10] *The Law Society has also argued that the involvement of the profession is important because it:*

8. *Telecommunications Industry Ombudsman (as at 29 March 2001) «www.tio.com.au».*
9. *See OLSC, Submission at 4; Law Society of NSW, Submission at 7; NSW Bar Association, Submission at 23-25.*
10. *Law Society of NSW, Submission at 7. See IP 18 Chapter 3.*

- *"preserves independence from control by the Government of the day";*[11] *and*
- *makes available the expertise of senior members of the profession through, for example, the Professional Conduct Committees.*[12]

7.12 Co-regulation was also supported in submissions by individual practitioners.[13]

7.13 Many submissions, especially from consumer groups and individual consumers of legal services, strongly opposed co-regulation.[14] *These submissions criticised the involvement of the profession, through the professional associations, in the disciplinary system. It was argued that there is a conflict of interest in the Law Society and the Bar Association participating in the complaints and disciplinary system, since they are the professional associations which represent practitioners. It was argued that the professional associations are not effective regulators. Other submissions argued that the public perception of the professional bodies' involvement in the system means that all results, however fairly and meticulously*

11. *Law Society of NSW, "About the Law Society of NSW: Maintaining Professional Standards" (as at 30 March 2001) «www.law society.asn.au».*
12. *About the Law Society of NSW: Maintaining Professional Standards.*
13. *R S Cuddy, Submission at 1; C Wall, Submission at 5.*
14. *P Breen, Preliminary Submission at para 1.1, 3.1, 3.2, 3.3; For Legally Abused Citizens Inc, Submission 1 at 2-3; For Legally Abused Citizens Inc, Submission 2 at 3; B Hagen, Submission 1 at 7; V Morris, Submission; NSW Legal Reform Group, Preliminary Submission at 1; NSW Legal Reform Group, Submission at 3; N R Cowdery, Submission at 1; Medical Consumers Association Inc, Submission at 7; Victorian Legal Ombudsman, Submission at 13-14. See also V Drakeford (letter to the Editor), "Legal whistling into the wind" Australian Financial Review (17 May 2000) at 24; N Carson, "Self-regulation a big issue for profession" Australian Financial Review (17 March 2000) at 32; NSWLRC Report 70 at para 3.7-2.23.*

arrived at, will be suspect.[15] *A substantial number of submissions called for independent regulation of the legal profession.*[16]

7.14 Several submissions suggested that the professional associations should not be dealing with complaints but should rather be playing a support role in the system.[17] *This role might be either assisting practitioners who have been complained against, representing the interests of the profession (in ensuring appropriate standards are upheld, etc),*[18] *or even by providing appropriate expertise where required.*[19]

CONSUMER REDRESS

7.15 The objects of Part 10 are to redress consumer complaints by users of legal services, ensure that individual practitioners comply with professional standards and maintain the standards of the profession as a whole.[20] *The object of addressing consumer complaints was inserted into Part 10 in response to the Commission's earlier work on complaints about lawyers.*[21] *In IP 18 the Commission asked how Part 10 could better address the needs of consumers (Issue 3).*

15. *N R Cowdery, Submission at 1. See also B Barac, Submission at 2.*
16. *F Combe, Submission at 4; N R Cowdery, Submission at 1; For Legally Abused Citizens Inc, Submission 1 at 3; M Fullerton, Submission at 1; B Barac, Submission at 2; NSW Legal Reform Group, Submission at 4; Federation of Community Legal Centres (Victoria), Submission at 2; Victorian Legal Ombudsman, Submission at 8-10; P Breen, Submission at 1.*
17. *F Combe, Submission at 3.*
18. *C Wall, Submission at 2.*
19. *F Combe, Submission at 4.*
20. *Legal Profession Act 1987 (NSW) s 123.*
21. *NSWLRC Report 70 at para 3.24-3.31 and Recommendation at 71.*

Submissions

7.16 One submission argued that the aims of consumer redress and maintaining professional standards are conflicting.[22] Another submission commented that consumers have little interest in disciplinary outcomes of complaints – what is important to consumers is the resolution of their individual consumer dispute.[23]

7.17 On the other hand, the OLSC argued that using the system to provide consumer redress will ultimately lead to the development of consumer-oriented professional standards as part of the regulatory system.[24]

7.18 It was also submitted that some consumers pursue disciplinary matters to ensure that the behaviour complained of does not happen again or that justice is done.[25]

LEGAL PROFESSION IN OTHER JURISDICTIONS

Australia

7.19 Complaints about lawyers in the Australian Capital Territory, the Northern Territory, South Australia, Queensland and Tasmania are dealt with by the professional associations.[26] In Queensland and Tasmania, the relevant legislation also provides for the appointment of a legal ombudsman but the ombudsman is limited to a monitoring role.[27]

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22. *P Breen, Preliminary Submission at para 1.*
23. *Medical Consumers Association Inc, Submission at 7.*
24. *OLSC, Preliminary Submission at 12. See also OLSC, Annual Report 1998/1999 at 20-21.*
25. *See C Wall, Submission at 1-2.*
26. *Legal Practitioners Act 1970 (ACT) Pt 8; Legal Practitioners Act (NT) Pt 6; Queensland Law Society Act 1952 (Qld) Pt 2 and 2A; Legal Practitioners Act 1981 (SA) Pt 6; Legal Profession Act 1993 (Tas) Pt 8.*
27. *Queensland Law Society Act 1952 (Qld) Pt 2B; Legal Profession Act 1993 (Tas) Pt 8 Div 4.*

7.20 In Victoria complaints about lawyers can be investigated and dealt with by either the Legal Ombudsman or the professional associations.[28] In March the Victorian Government published a Discussion Paper on regulating the Victorian legal profession.[29] This Paper discusses a number of alternative models for handling complaints against lawyers, ranging from a greater return to self regulation favoured by the professional associations to a completely independent regulatory regime.

7.21 In Western Australia complaints about lawyers are dealt with by a Legal Practice Board consisting of a Chairperson and at least six other practitioners, and two community representatives.[30]

Overseas

7.22 Complaints about solicitors in England and Wales are dealt with by the Office of Supervision of Solicitors, which is funded by the Law Society. The Office of Supervision of Solicitors is independent of the Law Society in the sense that the Law Society cannot interfere in its investigations or decisions.[31] Complaints against barristers are dealt with by the Bar Council.[32] A Legal Ombudsman monitors the way that complaints about solicitors and barristers are dealt with.[33]

7.23 Complaints about New Zealand lawyers are dealt with by the professional associations. Regional Lay Observers monitor the investigation and resolution of complaints by the professional associations.[34]

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28. Legal Practice Act 1996 (Vic) Pt 5.
29. P A Sallmann and R T Wright, Legal Practice Act Review (Victoria, Department of Justice, Discussion Paper, 2001).
30. Legal Practitioners Act 1893 (WA) Pt 4.
31. Solicitors Act 1974 (Eng).
32. Bar Council for England and Wales, Complaints Rules.
33. Courts and Legal Services Act 1990 (Eng).
34. Law Practitioners Act 1982 (NZ) Pt 7.

7.24 The legal profession in Canada is also essentially self regulated. Complaints are dealt with primarily by the professional association in each province.[35]

COMPLAINTS HANDLING STANDARDS

7.25 One way of evaluating complaints handling systems is to measure their performance against criteria considered necessary for effective complaints handling. The Commonwealth Ombudsman has developed complaints handling standards to assist government agencies with the establishment and maintenance of effective complaints handling systems.[36]

7.26 The first element identified by the Commonwealth Ombudsman is commitment to the complaints handling system and clients. Training and development of staff to foster a client service culture is an example of a practice which demonstrates commitment.[37]

7.27 The next element identified is fairness to participants in the system. The Commonwealth Ombudsman comments that a fair complaints handling system is impartial, confidential, transparent

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35. *W H Hurlburt, The Self Regulation of the Legal Profession in Canada and in England and Wales (Law Society of Alberta and Alberta Reform Institute, 2000).*
36. *Australia, Commonwealth Ombudsman's Office, A Good Practice Guide for Effective Complaint Handling (2nd edition, 1999). See also Standards Australia, Australian Standard: Complaints Handling (AS 4269-1995) (1995); Alaska, Ombudsman, "Devising a Government Complaint System: Guide to Good Practice" (as at 21 July 2000) «www.state.ak.us/ombud»; New South Wales, Attorney General's Department, National Competition Policy Review of the Legal Profession Act 1987 (Report, 1998) at 54.*
37. *See for example HCCC, Annual Report 1999/2000 at 81, and ABIO, Annual Report 1999/2000 at 19, where the HCCC and ABIO report on professional training and development of staff.*

and is able to provide outcomes and remedies in response to complaints which are substantiated.[38]

7.28 Thirdly, effective complaints handling systems must be accessible to their clients. According to the Commonwealth Ombudsman, accessibility involves providing clear information about how to make complaints, the complaint process, the client's rights and responsibilities and applicable service standards.[39]

7.29 Effective complaints handling systems must also be responsive to clients and their complaints. One tool for encouraging and maintaining responsiveness is the use of time standards for resolving complaints.[40]

7.30 Complaints handling systems must also be effective. The Commonwealth Ombudsman comments that ensuring effectiveness involves evaluating client satisfaction of processes and outcomes, and adjusting the system to reflect feedback about the quality of service provided.[41]

7.31 Finally, complaints handling systems must be accountable to clients and the wider public. This involves regular publication of the number and type of complaints received, speed of response,

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38. Commonwealth Ombudsman at 20-27. See for example the requirement that the HCCC must give reasons for its decisions: Health Care Complaints Act 1993 (NSW) s 41.

39. Commonwealth Ombudsman at 29-30. See for example the explanatory information published on the web sites of the Australian Banking Industry Ombudsman: «www.abio.org.au» and the Telecommunications Industry Ombudsman: «www.tio.com.au».

40. Commonwealth Ombudsman at 43. For example, the HCCC uses a time standard of 60 days, and reports the time taken to resolve all complaints each year: HCCC, Annual Report 1999/2000 at 7.

41. Commonwealth Ombudsman at 45-46. For example, the HCCC runs a consumer advocacy service which undertakes client satisfaction surveys.

outcomes, client satisfaction levels and adjustments made to improve the system.[42]

7.32 The complaints handling system set up by Part 10 is more complex than a simple model of a client complaining to a government agency about that agency's activities in that the participants in the system (practitioners, complainants, the professional associations, the LSC and the public) have various, and often overlapping, interests in the operation of the system and its outcomes.

7.33 Despite this, it may be possible to evaluate the system for dealing with complaints about lawyers by reference to standards such as those developed by the Commonwealth Ombudsman. This would involve assessment of the legislative framework and practical operation of the system.

42. Commonwealth Ombudsman at 49-50. For example this information is reported by the HCCC and ABIO their Annual Reports: HCCC, Annual Report 1999/2000 at 19, 20, 54-56; ABIO, Annual Report 1999/2000 at 20.

Appendix A: SUBMISSIONS

The Commission invites submissions on relevant issues. Submissions can be written or oral (such as a phone call or private discussion with a legal officer). Copies of all submissions are publicly available from the Commission upon request.

Organisations

Department of Fair Trading (19 December 2000)
Federation of Community Legal Centres (Victoria) (10 January 2001)
Law Society of New South Wales (19 December 2000)
Legal Aid Commission (11 December 2000)
New South Wales Bar Association (22 December 2000)
Office of the DPP (NSW), Mr NR Cowdery QC (12 December 2000)
Office of the Legal Services Commissioner (15 December 2000)
Victorian Legal Ombudsman (19 January 2001)

Consumer Groups

For Legally Abused Citizens Inc, Submission 1 (10 November 2000)
For Legally Abused Citizens Inc, Submission 2 (17 December 2000)
Medical Consumers Association Inc (12 December 2000)
New South Wales Legal Reform Group (5 January 2001)
New South Wales Legal Reform Group, Ms V Drakeford, Oral Submission (17 November 2000)

Individuals

Barac, Mr B (14 December 2000)
Beard, Ms L, Submission 1 (27 December 2000)
Beard, Ms L, Submission 2 (29 December 2000)
Berkemeier, Ms C (19 December 2000)

Breen MLC, The Hon P, (15 January 2001)
Combe, Ms F (6 December 2000)
Cuddy, R S (30 October 2000)
Fegent, Mr A (15 December 2000)
Fullerton JP, Ms M (13 December 2000)
Gormly, Mr J, (barrister) (30 November 2000)
Gunay, Mr (1 December 2000)
Hagen, B, Submission 1 (13 October 2000)
Hagen, B, Submission 2 (9 November 2000)
Lawrence, Mr W, Oral Submissions (11 and 12 October 2000)
Lawrence, Mr W, Submission 1 (14 March 2001)
Lawrence, Mr W, Submission 2 (15 December 2000)
Lawrence, Mr W, Submission 3 (15 February 2001)
Loveday, Mr J A (2 December 2000)
Lyall, Mr N D (20 February 2001)
Molloy, Mr G (17 January 2001)
Morris, Mr V (27 December 2000)
de Morana zu Künigsberg un de Morana, Mr (14 December 2000)
Nagle, Mr P (MLA) (12 December 2000)
O'Donnell, Dr C (22 November 2000)
Wall, Mr C P (24 November 2000)
Windeyer, The Hon Mr Justice W V, (Supreme Court of New South Wales) (15 December 2000)

Confidential

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Confidential, Oral Submission 2 (13 November 2000)
Confidential, Oral Submission 3 (16 November 2000)
Confidential, Oral Submission 4 (24 November 2000)
Confidential, Oral Submission 5 (4 December 2000)
Confidential, Submission 1 (13 December 2000)
Confidential, Submission 2 (15 December 2000)
Confidential, Submission 3 (8 December 2000)

Appendix B:
PRELIMINARY SUBMISSIONS

Organisations

Administrative Decisions Tribunal, Deputy President (Legal Services), Needham SC, Ms C, (3 May 2000)
Far North Coast Law Society (30 May 2000)
Law Society of New South Wales (4 May 2000)
NSW Bar Association, Preliminary Submission 1 (24 May 2000)
NSW Bar Association, Preliminary Submission 2 (26 June 2000)
Office of the Legal Services Commissioner (1 June 2000)
Professional Standards Council (8 June 2000)

Consumer Groups

For Legally Abused Citizens Inc, Preliminary Submission 1 (29 August 2000)
For Legally Abused Citizens Inc, Preliminary Submission 2 (4 July 2000)
New South Wales Legal Reform Group (31 May 2000)

Individuals

Breen MLC, The Hon P, (4 May 2000)
Corbishley, Mr G, Oral Submission (29 June 2000)
Cuddy, Mr S (15 May 2000)
Golder, Mr B (1 May 2000)
Hughes, Mr C (8 February 2000)
Lawrence, Mr W (12 October 2000)
McKeown, Mr M (undated)
Spigelman, The Hon Chief Justice J (8 June 2000)
Stenberg, Mr M (1 June 2000)
Taylor, Mr G, Oral Submission (12 April 2000)
White, Mr N, Oral Submission (16 June 2000)

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Chiropractors and Osteopaths Act 1991
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Dentists Act 1989
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