DISCUSSION PAPER 26 (1992) - SCRUTINY OF THE LEGAL PROFESSION

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Terms of Reference, Participants and Submissions

TERMS OF REFERENCE

On 12 November 1991, the Attorney General, the Honourable PEJ Collins QC MP, gave the Commission a reference, which was amended on 29 January, 1992. As amended, the Commission has been asked to inquire into and report upon:

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

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

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

PARTICIPANTS

The Law Reform Commission is established by the Law Reform Commission Act 1967 (NSW). Pursuant to s12A of the Act, the Chairman has constituted a Division for the purposes of conducting this reference. The members of the Division are:

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SUBMISSIONS

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DISCUSSION PAPER 26 (1992) - SCRUTINY OF THE LEGAL PROFESSION

Executive Summary

The reference on Scrutiny of the Legal Profession follows the Commission's earlier inquiry into the legal profession in New South Wales, which led to the present regulatory regime under the *Legal Profession Act* 1987 (NSW). The Commission has been asked by the Attorney General, following the Memorandum of Understanding between the three Independent Members of Parliament and the Greiner Government, to consider the necessity for implementing alternative mechanisms for dealing with complaints about the delivery of legal services. (The Commission also has been asked to look into the openness and accountability of the major public sector providers of legal services, such as the Legal Aid Commission, the Crown Solicitor's office, and the office of the Director of Public Prosecutions. This will be dealt with in a second Discussion Paper in this series.)

In Chapter 2 of this paper, we explain in some detail the current system for dealing with complaints against lawyers. Basically, the governing Councils of the peak professional associations - the Law Society of New South Wales and the New South Wales Bar Association - have been given wide statutory powers (some of which have been delegated to committees) to receive, investigate, assess and dismiss complaints, to issue reprimands, and to refer appropriate cases to the Legal Profession Standards Board or the Legal Profession Disciplinary Tribunal. The Board hears matters involving allegations of "unsatisfactory professional conduct", while the Tribunal hears more serious allegations of professional misconduct, for which a legal practitioner may be struck off. The Legal Profession Conduct Review Panel, with a majority of non-lawyers, may review a Council's dismissal of a complaint if the complainant has so requested.

In Chapter 3, we look at the methods used for handling complaints against lawyers in the other Australian states, with special attention to the system in Victoria. We also look at the position in England and Wales, and in the United States, with special reference to California. Finally, we consider the handling of complaints against health care professionals in New South Wales by the Department of Health's Complaints Unit.

The final two chapters contain the Commission's analysis of the strengths and weaknesses of the various methods of complaints-handling, and our suggestions for reform.

Chapter 4 covers common issues and problems in the handling of complaints against lawyers, with suggested improvements which are not necessarily contingent upon the retention or adoption of any particular regulatory model. Among the key matters which the Commission considers are:

> the introduction of a Complainant's Charter of Rights, which would include guarantees about effective access to the complaints-handling system, immunity from civil liability, the rights to appear as a party and to be present at any subsequent hearing of the complaint, and the right to be kept fully informed of the status and progress of the complaint;

> the encouragement of mediation of disputes between lawyers and clients (while remaining sensitive to the imbalance of power between the parties and the need for independent, qualified mediators);

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

confidentiality and the protection of communications made in the course of lodging or processing a complaint;

the prevention of misconduct and improprieties through the enhancement of professional standards;

the resolution of disputes about legal fees and costs; and

the most effective methods for funding an effective complaints system.

In the final chapter, the Commission sets out three competing options for handling complaints against lawyers. Option One leaves the principal responsibilities with the Councils of the Law Society and the Bar Association, but proposes a range of improvements to the existing system. The submissions of the professional associations themselves pointed out a considerable number of flaws and teething problems in the current system, and it is universally accepted that it is *not* an option for the Commission simply to recommend the status quo. The suggested improvements include: separation of the regulatory responsibilities from the membership responsibilities of the professional associations, in order to increase the actual and perceived independence of the complaints-handling system; taking a more active, thorough approach to the reception and investigation of complaints; the imposition of a time discipline on the system; narrowing the gap between what clients regularly complain about (negligence, incompetence, delay, poor communications, discourtesy and over-charging) and what the profession takes seriously enough to require disciplinary hearings (such as trust account defalcations and repeated acts of gross negligence); and making the external review mechanism (the Conduct Review Panel) more effective.

Option Two represents a major departure from the current system, adapting the health care complaints system to the legal services context. Under Option Two, the Law Society and the Bar Association would lose their central roles in the complaints-handling system, to be replaced by an independent, specialist agency with statutory authority, to be known as the Legal Services Complaints Commission. This Complaints Commission would receive and investigate all complaints against lawyers, and determine which complaints should be sent to the Standards Board and the Disciplinary Tribunal.

Option Three is something of a compromise, vesting the initial responsibility for the reception and investigation of complaints with an independent Legal Services Ombudsman, but leaving the professional Councils with the responsibility for deciding whether particular matters should be dismissed, result in a reprimand, or be referred to the Standards Board or the Disciplinary Tribunal for a hearing. Under this scheme, the Legal Services Ombudsman also would play a key role in the external monitoring of the professional Councils, and generally in raising public awareness of the role of the legal profession and the availability of complaints procedures.

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DISCUSSION PAPER 26 (1992) - SCRUTINY OF THE LEGAL PROFESSION

1. Introduction

BACKGROUND TO THE REFERENCE

The terms of reference

1.1 On 12 November 1991, the Commission was given a reference by the Attorney General, the Hon peter E J Collins QC MP, under the s10 of the *Law Reform Commission Act* 1967 (NSW), to inquire into and report upon the following matters by 28 February 1992:

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

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

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

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

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

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

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

The Commission's previous work on the legal profession

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

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

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

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

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

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

1.7 Although the new legislation only has been in place for four years, and it is not long since the Commission's earlier inquiry, there are good reasons for the Commission to look at this area again. First, the legal profession has changed considerably in the past decade. The number of lawyers and the lawyer-population ratio have increased greatly in a short time, with the average age and experience of the profession declining accordingly[1]. The decade also has seen the rise of the "mega-firm" of solicitors, and

substantial increase in inter-state and international practice[2]. Small firms are coming under electronic pressure, with the challenges to the traditional solicitors' monopoly over conveyancing work and changes to the system for compensating personal injury victims. Increased emphasis is being placed upon the advertising and marketing of legal services, and law firms of all sizes are enjoined to operate in a more "business-like" fashion, despite the traditional distinction between a service-oriented profession" and other occupations and commercial ventures. Lawyers are now commonly asked to practise outside of the traditional narrow role, serving as tax and commercial advisers, directors, and mediators, among other things.

1.8 Secondly, social expectations have changed considerably in the past decade. There is an increased awareness of the rights of consumers, and an extension of these principles into the public sector, with calls for increased openness, fairness and accountability of public sector institutions and officials. The recent emphasis on "micro-economic reform" has reached the professions, with the attendant concerns about the elimination of restrictive trade practices and the promotion of increased competition within and between markets for professional services.

The organisation of the current inquiry

1.9 While there is no obvious link, the first and second terms of reference in this inquiry are aimed at different systems. The first term, which is the subject of this Discussion Paper, related to the adequacy of the existing means of handling complaints about lawyers. Under the Act, the governing Councils of the peak professional associations - the New South Wales Bar Association and the Law Society of New South Wales - are given statutory powers (which may be delegated to committees) to receive, investigate, assess, and dismiss complaints, reprimand legal practitioners, and refer matters to the Standards Board and the Disciplinary Tribunal for determination. The Councils also have power over the conduct of legal practitioners though their control of the system of issuing (and suspending, cancelling or placing conditions on) practising certificates. While the regulation of the legal profession is thus largely in the hands of the private profession, the disciplinary system also may deal with complaints against lawyers who are employed in the public sector, such as those who work for the Legal Aid Commission or the Director of Public Prosecutions.

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

1.11 For reasons of policy as well as pragmatism, the Commission has decided to deal with these topics in separate Discussion Papers, and will shortly be releasing the paper on Accountability of Public Legal Services.

1.12 The Commission feels it is important to state at the onset that it has received a high level of cooperation from the Law Society and the Bar Association in the conduct of this inquiry, as well as from a range of other officials involved in different aspects of the disciplinary process. The professional associations have supplied the Commission with all of the requested information, statistical and otherwise. The Law

Society permitted members and staff of the Commission to observe its Complaints Committee and Council in deliberation, which provided valuable insights into the system in operation.

1.13 Shortly after receiving this reference from the Attorney General, the Commission advertised the fact and terms of reference and invited submission. Submissions were received from the Law Society and the Bar Association, as well as from the Australian Consumers' Association, the Lawyers Reform Association, the New South Wales Council for Civil Liberties, the New South Wales Combined Community Legal Centres Group, the President of the Legal Profession Disciplinary Tribunal, and a number of other organisations and individuals. A great deal of relevant material was provided to the Commission by the Hon John Hatton MP, and the Commission received valuable assistance from Mr Raymond R Trombadore, the Chair of the American Bar Association's Commission on Evaluation of Disciplinary Enforcement, in acquiring American materials. All of this material was valuable in assisting the Commission in the preparation of this Discussion Paper.

PURPOSE OF THE DISCUSSION PAPER

1.14 The matters considered in this Discussion Paper are of considerable importance to members of the legal profession and to the general public. The purpose of this Paper is to provide sufficient background and structure to the issues in order to promote informed debate about the best mechanism for handling complaints about the profession conduct of lawyers, and to elicit submissions from professional associations, community groups and interested individuals on this subject. Such submission will be of great assistance to the Commission in finalising its Report to the Attorney General containing recommendations for reform. **Any views expressed in this Paper are presented for the purpose of discussion and do not represent the final view of the Commission.** Because of the time restrictions which have been imposed on the Commission in the conduct of this inquiry, it is essential that all submission reach the Commission by the specified deadline.

OUTLINE OF THE DISCUSSION PAPER

1.15 Chapter 2 outlines the existing systems for handling complaints against solicitors and barristers, which have been in place since the *Legal Profession Act* 1987 (NSW) came into force in 1988/ We consider the roles of the professional associations, the Supreme Court, the new disciplinary bodies (the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal), and other relevant bodies, such as the Consumer Claims Tribunal. Chapter 3 provides some comparative perspectives, surveying the complaints-handling processes in respect of lawyers in other jurisdictions (in Australia and overseas) as well as the methods used by other professions. Special attention is paid to the disciplinary systems dealing with lawyers in Victoria and in England and Wales, and to the New South Wales Department of Health's Complaints Units, which handles complaints against most health care professionals (including doctors) in this State.

1.16 Chapter 4 raises issues and proposes a range of possible improvements to the disciplinary system which are broadly applicable, and not contingent upon the acceptance of any particular regulatory model. For example, the Commission considers among other things: the establishment of a "Charter of Rights" for complainants, which makes clear the role and position of the complainant in the system; practical methods of increasing access to the complaints-handling system; the use of consensual dispute resolution techniques,

such as mediation, to settle many lawyer-client conflicts; preventive measures to enhance professional standards and increase client satisfaction; and sources of funding for the new system.

1.17 In Chapter 5, we offer three competing options for regulation of the legal profession, with the aim of focusing the debate. Option One involves retention and improvement of the existing disciplinary system, which is organised around the Councils of the Law Society and Bar Association. The submissions of the professional associations themselves pointed out a considerable number of flaws and teething problems in the current system, and it is universally accepted that it is *not* an option for the Commission simply to recommend the status quo.

1.18 Option Two represents a major departure from the current system, adapting the health care complaints system to the legal services context. Under Option Two, the Law Society and the Bar Association would lose their central roles in the complaints-handling system, to be replaced by an independent, statutory agency known as the Legal Services Complaints Commission. This Complaints Commission would receive and investigate all complaints against lawyers, and determine which complaints should be sent to the Standards Board and the Disciplinary Tribunal.

1.19 Option Three is something of a compromise, vesting the initial responsibility for the reception and investigation of complaints with an independent Legal Services Ombudsman, but leaving the professional Councils with the responsibility for deciding which matters are to be referred to the Standards Board and the Disciplinary Tribunal. Under this scheme, the Legal Services Ombudsman also would play a key role in the external monitoring of the professional Councils.

FOOTNOTES

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

2. Weisbrot, Ch. 7

DISCUSSION PAPER 26 (1992) - SCRUTINY OF THE LEGAL PROFESSION

2. The Present System in New South Wales

INTRODUCTION

2.1 The purpose of this Chapter is to outline the present system (or systems) for dealing with complaints against lawyers, in order to provide some background against which to make proposals for reform. While the position with respect to the discipline of lawyers is often referred to as "self-regulation", this is not so according to regulatory theory. Under the *Legal Profession Act* 1987 (NSW), a system of "co-regulation" is established, in which the governing Councils of the Law Society and the Bar Association are vested with statutory authority (ie, *public* authority) to receive and investigate all complaints against lawyers, and to dispose of the great majority of complaints (through dismissal or reprimand). The remaining complaints are referred to bodies exercising statutory disciplinary authority - the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal. These bodies are independent of the profession, with members appointed by the Attorney General, but the majority of members are lawyers. A Legal Profession Conduct Review Panel, with a majority of non-lawyers, may review a decision of one of the professional Councils to dismiss a complaint, upon the application of the dissatisfied complainant.

2.2 In this Chapter, we consider in detail the various professional and public bodies which share the disciplinary responsibilities. We also consider a range of ancillary matters, such as admission to practice, the practising certificate system, the role of the Supreme Court in controlling the conduct of lawyers, and the previous disciplinary system. The processes for dealing with complaints against solicitors and barristers are considered separately, in keeping with actual practice. To the extent possible, we have presented empirical material about the operation of the system, supplied by the professional associations. This Chapter is intended mainly to be descriptive; more critical analysis may be found in Chapters 4 and 5, in the discussion surrounding the various proposals and options for reform.

BACKGROUND

The previous disciplinary system (under the Legal Practitioners Act 1898)

In respect of solicitors

2.3 Pursuant to the *Legal Practitioners Act* 1898 (NSW), the Law Society Council could refer to the Solicitors' Statutory Committee any question as to the professional misconduct of any solicitor which appeared to the Council to require investigation.[1] The Statutory Committee was a body independent of the Law Society consisting of not more than ten solicitors appointed by the Chief Justice and, in more recent times, ten lay people appointed by the Governor.[2] Although the Law Society had the power to regulate the issue of practising certificates it had no power under the *Legal Practitioners Act* 1898 (NSW) to sanction or impose a penalty on a solicitor. Where the Law Society Council considered that the solicitor's conduct, though unsatisfactory, did not amount to professional misconduct (and accordingly did not warrant referral to the Solicitors' Statutory Committee), the Council would generally administer an admonition.[3]

2.4 The Law Society still receives some complaints relating to conduct alleged to have occurred prior to the commencement of the 1987 Act (in January 1988). Where the Law Society considers that

pre-1988 conduct raises a question of *professional misconduct* the complaint is referred to the Disciplinary Tribunal. However, the situation differs in relation to pre-1988 conduct which raises a question of *unsatisfactory professional conduct* under the new Act. The professional associations and the disciplinary bodies take the view that, as this lesser category did not exist under the old legislation, such conduct is only actionable if it occurred after the new legislation took effect.[4]

In respect of barristers

2.5 The *Legal Practitioners Act* 1897 only regulated solicitors and contained no provisions in respect of the general discipline of barristers. Barristers were entitled to commence practice any time after admission by the Supreme Court - no practising certificate system then existed. The New South Wales Bar Association itself was responsible for discipline of its members, and the Supreme Court had control over barristers through its inherent supervisory powers. Where the Bar Council was satisfied that a complaint was justified it had a limited number of disciplinary options available: Where the barrister was a member of the Association, the Council could admonish, fine or expel the barrister from the Association. In addition the Council could bring the facts of the complaint to the attention of the Supreme Court (through the Prothonotary) so that the Court could deal with the complaint. This latter course of action could be taken by the Bar Council even though the barrister was not a member of the Bar Association.

The professional associations

2.6 The Law Society of New South Wales is the professional association representing solicitors in New South Wales. Solicitors are not required by law to belong to the Law Society, but there is no additional fee or charge for membership once a practising certificate has been paid for. The Law Society Council is the elected governing body of the Law Society. According to the 1991 Annual Report of the Law Society, there were 22 members of the Law Society Council, with all members being practising solicitors.[5]

2.7 The New South Wales Bar Association is the professional association representing barristers in New South Wales. Since the Act came into effect in mid-1988, barristers also have been required to hold a current practising certificate issued by the Council in order to practise.[6] The elected Bar Council, which acts as the executive of the Association, is comprised of nine Queen's Counsel, and 12 "junior" barristers.[7]

Practising certificates

2.8 In order to engage in legal practice in New South Wales, a person must be admitted as a practitioner by the Supreme Court, *and* hold a current practising certificate, issued by either the Law Society Council or Bar Council.[8] The Act prescribes certain grounds upon which the relevant Council may refuse to issue, cancel or suspend a practising certificate (for example where a fine has not been paid in relation to a finding of unsatisfactory professional conduct[9]). Where a Council exercises this power the applicant may appeal to the Supreme Court.[10]

Disciplinary powers of the Supreme Court

2.9 The Supreme Court is generally recognised as having inherent power with respect to the legal profession including the power to discipline barristers and solicitors.[11] Section 125 of the *Legal Profession Act* 1987 (NSW) specifically preserves the jurisdiction of the Supreme Court with respect to the discipline of barristers and solicitors. The equivalent position in the now repealed *Legal Practitioners Act* 1898 (NSW) was interpreted by the New South Wales Court of Appeal as evidencing the intention of the Legislature to leave the Supreme Court's inherent jurisdiction untouched.[12] In effect this means that the Supreme Court has the power to discipline members of the legal profession which it exercises concurrently with the Standards Board and the Disciplinary Tribunal.

Complaining about lawyers

To the Law Society and the Bar Association

2.10 Under the new legislation, formal responsibility for the reception of complaints against legal practitioners is placed with the professional Councils, who delegate this function to committees and staff.[13] In 1990, 1189 written complaints were received by the Law Society Council in relation to the conduct of solicitors.[14] In the same year, 61 written complaints in respect of 79 barristers were made to the Bar Association. The large difference in the number of complaints made against barristers and solicitors is typical, and was recognised by the Commission in its earlier inquiry into the legal profession.[15] This matter is discussed further in Chapter 4, below.[16]

To other organisations

2.11 In practice, members of the public regularly contact other organisations, such as the Law Reform Commission, the Attorney General's Department, Community Legal Centres, the Department of Consumer Affairs, and the Law Consumers Association, with complaints about the provision of legal services. The Department of Consumer Affairs estimates that its Sydney and Parramatta Service Centres between them receive approximately 16 to 18 telephone enquires a week.[17] The Department of Consumer Affairs and the Law Consumers Association report that they sometimes contact the legal practitioner on behalf of the complainant and attempt to mediate the matter if there is not a serious issue of professional ethics involved.[18] However, as the professional associations have the formal power to receive and investigate complaints against lawyers, most organisations simply supply some basic information about the disciplinary system and refer complainants to the Law Society or Bar Association.

To the Consumer Claims Tribunal

2.12 Pursuant to the *Consumer Claims Tribunal Act* 1987 (NSW), the Consumer Claims Tribunal has jurisdiction to hear and determine any consumer claim lodged within three years of the date in which the services were supplied or should have been supplied. However, the Consumer Claims Tribunal's jurisdiction is limited to claims where the amount in issue is not more than $6,000.[19] The definition of "services" in the *Consumer Claims Tribunal Act* is, following amendment, sufficiently wide to include services "of a professional nature" provided by a barrister or solicitor.[20] The Consumer Claims Tribunal has a number of remedies at its disposal, including the power to order that the legal practitioner pay to the claimant a specified amount (up to $6,000) or that certain services be supplied by the legal practitioner to the claimant.[21] In 1991, 114 claims in relation to the provision of legal services by solicitors and barristers were lodged at the Consumer Claims Tribunal. Of these claims, 30 were withdrawn before a hearing could be held, 12 were dismissed by the Tribunal and in 31 cases the complainant was awarded full or partial redress.[22]

THE LEGAL PROFESSION ACT 1987

2.13 The previous legislation was wholly repealed and replaced by the *Legal Profession Act* 1987 (NSW), which followed upon (but did not entirely adopt) the recommendations of the Commission in its earlier inquiry into the legal profession in this State. Part 10 of the Act deals with matters of professional discipline of the legal profession, although there are relevant provisions scattered throughout the Act, such as those dealing with practising certificates, funding for the system, the role of the judiciary, and so on.

2.14 The Commission recommended in its earlier inquiry into the legal profession that the disciplinary system should be extended to cover bad professional work which falls short of professional misconduct and that, accordingly, a new disciplinary offence be created. It was intended by the Commission that this new disciplinary offence would cover carelessness, incompetence, and failure to meet accepted standards of work. The Commission's recommendation was incorporated into the *Legal Profession Act* 1987 (NSW). The lesser offence was originally known as "minor professional misconduct" but after amendment became known as "unsatisfactory professional conduct".[23] The statutory scheme for assessing complaints *only* applies in respect of conduct which falls into one of these categories.

2.15 "Unsatisfactory professional conduct" is defined as including:

> 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 legal practitioner.[24]

2.16 "Professional misconduct" is defined as including:

> (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence;

b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of barristers or the roll of solicitors; or

(c) conduct that is declared to be professional misconduct by any provision of the Act.[25]

2.17 The Act provides for written complaints to be sent to the relevant Council of the professional association, that is the Law Society Council or the Bar Council.[26] The Councils, through their committees and staff, then undertake an initial assessment of the complaint. The Councils have no formal power to take action in relation to complaints which allege conduct not amounting to either unsatisfactory professional conduct or professional misconduct.[27]

2.18 The Act makes the Law Society and Bar Councils responsible for the investigation and assessment of complaints made against solicitors and barristers, respectively.[28] Where a Council is of the opinion that the conduct alleged does not fall within the relevant heads of misconduct in the Act, it has the power to dismiss the complaint. Where a Council is of the opinion that the conduct complained of does involve a question of unsatisfactory professional conduct, it has limited powers to discipline a member itself by issuing a reprimand. However, where a Council considers it appropriate, complaints involving questions of unsatisfactory professional conduct *may* be referred to the Legal Profession Standards Board. Alternatively where the Council is of the opinion that the complaint involves a question of professional misconduct, the complaint *must* be referred to the Legal Profession Disciplinary Tribunal.

2.19 The Act provides for the establishment of the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal. Both disciplinary bodies are constituted by members of the profession with some lay representation. Where the Disciplinary Tribunal is satisfied that the legal practitioner's conduct amounts to professional misconduct it has a number of powers including the power to strike the practitioner off the Roll, to cancel or restrict the practitioner's practising certificate, or to order a fine of up to $25,000. The Legal Profession Standards Board also has a number of disciplinary powers where it finds that the conduct alleged amounts to unsatisfactory professional conduct. The Board's powers to discipline are less expansive than those of the Tribunal and include the power to reprimand the legal practitioner, order a fine of up to $2,000, and order that the legal practitioner undertake a course of further legal education. The two disciplinary bodies also have limited powers to award compensation.

2.20 The Act provides for the establishment of the Legal Profession Conduct Review Panel. Where the Law Society Council[29] or Bar Council has dismissed a complaint, the complainant has the right to request that the Panel review the Council's decision. The Panel is constituted by a majority of lay people. Where the Panel disagrees with the Council's dismissal of the complaint, it can make a recommendation to the Attorney General that the matter be referred to one of the disciplinary bodies.

HANDLING COMPLAINTS ABOUT SOLICITORS

Form of the complaint

2.21 Pursuant to section 130 of the Act, a person who wishes to complain about a solicitor's conduct may lodge a formal complaint with the Law Society Council. Section 130 of the Act provides that the complaint must be in a certain form. The complainant must give full details of the complaint to enable the Law Society Council to determine whether the conduct alleged constitutes unsatisfactory professional conduct or professional misconduct. Details of the solicitor involved and any loss suffered as a consequence of the alleged conduct must also be provided. If the complainant seeks a compensation order, for example that the solicitor's fees be reduced or waived or that cash compensation be paid, then a request for this order must specifically be included in the complaint.

Reception of complaints

2.22 All *written* complaints received by the Law Society are referred to the Professional Conduct Department (the "Department"). The Department is staffed by a manager and several legal officers and is funded from the Statutory Interest Account pursuant to section 67 of the Act.

2.23 Generally those who ring the Law Society seeking help are put through to the Community Assistance Department. The Community Assistance Department is staffed by a Manager, a receptionist, two permanent and eight part-time legal officers. The Community Assistance Department is fully funded by the Law Foundation which in turn is funded (in part) from the Law Society's Solicitors' Trust Account Fund and from the Statutory Interest Account.[30] Members of the public who require general legal advice, or require a referral to an experienced solicitor, may contact the Community Assistance Department of the Law Society.

2.24 Both the Community Assistance Department and the Professional Conduct Department send to those who wish to make a complaint about a solicitor a copy of the Law Society's printed complaint form and explanatory brochure. The explanatory brochure advises that:

> If you have a complaint against <u>your</u> solicitor, you should first consider going to another solicitor for help in sorting out your problem; alternatively an approach could be made to the Community Assistance Department of the Law Society in an attempt to discuss the matter with your solicitor to find a satisfactory resolution of the problem. If the complaint is still unresolved or you choose not to adopt either of these courses, then you should fill out the complaints form attached hereto and forward it to the Manager, Professional Conduct Department.

2.25 The Law Society Council will accept complaints that are written but which are not on the standard form as long as all of the particulars required by the Act are included. Section 130 of the Act provides that the Councils are obliged to provide assistance to any person wishing to make a formal complaint to ensure that the complaint accords with the statutory requirements. The Commission has been advised by the Law Society that when such assistance is required it is normally provided by the Community Assistance Department.

The Complaints Committee

2.26 Section 136 of the Act empowers the Law Society Council to delegate (by resolution) the exercise of any or all of its functions under Division 3 to any of its committees. Pursuant to this section, on 21 November 1991, the Law Society Council delegated most of its disciplinary powers to a committee it had established for this purpose.[31]

2.27 The Attorney General has the power under the Act to require the Law Society Council to include lay members on a specified committee.[32] The Complaints Committee consists of twelve solicitors and two lay people. The Commission has been advised by the Law Society that the lay membership on this committee is not in response to a direction from the Attorney General but rather due to the Law Society's own initiative. The delegated powers of the Complaints Committee shall be discussed in greater detail below.

Categorisation of complaints

2.28 In 1990, the Professional Conduct Department received 1189 written complaints.[33] The Law Society also initiated 56 investigations itself,[34] usually in relation to trust account discrepancies which have been uncovered during the Law Society's routine inspections The balance of the investigations stem from the Law Society's monitoring of media reports and court hearings.

2.29 Each complaint is categorised by the Department according to the type of conduct alleged. The Law Society has provided the following breakdown of the conduct alleged in the complaints it received in 1990:

Client funds at risk	1
Delay	264
Delay in taxing party costs	5
Discourtesy	37
Failure to carry out instructions	61
Failure to pay third party	2
Failure to account	33
Liens	5
Negligence/Quality of work	254
No client advice	8
No communication	79
Failure to comply with undertaking	28
No statements available	2
Failure to trasfer documents	68
Overcharging	104
Failure to disclose personal interest	1
Trust Account inspection	37
Conduct/Standards breach	256
TOTAL	**1245**

2.30 This breakdown indicates that an overwhelming majority of the complaints received by the Law Society do not allege conduct so serious as to amount to professional misconduct, but generally relate to the alleged provision of sub-standard services. The statistics provided by the Law Society for the years 1988, 1989 and 1991 (noting that the 1991 figures are incomplete) also support this observation. Of the 3786 complaints dealt with by the Law Society in these years, 844 (22%) allege that the solicitor's conduct is unethical,[35] 761 (20%) allege that the solicitor is guilty of negligence or question the quality of the work provided, 641 (17%) allege delay on the part of the solicitor, 272 (7%) allege that the solicitor failed to carry out the complainant's instructions, and 247 (6.5%) allege overcharging by the solicitor. A further discussion of this issue can be found in Chapter 4.

Sources of complaints

2.31 There is no restriction in the Act about who may lodge a written complaint about the conduct of a legal practitioner.[36] The Law Society, at the request of the Commission, has provided the following breakdown of the complaints it has received for the years 1988-1991 (including those complaints where the conduct complained of occurred prior to 1 January 1988), according to the source of the complaint:[37]

Number of complaints received pursuant to section 135	**1988**	**1989**	**1990**	**1991**
Client/Former client	635	731	866	1266
Solicitor for the client	184	195	193	170
Executor for an estate	3		1	
Administrator of an estate	1			
Beneficiary	4	6	1	
Prothonotary	1			
Court Registrar	1	1	3	1
Attorney General				1
Member of Parliament	1	5	7	7
Legal Aid Commission	2	14	3	2
Third Party	10	38	41	3
Government Department	1	2	7	2
Non-Client	31	20	18	7
Solicitor	61	55	43	86
Department of Consumer Affairs			1	
Judge			5	1
Sub-Total	**935**	**1067**	**1189**	**1546**
Law Society-initiated investigations	136	46	56	56
Total Complaints Assessed	**1071**	**1113**	**1245**	**1602**

2.32 These figures indicate that the great majority of complaints come from clients or former clients, and that the people only occasionally seek or receive legal or official assistance in making the complaint to the Law Society.

Investigation of complaints by the Professional Standards Department

2.33 The Professional Standards Department of the Law Society opens a "complaints file" and advises the complainant that the complaint has been received and the name of the particular legal officer looking after the matter for the purposes of future contact. The complaint is then examined by the legal officer and a summary of the legal officer's understanding of the main grounds of complaint is forwarded to the complainant for approval and comment. A copy of the complaint and the summary is also forwarded to the solicitor whose reply is requested within fourteen days. If the complainant, upon receipt of the Law Society's summary of the complaint, subsequently raises further issues the solicitor will again be contacted for a response. The legal officer will also seek to clarify any outstanding matters at this stage.

2.34 Pursuant to the Act the Law Society has appointed a number of officers of the Law Society to be trust account inspectors.[38] The Commission is advised by the Law Society that routine accounting and regulation matters are no longer referred to the Professional Conduct Department but are carried out by the Trust Account Department of the Law Society. Only where a trust account inspection raises questions about professional conduct are such matters referred to the Professional Conduct Department.[39] A staff member of the Professional Conduct Department has been made a trust account inspector, so that if the Department is satisfied that an inspection is required urgently, this staff member would undertake the inspection. However normally such an investigation would be done by a staff member from the Trust Account Department.

2.35 The legal officer who has carriage of the complaint file prepares a report on the complaint, which summarises the facts, attaches relevant documents, and makes a recommendation as to further action. Common recommendations include that the matter be dismissed, be referred to the Legal Profession Standards Board or to the Legal Profession Disciplinary Tribunal.

Failure to respond to the Law Society's requests

2.36 The Commission is advised by the Law Society that where a solicitor fails to respond within fourteen days to the Law Society's request for a reply to the complaint, a reminder letter is promptly dispatched to the solicitor. The Law Society has recently begun including with the reminder letter a copy of a recent article from the Law Society Journal[40] which details six cases in which the failure of the solicitor to respond to the Law Society's enquires was held to amount to unsatisfactory professional conduct. The article advises that:

> There can be no doubt that a solicitor has a duty to respond promptly and to show candour in the answers being provided and failure to do so amounts to unsatisfactory professional conduct.[41]

2.37 The article also notes that in some instances failure to respond to the Law Society's enquires has amounted to professional misconduct.[42] We are advised by the Department that approximately six reminder letters (and a copy of the article) are sent out each month and that upon receipt of such correspondence, the solicitor usually responds promptly. The New South Wales Solicitors Manual also warns solicitors of the consequences of failing to respond to the Society's call for an explanation of the solicitor's conduct.[43] Section 35(2)(c) of the Act empowers the Law Society Council to refuse to issue, to cancel or to suspend the practising certificate of a solicitor who "being required by the Law Society Council to explain specified conduct by him or her as a solicitor fails, and continues to fail, to give an explanation to the Council". The Manual notes that the Law Society Council frequently brings

the provisions of the section to the notice of solicitors who are unusually dilatory in responding to an enquiry from the Society as to their professional conduct, and that the Council not infrequently resolves to cancel the certificate of a solicitor who still fails to respond after receiving a warning that the Council may exercise its power under the section.[44] The Commission has been advised by the Department that most solicitors, upon being informed that the Complaints Committee's recommendation of cancellation of the solicitor's practising certificate will be heard shortly by the Law Society Council, provide the requisite information.

2.38 Where the failure to respond reaches the level of the Council, the Council usually passes a resolution requiring an explanation from the solicitor for this failure. Where the solicitor fails to give a satisfactory answer within the specified time, a further resolution is passed by Council cancelling the solicitor's practising certificate. Since 1988, 131 resolutions have been passed seeking an explanation from the solicitor as to his or her failure to reply to the Law Society's correspondence and indicating a date upon which the Law Society would cancel his or her practising certificate.[45] Five solicitors' practising certificates have been subsequently cancelled by the Law Society Council pursuant to section 35(2)(c).

Delegated powers of the Complaints Committee

2.39 The Law Society Council has delegated most of its disciplinary powers to its Complaints Committee, except for those powers enabling a complaint to be referred to one of the two disciplinary bodies. In those cases where the Complaints Committee is of the opinion that referral is warranted it must make an appropriate recommendation to the Council. At each of its fortnightly meetings the Complaints Committee, with the benefit of the legal officer's report, must decide upon the appropriate course of action in respect of the large number of complaints before it.

2.40 Where the complainant has supplied insufficient details of the complaint, the Complaints Committee has the delegated power pursuant to the Act to request further particulars. It may also require the complainant to verify the complaint and the further particulars by statutory declaration.[46] Section 132 provides for the summary dismissal of frivolous or vexatious complaints. The power to dismiss such complaints has also been delegated to the Complaints Committee.

2.41 Where the Complaints Committee is satisfied that a complaint does not involve unsatisfactory professional conduct or professional misconduct, then it has the delegated power to dismiss the complaint.[47] However if the Committee is satisfied that the complaint involves unsatisfactory professional conduct, then it can either reprimand the solicitor (though this course of action is subject to the consent of the solicitor who may request that the Law Society Council formally assess the complaint[48]) or alternatively recommend to the Council that the complaint be passed on to the Legal Profession Standards Board.[49] The Complaints Committee also has the delegated power to dismiss the complaint even though it finds unsatisfactory professional conduct, but in this case it must be satisfied that the solicitor is generally competent and diligent and that no other material complaints have been made against the solicitor. Where the Complaints Committee is of the opinion that conduct involved is more serious and raises the issue of professional misconduct then it may recommend to the Law Society Council that the complaint be referred to the Disciplinary Tribunal.[50]

2.42 Of the 1245 total complaints assessed by the Department in 1990:

698 (56%) complaints were dismissed after investigation by the Complaints Committee pursuant to its delegated power on the grounds that each complaint did not involve a question of unsatisfactory professional conduct or professional misconduct;

299 (24%) complaint files (where there was no evidence of unsatisfactory professional conduct or professional misconduct) were closed with the consent of the complainant as the matter was resolved between the parties directly or through mediation;

55 complaints were dismissed prior to investigation on the grounds that such complaints were frivolous or vexatious;

a reprimand (with the consent of the solicitor) was given in respect of 30 complaints;

the details of 12 complaints were included as particulars to a number of formal complaints made by the Law Society Council to the Standards Board;

the details of 55 complaints were included as particulars to a number of formal complaints made by the Law Society Council to the Disciplinary Tribunal;

eight complaints were dismissed by the Complaints Committee with a finding that there had been unsatisfactory professional conduct;

an admonition was given by the Law Society in respect of seven complaints;[51]

one complaint was dismissed by the Complaints Committee because of the complainant's failure to provide requested information; and

80 matters remain to be considered.

The Law Society Council

2.43 As noted above, the Law Society Council has not delegated all of its disciplinary powers. Only the Law Society Council can refer matters involving questions of unsatisfactory professional conduct or professional misconduct to the Standards Board and the Disciplinary Tribunal, respectively. Section 135 of the Act provides that the Law Society Council may, of its own motion make a complaint to the Board or Tribunal[52] (without the need for a member of the public to have made a formal complaint). This power has not been delegated by the Law Society Council.

2.44 Where the Law Society has retained its disciplinary powers, the usual practice is for the Complaints Committee to submit a report and make one or a number of recommendations to Council. The report and recommendations are then considered by the Law Society Council. The Council is not bound to follow the Complaints Committee's recommendations. It may decide to dismiss the matter despite the Complaints Committee's recommendation to refer the matter for hearing, or vice versa. The Council may also require that further investigation be undertaken by the Complaints Committee.

2.45 Where the Law Society Council resolves to refer a complaint to the Standards Board or the Disciplinary Tribunal, the Professional Conduct Department takes over the matter on behalf of the complainant and prepares the case against the solicitor. Under the rules of the Standards Board and the Disciplinary Tribunal, where a complaint is *referred*, the originating document (ie the original complaint made to the Law Society Council) must be annexed to the Statement of Complaint. The Law Society Council as a matter of policy, prefers *to make a complaint* to one of the disciplinary bodies pursuant to section 135 rather than *refer a complaint* pursuant to section 134(1)(b)(i) or (ii) of the Act. Whereas a referral pursuant to section 134 would require each individual complaint to be referred

separately to one of the disciplinary bodies, the making of a complaint pursuant to section 135 allows the Law Society Council to aggregate a number of related individual complaints with respect to the same solicitor in the interests of administrative efficiency. The Commission is assured by the Department that where a complainant has specifically requested a compensation order in his or her complaint, the disciplinary body hearing the aggregated complaint would be made aware of this request.

HANDLING COMPLAINTS ABOUT BARRISTERS

Form of the complaint

2.46 The position under the Act is the same with respect to complaints made against either solicitors or barristers. Pursuant to section 130 of the Act, a person who wishes to complain about the conduct of a barrister may lodge a formal, written complaint with the Bar Council. Again the complaint must be in the form required by the Act, with full details of the barrister involved, the alleged conduct and the relief sought by the complainant.[53] The Bar Association also has produced a printed complaint form and an explanatory brochure to aid those wishing to lodge a complaint.

Reception of complaints

2.47 In its submission to the Commission,[54] the Bar Association advises that potential complainants sometimes telephone the Bar Association to enquire about their entitlement to lodge a complaint about a barrister's conduct or seeking assistance to lodge a complaint. All enquiries are directed to the Professional Affairs Director (the "PA Director") of the Bar Association. The Bar Association advises that sometimes a call to the Association is in the nature of an enquiry about fees or a change in a barrister and that such matters can be quickly resolved by the PA Director.[55] The PA Director has a staff of one secretary and a junior assistant. Section 67 of the Act provides that the costs incurred by the Bar Council in exercising its disciplinary functions are to be funded from the Statutory Interest Account maintained by the Law Society. Accordingly, the cost of the administrative and organisational support provided to the Council by the PA Director and her staff in respect of the Council's disciplinary functions under the Act is covered by the Statutory Interest Account.

2.48 The Commission understands that complaints are also often received by the President, the Registrar, the Director of Professional Affairs or a member of the Bar Council known to the complainant.[56] All complainants are asked by these persons to put their complaints in writing, and these are forwarded to the PA Director.

2.49 The Bar Association advises[57] that a complainant is sent a letter which acknowledges the receipt of the complaint and advises the complainant that the matter has been referred to an investigating committee. An explanatory brochure is sent to the complainant, if it appears that they have not yet received one. This explanatory brochure commences as follows:

> If you have a complaint against a barrister, you should first consider going to your solicitor for help in sorting out the problem. Complaint forms are available from the

Association. Such a form should be completed and forwarded to the Association. The Association will acknowledge receipt of the complaint.

Categorisation of the complaint

2.50 In 1990, the Bar Council received 61 written complaints in respect of 74 barristers. The Bar Council itself investigated 5 barristers on its own initiative.[58] The Bar Association has advised the Commission that for the purpose of compiling its figures, where one complainant has made a written complaint involving a number of barristers, it has treated each allegation as a separate complaint. The Bar Association has provided the following breakdown of the 79 separate complaints it assessed in 1990 according to the type of conduct alleged:[59]

Pressure (to settle, plead or change instructions)	6
Failure to appear at court of conference	4
Negligence/Incompetence/Lack of communication	12
Failure to carry out instructions/acting contrary thereto	4
Overcharging/Fee dispute	7
Delay in completing chamber work or failure to return brief/papers	4
Discourtesy/Abuse	5
Conflict of interest	5
Misleading conduct	6
Complaint concerning private dwelling	9
Abuse of privilege	5
Direct contact with client/No instructing solicitor	2
Criminal charges against barrister	1
Breach of advertising/Public appearance rules	2
Direct contact with client or opposing party	1
Withdrawing without justification or late in passing brief	6
Total	**79**

2.51 Over the period 1988-1991, the single largest category of complaints was for "negligence/incompetence/lack of communication/poor attitude", with 14% of the total. Other complaint categories of conduct complained of relatively frequently include "Pressure to settle, plead or change instructions", "Overcharging/fee disputes" and "Delay in completing chamber work or failing to return briefs or papers".

The source of complaints

2.52 At the request of the Commission, the Bar Association has provided the following breakdown of the complaints it has received in the years 1988 to 1991 (including a small number in which the conduct complained of occurred prior to 1988) according to the source of the complaint:[60]

Number of complaint received pursuant to section 135	**1988**	**1989**	**1990**	**1991**
Members of the public	41	52	54	45
Solicitors	10	52	54	45
Barristers	5	3	9	9
Judges		4	2	
Commonwealth Attorney General	2	1		
Corporate Affairs Commission		1		
Commonwealth DPP		1		1
Law Society				3
Legal Aid Commission		1		1
Prothonotary	1			
Solicitor General (NSW)			1	
Other				1
Sub-total	**59**	**76**	**79**	**74**
Bar Association-initiated investigation	4	4	5	7
Total complaints assessed	**63**	**80**	**84**	**81**

2.53 As may be seen, the majority of complaints come from members of the public[61] - usually clients or former clients. The next largest category is complaints from solicitors, followed by complaints from other barristers. The remainder come from a wide range of public or courts officials.

The Professional Conduct Committees

2.54 On 19 December 1991, the Bar Council resolved,[62] to delegate many of its disciplinary powers to each of four Professional Conduct Committees it had established for this purpose.[63] Accordingly, the Professional Conduct Committees have the responsibility to assist complainants to enable them to make their complaints in accordance with the Act's requirements. Each Professional Conduct Committee has the power to require further particulars from the complainant. Where further particulars are not furnished following a request or where a Professional Conduct Committee is of the opinion that a particular complaint is frivolous or vexatious, it has the power to dismiss the complaint. All other complaints are then investigated by a Professional Conduct Committee.

2.55 Professional Conduct Committee members are chosen by the President of the Bar Association. Each member of the Bar Council, excluding the President and the Senior Vice President is a member of a Professional Conduct Committee. Each Committee has between seven and nine members and is comprised of junior and senior members of the Bar Council and a number of barristers not being members of Council. In addition, in 1992 each Professional Conduct Committee has two lay members, up from one in previous years. The President also elects a chairman for each Committee, who must be a member of the Bar Council.

2.56 The Commission is advised that each Committee meets fortnightly and that the PA Director refers each new complaint to one of the four Professional Conduct Committees, depending upon their relative workloads. The Commission understands that where a previous complaint has been made against a barrister and heard by one of the Committees, all efforts will be made to refer any fresh complaints to the same Committee.[64] The chair of the Committee then allocates special responsibility for the matter to one member of the Committee.

2.57 Where the complaint does not provide the particulars required by the Act, the complainant will be asked for further information. Both the PA Director and the relevant Professional Conduct Committee assist the complainant where required to ensure that the complaint is in the form required by the Act. A summary of the complaint is then prepared by the PA Director and sent to the complainant for his or her approval and comment. The PA Director then refers the complaint and the summary to the barrister concerned and requests a response within 14 days. The Bar Association advises that it is rare for barristers to fail to respond within the time frame provided and that any such failure is normally the subject of an immediate telephone follow-up by the PA Director.[65]

2.58 The Committee member having carriage of the matter receives copies of all correspondence in relation to the matter and liaises with the PA Director concerning the investigation to be undertaken. Copies of all relevant correspondence are also given to the Chair of the Committee, who maintains overall control of the Committee's work. The Bar Association advises that the PA Director prepares for each fortnightly meeting of each Professional Conduct Committee a list of files indicating the current position for each matter. At each Committee meeting the member having carriage of a particular matter (or in his or her absence, the PA Director) will report on the progress of the matter.[66]

Summary dismissal of frivolous or vexatious complaints

2.59 Section 132 of the Act provides that a Council may dismiss a complaint without further investigation if particulars of the complaint are not furnished, the complaint or particulars provided are not verified as required by Council, or if the complaint is frivolous or vexatious. As noted above, the Bar Council has delegated these powers to its Professional Conduct Committees. The Commission is advised by the Bar Association that the Professional Conduct Committees have chosen not to use this power. Section 132 refers to "dismissal without further investigation". The Bar Association advises

that all complaints are fully investigated and that any decision to dismiss, whether pursuant to section 132 or section 134, is made by the Bar Council.

The investigation of complaints

2.60 In its Submission, the Bar Association advises that the investigation commonly undertaken by the Committee member generally encompasses the following: (a) obtaining the comments of the barrister involved; (b) depending on the barrister's response, a further comment by the complainant may be sought; (c) obtaining the instructing solicitor's comments; (d) obtaining the comments of the opposing barrister and solicitor or court officers, if relevant; (e) reviewing a copy of the transcript of proceedings, judgment, or court documents, if relevant; (f) obtaining statements from any independent witnesses; and (g) obtaining any final comments or information needed from the complainant and/or the barrister involved.[67]

2.61 The Bar Association notes in their submission that when comments of persons other than the complainant or the barrister complained of are sought, either specific enquiries are put to them or they are shown all or part of the complainant's response, and asked for a response.[68]

2.62 Once an investigation is complete, the responsible member of the Professional Conduct Committee prepares a report on the complaint. Reports usually include the Professional Conduct Committee member's recommendation(s) about how the complaint should be dealt with. The report is normally circulated among the other Committee members. The Bar Association advises that if the matter is complicated or the report lengthy a special Committee meeting may be called to allow the members to consider the matter in greater depth. Other Committee members may have access to the file at any time. All lay members get a copy of each report and have access to all of the relevant correspondence.[69]

The Committee's report

2.63 The report is then considered by the Professional Conduct Committee, which may: adopt the report, amend the report, or direct that further investigations be made. In the event of a failure to reach a consensus, a minority report also may be prepared.

2.64 The Bar Association advises that the Committee's final report to the Bar Council would normally provide a history of the litigation the subject of the complaint, identify the complaints made, identify the investigations made and the responses received, include an analysis of relevant parts of the transcripts or documents (as appropriate), provide an analysis of the conduct complained of with respect to breaches of standards, and make recommendations to the Bar Council as to dismissal or referral to the Standards Board or the Disciplinary Tribunal.[70]

Consideration of the complaint by the Bar Council

2.65 Following its adoption by the Committee, the Report is then referred to the Bar Council for consideration, usually at the next Council meeting. In contrast to the operation of the Complaints Committee of the Law Society, the four Professional Conduct Committees have only been delegated the power to dismiss frivolous and vexatious complaints and those in which further particulars are not supplied by the complainant, as requested. The Bar Council is not obliged to accept the recommendation(s) of the Professional Conduct Committee. We are advised by the Bar Association, that from time to time, the Bar Council directs that the report be returned to the Committee for further investigation and that it has sometimes come to a different conclusion based on the facts presented.[71]

2.66 Where the Bar Council is satisfied that a complaint does not involve unsatisfactory professional conduct or professional misconduct, it has the power to dismiss the complaint. However, where the Bar Council is of the opinion that the complaint does involve a question of unsatisfactory professional conduct, it has a number of options open to it.[72] It can reprimand the barrister (subject to obtaining his or her consent), refer the complaint to the Standards Board or alternatively dismiss the complaint. However dismissal is only possible where the Bar Council is satisfied that the barrister is generally competent and diligent and that no other material complaints have been made against the barrister.[73] Where the Bar Council is satisfied that the complaint does involve a question of professional misconduct it refers the complaint to the Disciplinary Tribunal.[74]

2.67 Where the Council considers that a reprimand is the appropriate form of discipline, (that is when it is of the opinion that the complaint involves a question of unsatisfactory professional conduct and the barrister has consented to a reprimand) this usually occurs in chambers and is delivered personally by the President of the Bar Association.[75]

2.68 Of the 79 separate complaints assessed by the Bar Council in 1990:

> the Bar Council dismissed 44 complaints after investigation on the grounds that there was no question of unsatisfactory professional conduct or professional misconduct;
>
> on nine occasions the Bar Council resolved to refer a complaint to the Disciplinary Tribunal;
>
> six complaints were withdrawn (in some of these cases the barrister was nevertheless counselled or reprimanded);
>
> a reprimand was given by the Bar Council in respect of six complaints;
>
> on four occasions the Bar Council resolved to refer a complaint to the Standards Board;
>
> two complaints were dismissed by the Bar Council after investigation on the grounds that they were frivolous or vexatious;
>
> in two cases in which the Bar Council had initiated the investigation, the Council decided to take no further action; and
>
> six complaints remain to be considered.[76]

Complainants advised of Bar Council's decision

2.69 The Act provides that a Council must notify the complainant of its decision (including the reasons for its decision) and advise the complainant of his or her right to seek a review of the decision from the Legal Profession Conduct Review Panel.[77] The Bar Association advised in their submission that as well as providing the information required by the statute, complainants are usually forwarded a copy of the final report considered by the Bar Council. In a small number of cases the report is not sent to the complainant for the reason that the Professional Conduct Committee believes that

> providing the complainant with the text or flavour of the responses by the barrister or witnesses might inflame the complainant in an undesirable or dangerous way and unnecessarily.[78]

THE LEGAL PROFESSION CONDUCT REVIEW PANEL

Notification of the complainant's right to a review

2.70 Where a complaint has been dismissed by the Council, or by Complaints Committee pursuant to its delegated powers, the person making the complaint has the right to have that decision reviewed by the Legal Profession Conduct Review Panel.[79]

2.71 The explanatory brochure forwarded by the Law Society to those who request a complaint form contains the following information:

> If the Law Society dismisses your complaint, you may refer the matter to the Legal Profession Conduct Review Panel which is comprised of one solicitor and two lay members. The Panel has the power to review the material on the Law Society's file. That review must be requested by you in writing within two months after the Council's decision. You will be given further details of your right of review upon the Society's conclusion of its investigation.

2.72 The explanatory brochure produced by the Bar Association also contains information as to the Panel's functions and powers. Both the Law Society and Bar Association advise that upon dismissal of a complaint, complainants are immediately advised in writing of Council's decision and at the same time are reminded of their right to have such decision reviewed by the Legal Profession Conduct Review Panel.

"Deemed dismissals"

2.73 Section 134(4) of the Act provides that for the purposes of the complainant's right to seek a review of a Council's decision from the Panel, the Council shall be deemed to have dismissed a

complaint if it has not notified the complainant of its decision with respect to the complaint within six months after the making of the complaint.[80]

2.74 The Commission is advised by the Law Society that the majority of complaints received are dealt with by the Law Society within the six month time period. In 1990, the average turn-around time[81] for the investigation of a complaint by the Law Society was 140 days.[82] The Bar Council generally takes longer than six months to complete its investigation and assessment.[83] The Bar Association has advised the Commission that delay was often experienced in obtaining comments form the solicitors involved in the matter and that in their opinion such matters were treated seriously by the barrister involved and the Bar Association.

2.75 In those cases in which the Law Society's investigation and assessment of the complaint extends beyond the six month period the Law Society does not formally notify the complainant of the "deemed dismissal" and, therefore, of the right to seek a review from the Panel. The Bar Council adopts the same policy. As mentioned above, the Panel does not exercise investigative powers beyond review of the complaint file. Therefore, if the complaint file is blank or incomplete, the Panel's power to review the Council's "deemed dismissal" appears to be meaningless.

2.76 The Commission is advised by the Professional Conduct Department of the Law Society that only on two occasions has a complainant relied upon the deemed dismissal provisions and sought a review from the Panel. In both cases, by the time the application was dealt with by the Panel, the Law Society had concluded its investigation and was then able to refer their completed file to the Panel. It would appear therefore, that where there is "deemed dismissal", the complainant has little to gain by lodging an application with the Panel . The Commission is advised by the Bar Association that it is not aware of any instance in which a complainant has sought a review from the Panel on the basis of a deemed dismissal.

Composition of the Panel

2.77 Section 126 of the Act provides that the Legal Profession Conduct Review Panel is to consist of one barrister, one solicitor and four lay persons. The barrister and solicitor members (who must be practitioners of at least five years standing[84]) are appointed by the Attorney General upon the recommendation of the relevant professional body. The lay persons are also appointed by the Attorney General, after consultation with the lay members of the Legal Aid Commission, the Law Foundation and any other bodies that the Attorney General thinks appropriate. The Act provides only that the lay persons must be "neither barristers nor solicitors".[85] One of the lay persons is appointed chairperson by the Attorney General. In 1989, the Act was amended to provide also for the appointment of alternate members who are eligible to sit on the Panel in the event of the absence or sickness of certain members.[86] The Commission understands that at present two alternate solicitor members has been appointed by the Attorney General. The Panel has sought the appointment of an alternate barrister member but to date there has been no appointment by the Attorney General.

2.78 Where the Panel is undertaking a review of a Law Society Council decision to dismiss a complaint made about a solicitor, it is constituted by two lay members and a solicitor. Where the Panel is reviewing a decision of the Bar Council to dismiss a complaint made about a barrister the Panel would be constituted by two lay members and a barrister member.[87]

The Panel's procedures for review

2.79 The procedure for calling meetings of the Panel and the conduct of the business at each meeting is determined by the Chairperson. Minutes of each Legal Profession Conduct Review Panel meeting are recorded. For the purposes of review, the Panel is entitled to view the record of the Council's investigation of the complaint and all other documents held by the Council in relation to that investigation.[88] The Commission is advised by the Chairman of the Panel that he considers that the investigative power of the Panel only extends to reviewing the Council's documentation. No parties or witnesses are called by the Panel - the procedure adopted is a paper review only. Section 139(2) of the Act states that the Panel shall consult with the relevant Council before it completes its review of the Council's decision to dismiss a complaint.

Reviews of Law Society Council decisions

2.80 Statistics supplied to the Commission by the show that at 1 December 1991, the Panel had received 520 applications requesting a review of decision of the Law Society Council.[89] When the Panel receives an application from a member of the public requesting review of a Law Society Council decision to dismiss a complaint, it immediately contacts the Law Society's Professional Conduct Department and requests the relevant file. The Panel regularly consults with the Professional Conduct Department and has come to an arrangement with the Department such that, if the Panel is not satisfied with the material in the Law Society's file (for example if the Panel is of the opinion that some relevant documents should be obtained), it makes an informal request to the Law Society for further information. Thus, on occasion, thee is something more than a mere paper review, but the complainant is not given the parallel opportunity to provide fresh evidence to the Panel.

Reviews of Bar Council decisions

2.81 At 1 December 1991, the Panel had received 30 applications for a review of a decision of the Bar Council. The Commission has been advised by the Panel that for the period 1 January 1988 to early December 1991, the Panel was precluded from reviewing any decision of the Bar Council due to that Council's refusal to hand over any of its files. The Commission understands that the Bar Council's refusal stems from its concern over the confidentiality of these files and their susceptibility to Freedom of Information requests when in the hands of the Panel. In addition, the Bar Council considered that while the Act entitled the Panel "to view" all documents held by the Bar Council in relation to the complaint, it did not empower the Panel to copy or take possession of a file. The Commission has been advised that a compromise has recently been reached and that, accordingly, the Panel now receives a photocopy of the Bar Council's file. Thus, for the first time since the Act came into operation in 1988, the Panel will begin to review decisions of the Bar Council to dismiss complaints.

The Panel's powers

2.82 Upon completion of its review, the Panel may uphold the Council's decision or recommend to the Attorney General that the matter be referred to the Standards Board or the Disciplinary Tribunal.[90] However, the Act provides that prior to doing so, the Panel must notify the Council of its decision and

allow the Council one month to refer the matter to the appropriate disciplinary body itself, if it so wishes.[91] Each recommendation must be accompanied by a statement of the Panel's reasons for making the recommendation.[92] The Act does not provide for the Panel to notify the complainant of its decision. However, the Commission is advised that, in practice, the Panel does notify complainants of the outcome of the review but does not give extensive reasons for its decisions.

2.83 The Act specifically states that the Attorney General is not *bound* to follow the Panel's recommendation, but shall take such recommendation into account.[93] The Attorney General may uphold the Council's decision to dismiss the complaint, or may refer the complaint to the Standards Board or to the Disciplinary Tribunal as he or she sees fit.[94] The Attorney General has a duty to notify the complainant of his/her decisions and reasons.[95]

Results of the Panel's review

2.84 The Panel has made a determination in respect of 395 of the 530 applications it has received for review of a Law Society Council decision. The Panel has notified the Law Society Council on 16 occasions of its intention to make a recommendation to the Attorney General that a complaint that was dismissed by the Council be referred to the Standards Board or the Disciplinary Tribunal.[96] On two of these occasions the Law Society Council resolved to alter its previous decision and refer the complaint itself to the appropriate disciplinary body. In respect of the remaining 14 matters, the Panel made a recommendation to the Attorney General that a Council's decision to dismiss be reversed. In eleven of these cases the Panel recommended that the matter be referred to the Standards Board and in three cases that the matter be referred to the Disciplinary Tribunal.

2.85 To date, to the Panel's knowledge, the Attorney General has concluded his assessment of only two matters. On one occasion the Attorney General dismissed the complaint. On the other occasion the Attorney General referred the complaint to one of the disciplinary bodies but this complaint was subsequently withdrawn with the consent of the parties.[97] The Commission is awaiting a reply from the Attorney General's Department to our request for information about the status of the remaining matters referred to the Attorney General by the Panel.

THE LEGAL PROFESSION STANDARDS BOARD

Jurisdiction and composition of the Board

2.86 Complaints involving questions of unsatisfactory professional conduct (rather than professional misconduct) which are not disposed of by the professional Councils are required by the Act to be dealt with by the Legal Profession Standards Board.

2.87 Section 127 of the Act provides that the Board shall consist of at least two barristers, at least two solicitors, and at least one lay person (being neither a barrister or a solicitor). The Act provides for the Attorney General to appoint the barristers and solicitors upon the nomination of the Bar Council and the Law Society Council, respectively.[98] The lay member is appointed by the Attorney General after consultation with the lay members of the Legal Aid Commission, the Law Foundation and such other bodies as the Attorney General considers appropriate.[99] The Act provides for a chairperson is to be nominated by the Attorney General, such person being either a barrister or a solicitor member. Provision has also been made in the Act for the appointment by the Attorney General of acting members and an acting chairperson in the event of illness or absence of a usual member or chairman. At present the Standards Board consists of seven barristers (all Queen's Counsel), nine solicitors and three lay persons.

2.88 Where the Standards Board hears a complaint involving the conduct of a solicitor then the Board is constituted by two solicitor members and one lay member. Where the Board hears a complaint involving the conduct of a barrister, the Board is constituted by two barrister members and one lay member.[100]

Referrals to the Board

2.89 Between 1 January 1988 and 1 December 1991, the Law Society received 4737 complaints[101] from members of the public[102] and itself initiated 294 investigations.[103] Of this total of 5031, only 40 complaints involving 24 solicitors were considered to be appropriate for referral to the Standards Board.[104]

2.90 Between 1 January 1988 and 31 December 1991 the Bar Council received 223 written complaints in respect of 244 barristers[105] and itself initiated investigations against 19 barristers. As noted above, where one complainant has made complaints against a number of barristers, each has been treated as a separate complaint in the Bar Association's figures. Of the total 263 separate complaints investigated and assessed by the Bar Council, only ten were considered appropriate for referral to the Standards Board.[106]

Conduct of a hearing before the Board

2.91 Hearings held by the Standards Board are meant to be relatively informal. The Standards Board is not bound by the usual rules of evidence and can inform itself on any matters it sees as appropriate. Standards Board hearings are *not* open to the public and therefore only parties to the *in camera* hearing (and their legal representatives) can attend.[107] The complainant is only entitled to attend the hearing if the matter involves a question of compensation or if a specific order has been requested, but even in these situations the complainant can only appear in those parts of the hearing where those issues are relevant. The Standards Board has the power to summon persons to give evidence or to produce documents.[108]

2.92 If in the course of the hearing the Standards Board considers that the complaint involves a question of professional misconduct, then the Standards Board must terminate the hearing and refer the complaint to the Disciplinary Tribunal.[109]

The Board's disciplinary powers

2.93 If at the conclusion of the hearing the Standards Board is satisfied that conduct involved does amount to unsatisfactory professional conduct, then it has a number of disciplinary powers open to it. The Standards Board has the power to reprimand the legal practitioner, order that further legal education be undertaken, or impose a fine of up to $2000. The Standards Board has further powers in relation to a solicitor: it may require that the solicitor seek management advice; order periodic inspections of the solicitor's practice; order that a solicitor cease to employ a particular person; restrict the sort of work the solicitor undertakes or place a restriction on the solicitor's practising certificate.[110]

2.94 The Standards Board also has the power to make a number of further orders to benefit the complainant. It can order the payment of compensation not exceeding $2000. However, the other remedial orders can only be made: (1) if it has been specifically requested by the complainant when lodging his or her complaint with the Law Society Council or Bar Council, and (2) where both the complainant and, more importantly, the legal practitioner consent to the making of the order. Where these two requirements are satisfied the Standards Board has the power to make an order requiring the legal practitioner to repay or waive any fees charged, undertake further legal work on behalf of the client, waive any lien in respect of documents or pay compensation exceeding $2000 to the person who has suffered loss. The Standards Board can make one or a number of these orders.[111] The Standards Board also has the power to make ancillary orders and to order that the solicitor pay the costs of the other parties.[112]

2.95 Both the Law Society's and Bar Association's explanatory brochures advise complainants of Board's powers and the statutory requirement that any orders to their benefit must be specifically requested by them when making their complaint. The Commission is advised by both professional associations that they take a fairly relaxed approach to this requirement and that the complainant may request such orders right up until the time the matter is referred by the appropriate Council to the Standards Board or the Disciplinary Tribunal.

The Board's determinations

With respect to solicitors

2.96 It is not uncommon for the Law Society and Bar Councils to aggregate a number of complaints about a single legal practitioner and refer these to the Standards Board. Where the complaints relate to the same factual situation and legal practitioner, the Standards Board often decides to conduct one hearing in respect of all the complaints rather than a number of hearings. The Registrar of the Standards Board has advised the Commission that the Board has conducted 22 hearings to date in respect of solicitors. One complaint was withdrawn with the consent of the parties prior to hearing and as at 31 December 1991, one complaint had not yet proceeded to a hearing. The following list is a summary of the Board's determinations in relation to the 22 hearings:[113]

costs were ordered on 18 occasions;

14 reprimands were issued;

six compensation orders were made;

four orders were made that the solicitor's practice be subject to periodic inspection;

four orders were made that the solicitor employ a person belonging to a specific class (eg a part time experienced solicitor or an accountant);

three orders were made requiring the solicitor to undertake further legal education;

one order each was made that a solicitor seek management advice, that the practising certificate of a solicitor be restricted, and that a solicitor pay a fine; and

in one case the complaint was found "not proven".

With respect to barristers

2.97 The Commission is advised by the Registrar of the Standards Board that four determinations have been made with respect to barristers. One of these determinations corresponds to a complaint which was settled by the parties prior to the Board's hearing. The terms of the settlement were then ratified by the Board. A reprimand was given by the Board in one matter and in the remaining two matters the Board held that the complaint was not proven.[114] As at 31 December 1991, five matters had not yet been heard by the Board. Two of these five matters were placed on hold pending the outcome of hearings in the Disciplinary Tribunal with respect to the same barristers.[115]

Rights of appeal

2.98 A party to the Standards Board's hearing may make an application to the Disciplinary Tribunal for a review of the Standards Board's decision. However, where the party requesting the review is the person who initially made the complaint then the application is limited to those aspects of the Standards Board's hearing that dealt with the loss suffered by that person.[116]

THE LEGAL PROFESSION DISCIPLINARY TRIBUNAL

Composition and jurisdiction of the Disciplinary Tribunal

2.99 The Act provides that there must be at least two barristers, two solicitors and two lay people appointed to the Disciplinary Tribunal by the Attorney General.[117] At present, in addition to the President (who is a solicitor), there were five barrister members (all Queen's Counsel), five solicitor members and six lay members of the Disciplinary Tribunal. The Act also provides for the appointment of acting members in the event of illness or absence of members.

2.100 The Tribunal may review decisions of the Standards Board, and also conducts hearings into matters referred to it by the Councils or by the Attorney General (where a complaint was originally dismissed) where the conduct involved raises the question of professional misconduct. In either case the Disciplinary Tribunal is constituted by three members, of which one is to be a lay member. If the Tribunal is examining the conduct of a solicitor, the remaining two members will be solicitor members; likewise if the Tribunal is examining the conduct of a barrister, the remaining two members will be the barrister members. If the President is not sitting, the President nominates one of the sitting legal members to preside in a particular hearing.[118]

Conduct of the Tribunal

When reviewing Board decisions

2.101 Where an application is made to the Disciplinary Tribunal to review a decision of the Standards Board, the matter will be dealt with by way of a new hearing and fresh and further evidence may be given to the Tribunal. However in all other respects the review is conducted in much the same manner as the initial hearing of the Standards Board in that the same parties may attend, the hearing will be in the absence of the public and the Disciplinary Tribunal has the power to summon persons to attend the hearing and/or to produce documentation.[119] The Registrar of the Disciplinary Tribunal has advised the Commission that only one solicitor has made an application to the Disciplinary Tribunal for a review of a decision of the Standards Board since the system came into effect in 1988. This review resulted in the Board's orders being quashed by the Tribunal.[120]

When hearing matters itself

2.102 Where a complaint involving a question of professional misconduct has been referred to the Disciplinary Tribunal, the matter will be dealt with by way of a formal hearing. In contrast to the hearings of the Standards Board, the rules of law governing the admission of evidence are applicable to hearings conducted by the Tribunal.[121] Although Tribunal hearings are normally conducted in public,[122] the Act provides that only the legal practitioner who is the subject of the complaint, the relevant Council, the Attorney General and the original complainant are entitled to *appear* at the hearing.[123] As is the case with hearings before the Standards Board, the complainant may only appear at the hearing to the extent that a matter of compensation is being considered.[124] Parties to the hearing may appear personally or through counsel.[125] The Tribunal also has the power to summon persons to give evidence or to produce documents.[126]

2.103 Those determinations of the Disciplinary Tribunal relating to solicitors regularly are published by the Law Society as a supplement to the *Law Society Journal*. The Bar Association includes a summary of determinations relating to barristers in its journal, the *Bar News*.

The Tribunal's powers

On review

2.104 Upon completion of the review, the Disciplinary Tribunal may uphold the Standards Board's decision or, alternatively, make one or more of the orders that the Standards Board could have made in relation to the complaint.[127] Where the Disciplinary Tribunal considers that the conduct is more serious and that there is a question of professional misconduct, the Tribunal must terminate the review and deal with the matter in the same way it would had the matter been referred to it directly (from a Council, the Attorney General or the Standards Board).[128]

After hearings

2.105 If the Disciplinary Tribunal is satisfied, after completing its hearing, that the legal practitioner is not guilty of professional misconduct but rather is guilty of the lesser offence of unsatisfactory professional conduct it has the same powers as the Standards Board in relation to a finding of unsatisfactory professional conduct.[129] Where the Tribunal is satisfied that the legal practitioner is guilty of professional misconduct it may make one or a number of orders. It may order that the practising certificate of the legal practitioner be cancelled, suspended or not issued for a period of time, or that the name of the legal practitioner be struck of the Roll, or it may impose a fine of up to $25,000. Where the Tribunal is satisfied that the person who made the complaint has suffered loss as a consequence of the legal practitioner's professional misconduct, then it may make the same orders as the Standards Board where such an order would have been appropriate.[130] The Tribunal also has the power to make ancillary orders (for example that the fees of counsel assisting the legal practitioner be paid) and to order that the legal practitioner pay the costs of the parties involved.[131]

Applications to the Tribunal in respect of clerks

2.106 Section 120 of the Act provides for the Tribunal, upon application by the Law Society, to make an order prohibiting any solicitor from employing or paying in connection with the solicitor's practice a particular clerk. In order to apply for such an order, the Law Society must be of the opinion that the person is not a fit and proper person to be involved with a solicitor's practice or that the conduct of the clerk, had he or she been a solicitor, would have constituted unsatisfactory professional conduct or professional misconduct.[132] For the purposes of a hearing in respect of a clerk, the composition of the Legal Profession Disciplinary Tribunal shall be determined by the President.[133] The Disciplinary Tribunal has received three applications from the Law Society in relation to law clerks. The Tribunal has conducted hearings in respect of two of these matters. An order was made by the Tribunal pursuant to section 120 of the Act in both cases prohibiting the employment of the law clerk by any solicitor.[134]

Referrals to the Tribunal

By the Law Society

2.107 Of the 5021 complaints investigated and assessed by the Law Society during the period 1 January 1988 to 1 December 1991,[135] 179 complaints were considered by the Law Society Council to be appropriate for referral to the Legal Profession Disciplinary Tribunal. These 179 complaints[136] were in respect of 56 solicitors and three clerks, and accordingly the Law Society Council, pursuant to sections 120 and 135 of the Act, made a total of 59 formal complaints to the Tribunal.[137] One complaint was later discontinued by consent.[138]

By the Bar Association

2.108 Of the 263 separate complaints investigated and assessed by the Bar Council, 21 complaints (involving 13 barristers) were considered appropriate for referral to the Disciplinary Tribunal. Where a particular barrister was the subject of a number of Bar Council referral resolutions, the complaints were often combined for the purpose of filing at the Disciplinary Tribunal. The Bar Council subsequently filed eleven complaints (involving nine barristers) with the Tribunal pursuant to s134 of the Act and made four formal complaints (in relation to three barristers) to the Tribunal pursuant to s135 of the Act.[139] The Bar Council decided not to proceed with the filing of one complaint and two complaints (corresponding to one barrister) have yet to be referred to the Tribunal.[140]

Determinations of the Tribunal

2.109 The Disciplinary Tribunal, as with the Standards Board, often conducts one hearing in respect of a number of complaints relating to the same legal practitioner. The Registrar of the Tribunal has advised the Commission that the Tribunal has conducted 42 hearings with respect to complaints about solicitors. One complaint was withdrawn prior to hearing with the consent of the parties. The Commission is advised by the Registrar of the Disciplinary Tribunal that as at the end of 1991, six complaints had not yet been proceeded to a hearing. The following is a summary of the Tribunal's determinations:[141]

costs orders were made 39 times;

solicitors were struck off the Roll on 23 occasions;

fines were ordered eight times;

three orders were made that the solicitor's practising certificate not be issued until the expiration of a specified period;

two findings that the complaint was not proven;

two findings that there was no case to answer;

one order that the solicitor's practising certificate be cancelled;

one order that the solicitor pay compensation to the complainant;

one ancillary order that the solicitor pay the outstanding costs of counsel (in respect of original court proceedings); and

one order that a solicitor (who had his practising certificate suspended for a period) could practise as a legal clerk.[142]

2.110 On five occasions, the Disciplinary Tribunal made a finding after the hearing that the solicitor was guilty of unsatisfactory professional conduct (and not professional misconduct). In these cases, the Tribunal[143] issued three reprimands and there was one order each that: the solicitor's practice be subject to periodic supervision; the solicitor seek management advice; the solicitor employ a certain type of person (eg, a bookkeeper); the solicitor cease accepting instructions in a specified area of work; the solicitor pay a fine; and that the solicitor pay costs.

2.111 The Tribunal has conducted two hearings into complaints made about barristers. Two complaints were withdrawn by consent prior to hearing.[144] At 31 December 1991, eight hearings remained pending. In relation to the two matters heard by the Disciplinary Tribunal, the Tribunal made one finding of "complaint not proved" and in the other matter found that the barrister was not guilty of professional misconduct but rather was guilty of the lesser offence of unsatisfactory professional conduct. In relation to this latter finding, the Tribunal issued a reprimand and ordered that the barrister pay the costs of the Bar Association.[145]

Appeals against the determinations of the Tribunal

2.112 The Commission understands that seven solicitors have appealed to the New South Wales Court of Appeal against the Disciplinary Tribunal's determination of their complaint. The Commission is advised by the Law Society that at 1 December 1991, only three judgments had been delivered.[146] In two cases the solicitor's appeal was dismissed, with costs awarded against the solicitor. In the other case the solicitor's summons was dismissed, as it was defective in form. This solicitor also had to pay the Law Society's costs.

FOOTNOTES

1. *Legal Practitioners Act* 1898 (NSW), s76.

2. *Legal Practitioners Act* 1898, s75.

3. F Riley, *The New South Wales Solicitors Manual* at 1747.

4. The Commission understands that there is a 1990 decision of the Standards Board to this effect, but as the matter was heard *in camera* we cannot verify this officially.

5. Law Society of New South Wales, *Annual Report 1991* (1991) at 10.

6. *Legal Profession Act* 1987 (NSW), s25. Unless otherwise indicated, all section references in this Chapter refer to provisions of the *Legal Profession Act* 1987.

7. The New South Wales Bar Association, *Annual Report 1991* (1991) at 5.

8. Sections 25 and 26.

9. Section 29(4)(a).

10. Section 37(1).

11. *Re B* [1981] 2 NSWLR 372.

12. *Law Society of New South Wales v Weaver* [1977] 1 NSWLR 67.

13. Section 130.

14. 1991 figures are available in respect of both solicitors and barristers. However, not all of the complaints received in 1991 have been finally determined. The Commission has chosen to use 1990 figures throughout this Paper, for that reason.

15. New South Wales Law Reform Commission, *Complaints, Discipline and Professional Standards - Part 1* (DP 2, 1979) at 99.

16. See paras 4.123-4.127.

17. Letter to the Commission from Mr John Holloway, Commissioner for Consumer Affairs, 8 January, 1992, at 2.

18. In 1991, 52 complaints were mediated by the Department of Consumer Affairs. Eight mediations resulted in full redress and six in partial redress for the complainant. Another three only required the provision of information. In most cases the complainant did not obtain redress. Seventeen complainants were referred to the Consumer Claims Tribunal or to the Legal Aid Commission. In the remaining cases, the complaint lapsed, was withdrawn, or was not justified, or conflicting evidence existed as to the facts or the result was not known.

19. *Consumer Claims Tribunal Act* 1987 (NSW) s32.

20. *Consumer Claims Tribunal Act* 1987, s3. The Act was amended following the decision of the Supreme Court in *Holman v Deol* [1979] 1 NSWLR 640 (at 651), in which it was held that lawyers were not "traders" within the meaning of the earlier definition.

21. *Consumer Claims Tribunal Act* 1987, s30.

22. The Commission does not have information in relation to the remaining 41 claims but presumes that these claims were decided in the favour of the legal practitioner.

23. *Legal Profession (Amendment) Act* 1987 (NSW) Sch 8, and see Weisbrot, at 207.

24. Section 123.

25. Section 123.

26. Section 130.

27. The Commission understands that some attempt is made by the Law Society to mediate some of these matters.

28. Part 10, Division 3.

29. Or any Committee to which it has delegated this power pursuant to s136 of the Act.

30. See s67(2)(g). See also Law Foundation of New South Wales, *Annual Report 1991* (1991) at 60.

31. Submission of the Law Society of New South Wales, 31 January 1992, at 18. (Hereafter, "Law Society submission".)

32. Section 50.

33. The Law Society advises that included in these figures are complaints involving conduct which occurred after the introduction of the Act.

34. Section 54(a).

35. The Law Society advises that the category of conduct /standards breach was previously known as unethical behaviour and includes a broad range of allegations including communicating with another solicitor's client, acting for both parties, unethical letters of demand, misleading and many other "catch all" categories.

36. Section 130.

37. Letter to the Commission from the Law Society of New South Wales, 30 March 1992.

38. Section 55.

39. Law Society submission, at 10.

40. R MacDougal, "Unsatisfactory Professional Conduct" (March 1991) *Law Society Journal* at 42.

41. MacDougal at 44.

42. MacDougal at 44.

43. Riley, at para 1751.1.

44. Riley, at paras 1751.1-1751.2.

45. The Law Society advises the Commission that these 131 resolutions are based upon 131 complaints and are directly related to each complaints matter. Letter to the Commission from the Law Society of New South Wales, 16 March 1992.

46. Section 131.

47. Section 134(1)(a).

48. The power contained in s134(1)(b)(ii) was delegated subject to a proviso that the solicitor is to be advised that if the solicitor does not consent to a reprimand by the Committee, he or she may have the matter resolved by the Council.

49. Section 134(1), (1A) and (2).

50. Section 134(1)(c).

51. These admonitions relate to complaints where the conduct complained of occurred prior to the introduction of the Act.

52. Section 135.

53. Section 130(2)-(3).

54. Submission of the New South Wales Bar Association, 20 February 1992. (Hereafter, "Bar Association submission".)

55. Bar Association submission, at 4.

56. See (Summer 1991) *Bar News* 16-17.

57. Bar Association submission, at 4.

58. Pursuant to s51 of the Act. The complaints and investigations mentioned here relate only to complaints in which the alleged conduct took place after the commencement of the Act. In 1990, the Bar Council also received four written complaints in respect of five barristers in which the conduct in question occurred prior to 1988. See The New South Wales Bar Association, *Statistical Analysis - Complaints to the New South Wales Bar Association* (28 January 1992) at 2. (Hereafter, "Bar Association statistics".)

59. Bar Association statistics, at 1.

60. Letter to the Commission from the New South Wales Bar Association, 8 April 1992.

61. The Bar Association advises that the category "members of the public" includes litigants for whom barristers appeared, litigants against whom barristers appeared, witnesses called in litigation, persons complaining on behalf of other persons and persons complaining who had no direct interest in the litigation the subject of the complaint. Bar Association letter, 8 April 1992.

62. Pursuant to s136(1).

63. Under ss 130(5), 131, 132 and 133(1).

64. Bar Association submission, at 4.

65. Bar Association submission, at 5.

66. Bar Association submission, at 5.

67. Bar Association submission, at 5 and 6.

68. Bar Association submission, at 6.

69. Bar Association submission, at 6.

70. Bar Association submission, at 7.

71. Bar Association submission, at 7.

72. See generally s134.

73. Section 134(1A).

74. Section 134(1)(c).

75. See (Summer 1991) *Bar News* 16-17.

76. Bar Association statistics, at 2-3.

77. Section 134(3).

78. Bar Association submission, at 7.

79. Section 137.

80. Section 134(4).

81. The Law Society describes the average turn around time to be "the turn around time on average from the date of the receipt of the complaint to the date of the Complaints Committee or Council resolution or withdrawal or settlement of the complaint". Law Society submission, at 23.

82. Law Society submission, at 23.

83. Bar Association statistics, at 9.

84. Schedule 4, cl 2.

85. Section 126(2)(c).

86. *Legal Profession (Amendment) Act* 1989 (NSW), Sch 4, cl 18.

87. Section 138.

88. Section 139(3).

89. Figures supplied to the Commission by the Registrar of the Legal Profession Conduct Review Panel in a letter of 27 February 1992, at 5. Number of applications given do not include those dismissed for being out of time or those over which the Panel has no jurisdiction.

90. Section 140(1).

91. Section 140(2).

92. Section 140(4).

93. Section 141(2).

94. Section 141(1).

95. Section 141(3).

96. Pursuant to s140(2).

97. This complaint related to conduct which took place prior to the commencement of the 1987 Act in 1988. The Panel's jurisdiction was later clarified and found not to extend to pre-Act conduct. Therefore the Panel had no jurisdiction to review the complaint.

98. Section 126(2)(a)-(b).

99. Section 126(2)(c).

100. Section 142.

101. This figure includes complaints where the conduct complained occurred prior to 1 January 1988.

102. Law Society submission, at 11.

103. Law Society submission, at 11.

104. Law Society submission, at 13.

105. This figure represents the number of complaints received by the Bar Council where the conduct complained of occurred after 1 January 1988. During the same time period the Bar Council received 45 complaints in relation to alleged conduct that occurred prior to the introduction of the *Legal Profession Act* 1987 (NSW).

106. Bar Association statistics, at 2.

107. Sections 143 and 145.

108. Sections 146 and 147.

109. Section 143.

110. Sections 149(1) and (2).

111. Section 149(3)-(4).

112. Section 149(6).

113. Letter to the Commission from the Registrar of the Legal Profession Standards Board, 27 February 1992, at 4.

114. The Commission is advised by the Bar Association that in one case where the Board found that the complaint was not proven, the Board recommended that the barrister be counselled by the Bar Council. The Bar Association advises that the Bar Council subsequently adopted the Board's recommendation and the barrister was counselled by the then President. Bar Association statistics, at 6.

115. Registrar's letter, at 4.

116. Section 150.

117. Section 128.

118. Sections 151 and 156.

119. Section 153.

120. Registrar's letter, at 3.

121. Section 157(2).

122. Section 159.

123. Section 158.

124. Section 158(2)-(3).

125. Section 158(5).

126. Section 160.

127. Section 154.

128. Section 155.

129. Section 163(3).

130. Section 163.

131. Section 163(6).

132. Section 120(2).

133. Section 120(12).

134. Registrar's letter, at 2 and 3.

135. Law Society submission, at 11.

136. Law Society submission, at 13.

137. Registrar's letter, at 1-2.

138. Registrar's letter, at 2.

139. One barrister was the subject of a number of complaints, some of which were referred to the Disciplinary Tribunal pursuant to s134 and the others referred pursuant to s135.

140. Bar Association statistics, at 3.

141. Registrar's letter, at 2-3.

142. Section 121 (2).

143. Under s163(2)(b).

144. Bar Association statistics, at 5.

145. Registrar's letter, at 3.

146. Law Society submission, at 22.

DISCUSSION PAPER 26 (1992) - SCRUTINY OF THE LEGAL PROFESSION

3. Comparative Perspectives

INTRODUCTION

3.1 This Chapter seeks to provide some comparative perspectives on the handling of complaints against professionals. We first consider the position with respect to legal practitioners in all of the other Australian states, with special attention to Victoria. The system of handling complaints against lawyers in England (and Wales) is considered next. The question of the regulation and discipline of the legal profession in England has received close attention in the past two decades, with a succession of official inquiries leading to some major legislative changes in recent years. Of particular interest is the establishment of the office of Legal Services Ombudsman in January 1991. The Law Society of England and Wales also has developed some initiatives in this area, including the administrative separation of its complaints-handling function with the establishment of the Solicitors' Complaints Bureau, the markedly increased use of conciliation, and efforts at prevention of Disputes through a "Client Care" program. The system in the United States receives brief attention, with a particular focus to California, which has created a substantial infrastructure dedicated to the prevention and resolution of lawyer-client problems. Finally, we consider the operation of the Complaints Unit of the New South Wales Department of Health, which has the power to investigate complaints against health care service providers (including doctors) in this State. The Complaints Unit replaces the previous model of professional self-regulation with an independent investigatory agency.

Victoria

The general regulatory regime

3.2 With the enactment of the *Legal Profession Practice Act* 1891 (Vic) the barristers' and solicitors' branches of the legal profession became legally fused in Victoria. The current act, the *Legal Profession Practice Act* 1958 (Vic), maintains this formal distinction.[1] However, the branches remain quite separate in practice, for a person admitted as a "barrister *and* solicitor" of the Supreme Court of Victoria must make an election whether they wish to be inscribed on the Roll of barristers *or* on the Roll of solicitors.

3.3 Consistent with this *de facto* separation of professions in Victoria, there are also separate complaints systems for solicitors and barristers. Both systems are governed by the *Legal Profession Practice Act* 1958 (Vic). The Act also provides for the appointment by the Attorney General of a Lay Observer, who is given general powers to oversee the complaints systems operated by the two professional bodies.[2] The Act specifies that the Lay Observer must not be a legal practitioner. The Lay Observer has the power to examine and investigate, at the request of members of the public, the manner in which a complaint has been dealt with or dismissed by one or a number of the disciplinary bodies created under the Act.[3] The Lay Observer has a statutory obligation to report to the Attorney General and to the Law Institute (the Victorian solicitors' professional body). The Lay Observer is appointed on a part-time basis and only has the support of a part-time secretary. The extent to which the Lay Observer can effectively oversee the two systems and also seek to raise public awareness about the right to complain about the provision of legal services must, as a result, be limited.

3.4 The Law Reform Commission of Victoria is currently reviewing the two complaints systems and has produced a Discussion Paper containing a number of proposals for change,[4] which are discussed below.

The Law Institute's complaints system

Statutory authority

3.5 In 1989, an Amendment Act was passed which introduced substantial changes to then existing statutory complaints procedure overseen by the Law Institute.[5] Prior to the amendment, the Law Institute and the disciplinary bodies had jurisdiction only in respect of actions or omissions which were found to constitute "misconduct". As well as introducing a new lower level disciplinary offence of "standards breach", the Law Institute and the newly created Solicitors' Board (which replaced the Solicitors' Disciplinary Tribunal) were given the power under the Act to investigate, settle and determine Disputes (including Disputes over bills of costs) between solicitors and their clients involving sums of up to $2500.

Reception of complaints

3.6 The Law Institute is now empowered to receive and deal with two types of complaints: (1) those which relate to the professional conduct of solicitors; and (2) those relating to a Dispute between the solicitor and the client (for example a Dispute over costs), but where there is no issue of professional conduct. The Act provides for a framework for conciliating Disputes, failing which the Secretary of the Law Institute, and the Solicitors' Board and its Registrar, are given limited power to resolve the matter and award compensation (up to $2500) where appropriate. These bodies have more extensive powers in relation to professional conduct matters.

3.7 Both the Registrar of the Solicitors' Board and the Secretary (or Executive Director) of the Law Institute are appointed by the Law Institute Council. The Act provides that the Registrar shall be a solicitor or a barrister with at least seven year's standing.[6] The Commission understands that the Secretary of the Law Institute is usually legally trained. The Solicitors' Board is constituted by a chairperson (who must be a Judge (either resigned or retired), appointed by the Attorney General[7]), members of the Law Institute Council, a number of solicitors chosen by the Law Institute Council in accordance with the Act, and a number of lay people (not being practitioners).[8] For the purposes of a hearing, the Solicitors' Board is constituted by the chairperson, a solicitor and a lay person.[9]

3.8 Each written complaint received by the Law Institute is classified according to whether it is a Dispute between the complainant and the solicitor (referred to by the Law Institute as a "Dispute"), a matter involving "professional misconduct" or a "standards breach".

3.9 A "standards breach" is defined in s2A of the Act as meaning:

> conduct by a solicitor in a professional capacity which would be regarded by a solicitor in good standing to be unacceptable or unprofessional behaviour and, without limiting the generality of the foregoing, includes -
>
> (a) conduct unbecoming a solicitor;
>
> (b) unprofessional conduct;
>
> (c) a contravention of this Act (other than section 80 or 81), the regulations or the rules without reasonable excuse.

3.10 "Misconduct" covers more serious behaviour. The definition of misconduct in the Act includes a lengthy list of specific examples of misconduct. The examples given include wilful or reckless contraventions of the Act, charging grossly excessive fees or costs, making false statements in the course of conducting a practice, failure to perform work in a way that amounts to a gross breach of duty to a client or to the court, and repeated standards breaches.[10]

3.11 A complaint relating to a solicitor's bill of costs must be lodged within six months of the complainant receiving the bill.[11] If the complaint relates to pecuniary loss suffered by the client or any other genuine Dispute, or if the complainant is alleging misconduct or a standards breach, the complainant has six years in which to lodge a complaint.[12] Where the complaint involves misconduct or a standards breach in addition to a Dispute, two files are opened and are dealt with separately by the Law Institute.[13] In 1990, the Law Institute received 1134 complaints alleging misconduct or a standards breach and 1535 complaints which related to a Dispute between the client and his or her solicitor.[14]

Investigation of complaints

3.12 The matter is then investigated by a legal officer employed in the Law Institute's Professional Standards Department ("the Complaints Solicitor"). The solicitor whose conduct is in question is given 14 days to respond to the complaint. If no response is received a further letter is sent to the solicitor noting that failure to respond within seven days will result in the matter being referred to the Registrar of the Solicitors' Board. The Commission understands that approximately six matters each month are so referred but that not all such matters proceed to a hearing, as the solicitor often provides the requisite information prior to the hearing. Those matters that do proceed to a hearing tend to result in the solicitor being fined and an order made requiring a response.

Disputes

3.13 If there is no question of a standards breach or misconduct, the Complaints Solicitor, on behalf of the Secretary of the Law Institute, will attempt to negotiate a settlement between the parties if requested. Where the Dispute relates to a solicitor's bill of costs the complainant must lodge with the Secretary of the Law Institute the amount in Dispute.[15] If the Dispute is resolved at this stage then terms of settlement are drafted by the Secretary of the Law Institute and forwarded to the Registrar of the Solicitors' Board where formal orders capable of being enforced by the Supreme Court of Victoria are drafted.[16] The Lay Observer notes in her report that of the 1535 Dispute complaints lodged with the Law Institute in 1990, the great majority (64%) were settled by the Complaints Solicitor.[17]

3.14 If settlement does not occur then the complaint is referred to the Registrar of the Solicitors' Board for conciliation.[18] The Act provides for a panel of not less than 15 solicitors to be appointed as conciliators by the Council of the Law Institute.[19] A conciliator is allocated to each matter and organises a conference between the parties. The Lay Observer reports that many of the matters that are referred to the Conciliator are settled. In 1990, 283 Disputes were referred for conciliation. By the end of that year, 207 conferences had been completed. Of these, 138 had resulted in a settlement and 76 matters still awaited determination.[20] If in the course of conciliation it appears to the Conciliator that the matter involves a question of misconduct or a standards breach, the matter may be referred to the Secretary of the Law Institute.[21] The Law Institute has no power to dismiss Disputes (even if they believe a Dispute to be vexatious or frivolous).

3.15 If the complainant does not agree to settle the Dispute at the various conciliation stages, then the Dispute is referred to a Registrar's hearing.[22] Hearings before the Registrar are relatively informal and are held *in camera*. The complainant usually attends the hearing. Where the complainant is unrepresented, the Law Institute will lead the evidence and cross-examine witnesses on behalf on the complainant. During the course of the hearing points of law and any other matters which may confuse the complainant are explained by the Registrar. At the conclusion of submissions the complainant is again given an opportunity to comment on the proceedings and indicate any matter which he or she feels has not been covered.[23] The Registrar may make such orders as he or she sees fit, including an order that the solicitor pay compensation not exceeding $2500 to the complainant, an order that the solicitor's costs be reduced, or that a lien be forfeited. The solicitor may also have to pay the costs of the hearing.[24] A person "aggrieved" by an order of the Registrar may appeal to the Solicitors' Board but must do so within 21 days of the Registrar's order.[25]

Professional conduct matters

3.16 Where the complaint involves a question of a standards breach or misconduct, the Complaints Solicitor will further investigate and assess the complaint to determine whether there may be a case to answer, whereupon the matter will be referred to the Secretary of the Law Institute. The Law Institute has no power to conciliate or settle complaints which involve allegations of a standards breach or misconduct. If the complaint involves trust funds then an inspector from the Accounting Section of the Law Institute will carry out the investigation. The Secretary of the Law Institute may dismiss the matter (in which case the complainant could seek a review of this decision by the Lay Observer), refer the matter to the Registrar of the Solicitors' Board or, if the matter is more serious, to the Solicitors' Board itself. The Secretary also has the power under the Act to cancel, suspend or refuse to grant a practising certificate in certain circumstances.[26] In 1990, of the 1134 complaints involving alleged misconduct or standards breaches received by the Law Institute, 83 (7.3%) were referred for further action to the Registrar of the Solicitors' Board or the Solicitors' Board.[27]

Hearings by the Registrar

3.17 The Registrar of the Solicitors' Board generally hears those matters which are considered by the Secretary of the Law Institute to be less serious. When the Registrar finds that there has been a standards breach he has the power to make a number of orders including: that no further action be taken; that the solicitor be reprimanded; that the solicitor undertake a course of further education, management or accounting; that the solicitor's practice be supervised, or that the solicitor not employ a specified person.[28] The Registrar of the Solicitors' Board may also make an order as to payment of costs. Where the solicitor has been found guilty of misconduct, in addition to the above powers the Registrar may impose a fine of up to ten penalty units.[29]

3.18 In 1990, the Registrar heard 44 matters. In most of these matters the Registrar found against the solicitor with the usual form of punishment consisting of a fine and/or a reprimand. In a small number of cases the orders made by the Registrar included an order that the solicitor seek management advice.[30]

Solicitors' Board hearings

3.19 The Solicitors' Board hears appeals from decisions of the Registrar. In addition, the Solicitors' Board hears in the first instance matters involving more serious conduct, including those where misconduct is alleged. Hearings are generally held in public. Where the Solicitors' Board finds that the solicitor has committed a standards breach or is guilty of misconduct, it has the same powers as the Registrar but may impose a fine of up to 50 penalty units for misconduct and may make an order that varies, cancels, restricts or suspends for any period a solicitor's practising certificate or an order that requires the solicitor not practise as a barrister.[31]

3.20 The 1990 Lay Observer's Report[32] gives details of the 33 matters heard by the Solicitors' Board in that year where the solicitor was found guilty of misconduct and a penalty imposed. These matters concerned conduct including misappropriation of funds, knowingly making a false statement and gross breach of duty to a client. In most cases the solicitor was reprimanded or fined. In nine cases, the Solicitors' Board deferred, suspended, restricted or cancelled the solicitor's practising certificate.

Rights of appeal

3.21 An appeal may be taken to the Supreme Court from a decision of the Solicitors' Board by the solicitor where his or her right to practise has been affected.[33] Where the Board's hearing was not an appeal from a decision of the Registrar "a person aggrieved" also has the right to appeal to the Supreme Court.[34]

Continuing assessment

3.22 It is worthwhile noting that the Law Institute of Victoria publishes a Professional Standards Report twice a year. This Report contains a summary of the regulatory activities that have taken place in the preceding six months. This report is forwarded by the Law Institute to state and federal members of parliament, all major media outlets, consumer organisations, community legal centres and anyone who requests a copy.

3.23 In addition to the publication of this regular report, in June 1990, the Registrar of the Solicitors' Board circulated a detailed questionnaire in relation to those Disputes that had been received by the Law Institute (as at 15 June 1990) and subsequently dealt with by the Law Institute, a conciliator or referred to the Registrar of the Solicitors' Board or the Solicitors' Board.[35] Both complainants and the solicitors involved were asked a number of questions aimed at assessing the level of satisfaction with the system. The Commission understands that the Solicitors' Board intends to continue this practice.

3.24 Three questionnaires were prepared by the Solicitors' Board corresponding to those Disputes which were (a) settled at the Law Institute stage, (b) settled with the aid of a conciliator, and (c) referred to the Registrar or the Solicitors' Board. The parties to 147 Disputes were forwarded questionnaires. Seventy-two complainants and seventy-four solicitors completed and returned the questionnaire. The results indicate that at each of the three stages the majority of complainants and solicitors who replied to the questionnaire were satisfied with the Law Institute's initial handling of the complaint.[36]

3.25 In those Disputes in which settlement was reached between the parties with the aid of a conciliator, the majority of complainants and solicitors were satisfied with the way the conciliator conducted the conference and the result achieved.[37] Where matters had been referred to the Registrar of the Solicitors' Board or the Solicitors' Board the majority of complainants and solicitors were of the opinion that the hearing before the Registrar or the Board was easy to follow and was long enough to allow their arguments to be fully considered. However a greater number of complainants compared to solicitors thought that the hearing was conducted fairly.[38]

3.26 All complainants and solicitors were asked whether they were satisfied with the final result achieved. Only five of the 72 complainants who responded advised that they were "not satisfied". Ten of the 74 solicitors responded similarly. Thirty-three complainants and forty-two solicitors replied that they were "very satisfied" or "satisfied". Another 29 complainants and 23 solicitors advised that "they would accept the result although not entirely satisfied".[39]

Law Institute's response to reform proposals

3.27 In its response to the Victorian Law Reform Commission's Discussion Paper on the Accountability of the Professions,[40] the Law Institute noted that it had approached the Standards Association of Australia and requested their assistance in the development of an objective standard which could be applied to all complaints-handling bodies.[41] It was hoped that this could the be used to assess and compare the

effectiveness of such bodies. However, the Law Institute was advised by the Standards Association of Australia that before a standard could be developed the consent of the other professional bodies was required. The Commission understands that the professional bodies of the other states do not wish to pursue this course of action and therefore have not given their consent.

The Victorian Bar Council's complaints system

Statutory authority

3.28 Part IIA of the *Legal Profession Practice Act* 1958 (Vic) creates a complaints system under which the executive of the Victorian barristers' professional body (the Victorian Bar Council) deals with complaints made against barristers. The Bar Council's system differs from that of the Law Institute in that the Bar Council only has power to investigate complaints and consider awarding compensation where the complainant alleges "a disciplinary offence" has been committed. The Bar Council does not have the jurisdiction to review complaints where the conduct alleged is not within the definition of a "disciplinary offence".

3.29 Section 14B of the Act provides that a barrister commits a disciplinary offence if he or she:

a) is guilty of professional misconduct:

b) is guilty of improper conduct in a professional respect;

c) infringes a rule made and published by the Victorian Bar Council on a matter of professional conduct or practice; or

d) is guilty of any other conduct for which a barrister could be struck off the roll of practitioners kept by the Supreme Court.[42]

Reception and investigation of complaints

3.30 The Act provides that complaints about the conduct of barristers are to be made in writing to the Chairman of the Bar Council.[43] The Chairman must then refer each complaint to the Ethics Committee. The Ethics Committee consists of a panel of barristers appointed by the Bar Council. The Ethics Committee then undertakes a preliminary investigation of the complaint.[44] The Ethics Committee generally forwards a copy of the complaint to the barrister and requires a response within 14 days. The Committee also seeks information from other relevant parties, such as judges and instructing solicitors.

3.31 The Commission understands from its discussions with the Victorian Bar Council that the Bar considers that the most appropriate forum for the resolution of complaints relating to negligence is the civil court system. However, where conduct is such that it amounts to gross negligence, disciplinary action would be considered.

3.32 If the Ethics Committee is of the opinion that a barrister has committed a disciplinary offence, it may decide to take no further action, deal with the matter summarily (subject to the barrister's consent) or lay a charge before the Barristers Disciplinary Tribunal (the "Bar Tribunal").[45] If the Committee dismisses the matter the complainant is advised of the possibility of a review by the Lay Observer.

Summary hearings

3.33 If the Ethics Committee deals with a matter summarily and finds that the barrister has committed a disciplinary offence it has the power to order that:

a) no further action be taken;

b) the Chairman of the Ethics Committee give the barrister such advice or express such views as the Ethics Committee thinks appropriate;

c) the barrister be reprimanded, admonished, cautioned or counselled;

d) the barrister pay a fine of up to ten penalty units;

e) the barrister be suspended for not more than three months; or

f) the barrister pay compensation of up to $3000 if the complainant has suffered loss as a result of the barrister committing the disciplinary offence.[46]

3.34 Where a matter is dealt with summarily by the Ethics Committee, the usual practice is for the matter to be heard before half of the Committee members.[47] Hearings are apparently relatively informal with evidence not required to be given on oath.[48] The Act provides that no person shall be entitled to be present at the summary hearing without the leave of the Ethics Committee.[49] However, the Commission understands that the usual practice is for complainants to attend the hearing and have an opportunity to be heard. Where there is no Counsel assisting the Ethics Committee, complainants are sometimes given the opportunity to question the barrister involved.[50]

Rights of appeal

3.35 If the barrister is dissatisfied with the Board's determination then he or she can appeal to the Bar Tribunal.[51] A dissatisfied complainant may make a further complaint to the Lay Observer.[52] The Bar Tribunal is constituted by a chairman (a Judge or former Judge), three barristers (two being Queen's Counsel) and a lay member.[53] If the Bar Tribunal is hearing an appeal from a decision of the Ethics Committee upon a summary hearing it has the same powers as the Ethics Committee.[54]

Hearings before the Tribunal

3.36 Hearings before the Bar Tribunal of any appeal or charge are normally heard in public, unless the Tribunal is satisfied that the interests of justice require otherwise.[55] The Act also provides for certain sections of the Evidence Act 1958 (Vic) to apply to hearings of the Tribunal.[56]

3.37 Where the Bar Tribunal hears a matter which originated from a charge laid by the Ethics Committee and determines that the barrister has committed a disciplinary offence, it has further disciplinary powers.[57] The Bar Tribunal may order a greater fine (up to 50 penalty points) and may suspend the barrister for such time as it finds appropriate. In addition the Bar Tribunal may order that the barrister's name be struck off the Roll. The barrister may be required to pay the expenses incurred by the Bar Tribunal in connection with the proceedings. The Bar Tribunal may also order that the particulars of the Bar Tribunal proceedings be published in the Annual Report of the Bar Council.

3.38 The Act provides that a "party aggrieved" by an order of the Bar Tribunal may appeal to the Full Court of the Supreme Court of Victoria.[58] The appeal must be instituted within one month of the Bar Tribunal's order.[59] A complainant dissatisfied with the decision may make a further complaint to the Lay Observer.[60]

3.39 In 1990, the Bar Council received 42 complaints. These, plus 14 from the preceding year, were dealt with as follows: 32 matters were dismissed; 11 were subject to a summary hearing; three were listed for hearing before the Bar Tribunal; and ten were still under investigation at the end of the year.[61] In the summary hearings, nine barristers were found guilty of a disciplinary offence, one charge was dismissed and one charge was withdrawn by the complainant.[62] Only one matter was actually heard by the Bar Tribunal in 1990, with the Tribunal upholding the complaint. The barrister involved was reprimanded and ordered to pay costs.

The Lay Observer

Complaints about solicitors

3.40 The Lay Observer is an independent statutory office holder appointed by the Attorney General. The appointment is made on a part-time basis, and the appointee may not be a lawyer. Where a complaint about a

solicitor has been dismissed or where the complainant is dissatisfied with the way the matter was handled, the complainant may lodge a further complaint with the Lay Observer. The Lay Observer has the power to reinvestigate the matter and if appropriate to make recommendations to the Law Institute and the Attorney General.[63] The Lay Observer has power under the Act to obtain such information he or she requires from the Law Institute, the Law Institute Council (or any member of it), the Secretary of the Law Institute, the Registrar of the Solicitors' Board and the Solicitors' Board.

3.41 The Commission understands that currently most of the investigative work is undertaken by the Lay Observer herself. Such work would normally involve obtaining further information from the complainant and the relevant arm of the profession. When the Lay Observer is of the opinion that further investigative work is required in relation to a particular complaint the Lay Observer would usually request such work be undertaken by the Complaints Solicitor. The part-time Lay Observer simply does not have the time or resources to undertake a further lengthy and involved investigation herself.

3.42 After investigating the matter, the Lay Observer generally chooses one of five courses of action:[64]

a) negotiating with the solicitor whose conduct was the subject of the complaint;

b) referring the complaint back to the Law Institute and recommending that the matter be re-examined;

c) recommending to the complainant that he or she seek further legal advice about commencing civil legal proceedings against the solicitor;

d) referring the complainant to another government department or statutory agency; or

e) dismissing the complaint (with reasons provided).

Complaints about barristers

3.43 In respect of services provided by a barrister, any person may complain to the Lay Observer about the dismissal of the complaint by the Bar Council, the Ethics Committee or the Bar Tribunal, or generally about the manner in which their complaint was dealt with by those bodies. The Lay Observer's powers and procedures in relation to barristers are parallel to those in relation to solicitors. After making an independent assessment of the complaint the Lay Observer may redirect the complaint back to the Ethics Committee for further examination, or may dismiss the complaint.[65]

Educational role

3.44 In addition to investigating complaints, the Lay Observer regularly attends meetings of both the Law Institute and Bar Council's Ethics Committees, addresses community groups and organisations on the role of the Lay Observer, and participates in a variety of other educational events. The Lay Observer also attends many of the meetings of the Registrar of the Solicitors' Board, Solicitors' Board hearings, and many of the summary hearings of the Bar Council's Ethics Committee.[66]

Statistics

3.45 During 1990, the Lay Observer received 202 formal complaints, and 77 complaints from the previous year also were dealt with. The outcomes of the investigations included: 136 complaints were dismissed, 15 complaints were referred for conciliation, 12 were referred to private practice or a community legal centre for legal advice, 14 refunds or reductions in costs were recommended; ten payments from the discretionary fund were recommended; 19 matters were referred to government departments or other agencies; eight matters were sent to the Law Institute for further action; and three matters were referred to the Ethics Committee.[67]

Some strengths of the Victorian system

3.46 The Commission has considered it worthwhile to examine the complaints system in Victoria (particularly with respect to solicitors) as it is similar to the system operating in New South Wales, albeit with a number of variations. It is the Commission's view that these variations make the system more effective in that the mechanisms in place allow for the resolution of a greater number of Disputes between clients and their solicitors. The Victorian system is now oriented more towards achieving the client's satisfaction. The Commission considers the following aspects of the Law Institute's complaints system to be the key strengths of that system:

> The expanded jurisdiction of the Law Institute and disciplinary bodies allows resolution of complaints not involving a standards breach or professional misconduct.
>
> The complainant has access to a cheap and accessible forum for the resolution of complaints and Disputes not involving a standards breach or misconduct.
>
> Complainants and their solicitors can now settle their disagreements (where there is no standards breach or misconduct) with the aid of a trained conciliator.
>
> The complainant has the ability to obtain relief (often in the form of compensation) in relation to services provided by a solicitor even where no allegation of misconduct or standards breach is made (eg, reduction of a solicitor's bill of costs).
>
> The Law Institute undertakes an assessment of the complaints system every six months. The Solicitors' Board intends to undertake regular surveys in order to assess whether those using the system are satisfied with the way complaints are being handled.

3.47 The Law Institute can now deal with a wide range of complaints. In addition there is now the opportunity of bringing the solicitor and the dissatisfied client together in an environment where the client can voice his or her concerns about the solicitor's conduct. A criticism of the complaints system, commonly levelled by solicitors whose conduct has been the subject of a complaint, is that the whole procedure appears to be designed to extract a settlement or compromise from the solicitor regardless of whether or not fault exists on the part of the solicitor.[68]

3.48 It is the Commission's understanding that this approach has been adopted intentionally by the drafters of the legislation, the Professional Standards Department of the Law Institute and the Lay Observer, with a view to counteracting the perceived high level of public dissatisfaction and frustration with the legal profession. The complaints system has been deliberately oriented towards obtaining the satisfaction of the complainant in an effort to dispel the public's belief that the Law Institute "protects its own".

The Victorian Law Reform Commission's proposals

3.49 The Victorian Law Reform Commission is currently undertaking a review of complaint systems in that state and has put forward the following proposals (which are not yet recommendations) in a Discussion Paper:[69]

> That an independent Legal Practice Board and Registrar be established to take over the Dispute resolution and disciplinary functions now handled by the Law Institute of Victoria and the Bar Council. The Solicitors' Board and its Registrar should also take over the taxation of client-lawyer bills of costs from the Courts.
>
> The Bar Council and the Law Institute of Victoria collaborate on publishing a common Code of Professional Conduct.
>
> The *Legal Profession Practice Act* 1958 (Vic) be amended to remove the immunity of advocates from liability for negligent "in-court" work.[70]

3.50 Both the Law Institute and the Bar Council are opposed to the first proposal and consider it to be misconceived: the Law Institute because "it does not take account of the improvements which have occurred since the 1989 amendments to the *Legal Profession Practice Act*";[71] the Bar Council because, in its view, the current system is working well and that the proposed new structure would be unwieldy, inexpert and costly.[72]

3.51 The second proposal received the support of the Law Institute on the understanding that the proposed code would be no more restrictive than the current restraints imposed on Victorian solicitors and that it could be readily adapted to meet changing demands in the future.[73] **T**he Bar Council is of the opinion that a unified code of conduct would be inappropriate to barristers as the two professions have inherently different functions.[74]

3.52 The Law Reform Commission's third proposal is supported by the Law Institute[75] but not by the Bar Council which notes that the immunity does not result from any rule or practice of the Bar but is the result of considered decisions of the House of Lords and the High Court of Australia.[76]

OTHER AUSTRALIAN JURISDICTIONS

South Australia

The present system

3.53 The *Legal Practitioners Act* 1981 (SA) ("the Act") regulates the practice of the law in South Australia. Under the Act, every practitioner is admitted and enrolled as a barrister and solicitor of the Supreme Court.[77] However, a separate bar emerged in the 1960s, and in October 1990, there were approximately 100 members of the voluntary Bar Association, who had undertaken to practise only in the manner of a barrister.[78]

3.54 All complaints concerning members of the legal profession are directed to the Legal Practitioners Complaints Committee ("the "Complaints Committee") established by the Act. Although the Bar Association is empowered to deal with complaints about lawyers who practise exclusively as barristers, as a matter of course all complaints are referred to the Complaints Committee. The Act also establishes the Legal Practitioners Disciplinary Tribunal ("the Tribunal"). The Complaints Committee consists of seven members, of which at least three are required to be non-practitioners. The functions of the Complaints Committee are set out in s74(1):

> (a) to receive, consider and investigate complaints of unprofessional conduct against legal practitioners;
>
> (b) where the subject matter of a complaint is, in the opinion of the Committee, capable of resolution by conciliation - to attempt to resolve the matter by conciliation;
>
> (c) where, in the opinion of the Committee, a complaint has substance but may be adequately dealt with by admonishing the legal practitioner against whom the complaint was made - to admonish the legal practitioner accordingly;
>
> (d) to lay charges of unprofessional conduct before the Tribunal.

3.55 "Unprofessional conduct" is defined in the Act to include an illegal act of any kind committed in the course of his (or her) practice by the legal practitioner and any offence of a dishonest or infamous nature committed by the legal practitioner in respect of which punishment by prison is prescribed by law.[79] In practice, however, the Complaints Committee takes the view that this definition is not comprehensive and has regard to the common law. The Complaints Committee has no jurisdiction to investigate the alleged negligence of a legal practitioner or to determine whether a practitioner has overcharged. Examples of the type of conduct that the Complaints Committee will investigate include allegations of unreasonable delay, failure to account, breach of confidentiality and conflict of interest.

3.56 The principal powers of the Complaints Committee are conciliation, admonition and, where appropriate, laying charges before the Tribunal. Where the Complaints Committee admonishes a practitioner a copy of the admonition is forwarded to the Law Society and the Attorney General. Copies of the admonition are not made public. The Complaints Committee is not able to order a legal practitioner to pay compensation or damages.

3.57 The Tribunal has twelve members, all of whom are legal practitioners.[80] For the purposes of conducting a hearing, the Tribunal is comprised of a panel of three of its members.[81] Upon a finding of unprofessional conduct by the Tribunal, the Tribunal may: reprimand the legal practitioner; order the practitioner to pay a fine; suspend the right of the practitioner to practise for a period not exceeding three months; stipulate conditions to a practitioners practise of the profession of the law; or recommend disciplinary proceedings be commenced against the legal practitioner in the Supreme Court. Only the Supreme Court may order that a practitioner's name be struck off the Roll.

3.58 The Act also creates the office of the Lay Observer.[82] The Lay Observer is directly appointed by the Attorney General. A complainant who is dissatisfied with the Complaint Committee's investigations or the proceedings and decision of the Tribunal may make representations to the Lay Observer. The Lay Observer does not reinvestigate the complaint but may call for further investigation by the Complaints Committee if it is believed that members have not properly carried out their duties.

3.59 The Lay Observer is entitled to be present at proceedings of the Committee or Tribunal. Any aspect of the proceedings may form the basis of a report by the Lay Observer to the Attorney General. There is, however, no general obligation to furnish reports and it is the practice of the present Lay Observer not to prepare any. The present Lay Observer has held the office on a part-time basis for the last nine years. In that time the Lay Observer has disagreed with the decision of the Law Society in only two or three cases.

Government proposals for reform

3.60 In October 1990, the Policy and Research Division of the South Australian Attorney General's Department prepared a Green Paper on the Legal Profession. The Green Paper covered a number of different areas, but for the purposes of this reference two areas in particular are of interest.

3.61 Inadequate information about legal procedures was identified as one of the major sources of client complaint. The Green Paper proposes that practitioners should ensure that their clients receive a pamphlet or letter of general information at the initial interview, detailing the steps necessary for the resolution of the matter, how long each step might take, and the likely prospects of success, all of which would enable the client to provide more informed instructions to the solicitor. Brief letters should be sent periodically to the client to advise on the progress of the matter and any factors which have affected the initial advice as to success.[83] The Green Paper also proposes that practitioners should be obliged to provide more information to the client in respect of costs and that this information should be supplied before formal instructions are received.[84]

3.62 The Green Paper invites submissions in relation to the merits of creating an advisory committee in the nature of a Public Council on Legal Services, similar to that previously recommended by this Commission. The principal role of such a body would be to act as a review and advisory body in relation to the regulation of the profession and the delivery of legal services.[85] A report following up on the issues raised by the Green Paper is expected to be tabled in the latter half of 1992 by the South Australian Attorney General.

Queensland

Solicitors

3.63 Complaints against solicitors are made to the Queensland Law Society. The *Queensland Law Society Act* 1952 (Qld) sets up the Statutory Committee of the Law Society and the Solicitors Disciplinary Tribunal, for the purpose of hearing charges of professional misconduct, or unprofessional conduct or practice, on the part of practitioners.[86] The Act does not define professional misconduct or unprofessional conduct, so resort must be had to the common law.

3.64 Complaints alleging failure to account, dishonesty, unreasonable delay or neglect, or conflict of interest, are examples of the type of complaint that will be considered by the Law Society. The Law Society does not have authority to resolve Disputes about costs between solicitor and client. There is no power to award compensation to the complainant.

3.65 Complaints are received for initial assessment by the director of the Professional Conduct Department of the Law Society, who will then allocate the complaint to one of the staff of the Professional Conduct Department. Currently there are four solicitors and two complaints officers dealing with complaints. The Professional Conduct Department has responsibility for trust account inspections, audits, receiverships and Fidelity Fund matters in addition to complaints. The total number of staff in the Department is approximately 20.

3.66 If, upon investigation, the complaint discloses a *prima facie* case of professional misconduct or unprofessional conduct, the complaint is referred to the Professional Conduct Committee. It is the responsibility of the Professional Conduct Committee to then refer major matters to the Statutory Committee and minor matters to the Tribunal. The Statutory Committee has no lay membership,[87] although three of the twelve persons constituting the Solicitor's Disciplinary Tribunal are lay persons.[88] Powers available to the Tribunal include censuring the practitioner, imposing a fine (not exceeding $5000), requiring that the practitioner make available particular documents for inspection, requiring the practitioner to make reports on his practice, requiring the practitioner to undertake a course of further education, or referring the matter to the Statutory Committee.[89]

3.67 Upon a finding that a practitioner is guilty of malpractice, professional misconduct or unprofessional conduct, the Statutory Committee has power to impose a fine, strike the practitioner off the Roll or suspend him or her from practice. Where the Committee does not strike the practitioner off the Roll the Committee may censure the practitioner and/or make one or more of those orders available to the Tribunal as set out above.[90]

3.68 In the latter half of 1991, the Law Society implemented a mediation process to assist in the resolution of solicitor-client Disputes or misunderstandings. This program utilises the services of Law Society-approved mediators. Both parties to the mediation process are required to sign a confidentiality agreement to ensure that they will remain free to pursue their legal rights further if they wish.[91]

3.69 For the period 1 July 1990 to 30 June 1991, the Professional Conduct Department received 648 written complaints. In that same period the Statutory Committee ordered that four practitioners be struck off, one be suspended and two be fined. The Disciplinary Tribunal imposed two fines, made one order of "no future employment", and ordered one censure.[92]

3.70 A Lay Observer has been appointed in Queensland to monitor written complaints received by the Law Society. Where necessary, and in order to fulfil this monitoring role, the Lay Observer may investigate, examine and make reports and recommendations to the Attorney General and to the Law Society.[93] The Lay Observer is permitted to (and in practice generally does) attend any meeting and take part in the deliberations of the Law Society Council, the Professional Conduct Committee, the Statutory Committee and the Tribunal.

Barristers

3.71 The Queensland Bar Association has failed to provide any details about its complaints-handling procedures despite numerous requests from the Commission.

Western Australia

3.72 Western Australia has a fused legal profession, although a small separate, voluntary Bar has emerged. Most members of the Perth Bar remain members of the Law Society.[94] The *Legal Practitioners Act* 1893 (WA) vests statutory authority over the admission and discipline of all legal practitioners in the Barristers' Board.[95] Complainants in Western Australia may approach either the Law Society or the Barristers' Board.

The Law Society

3.73 The Law Society has very limited powers. Complaints sent to the Law Society are reviewed at first instance by a Legal Officer. Depending upon the subject matter of the complaint, the Legal Officer may be able to resolve the Dispute immediately by means of a telephone call to the legal practitioner concerned.

Alternatively, the Legal Officer might form the view that the complaint is of such a serious nature that it should be referred immediately to the Barristers Board. Other complaints will be referred to either the Professional Conduct Committee or the Ethics Committee of the Law Society. These Committees of the Law Society may find that the complaint is unjustified or they might refer the matter to the Council of the Law Society recommending that the Council reprimand the practitioner. The Committees also may refer the matter to the Barristers Board.

3.74 The only sanction available to the Law Society is a reprimand and the Law Society has no powers of investigation. The consequence of this latter limitation is made apparent in the following situation. In relation to each complaint received the Law Society will seek the response of the practitioner concerned. The complainant is then entitled to reply to the practitioner's response. If, however, there is a conflict between the views expressed by the parties, the Law Society is not in a position to resolve the conflict.

3.75 For the period 16 October 1990 to 16 October 1991, the Law Society received 51 complaints against practitioners, the majority against sole practitioners. Delay and cost complaints were the two matters most complained about. For that period no complaints were referred to the Board for investigation or information. Two reprimands were issued and no action was taken by the Law Society in relation to 38 of the complaints.[96]

The Barristers' Board

3.76 The Barristers Board is comprised of the Attorney General, the Solicitor General, all resident Queen's Counsel, and nine annually-elected legal practitioners of at least three year's standing. Pursuant to the *Legal Practitioners Act* 1893 (WA) the Board has power to investigate complaints of alleged illegal or unprofessional conduct or any neglect or undue delay in the conduct of the client's business.[97] The disciplinary powers of the Board are invoked only where a practitioner's conduct raises an issue as to the practitioner's fitness to practice, or reveals a serious departure from proper professional conduct. The disciplinary powers of the Board do not extend to cases of negligence. Such cases are to be dealt with by private proceedings brought against the practitioner by the client. The Board has no power to award damages.

3.77 A complainant may choose to proceed against a practitioner formally or informally. An informal complaint may be made to the Board orally although it is preferred that complaints be made in writing. A copy of the complaint or a summary of the oral complaint is forwarded to the practitioner involved for a response. This response is then sent to the complainant for further comment unless the practitioner expressly refuses permission to do so. The Board takes the view that where the practitioner has refused permission, it is unable to forward the response to the complainant. In the course of considering the matter the Board will on occasion require further information from the complainant or practitioner, and will sometimes examine the practitioner's file or check court records or other official records relevant to the complaint. At the conclusion of its investigation the Board may: adopt the formal complaint and take formal disciplinary proceedings against the practitioner; take no further action; conduct a formal inquiry if the full facts were not obtained during the informal inquiry; or decide against bringing formal proceedings but remind the complainant that a formal complaint may be made.

3.78 In practice, the basis of a large number of complaints to the Board is uncertainty or misunderstanding by the client or a lack of communication by the practitioner and can be dealt with during the initial telephone call or

interview. Others Disputes require no more than a telephone call to the practitioner by the Secretary to clarify the position. For the year ended 30 June 1991, the Board estimated it received approximately 1,000 verbal complaints or enquiries. The Board received 269 written complaints or enquiries from members of the public. A further 15 matters were drawn to the Board's attention by other sources. Formal complaints were issued against 22 legal practitioners at the Board's direction during the year.

3.79 In addition to the Board's power to institute formal disciplinary proceedings against a practitioner, formal complaints may be sworn by an interested party or by the Law Society. The complainant may make a formal complaint to the Board either at first instance or upon information that the Board does not intend taking the matter any further. However, where a formal complaint is lodged by the complainant, the complainant (generally by his or her legal representative) is responsible for bringing the prosecution and thus adducing the evidence to prove the allegation. The complainant also bears the costs of the practitioner's defence if he or she fails to prove the breach alleged. During the year ending 30 June 1991 no formal complaints of this nature were made.

3.80 The penalties which may be exacted against a practitioner found guilty of misconduct[98] following a formal complaint brought either by the Board's Secretary or a complainant include: a reprimand; a fine up to $10, 000; or a suspension from practising law for a period of up to 2 years. In addition the Board may report the practitioner to the Supreme Court, which may order that the practitioner's name be struck off the Roll of Legal Practitioners.[99]

3.81 During the year ending 30 June 1991, the Board conducted 16 hearings of formal complaints. The Board heard 28 allegations of unprofessional conduct, three allegations of neglect and undue delay and one allegation of illegal and/or unprofessional conduct. The allegations were dismissed in five instances, the decision was reserved in two, in another two no order was made, and the remainder were proved. The type of conduct found to constitute unprofessional conduct included failing to respond to correspondence, misleading a client about the progress of a court action, overcharging, improperly securing a costs agreement that was champertous and being under the influence of alcohol in the presence of clients.[100]

3.82 The Barristers' Board has a policy of making available to the media information concerning all proceedings which result in a practitioner being suspended from practice. In addition, practitioners are kept aware of the nature and result of disciplinary hearings and of matters of importance that arise from hearings from articles appearing in the Law Society's publication.

Government proposals for reform

3.83 The *Legal Practitioners Amendment (Disciplinary Provisions) Bill* was tabled in Parliament for public comment in December 1991. This Bill proposes substantial changes to the current complaints procedure. The Bill would establish a Complaints Committee, a Legal Practitioners Disciplinary Tribunal, a Law Complaints Officer and, without making substantive alterations to its composition, the Barristers' Board would be renamed the Legal Practice Board. The nature of the conduct subject to review by the Board is unchanged by the Bill. Under the proposed regime written complaints, and in some cases oral complaints, will be made to the Complaints Committee or the Law Complaints Officer. The Bill clearly sets out the persons and bodies entitled to make a complaint. The expanded role of the Board in relation to the professional conduct of a practitioner is

reflected in the heading to part IV whereby "Professional Conduct and Discipline" is substituted for "Suspension and Striking Off the Roll".

3.84 The Complaints Committee would be given numerous functions apart from receiving and inquiring into complaints. In particular the Complaints Committee would be under a statutory obligation to conciliate between a practitioner and a complainant or refer the matter for conciliation, where it would be appropriate to do so. In addition, the Complaints Committee would be given a summary disciplinary jurisdiction (exercisable only with the consent of the practitioner). Other proposed functions of the Complaints Committee include: instituting proceedings against a practitioner before the Tribunal or Supreme Court; supervising the Law Complaints Officer; and commenting on and making recommendations in respect of the Act (ie the *Legal Practitioners Act* as amended).

3.85 In the exercise of its summary disciplinary jurisdiction, it is proposed that the Complaints Committee will have the following powers upon a finding that the practitioner has been guilty of illegal conduct, unprofessional conduct or neglect or undue delay in the course of legal practice: order the practitioner to pay to the Board a fine not exceeding $500; reprimand the practitioner; order that the practitioner seek and implement advice concerning the management and conduct of the practice; or order that the practitioner reduce or refund any fees, charges or disbursements; order that the practitioner pay costs in relation to the complaint. This latter penalty may be imposed notwithstanding the fact that no finding was made against the practitioner, provided that the Complaints Committee is of the opinion that the conduct of the practitioner gave reasonable cause for the inquiry.

3.86 With the exception of the summary professional disciplinary jurisdiction, all functions of the Complaints Committee would be exercisable by the Law Complaints Officer. The Law Complaints Officer is to be a legal practitioner with experience in the conduct of a legal practice. The Law Complaints Officer will be responsible for notifying in writing the complainant and practitioner of the Complaints Committee's decision to neither deal with the complaint summarily nor refer the matter to the Tribunal for determination. This notification is to include reasons for the determination.

3.87 The proposed Disciplinary Tribunal will hear and determine all matters arising out of complaints referred to it. All the powers of the Supreme Court as are necessary for the carrying out of this function will be available to the Tribunal. As a general rule, proceedings before the Tribunal will not be public. The Tribunal will be given an extensive armoury of sanctions, including the power to: make and transmit a report to the Full Court; suspend the practitioner from practice for up to two years or until such time as the problem or disability suffered by the practitioner has been overcome; impose conditions on the practitioner's right to practice; require the practitioner to take advice in relation to the management of the practice; impose a fine in respect of each allegation proved; reprimand the practitioner; direct that the practitioner either undertake further work for the client at an amount for costs and charges determined by the Board, or pay for further work to be done by another practitioner or reduce or refund the amount of any fees, charges or disbursements; order that money owing to the complainant be paid to the Board; or order the payment of compensation where the conduct of the practitioner has caused the complainant to suffer pecuniary loss. The capacity for the Tribunal to order compensation is subject to numerous conditions, qualifications and limitations. An appeal may be made against any finding or order of the Tribunal to the Full Court.

3.88 The proposed legislation makes provision for some lay participation in the complaints procedure. The Complaints Committee is to have two members whose function is to act as the representatives of the community and the Tribunal is to have one. The "community representatives", who are to be appointed by the Attorney General after consultation with the Minister responsible for Consumer Affairs, do not have a vote on any question with respect to a judicial decision in the exercise of disciplinary jurisdiction, but may otherwise participate fully in

any meeting. The lay members may also report independently to the Attorney General on any aspect of a complaint, any inquiry or hearing, rules made under the Act, or on the activities or proceedings of the Law Complaints Officer, the Complaints Committee or the Disciplinary Tribunal.

3.89 The draft legislation does not propose any form of external review, along the lines of a Lay Observer. However a complainant aggrieved by the Complaints Committee determination will be empowered to initiate proceedings against the practitioner before the Disciplinary Tribunal. Proceedings may be initiated unless the Complaints Committee has specifically determined the complaint to be trivial, frivolous, vexatious, unreasonable, relating to conduct too remote in time, or a matter in which the complainant does not have a sufficient interest. Where a complainant does initiate proceedings before the Tribunal the complainant risks having a costs order made against him or her, if no finding is made against the practitioner.

3.90 The Western Australian Attorney General's Department has advised the Commission that it anticipates that the *Legal Practitioners Amendment (Disciplinary Provisions) Bill* will become law in 1992. Amendments to the Bill are likely as a consequence of the submissions received.

Tasmania

3.91 Tasmania is also a fused jurisdiction in which a small, voluntary Bar has emerged. The Tasmanian Law Society has the power to investigate and proceed against any practitioner under the *Legal Practitioners Act* 1959 (Tas) and the *Law Society Act* 1962 (Tas).

3.92 As there is no statutory definition of professional misconduct, the Law Society applies the common law. Rules of Practice were made in 1977, pursuant to s14 of the *Law Society Act* 1962, regulating various aspects of legal practice.[101] Rule 5 specifically requires a practitioner to do his or her best to complete any business entrusted to him or her within a reasonable time. Rule 6 requires a practitioner to render a bill of costs within a reasonable time after being requested in writing by a client to do so. Rule 7 empowers the Council of the Law Society, acting on its own motion or on a written complaint, to require practitioners to furnish the Council with a full and accurate account of his or her conduct in relation to any matter relating to his or her practice.

3.93 The Executive Director of the Law Society acts as a filter for incoming complaints and has a wide discretion in relation to them, including the power to dismiss complaints which are frivolous or vexatious. The type of matters which the Law Society can investigate must raise issues of professional misconduct. This has been taken to include a failure to account for moneys held on a client's behalf, persistent delay in answering correspondence and breach of confidentiality, but does *not* extend to allegations of negligence. Complainants alleging negligence are advised to contact another solicitor about the possibility of commencing a civil action. If the conduct complained of does not constitute professional misconduct but nonetheless is of a standard which falls short of that which may be expected of a practitioner, an informal presidential reprimand may be issued to the practitioner.[102] No statistics on complaints are maintained by the Law Society of Tasmania.

3.94 The *Law Society Act* 1962 establishes the Disciplinary Committee, consisting of five members of the Law Society. Depending on the seriousness of the issues raised in a complaint, the Law Society may refer the matter to the Disciplinary Committee or the Supreme Court. Generally the Supreme Court will be referred defalcation matters, those matters where the practitioner has prior convictions before the Disciplinary Committee, or where the penalty involved is likely to be striking off the Roll of practitioners.

3.95 The Disciplinary Committee has no power to order compensation for the complainant. Powers are confined to imposition of a fine, suspension or withdrawal of the solicitor's right to practice. An appeal against an order of the Disciplinary Committee may be made to the Supreme Court.[103]

3.96 A new *Legal Practitioners Bill* to replace the current *Legal Practitioners Act* and the *Law Society Act* has been drafted. The Bill makes substantial amendments to the disciplinary procedure and the Commission understands that provision is made in the Bill for the appointment of a Lay Observer. At present there is no provision for lay participation in the complaints procedures. The new *Legal Practitioners Bill* has yet to be approved by the new State Cabinet.

CONCLUSIONS

3.97 All of the Australian jurisdictions share some similar experiences in the area of dealing with complaints against legal practitioners.[104] The same types of complaints predominate and in no State has the profession managed to overcome the general underlying problem of misunderstanding and lack of communication. Several trends are apparent across the jurisdictions, notably participation by lay persons in the complaints process, and the increase in the range of sanctions available against legal practitioners.

3.98 The emphasis being placed upon conciliation is also noteworthy. Most jurisdictions have been undertaking informal mediation without specific legislative power to do so; however, the inclusion of a statutory obligation to attempt a conciliated resolution where appropriate is a positive development.

3.99 Another common thread between these jurisdictions is the clear distinction which is made by the complaints bodies between allegations of negligence, which generally are not investigated, and allegations about "conduct", which may be investigated.

3.100 Victoria, Queensland and South Australia have Lay Observers, and Tasmania appears likely to move in this direction. The Lay Observers in these jurisdictions become involved in the complaints process at a much earlier stage than does the Legal Profession Conduct Review Panel in New South Wales. Notably, the Lay Observers are entitled to attend the various complaints committee and disciplinary proceedings. Western Australia, which has recently had occasion to reassess their complaints system and recommend changes, has not proposed the introduction of a Lay Observer. Lone among Australian jurisdictions, however, the disciplinary process in Western Australia already is in the hands of an independent body rather than the peak professional association(s).

COMPLAINTS AGAINST LAWYERS IN ENGLAND

Introduction: the era of inquiries

3.101 The present system of regulation of the legal profession in England and Wales comes after two decades of unprecedented attention to this issue. Between 1970 and 1990, there were six major public inquiries and two major privately commissioned inquiries into the organisation of legal work and the structure and regulation of the profession. The Monopolies and Mergers Commission conducted inquiries into the provision of legal services in 1970 and (two in) 1976, with little result in the face of professional opposition to free market reform proposals.[105] The Royal Commission on Legal Services (the "Benson Commission") conducted a major inquiry and presented its report to Parliament in 1979.[106] (A separate royal commission on legal services in Scotland reported to Parliament in 1980.)[107] The Government responded with its own White Paper in 1983.[108]

3.102 Following considerable public outcry in 1982-1983 over the apparently lenient treatment accorded to a member of the Law Society Council who had been found to have been guilty of grossly overcharging clients,[109] the Law Society commissioned the firm of management consultants, Coopers & Lybrand, to undertake a review of the organisation, management and administration of the affairs of the Law Society. The Coopers draft report "clearly came as a shock to the Council",[110] recommending the transfer of all disciplinary powers from the Law Society to an independent, statutory Solicitors Complaints Board. The draft proposed that the Board would have power to investigate complaints, to arrange compensation and to prosecute complaints before the Solicitors Disciplinary Tribunal. Matters not sufficiently serious to go before the Tribunal would be determined by the Board itself. The Board would be independent of the Law Society, but funded by the profession, and its members would be elected by the profession.[111] The Law Society Council persuaded Coopers to include an alternative proposal in its final report, which would preserve the Law Society's responsibility for discipline, but with greater internal separation of functions and an increased monitoring role for lay persons.

3.103 In 1985 the National Consumer Council ("NCC") published the results of a survey that it had commissioned in the previous year.[112] The survey sought to ascertain the kind of complaints system that would meet the approval of the public. The survey was conducted among a representative sample of nearly 2000 adults. Only 15% of respondents thought that the Law Society or solicitors should investigate complaints made about the standard of service provided by solicitors. A question was posed concerning the desirable composition of any new complaints body: 34% of respondents thought that it should be made up entirely of people who are not solicitors, 60% thought that the body should be made up of a mixture of solicitors and other people, while only 3% thought the body should be made up entirely of solicitors. A majority (55%) of respondents preferred to have all or a majority of lay persons on any body investigating complaints against solicitors.[113]

3.104 The NCC concluded by making its own proposal for the reform of the complaints handling process, the essence of which was the creation of an independent Legal Council, composed of both solicitors and lay persons,[114] with power to investigate all complaints against solicitors, and to set standards of professional conduct. This would leave the Law Society free to concentrate upon its role as a professional association.[115] The NCC proposed that the Legal Council would employ at least one Legal Ombudsman, with responsibility for

investigating all complaints and resolving minor ones. More serious charges would be prosecuted before the Disciplinary Tribunal.[116]

3.105 Also in 1985, a private members bill was introduced into the House of Commons by a Labour backbencher (and co-sponsored by five others), with the support of the NCC and the Legal Action Group.[117] The *Solicitors (Independent Complaints Procedure) Bill* called for an independent General Legal Council with a bare majority of solicitors and the power to investigate and correct both misconduct and negligence as well as to arbitrate malpractice claims.

3.106 In 1986, a Committee of Inquiry into the Future of the Legal Profession was established under the convenorship of Lady Marre, with representation from both branches of the legal profession as well as independent members. The resulting Report[118] had only been available for discussion for six months in 1988 when the Lord Chancellor, Lord Mackay of Clashfern, released a series of three Green Papers on the work and organisation of the legal profession,[119] conveyancing,[120] and contingency fees[121] in January 1989.

3.107 Referring to the need for complaints about services to be investigated promptly, thoroughly and impartially, the Green Paper on the *Work and Organisation of the Legal Profession* noted that:

> The Law Society appears to have hoped that, by setting up the Bureau in a separate establishment, with a lay-dominated Investigation Committee to monitor its performance, they would, notwithstanding that they fund the Bureau, enable it to be regarded as independent of the Law Society. It is not clear that they have as yet been successful in this.[122]

3.108 The Green Paper identified several problems with the system which were in need of rectification, including:[123]

> The need to adopt clear standards in a written code of conduct to assist in identifying what is meant by the expression "shoddy work".
>
> The Bureau's unwillingness to take action where it appeared that the complaint raised a question of negligence as opposed to professional misconduct. In the Green Paper, the Government states that in some cases it would be appropriate to deal with the complaint under the shoddy work powers. According to the Paper, the possibility of court proceedings should not be used as an excuse to prevent or delay making right what has gone wrong, especially when the damage is perfectly clear.
>
> The need for the Law Society to explain to the public the nature of its various powers and the relationship between them.
>
> The inadequacy of the Lay Observer's powers. The Lay Observer had limited powers to take cases to the Solicitors Disciplinary Tribunal, no powers of referral to the Bureau, no power to re-investigate the case or to award compensation. Furthermore, there was no equivalent office-holder to monitor the complaints procedures of the Bar.

3.109 Following submissions, the Lord Chancellor produced a White Paper later in 1989 on Legal Services.[124] The key recommendations were: the abolition of the solicitors' monopoly over conveyancing and probate work; the abolition over the barristers' monopoly over higher court advocacy, the establishment of the office of Legal Services Ombudsman to monitor the handling of complaints against lawyers; and the establishment of a Lord Chancellor's Advisory Committee on Legal Education and Conduct. Legislation giving effect to most of the recommendations in the White Paper followed in 1990, with the passage of the *Courts and Legal Services Act* 1990 (UK).

Complaints against solicitors

The previous system

3.110 Prior to September 1986, the Law Society's Professional Purposes Committee (PPC), supported by the Society's Professional Purposes Department, was responsible for: the investigation and adjudication of complaints against solicitors; administrative action (by means of reprimands of varying grades of seriousness) against less serious breaches of the rules of conduct; and prosecuting more serious cases before the Solicitors Disciplinary Tribunal. The PPC was also responsible for, among other things, setting and maintaining standards of conduct and advising solicitors on conduct issues including how to deal with complaints ("pastoral care").[125] A Lay Observer was responsible for external monitoring of the Law Society's handling of complaints against solicitors.[126]

3.111 The *Administration of Justice Act* 1985 (UK) significantly extended the powers of the Law Society in dealing with complaints about solicitors. This Act conferred upon the Law Society the power to investigate complaints about "inadequate professional services", or "shoddy work" as the provision is more commonly known. Until this time the Law Society's investigation of complaints was restricted to matters of conduct (ie, in our terms, professional misconduct). Section 1 of that Act gave the Law Society power (beginning in 1987) to impose sanctions for inadequate professional services, including the power to direct the solicitor to secure the rectification of any error, omission or deficiency and the power to refund, remit or waive the whole or any part of the solicitor's costs. Section 2 of this Act gave the Law Society the power to call for and examine the files of a solicitor for the purpose of investigating a complaint made to the Law Society.

3.112 The *Administration of Justice Act* 1985 also effected amendments to ss 12 and 76 of the *Solicitors Act* 1974. The effect of the first of these amendments was to enable the Law Society to impose such conditions on a practising certificate as the Society may think fit in the case of a solicitor who has failed to give a satisfactory explanation in respect of any matter relating to his or her conduct after having been invited to do so.[127] By virtue of the second amendment, any committee appointed to exercise the Council's powers in relation to inadequate professional services or examination of files shall include at least one solicitor who is not a member of the Council, and at least one lay person.[128]

The Solicitors' Complaints Bureau

3.113 In late 1986, the Law Society Council[129] adopted the alternate Coopers & Lybrand proposal. The Law Society established two new Committees in place of the Professional Purposes Committee: an Adjudication Committee (which exercised the statutory powers of the Law Society) with a majority of solicitor members, and an Investigation Committee with a majority of lay members. The Committees and their supporting staff constituted the Solicitors Complaints' Bureau (the "Bureau"), which, while being an establishment of the Law Society, is housed in separate premises and distanced from the other functions of the Society. The other functions of the Professional Purposes Department were transferred to a new Ethics and Guidance Department, subsequently absorbed into the Directorate of Professional Standards and Development.[130]

3.114 The structure of the Bureau changed substantially in early 1991 to accommodate the new powers granted by the *Court and Legal Services Act* 1990. Under the new Act the Council of the Law Society is empowered to delegate any of its functions (other than reserved functions) to a committee (or a sub-committee).[131] These committees may include lay persons.[132] A significant introduction made by the Act was the power of the Council to order the solicitor to pay compensation to the client of an amount up to £1,000 where there has been a finding of inadequate professional services. The amendments to the *Solicitors Act* 1974 made by the *Courts and Legal Services Act* 1990 mark a change by the Bureau in the way it handles complaints. The emphasis has shifted from disciplinary action to consumer redress,[133] a move which had been urged by the Chairperson of the Investigation Committee.[134]

3.115 In December 1990, the Law Society Council approved a package of proposals to improve and expedite complaints-handling procedures at the Bureau to take advantage of these new powers under the *Courts and Legal Services Act* 1990. The reforms make provision for first-instance (summary) decisions in many cases, including some conduct matters to be delegated to senior Bureau staff. The Bureau's director and assistant directors now have the power to order a trust account inspection and the power to award compensation in respect of inadequate professional services.[135] This measure was approved despite strong resistance from by some Council members, and only after assurances from the chairman of the Adjudication Committee that staff would never be empowered to deliver rebukes or to institute disciplinary proceedings. The Council also reserved for itself the power to approve any future extensions of staff delegation. Other components of the package include an overhaul of the committee structure in order to introduce a formal appeals system.

3.116 Complaints are now received by a central "diagnostic unit" of experienced Bureau staff who act as a first filter. The unit directs urgent interventions, regulatory matters and serious misconduct to a conduct and regulation section. Compensation claims and matters of inadequate professional services are directed to the compensation and costs section. All remaining matters are sent for conciliation. A conduct sub-committee (with a solicitor majority of two to one) hears appeals in regulation and conduct cases. The compensation sub-committee has a lay majority of two to one. Three-person committees are now the rule, with provision for additional members in complex or sensitive cases. If a finding of misconduct proves worthy of a disciplinary sanction or proceedings, the decision is made by the conduct sub-committee, with a right of appeal to a differently constituted appeals sub-committee.

3.117 *Conciliation efforts.* The principal grounds of complaint against solicitors received by the Bureau concern delay, poor communication, misunderstandings and carelessness.[136] Only a small percentage of all complaints ever reached the Adjudication Committee.[137] In 1990, it was reported that delay accounted for one quarter of all complaints received by the Bureau.[138] In 1990, the Bureau identified a number of typical problems suitable for conciliation. These included the situations mentioned above, where communications between solicitor and client break down, where there is avoidable delay, and where the solicitor fails to hand over papers although exercising no lien.[139]

3.118 The use of conciliation by the Bureau has increased very rapidly over the past few years. In 1989, 20% of complaints received by the Bureau were handled by conciliators, with a 90% success rate.[140] In January 1991, 30% of complaints were being referred for conciliation,[141] and by June 1991 the figure had leaped to 90%.[142] The conciliation scheme expanded with the launch of a local conciliation scheme.[143] To assist in the expeditious resolution of this type of complaint a direct telephone contact system was introduced. Rather than waiting for the respondent solicitor to reply to the standard letter asking for his or her comments on the complaint, the solicitor is contacted by telephone. Early results on the operation of the special unit responsible for using this method showed that about 60% of complaints dealt with in this manner are resolved to the satisfaction of both parties within one month.[144]

3.119 *Helpline*. In September 1990, a telephone information "helpline" was introduced. Callers to the helpline are not provided with legal advice, but receive practical advice on how their problem with their solicitor might be resolved. If the helpline operator recognises the problem as being of a kind that might be dealt with by a telephone call to the complainant's solicitor, the caller will be referred to the Bureau's conciliation team.[145]

The Legal Services Ombudsman

3.120 The provisions of the *Courts and Legal Services Act* 1990 dealing with the Legal Services Ombudsman commenced operation on 1 January 1991. Section 21 establishes the office of the Legal Services Ombudsman. The Legal Services Ombudsman is appointed by the Lord Chancellor. He or she may not be an authorised advocate, litigator, licensed conveyancer, authorised practitioner (ie, solicitor or barrister) or notary.

3.121 The main function[146] of the Legal Services Ombudsman is to review the way in which complaints have been handled by the professional associations, including the Solicitors' Complaints Bureau, the General Council of the Bar and the Council for Licensed Conveyancers.[147] This may involve some re-investigation of the complaint, both in terms of the sufficiency of the initial investigation as well as the substance of the complaint.[148] The Ombudsman's office may not commence an inquiry until after the professional body has finished dealing with the matter (unless there has been unreasonable delay). The Ombudsman is not permitted to investigate issues which have determined by the courts or the statutory disciplinary tribunals. Once the Ombudsman has commenced an inquiry, he or she has the same powers as the English High Court (Supreme Court) to compel the attendance of persons, to compel the production of documents or other information, and to examine witnesses.[149]

3.122 Having completed an investigation, the Ombudsman must report in writing to the complainant, the practitioner who is the subject of the complaint, and the relevant professional association. The Ombudsman may make *recommendations* that: (1) the complaint be reconsidered by the relevant professional association; (2) the professional association exercise its powers; (3) the subject of the complaint and/or the professional association involved pay specified compensation to the complainant for any loss, distress or inconvenience suffered; and (4) the complainant be reimbursed whole or in part for the costs of making the allegation.[150] The Ombudsman also may make recommendations of an "advisory nature" to the professional associations about their arrangements for the handling of complaints, and the professional associations are under an obligation "to have regard" to any such recommendation.[151] Finally, the Legal Services Ombudsman may refer matters to

the Lord Chancellor's Advisory Committee on Legal Education and Conduct, as part of the general duty to assist in the maintenance and development of standards in the education, training and conduct of those offering legal services.[152]

3.123 The first Legal Services Ombudsman, Mr Michael Barnes, took office in January 1990. He made it clear prior to assuming office that it was his intention to make himself available to complainants and to members of the profession where necessary. From his prior experience on the Investigation Committee of the Solicitors' Complaints Bureau, he was aware that the complaints machinery was not as accessible to people unable to clearly communicate their complaint by letter. The Ombudsman was also eager to ensure that the office, and the services offered by it, were publicised to consumers.[153]

3.124 In the first six months of office the Ombudsman had almost 1,000 complaints to deal with, most of these left over from the Lay Observer's office. Not unexpectedly, the majority of new complaints received by the Ombudsman concerned solicitors. Only 3% related to the handling of complaints against barristers or licensed conveyancers.[154] Reports were issued on 224 complaints. In 15% of the inherited cases and 20% of new cases the Ombudsman found wholly or partly in favour of the complainant. In many of these cases the Ombudsman did not disagree with the Bureau's ultimate decision but made some criticism of the conduct of the matter. In this latter circumstance, no cash compensation is payable to the complainant.[155]

3.125 By July 1991, the Ombudsman had ordered four solicitors and the Bureau to pay compensation to complainants. The Bureau was ordered to pay £350 pounds for delay and lack of coordination in handling a case in 1988.[156] Two of the four solicitors ordered to pay compensation were guilty of failing to follow clients' instructions and one of these had overcharged the client. A third was guilty of generally sloppy service and the fourth of inaction, lack of communication with the client and failure to follow counsel's advice.[157] In determining the amount of the awards the Ombudsman had regard to the awards made in small breach of contract cases.

3.126 Since the release of the Green Paper and in the short time that the office has been established, there has been some criticism of the Legal Services Ombudsman's role and likelihood of success. At the time that the proposal for an Ombudsman was first made there was concern that replacing the Lay Observer with a Legal Services Ombudsman would do nothing but change the packaging.[158] In particular, there were concerns about the provision of adequate resources to enable the Ombudsman to thoroughly review and investigate matters, and in fact resource problems already have begun to emerge.[159] The other major criticism of the institution of the Ombudsman's office is that the Ombudsman has no enforcement powers, other than adverse publicity, and thus is "toothless",[160] or a "watchdog in need of dentures".[161] Suggestions on how to improve the office were made when the introduction of an Ombudsman was first mooted. One author has suggested that the value of the Ombudsman would be considerably greater if he or she were given the power, if not the duty, to establish a specialist unit to conduct research aimed at the improvement of standards.[162]

The Solicitors Disciplinary Tribunal

3.127 Applications to have the name of a solicitor struck off the Roll, or applications from a former solicitor to have his or her name restored to the Roll, are heard by the Solicitors Disciplinary Tribunal. The Tribunal is properly constituted by three members, one of whom must be a lay member. The Tribunal has a range of

statutory powers, including the power to strike off, to suspend a solicitor from practice, and to fine (an amount not exceeding £5000).[163] Recent amendments brought about by the *Courts and Legal Services Act* 1990[164] make it clear that the Tribunal may suspend a solicitor from practice for either a specified period or indefinitely. Also, the provision makes it clear that the Tribunal may impose a separate penalty in respect of each and every proven allegation. The Tribunal may make orders in respect of a former solicitor's conduct at the time that he or she was a solicitor.

3.128 The *Courts and Legal Services Act* repealed the Disciplinary Tribunal's jurisdiction over inadequate professional services.[165] However, the Tribunal may hear complaints that a solicitor has failed to comply with a direction made by the Solicitors' Complaints Bureau.[166]

Client Care

3.129 At the end of 1989, mindful of the imminent passage of the *Courts and Legal Services Bill*, the Secretary General of the Law Society suggested that there should be more regulation of practitioners by those practitioners themselves within their own practices. For example, every practitioner should be required to state the terms of business at the beginning or soon after the start of every transaction. These terms would cover the scope of the retainer, the system used to assess charges, the manner of informing the client about progress and about costs, and who to contact in the event of questions or problems. The Secretary General observed that if this was applied as a general rule, the number of matters going to the Solicitors' Complaints Bureau would reduce significantly. Apart from complaints about dishonesty and other major acts of misconduct, the Bureau could assume a role more analogous to an ombudsman, in that the Bureau would not necessarily need to consider a complaint which has been pursued through the firm from which it has come or through any local conciliation machinery.[167]

3.130 In July 1990, the Council of the Law Society passed the "client care rule". This rule sets out duties in relation to keeping clients informed and obliges firms to set up in-house complaints handling procedures. The Society also made a commitment to step up its efforts to encourage firms to introduce the practice of providing detailed information to clients about costs in advance.[168] The rule came into effect on 1 May 1991. Breach of the rule is not automatically a disciplinary matter; however, a material breach could constitute "inadequate professional services" and a serious or persistent breach could amount to professional misconduct.[169]

Complaints against barristers

Governance of the Bar

3.131 The English Bar is governed by six principal bodies: the Bar Council, the four Inns of court, and the Inns' Council.[170] All barristers must belong to one of the four Inns of Court. Professional governance of the Bar is vested in the executive Bar Council. On all policy matters affecting discipline, the Bar Council works in

close consultation with the Inns through the Council of the Inns of Court, on which all the Inns' governing bodies are represented.[171]

3.132 The Bar has a written Code of Conduct. The first code was issued in 1980 and contained all the matters which the Benson Royal Commission recommended should be covered.[172] The latest Code of Conduct was adopted by the Bar Council in early 1990. The Code sets out, amongst other things, the general duties of barristers, the rules on acceptance of instructions and on withdrawal from a case, the duties of barristers to clients, the manner in which a case should be conducted both in and out of court, and what happens when a conflict of interest arises. Part VIII of the Code is devoted to disciplinary proceedings.

Reception and investigation of complaints

3.133 Complaints against barristers are received by the Bar Council and are referred to its Professional Conduct Committee ("PCC") for investigation. The PCC consists of members of the Bar and a number of lay members nominated by the Lord Chancellor. The procedure for dealing with complaints is set out in the PCC Rules.[173] The PCC may summarily dismiss trivial or vexatious complaints. In all other cases the Secretary of the Committee invites the barrister who is the subject of the complaint to comment on the complaint. This invitation is conveyed by letter. Significantly, if no response is received from the barrister concerned within 28 days, the PCC may proceed as if the barrister's response had been to *deny* the substance and the validity of the complaint in its entirety.

3.134 Once the response of the barrister concerned is received (if at all) the PCC considers the complaint in light of all the material then available. The PCC may then pursue one of a number of courses. The complaint may be dismissed under a self imposed rule, however, no complaint is rejected by the PCC unless the lay members agree. Further investigation or inquiry may be ordered. Where the conduct disclosed by the complaint is such as to require informal treatment, the PCC will draw it to the barrister's attention in writing and in appropriate circumstances the barrister will be directed to visit the Chairman of the PCC to discuss the issues raised by the complaint.

3.145 The Rules of the PCC require the Secretary of the PCC to "take steps as are reasonably practicable to inform the complainant of the progress and result of his complaint".

Hearings before a Tribunal

3.146 Subject to one exception (see the next paragraph, below), complaints which disclose a *prima facie* case of professional misconduct or a breach of proper professional standards form the basis of a charge or charges before a Summary Tribunal or a Disciplinary Tribunal. Professional misconduct includes any failure by a barrister to comply with the provisions of the Code of Conduct, the Consolidated Regulations of the Inns of Court, the Code of Conduct for lawyers in the European Community, and the *Legal Aid Act* 1974.[174] A Summary

Tribunal is referred those matters in which there arises no Disputes of fact which cannot be resolved by a summary procedure. A charge which, if proved, would be likely to result in a sentence of disbarment or suspension must referred to a Disciplinary Tribunal. Where the PCC determines that a complaint shall form the subject matter of a charge or charges before a Disciplinary or Summary Tribunal, the PCC nominates one of its members to take charge of the proceedings on its behalf.

3.147 In cases where the complaint discloses a *prima facie* breach of professional standards, but the PCC does not consider that the matter is serious enough to warrant referral to a Disciplinary or Summary Tribunal, the PCC will direct the barrister to attend on the Chairman or Vice Chairman of the PCC to provide an explanation for his or her conduct and, if the explanation is not satisfactory, to be given advice as to his or her future conduct, or to be admonished. (Where the PCC follows this procedure its findings are not publishable.)

3.138 A Disciplinary or Summary Tribunal consists of a Chairman, who shall be a judge (or in cases determined by summary procedure the Chairman may be a Queen's Counsel), a lay representative and three practising barristers. Proceedings before a Disciplinary or Summary Tribunal are generally conducted in private. Proceedings are governed by the rules of natural justice. The Tribunal is not bound by the rules of evidence. At the conclusion of a hearing the finding of the Tribunal is recorded. On any charge of professional misconduct it is open to the Tribunal to find that professional misconduct has not been proved but that a breach of proper professional standards has been proved. Where the members of the Tribunal are equally divided as to the finding on any charge, or as to the penalty to be imposed, the determination that prevails is that which is the most favourable to the barrister.

3.139 Upon a finding of professional misconduct on the part of a barrister, a Summary Tribunal may order that the barrister pay a fine to his or her Inn of up to £500, that the barrister repay or forego fees, or that the barrister be reprimanded by the Treasurer of his or her Inn. A barrister against whom a charge of breach of proper professional standards has been found proved may be admonished by the Tribunal, given advice as to his or her future conduct or ordered by the Tribunal to attend on a nominated person for such purpose. The same sanctions are available to a Disciplinary Tribunal upon a finding of professional misconduct, except that the Tribunal also has the power to disbar the barrister, or suspend him or her for a prescribed period (either unconditionally or subject to conditions), or to impose a fine not exceeding £5,000. The Tribunal also may reduce or cancel legal aid fees and exclude a barrister from legal aid work in appropriate cases.[175] In determining the sentence to impose, a Tribunal will have available information concerning the barrister's previous professional history. The barrister's Inn of Court gives effect to the sentence.

3.140 A Summary or Disciplinary Tribunal has the power to make orders for costs. Any costs ordered to be paid by or to a defendant shall be paid to or by the Bar Council. All costs and expenses incurred by a Tribunal or by the PCC in connection with a hearing before a Tribunal are borne by the Bar Council.

Appeals

3.141 Appeals against the conviction and sentence made by a Tribunal may be lodged with the Visitors. An appeal is heard by a single judge of the High Court. unless the appeal relates to an order for disbarment, or is an

appeal from a tribunal presided over by a judge of the High Court in which case the appeal is heard by three judges of the High Court or the Court of Appeal.

The complaints experience

3.142 The largest category of complaint against barristers concerns inadequate representation. Other major grievances include complaints about the conduct of proceedings, acting without instructions, bad advice and lack of courtesy.[176] In 1989, the PCC noted that a large number of complaints alleged a failure to deal with papers within a reasonable time, and an equally significant number concerned the late return of instructions due to clashes of professional commitment. The PCC observed that this latter problem could be alleviated through increased liaison between barristers and their clerks.[176] The PCC also noted a significant number of complaints had been received from members of the judiciary alleging failure to attend court on time for hearings.

3.143 For the year 1989, the PCC received just over 400 complaints. By December 1989, 233 complainants had been dealt with, leaving 171 to be resolved together with an additional 88 carried over from previous years. Of the unresolved complaints, 31 were cases referred to a Disciplinary or Summary Tribunal or awaiting the results of subsequent appeals. Of those matters which had been decided, only one barrister was disbarred and only one barrister was suspended from practice. Four of the 31 cases awaiting resolution by a Tribunal related to non-payment of Bar subscriptions.[178]

THE UNITED STATES

Generally

3.144 The American legal profession is by far the largest in the world, both in terms of numbers and on a per capita basis. The regulation and discipline of lawyers is organised on a state-by-state, rather than on a national, basis, although the American Bar Association is very influential and there are efforts at setting and maintaining uniform standards. For example, most states have adopted the American Bar Association's Model Rules of Professional Conduct. Unlike the position in England and Australia, at least with respect to solicitors, the American state disciplinary systems tend to place most of the regulatory powers in the hands of the judiciary.

3.145 There have been two major studies of disciplinary systems in respect of lawyers in the United States. In 1970, the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement (the "Clark Committee") produced the first national evaluation of disciplinary procedures. A second inquiry was conducted between 1989-1991 by the American Bar Association's Commission on Evaluation of Disciplinary Enforcement, resulting in a May 1991 Report.[179] The Executive Summary of the Report is worth quoting from at some length:

> [The] system of regulation must withstand the charge of inherent conflict of interest and appearance of impropriety. Regulation of lawyer conduct must be exercised by the judiciary and not by the organized bar. The courts must take more direct and active control of the disciplinary system. Reform is required to insulate disciplinary counsel from control or influence by the organized bar. Lawyers have a legitimate role to play in an appropriately structured disciplinary system, but the management and control of the system must rest with the courts. Central intake and statewide jurisdiction are essential ... Non-lawyers must be given a significant role in the administration of the system. Adequate resources must be provided to insure a thorough and comprehensive system of regulation.
>
> The Commission's research convinces us that the disciplinary systems are fair to both respondents and complainants, but there is a high level of public distrust. Secret proceedings are the greatest cause of distrust. If public trust is to be promoted, disciplinary systems can no longer operate secretly. ...
>
> Despite the considerable progress made since the Clark Report, there is still room for improvements in the functioning of disciplinary systems. Lawyers charged with misconduct are entitled to basic due process. At the same time, summary procedures and consent procedures are appropriate to insure prompt disposition of complaints. Expedited processing of minor complaints will unburden the system and permit greater attention to more serious charges. In all cases, the disciplinary system must react in a timely fashion to protect the public against continued misconduct. Interim suspension procedures must be available. There must be expedited processes for reciprocal discipline and for discipline upon conviction of crime. Preventive measures must be adopted. ...
>
> Finally, and perhaps most importantly, the scope of judicial regulation must be expanded to cover the thousands of complaints that are routinely dismissed each year. These complaints are dismissed because they do not allege ethical violations. Yet in many of these cases, while the lawyer's conduct may not have been unethical, the complaint deserves attention and response. In some jurisdictions, a response has been provided by the organized bar such as fee Dispute arbitration. In a few of these jurisdictions, arbitration is mandatory for the lawyer. Some bar associations have offered mediation and voluntary arbitration services to resolve minor Disputes. In some jurisdictions, continuing legal education is mandatory. However, these efforts are not coordinated or offered in any structured, integrated way. The Commission recommends a multi-door system of lawyer regulation which affords a variety of responses to the needs of the public and the profession in addressing these problems.[180]

California

Disciplinary framework

3.146 California has the largest legal profession in the United States, with 132,000 members. California - in common with all of the American states - is a fused jurisdiction. All lawyers are admitted as "Attorneys and Solicitors" of the Supreme Court of California. The system of regulation and discipline of lawyers in California is

widely regarded as the "state of the art" in the US, with the large size of the profession permitting considerable funds to be devoted to these efforts. In 1992, over $40 million, or 68.25% of the State Bar's budget, which is raised entirely from membership fees, is devoted to matters of discipline (including programs aimed at prevention of incompetent or unethical conduct).[181]

3.147 In 1989, California established the first (and still the only) full-time "Bar Court" to hear disciplinary matters. The California Supreme Court appointed the nine judges to the Bar Court, which is comprised of a presiding judge, six hearing judges, and two review judges - one of whom is a "public member" (a lay person). In 1990, the Bar Court took or recommended disciplinary action in 455 cases.

The handling of complaints by the State Bar

3.148 All complaints about lawyers are received by or directed to the Office of Intake and Legal Advice. In 1990, there were 68,197 calls from the public made to the toll-free "Attorney Complaint Intake Line". Telephone calls and other communications disclosing possible lawyer misconduct are referred to the Office of Investigation. After investigation, matters which are going to be taken to the State Bar Court are sent to the Office of Trials, which prepares the prosecution. The State Bar also operates a system of mandatory fee arbitration to resolve Disputes about lawyers' fees.

3.149 The Office of Trials has the power to impose interim remedies in appropriate cases; for example, it may suspend a lawyer from practice if it has reasonable cause to believe that there is a substantial risk of harm to clients.[182] Hearings before the State Bar Court are formal. It is interesting to note that the scale of operations in California has led to the development of a legal specialty in defending lawyers charged with a disciplinary offence.[183]

3.150 Members of the public who feel aggrieved when the State Bar decides not to file formal charges with the Bar Court may appeal to a Complainants Grievance Panel, which has substantial lay representation. There also is an "independent discipline monitor" who reports annually to State Legislature. At present, this position is held by an academic lawyer.[184]

3.151 The State Bar's Office of Professional Competence, Planning and Development is largely responsible for running the prevention and education programs. This Office operates the "Ethics Hotline" for lawyers, which took 22,000 calls in 1990.

THE NSW DEPARTMENT OF HEALTH'S COMPLAINTS UNIT

Establishment of the Complaints Unit

3.152 The Complaints Unit was set up administratively within the New South Wales department of Health in 1984, in response to pressure from community and consumer organisations for a clear avenue for the resolution of complaints about the New South Wales health system. The Complaints Unit presently relies for its powers upon various statutes relating to the registration of health professionals and hospital administration, including the *Health Administration Act* 1982, the *Public Hospitals Act* 1929 and the *Medical Practitioners (Amendment) Act* 1987. A proposal to consolidate the Complaints Unit's legislative base by constituting it as an independent statutory authority known as the Health Care Complaints Commission recently received "in principle" support from Cabinet.[185] Under the proposal the Health Care Complaints Commission will have considerably enhanced powers.

3.153 The principal role of the Complaints Unit is to investigate complaints made by health consumers against health professionals or health services. The categories of health provider against whom a complaint may be lodged are very wide. The Complaints Unit accepts complaints against any person or institution involved in any aspect of health services in NSW including medical practitioners, nurses, chiropractors, pharmacists, and even administrative and clerical staff employed in those areas (but not dentists[186]). There are approximately 129,117 registered health professionals in New South Wales.[187] Expenditure on the Complaints Unit has increased from just over $1 million in 1987 to $2,134,798 in 1990.[188]

3.154 The Complaints Unit has a Consumer Advisory Committee which provides advice and feedback from non-government consumer advocacy groups. The existence of this Committee, whose participants are drawn from various consumer organisations, recognises that the participation of consumers in the guidance and scrutiny of systems of which they are a part is an essential ingredient for accountability.[189] There are 14 consumer organisations represented on the Consumer Advisory Committee including the Medical Consumers' Association, Public Interest Advocacy Centre, Australian Consumers' Association, Women's Health Information Resource and Crisis Care Association, New South Wales Council for Social Services and the Network of Alcohol and other Drug Agencies.

The objectives of the Complaints Unit

3.155 The objectives of the Complaints Unit are summarised in the Complaints Unit's Annual Report to be:

> to analyse and resolve complaints about health services impartially;
>
> to monitor underlying trends in complaints;
>
> to take appropriate action as a result of investigation;
>
> to identify the implications for policy and administration which would improve the quality of health services;
>
> to serve as liaison point for consumer and other groups involved in health services; and
>
> to undertake professional, consumer and general community education.[190]

3.156 In addition to its investigatory and prosecutorial functions, the Complaints Unit assumes a more general monitoring and public information role. The Complaints Unit does not consider individual complaints in isolation, but maintains a central database, actively monitors patterns and trends and identifies the policy implications for the health care system. The Complaints Unit works closely with the specialist colleges in this regard. The Unit has a high-profile public information role, exercised through the media, which is encouraged by the Minister for Health. The Unit has achieved a large degree of recognition through participation at consumer and professional forums.[191] In addition, the Minister for Health and the Director General of the Department will from time to time request the Unit to initiate or participate in reviews and working parties on health issues.[192]

The structure of the Complaints Unit

3.157 The Complaints Unit has organised itself into six sections to deal with the various aspects of its work. The Preliminary Inquiry Section has seven investigation officers and one inquiry officer. The section was created to enable complaints to be resolved within a short time frame. In cooperation with the Director of the Complaints Unit this section screens the majority of complaints received by the Complaints Unit. The functions and operation of the Preliminary Inquiry Section are described in more detail below.

3.158 The Investigation Section has two teams. The Standards of Care team, with five investigators, is responsible for investigating complaints about health care facilities and issues which involve problems of a systems or policy nature. The Service Providers team, also with five investigators, is responsible for the investigation of complaints about health providers. Members of the team prepare and appear in cases heard by the Professional Standards Committees of the Medical Board, Nurses Board and Physiotherapists Board.[193]

3.159 The Legal Section contains four lawyers who investigate those complaints which, if proven, may warrant deregistration or suspension. Members of the section draft formal complaints, provide legal advice to other staff of the Complaints Unit, undertake special major investigations, and deal with coronial inquiries. The section is responsible for cases proceeding to disciplinary tribunals and any court proceedings arising from disciplinary actions.[194]

3.160 The Policy and Publications Section consists of two members whose responsibilities include the preparation of submissions, reports and publications, undertaking major surveys and preparation of policy documents. This section also develops seminar programs given by the Complaints Unit.[195] The other two sections are the Administrative Section and the Consultative Medical Practitioners. The latter group offers medical advice about complaints, reviews investigations by the Complaints Unit, and counsels complainants. The Complaints Unit currently has four consultants.[196]

The complaints procedure

3.161 The Complaints Unit model (even more so the Complaints *Commission* model) possesses a number of positive features which could readily be adapted for use within the legal services context. The Complaints Unit is concerned exclusively with the receipt and investigation of complaints against health professionals and health services in New South Wales, and is quite distinct from bodies undertaking representative functions, such as the Australian Medical Association. This actual and perceived independence of the Complaints Unit inspires public confidence that complaints will be dealt with in an impartial manner.

3.162 The Complaints Unit has managed to achieve a high level of acceptance within the health system despite some resistance from within the profession, particularly at its initial stages. Medical practitioners are increasingly less reluctant to give evidence or information against peers in relation to complaints. The Complaints Unit has eminent members of the profession to call upon as consultants and to provide the Unit with special expertise as required. As mentioned above, the Complaints Unit has established good, reciprocal working relationships with many of the specialist colleges.

Reception of complaints

3.163 Complaints against medical practitioners can be made to the Medical Board[197] or to the Director General of the Department of Health.[198] All complaints, regardless of their point of receipt, are investigated by the Complaints Unit under delegated authority from the Director General of the Department of Health. Similarly, other legislation obliges the Director General to investigate complaints made against health professionals, such as nurses and psychologists.[199] In other cases the health registration Acts provide the Director General with certain powers in relation to investigations, which are delegated to the Director of the Health Complaints Unit.

3.164 Although the Complaints Unit presently is part of the Department of Health, it has effective independence from the rest of the Department. The absence of a proper legislative base means that in practice the Complaints Unit has no power to subpoena witnesses and documents until a formal complaint has been made to a registration board, no power to insist on information being provided to it for the purpose of its investigations and reporting to the public is restricted. As noted above, these limitations will be overcome once the recommendations contained in the Cabinet proposal are implemented.

The handling of complaints

3.165 The right to complain is not limited to any category of person. Complaints are received from patients or persons acting on their behalf, the NSW Medical Board, the Office of the Ombudsman, the NSW Nurses Registration Board, consumer organisations and government authorities.[200]

3.166 The type of complaints received against health professionals are not dissimilar to those received against legal practitioners. As with complaints against legal practitioners, the basis of a large proportion of complaints against health professionals is poor communication between professional and client. There is, however, much

disparity between the operation of the respective complaints mechanisms, especially at the initial intake phase. The Complaints Unit distinguishes itself with its superior record keeping. A form is completed by the Unit's staff following each telephone enquiry. Where necessary, staff will actively follow up on the telephone enquiries, particularly if the enquiry appeared to raise serious issues. The Complaints Unit organises a telephone interpreter service where a complainant's English language skills are not especially proficient.

3.167 Current explanatory material on the role and operation of the Complaints Unit is distributed widely, and is always sent to the complainant, the health professional who is the subject of the complaint. Information sheets are also made available to any health professional providing an independent opinion.

3.168 Complete records are retained by the Complaints Unit on all complaints lodged. Medical practitioners attract the largest number of complaints. In every year since the Complaints Unit's inception, the single largest category of complaint has been in relation to treatment received. Other common complaints have been categorised by the Complaints Unit as professional conduct, service, costs and communications. In 1990, the Complaints Unit recorded 2,344 telephone enquiries and 1,373 written complaints were received.

3.169 Most complaints initially are allocated to the Preliminary Inquiry Section ("PIS") of the Complaints Unit. The PIS was set up in 1990 in response to the large increase in complaints being received. The Complaints Unit made a policy decision at that time to devote more resources and more senior personnel to this phase, acknowledging the critical importance of the first step in the process. The PIS conducts personal interviews with complainants and responds to telephone enquiries. The PIS is also responsible for:[201]

Assessing complaints.

Referring the complaint to another agency if it is outside the jurisdiction of the Complaints Unit, for example cases of alleged fraud and over-servicing are referred to the Commonwealth Department of Health and the Health Insurance Commission.

Notifying the complainant if the complaint is not suitable for investigation by the Complaints Unit. For example, the Complaints Unit does not pursue matters in relation to financial compensation for consumers.

Initiating contact with the complainant and health provider, with a view to facilitating resolution by consent. Generally the health provider or facility is referred the complaint with a request that he/she/it consult with the complainant. Alternately a meeting may be arranged at the Complaints Unit at which the complainant, the health provider or facility, a Complaints Unit officer and a medical officer attend.

Providing information.

3.170 Matters which are not resolved by the PIS within 28 days are referred to the Investigation or Legal sections of the Complaints Unit. Once a complaint reaches the investigation stage, officers of the Complaints Unit will invariably obtain documentary evidence to supplement the correspondence from the complainant and response from the health provider or institution. This enables the officers to have sufficient information from which to make an evaluation of the complaint. Officers approach consultants for an opinion, and if necessary, an expert will then be asked to comment.

3.171 The majority of investigated complaints are resolved by providing the complainant with further information in the form of a letter of clarification or explanation. In 1990, 295 complaints were found to be "not substantiated" and information was provided to the complainant. Where investigation of the complaint results in recommendations for changes to existing policies or procedure, these are put to the Director General of the Department and the Minister for Health. Otherwise the complaint may be resolved by conciliation, be referred for disciplinary action by the Medical Tribunal or Professional Standards Committee or action under the appropriate registration Act, or be referred elsewhere. In 1990, 37 complaints were conciliated, 40 complaints were substantiated by a disciplinary body and 52 complaints were referred elsewhere. Only a very small percentage of complaints result in disciplinary action being initiated. In 1990, only five percent of complaints resulted in a disciplinary hearing.

3.172 The statistics published in the Complaints Unit's Annual Reports indicate that for any given year a fair number of complaints are "terminated" (either by the complainant himself/herself or by the Complaints Unit). In 1990, 186 complaints were terminated. Reasons proposed by the Complaints Unit for discontinuing an investigation into a complaint include: where to continue would be detrimental to the complainant's health; where the complaint is vexatious; where the Complaints Unit has offered solutions to the complainant and can offer no further assistance; where the complaint has previously been adequately investigated by another body; or where the complaint is more than five years old.[202]

3.173 A source of complainants' dissatisfaction in the legal complaints arena is the often succinct manner in which the Law Society or Bar Association communicate the dismissal of the complaint. Complainants may be left with the (generally erroneous) impression that scant attention has been directed to their complaint and that not all the issues raised have been addressed. In this regard the legal complaints system could profit from the procedures applied by the Complaints Unit.

3.174 Letters of dismissal from the Complaints Unit are extremely detailed and contain an outline of all the evidence presented, an assessment of that evidence and the conclusions of the Complaints Unit. It is not uncommon for the complainant to receive a seven page report on the outcome of their complaint. The report to the complainant will regularly invite the complainant to attend at the Complaints Unit to discuss their complaint with the investigator and consultant involved in the determination of their complaint. The Complaints Unit considers this process necessary to reassure complainants that their allegations have been taken seriously and examined thoroughly.

3.175 The procedures applied by the Complaints Unit may be contrasted with those employed by the Dental Care Assessment Committee ("DCAC"). Since the passage of the *Dentists Act* 1989, the Complaints Unit no longer has jurisdiction to investigate complaints against dentists. There is evidence that persons making complaints against dentists are "appealing" to the Complaints Unit, alleging that the DCAC has not adequately investigated their complaint and producing a one page letter of dismissal in support. The Complaints Unit believes that the extra time and effort involved in providing a detailed explanation is fully justified by this experience.

3.176 All letters of dismissal from the Complaints Unit are reviewed by the coordinator of the section and the Director of the Complaints Unit prior to dispatch. Copies of the report are also forwarded to the subject of the complaint, the Medical Board, and certain other interested parties, such as the Area Health Service.

3.177 It is important to note that the investigation carried out by the Complaints Unit is *fact finding* in nature and not *disciplinary*. The Complaints Unit does not have the power to reprimand or otherwise sanction the health provider the subject of the complaint. If the investigation produces evidence of misconduct the Complaints Unit refers the complaint to the relevant disciplinary body. However, the vast majority of complaints do not proceed to this stage and are resolved by issuing a letter of explanation or clarification to the complainant.

Conciliation

3.178 A review of the Complaints Unit in 1988 suggested that the fact that the Complaints Unit was not set up as a conciliatory body was a major drawback to its efficient operation, particularly when the number of complaints which were resolved by providing information, counselling or conciliation was considered.[203] Under the proposal approved in principle by Cabinet, complaints would be assessed to determine their suitability for conciliation, and those which are suitable would be referred outside the Complaints Unit (or Health Care Complaints Commission) for conciliation. This proposal is intended to allay concerns about the Complaints Unit performing both prosecutorial and conciliatory functions. Complaints which have no element of public interest, for example those complaints which do not involve a question of the doctor's competence, will be appropriate for conciliation. In order to encourage doctors to agree to conciliation it is proposed that the conciliation proceedings will be absolutely privileged.

Disciplinary Action

3.179 If it is warranted, following an investigation by the Complaints Unit, the complaint is referred to the NSW Medical Board. The Board or the Director General of the Department may decide to refer the complaint to a Professional Standards Committee or the Medical Tribunal[204] depending upon the nature and seriousness of the complaint. Professional Standards Committees and the Medical Tribunal (the "Tribunal") are established by the *Medical Practitioners Act* 1938. The former is constituted by two medical practitioners and one lay person.[205] Complaints that, if proven, would not lead to suspension or deregistration usually go before a Professional Standards Committee. Neither the complainant nor the medical practitioner concerned is allowed legal representation before a Committee although both may be accompanied by a legal adviser.[206] If a Committee finds the subject matter of a complaint proved the Committee may caution or reprimand the practitioner, order that he or she seek treatment or counselling, impose conditions on the practitioner's registration, order additional education, order that he or she report on his or her medical practice, order the practitioner to take advice in relation to the management of the medical practice, or impose a fine not exceeding $5,000.[207]

3.180 The Tribunal is constituted by a Chairperson or Deputy Chairperson, two registered medical practitioners and a lay person.[208] The Tribunal conducts full judicial public hearings with legal representation for both parties. Referrals to the Tribunal are usually made by the Board, the Director General of the Health Department or a Professional Standards Committee. Generally it is the Complaints Unit that formulates and lodges the complaint with the Tribunal. The Tribunal may exercise all powers available to a Professional Standards Committee, although a fine imposed by the Tribunal may be up to an amount of $25,000.[209] In addition the Tribunal may suspend the practitioner from practising medicine or direct that the person's name be removed from the Register of Medical Practitioners for New South Wales.

3.181 The Registration Acts for various other health professionals have been modelled on the 1987 amendment to the *Medical Practitioners Act* 1938[210] and therefore provide for similar procedures for dealing with complaints against the various registered health professionals.[211] For example, pursuant to the *Chiropractors and Osteopaths Act* 1991 (NSW), complaints made against chiropractors and osteopaths are to be made in the prescribed form to the Chiropractors and Osteopaths Registration Board or to the Director General of the Department of Health. The Board and the Director General are obliged to inform the other when a complaint is made to or by either of them. The Director General is required to investigate the complaint or cause it to be investigated. If, following an investigation, it is determined that further action should be taken on the complaint, the complaint will be referred to either a Professional Standards Committee or to the Chiropractors and Osteopaths Tribunal, both established by the Act.

Accountability

3.182 While independent, the Complaints Unit is subject to a considerable degree of public scrutiny and accountability.[212] The Director of the Unit reports to the Minister for Health Services Management on complaints issues and the Minister for Health and Community Services on policy issues. As a public body, the Unit is open to investigation by the Ombudsman, the Privacy Committee, and the Independent Commission Against Corruption.

3.183 As noted above (see paragraph 3.164), a Consumers Advisory Committee to the Complaints Unit was established in 1988, with representation from consumer groups, community groups, health care advocates, relevant agencies, and others. The Committee operates to ensure consultation between the Unit and consumer groups, convey grievances and provide advice to the Unit, and provide current information about the health care and health care complaints systems.

FOOTNOTES

1. *Legal Profession Practice Act* 1958 (Vic) s5. In this section, all footnote references are to this Act unless otherwise indicated.

2. Sections 14Q and 32F.

3. The Law Institute, the Council of the Law Institute, the Secretary of the Law Institute, the Registrar o3.186 A source of complainants' dissatisfaction in the legal complaints arena is the often succinct manner in which the Law Society or Bar Association communicate the dismissal of the complaint. Complainants may be left with the (generally erroneous) impression that scant attention has been directed to their complaint and that not all the issues raised have been addressed. In this regard the legal complaints system could profit from the procedures applied by the Complaints Unit.

3. The Law Institute, the Council of the Law Institute, the Secretary of the Law Institute, the Registrar of the Solicitors' Board, the Solicitors' Board, the Bar Council, the Ethics Committee of the Bar Council and the Bar Tribunal.

4. Victoria. Law Reform Commission, *Accountability of the Legal Profession* (Discussion Paper 24, 1991).

5. *Legal Profession Practice (Amendment) Act* 1989 (Vic).

6. Section 38J.

7. Section 38B.

8. Section 38A.

9. Section 38E.

10. Section 2A.

11. Section 38O(2)(a).

12. Sections 38O(2)(b) and 38Q.

13. The Lay Observer has recommended that when a complaint raises allegations of misconduct as well as negligence the two matters should be dealt with together so the complainant and the solicitor can avoid going through two separate procedures. For more information refer to the Lay Observer to the Solicitors' Board and the Barristers Disciplinary Tribunal, *Annual Report 1990* (1990) at 26. (Hereafter, Lay Observer's Report".)

14. Lay Observer's Report, at 12.

15. Section 38N.

16. Section 38(0)(4) & (5).

17. Lay Observer's Report, at 13.

18. Section 38P.

19. Section 38L.

20. Lay Observer's Report, at 14.

21. Section 38P(7).

22. Section 38P(6).

23. Lay Observer's Report, at 15.

24. Section 38Z.

25. Section 38ZG.

26. Section 38Q(5).

27. Lay Observer's Report, at 52.

28. Section 38ZA.

29. Under the *Penalties and Sentences Act 1985*(Vic), s96, one penalty unit is equal to $100.

30. Lay Observer's Report, at 17-19.

31. Section 38ZB.

32. Lay Observer's Report, at 22-25.

33. Section 38ZH(1).

34. Section 38ZH(2).

35. Solicitors' Board of Victoria, *Results of Questionnaires.*

36. *Results of Questionnaires,* at 1, 4, 7, 11, 15, and 19.

37. *Results of Questionnaires,* at 7-8, 11-12.

38. *Results of Questionnaires,* at 16-17, and 20-21.

39. *Results of Questionnaires,* at 1, 4, 8, 12, 17, and 22.

40. Victoria. Law Reform Commission, DP 24.

41. *The Law Institute's Response to the Law Reform Commission of Victoria's Discussion Paper No. 24: Access to the Law: Accountability of the Legal Profession* (1991) at 3-4. (Hereafter, the "Law Institute's Response".)

42. Section 14B.

43. Section 14D(1).

44. Section 14D(2) & (3).

45. Section 14E.

46. Section 14F(5).

47. Lay Observer's Report, at 32.

48. Lay Observer's Report, at 32.

49. Section 14F.

50. Lay Observer's Report, at 32.

51. Section 14G.

52. Section 14Q(4).

53. Section 14C.

54. Section 14G(5).

55. Section 14I(8).

56. Section 14I(15).

57. Section 14H.

58. Section 14J.

59. Section14J(2).

60. Section 14Q(4).

61. Lay Observer's Report, at 29.

62. Lay Observer's Report, at 32.

63. Section 32F.

64. Lay Observer's Report, at 8.

65. Lay Observer's Report, at 9.

66. Lay Observer's Report, at 37.

67. Lay Observer's Report, at 46, App 2.

68. *Results of Questionnaires,* at 6.

69. Victoria. Law Reform Commission, DP 24, at para 52.

70. *Giannarelli v Wraith* (1988) 165 CLR 543 (HCA).

71. The Law Institute's Response, at 12.

72. *Victorian Bar's Response to the Law Reform Commission of Victoria's Discussion Paper No. 24: Accountability of the Legal Profession* (1991) at 2. (Hereafter, the "Victorian Bar's Response".)

73. The Law Institute's Response, at 11.

74. Victorian Bar's Response, at 2.

75. The Law Institute's Response at 12

76. Victorian Bar's Response, at 2.

77. South Australian Attorney General's Department, Policy and Research Division, *The Legal Profession - A Green Paper* (October 1990) at 5. (Hereafter, the "SA Green Paper".)

78. SA Green Paper, at 5.

79. *Legal Practitioners Act* 1981 (SA) s5.

80. *Legal Practitioners Act* 1981 (SA) s78.

81. *Legal Practitioners Act* 1981 (SA) s80.

82. *Legal Practitioners Act* 1981 (SA) s90.

83. SA Green Paper, at 27-28.

84. SA Green Paper, at 28.

85. SA Green Paper, at 42.

86. *Queensland Law Society Act* 1952 (Qld), ss 6(1)(a) and 6F.

87. *Queensland Law Society Act* 1952 (Qld) s6(1)(b).

88. *Queensland Law Society Act* 1952 (Qld) s6A(2).

89. *Queensland Law Society Act* 1952 (Qld) s6J.

90. Section 6(ab) was introduced by the *Queensland Law Society Act and Another Act Amendment Act* 1988 (Qld).

91. The solicitor-client mediation scheme launched on 30 August 1991. See (October 1991) *The Proctor* 7.

92. Statistics provided by the Director of the Professional Conduct Department on 9 March 1992.

93. *Queensland Law Society Act* 1952 (Qld) s65.

94. JRS Forbes, *The Divided Profession* (1979) at 189.

95. See D Weisbrot, *Australian Lawyers* (1990) at 171 and 199-200.

96. Law Society of Western Australia, *Annual Report 1991*.

97. *Legal Practitioners Act* 1893 (WA) s25.

98. *Legal Practitioners Act* 1893 (WA) s25.

99. *Legal Practitioners Act* 1893 (WA) s29.

100. This information is contained in the Barristers' Board, *Annual Report 1991*.

101. Statutory Rules 1977, No 209.

102. There is no specific power to do so formally.

103. *Law Society Act* 1962 (Tas) s19.

104. See Weisbrot, at 164-171 and 201-210, for a summary of the regulatory regimes in the various states and territories.

105. United Kingdom Monopolies Commission, *Report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to supply of professional services* (1970); United Kingdom Monopolies and Mergers Commission, *Barristers Services* (1976) and *Services of Solicitors in England and Wales* (1976).

106. Royal Commission on Legal Services, *Final Report* (1979) (the "Benson Report").

107. Royal Commission on Legal Services in Scotland, *Report* (1980) (the "Hughes Report").

108. Lord Chancellor's Department, *The Government Response to the Report of the Royal Commission on Legal Services* (1983).

109. See RL Abel, *The Legal Profession in England and Wales* (1988) at 255 for an account of the "Glanville Davies Affair".

110. Abel, at 255.

111. (1985) 82 *Law Society's Gazette* 3146.

112. National Consumer Council, *In Dispute with the Solicitor* (1985) (from the series "Consumers and the professions: a review of complaints procedures"). (Hereafter, the "NCC Report".)

113. NCC Report, at 18.

114. NCC Report, at 39.

115. NCC Report, at 37.

116. NCC Report, at 42.

117. Abel, at 255-256. See also the NCC Report, at 10.

118. *Report of the Committee on the Future of the Legal Profession* (1988) (the "Marre Report").

119. Lord Chancellor's Department, *The Work and Organisation of the Legal Profession* (Cmnd 570, January 1989).

120. Lord Chancellor's Department, *Conveyancing by Authorised Practitioners* (Cmnd 572, 1989).

121. Lord Chancellor's Department, *Contingency Fees* (Cmnd 571, 1989).

122. Cmnd 570, at 16-17.

123. Cmnd 570, at 17-18.

124. Lord Chancellor's Department, *Legal Services: A Framework for the Future* (Cmnd 740, 1989).

125. United Kingdom. *Twelfth Annual Report of the Lay Observer 1986* (1986) at 5.

126. In the first decade of its operation, the Lay Observer only recommended that the Law Society reconsider 36 cases out of 3130 cases it was asked (by complainants) to consider. See Abel, at 253-254.

127. *Administration of Justice Act* 1985 (UK) s4.

128. *Administration of Justice Act* 1985 (UK) Sch 1.

129. Abel, at 256.

130. Lay Observer's Annual Report 1986, at 5.

131. *Solicitors Act* 1974, s79(1), inserted by the *Courts and Legal Services Act* 1990, s97.

132. *Solicitors Act* 1974, s79(7), inserted by the *Courts and Legal Services Act* 1990, s97.

133. (1990) 140 *New Law Journal* 331.

134. O Hansen, "Complaints, What Complaints?" (1989) 139 *New Law Journal* 1347, reproduces an extract from the Annual Report in which the Chairperson comments, "...in the SCB's work too much emphasis is put on the Law Society's interest in regulating the profession and insufficient attention was paid to providing proper recompense for justifiably aggrieved clients".

135. (1991) 141 *New Law Journal* 482.

136. (1989) 28 *Law Society's Gazette* 6.

137. (1987) 84 *Law Society's Gazette* 3462.

138. (1990) 12 *Law Society's Gazette* 33.

139. (1990) 20 *Law Society's Gazette* 4.

140. (1989) 27 *Law Society's Gazette* 8.

141. (1991) 1 *Law Society's Gazette* 5.

142. (1991) 24 *Law Society's Gazette* 6.

143. See, eg, (1990) 140 *New Law Journal* 770, and (1990) 14 *Law Society's Gazette* 4.

144. (1988) 138 *New Law Journal* 453.

145. *New Law Journal* 1218 (1990) 140.

146. *Courts and Legal Services Act* 1990 (UK) s22.

147. *Courts and Legal Services Act* 1990 (UK) s22(1).

148. *Courts and Legal Services Act* 1990 (UK) s22(2).

149. *Courts and Legal Services Act* 1990 (UK) s25.

150. *Courts and Legal Services Act* 1990 (UK) s23(2).

151. *Courts and Legal Services Act* 1990 (UK) s24.

152. *Courts and Legal Services Act* 1990 (UK) s24.

153. (1990) 36 *Law Society's Gazette* 11.

154. (1991) 28 *Law Society's Gazette* 3.

155. (1991) 28 *Law Society's Gazette* 3.

156. (1991) 28 *Law Society's Gazette* 3.

157. (1991) 28 *Law Society's Gazette* 3.

158. E Gilbert, "Profession in crisis?" (1989) 139 *New Law Journal* 583.

159. See R Smith, "A place of last resort" (1991) 141 *New Law Journal* 297 and 1495.

160. Smith, at 1495.

161. Gilbert, at 583.

162. M Zander, "Accountability and Standards" (1989) 139 *New Law Journal* 303.

163. *Solicitors Act* 1974 (UK) s47.

164. Section 92.

165. Section 93.

166. Solicitors Act 1974, Sch 1A cl 5, inserted by the *Courts and Legal Services Act* 1990, s93.

167. Secretary General John Hayes, "A Fateful Year" (1989) 44 *Law Society's Gazette* 10.

168. (1991) 5 *Law Society's Gazette* 6.

169. (1991) 15 *Law Society's Gazette* 14-15.

170. (July 1991) *Counsel: The Journal of the Bar of England and Wales* 14.

171. (November 1989) *Counsel* 30.

172. The Bar of England and Wales, *The Quality of Justice: The Bar's Response to the Government's Green Paper* (1989) at 192.

173. *Code of Conduct of the Bar of England and Wales,* Annexe M (adopted by the Bar Council on 27 January 1990).

174. *Code of Conduct of the Bar of England and Wales,* (1990) at para 802.1.

175. Under the *Administration of Justice Act* 1985, ss 41-42, as amended by s33 of the *Legal Aid Act* 1988.

176. Abel, at 379, Table 1.48.

177. (December 1989) *Counsel* 19.

178. (December 1989) *Counsel* 19.

179. The Commission initially was chaired by Mr Robert B McKay; after Mr McKay's death the Commission was chaired by Mr Raymond R Trombadore.

180. American Bar Association, Commission on Evaluation of Disciplinary Enforcement, *Report* (1991) at iv-v.

181. Information supplied by the State Bar of California. The membership fee for "active" members in 1992 is US$ 428.

182. Technically, the lawyer's membership of the Bar is involuntarily placed on "inactive" status.

183. The State Bar's monthly journal, *California Lawyer*, contains many advertisements for "lawyers' lawyers".

184. Prof Robert C Fellmeth of the University of San Diego Center for Public Interest Law.

185. Approved in principle by State Cabinet on March 17, 1992.

186. Under the *Dentists Act* 1989 (NSW), complaints about dentists are dealt with by the Dental Care Assessment Committee.

187. NSW Department of Health, *Annual Report 1990-1991* (1991).

188. NSW Department of Health, *Complaints Unit 1987 Annual Report* (1987) at App "C" (hereafter, for all years, the "Complaints Unit Annual Report"), and Complaints Unit 1990 Annual Report (1990) at 44.

189. Complaints Unit Annual Report (1989), at 17.

190. Complaints Unit Annual Report (1987), at 6.

191. Examples of conferences attended by officers of the Unit may be found in the Complaints Unit Annual Reports. See, for example, the Complaints Unit Annual Report (1988), at 24, and the Complaints Unit Annual Report (1989), at 20.

192. See the Complaints Unit Annual Report (1987), at 22, for examples.

193. NSW Department of Health, Complaints Unit, Submission, 28 February 1992, at 7-8. (Hereafter, the "Complaints Unit submission".)

194. Complaints Unit submission, at 8.

195. Complaints Unit submission, at 8.

196. Complaints Unit submission, at 8.

197. The Medical Board is established by the *Medical Practitioners Act* 1938 (NSW) s5.

198. *Medical Practitioners Act* 1938 (NSW) s32A.

199. For example the *Nurses Act* 1991 (NSW) and the *Psychologists Act* 1989 (NSW).

200. Complaints Unit Annual Report (1989), at 6.

201. Complaints Unit Annual Report (1990), at 8.

202. Complaints Unit Annual Report (1987), at 10.

203. Complaints Unit Annual Report (1988), at 25. The review was undertaken by Mr John Mant of the law firm Phillips Fox, and was published as a Discussion Paper in January 1989.

204. The powers of the Board and the Secretary of the Department in relation to complaints received are contained in s31 and s32 of the *Medical Practitioners Act* 1938, respectively.

205. *Medical Practitioners Act* 1938, s32E(4).

206. *Medical Practitioners Act* 1938, s32G.

207. *Medical Practitioners Act* 1938, s32I.

208. *Medical Practitioners Act* 1938, s32M(5).

209. *Medical Practitioners Act* 1938, s32R.

210. The *Medical Practitioners (Amendment) Act* 1987 (NSW) reconstituted the NSW Medical Board and established the new disciplinary bodies and procedures for regulating the practice of medicine.

221. See, eg, the *Nurses Act* 1991 (NSW). See also the *Psychologists Act* 1989 (NSW), the *Podiatrists Act* 1989 (NSW), and the amendments introduced to the *Pharmacy Act* 1964 (NSW) by the *Pharmacy (Amendment) Act* 1989 (NSW).

212. Complaints Unit submission, at 10-11.

DISCUSSION PAPER 26 (1992) - SCRUTINY OF THE LEGAL PROFESSION

4. Common Issues and Proposals

INTRODUCTION

4.1 In the next Chapter, the Commission offers three Options for the regulation of the legal profession, with the major variable being the degree of control which the executive Councils of the peak professional associations - the Law Society and the Bar Association - exercise over the process. In Option One, the professional Councils will continue to play the main role in the reception and investigation of complaints, as well as continuing to have certain, limited dispositive powers (to dismiss and to reprimand) and the power to refer matters to the Standards Board or Disciplinary Tribunal for hearing and determination. A number of possible changes to the existing system are canvassed. In Option Two, the establishment of an independent Legal Services Complaints Commission is considered, which would supplant the role of the professional Councils in the disciplinary system. In Option Three, the reception and investigation of complaints would be placed in the hands of an independent Legal Services Ombudsman, but the professional Councils would continue to have limited dispositive powers and the responsibility for deciding which matters to refer to the Board or Tribunal. The Legal Services Ombudsman would also serve as the external monitor of the system.

4.2 In this Chapter, we consider a range of issues which apply across the board. For example, the analysis of, and tentative proposals made in connection with, the role and position of complainants, the powers and procedures of the Standards Board and Disciplinary Tribunal, and measures for the enhancement of professional standards, are not contingent upon the particular mode of regulation which is ultimately preferred. Depending upon the course chosen, this may involve amendments to the *Legal Profession Act* 1987 and/or changes to administrative arrangements.

4.3 It is worth pointing out here that, while the choice of regulatory model is of obvious importance, the formal disciplinary system is not the only institution which ensures or tends to ensure compliance with professional standards. Other factors which bear upon the conduct of lawyers include “professional pride”, collegial and peer pressures, education and socialisation, and market controls (client satisfaction and retention). At the somewhat more formal level, there is also the threat of liability for professional negligence or malpractice, consumer claims, costs orders, Fidelity Fund claims, complaints to the Ombudsman (in respect of public officials) and other controls on competence.[1]

4.4 Similarly, no single regulatory system will effectively control the conduct of all lawyers in all circumstances. The increasing diversity of the organisation of legal work in Australia[2] means that it is difficult to speak of a “typical” lawyer or a “traditional” style of practice. For example, the ethical dilemmas which face sole-practitioner solicitors, senior barristers, community legal centre lawyers, partners in the “mega-firms” of solicitors, and lawyers employed in the public service, are likely to be quite different, as will be the pressures referred to above and the resources which are available to assist in resolving the problem. As a consequence, it is necessary to pursue a variety of strategies in order to meet the public interest - to take steps to enhance professional standards as well as to punish breaches.

THE ROLE AND POSITION OF COMPLAINANTS

General issues

4.5 It is an unfortunately common feature of legal systems that, as they become more formal and sophisticated, the parties lose control over their own dispute.[3] Once the formal proceedings commence, the alleged "victim" becomes marginalised and is assigned the role of witness or, sometimes, is assigned no role at all. It may be that part of the public dissatisfaction with the existing disciplinary system for the legal profession stems from the fact that complainants[4] feel removed from the process and uncertain about whose interests and concerns are really at the heart of the system.

4.6 In order to correct this problem, it is necessary to put in place mechanisms throughout the disciplinary process which are responsive to the concerns of complainants and which assess the satisfaction of complainants with the manner in which their complaints are being handled. This may sometimes involve assuring complainants that their concerns are *not* well-founded, as well as sometimes telling the professional associations that there are *systemic* problems, or problems with the handling of a particular case. The Commission's discussions with the people who directly deal with complaints against doctors and lawyers suggest that the key to proper handling of complaints is the recognition that the clients have suffered at least some degree of anxiety, trauma or financial loss, whether or not this was the result of any fault on the part of the service-provider. The complaints-handling process must be sensitive to this, and part of it must be specifically geared towards helping the complainant resolve their feelings about the situation. In Victoria, the Solicitors' Board has recently begun surveying complainants and respondent solicitors to determine their relative levels of satisfaction with the dispute resolution process, thereby providing information which may help to improve services.[5]

4.7 In this Chapter and the next, we make a number of proposals aimed at improving the position of complainants, including: increased advice and assistance to persons inquiring about the lodgment of a complaint; statutory requirements and practical measures to reduce delays in complaints-handling; the institution of less adversarial and less formal dispute settlement techniques, such as mediation and conciliation, in appropriate cases; more active and thorough investigation of complaints raising issues of unsatisfactory professional conduct or professional misconduct; ensuring that to the extent possible there is "open justice" in the disciplinary system; granting increased powers to the various disciplinary bodies to fashion appropriate, tailor-made remedies, which consider the needs of the complainant as well as the proper penalty for a "guilty" legal practitioner; a greater role and increased support for independent, lay members on the various disciplinary bodies; a much more effective and powerful system of external monitoring of the whole system; and an emphasis on prevention, through educational and support programs aimed at the enhancement of legal ethics and professional responsibility.

Complainant immunity

4.8 In order for any disciplinary system to be effective, prospective complainants must feel free from any suggestion of intimidation or retaliation. The findings and recommendations of the Royal Commission of Inquiry into Chelmsford Hospital pointed out the urgent need for complainant immunity in the medical disciplinary area[6], and this Commission understands that immunity is likely to be guaranteed in the new legislation establishing the independent Health Care Complaints Commission, which will replace the Health Department's Complaints Unit. The need for immunity in the legal disciplinary system is at least as plain, for prospective complainants will be

acutely aware that lawyers will have the necessary expertise, access to the courts, and financial resources to sue or threaten to sue them, if they are so minded, in order to forestall or force a withdrawal of the complaint.

4.9 Complainants should be absolutely immune from civil suit for all communications made to a body with disciplinary responsibilities in respect of a complaint against a legal practitioner, and for all statements made within any disciplinary proceedings. The officers in charge of the initial intake of complaints should be under a positive obligation to inform all prospective complainants of the nature and existence of this absolute immunity.

4.10 The Commission notes the conclusion of the American Bar Association's Commission on Evaluation of Disciplinary Enforcement ("ABA Disciplinary Evaluation Commission") in this regard, that:

> the small potential for harm to the individual lawyer's reputation is a price the profession must pay to maintain public confidence in the profession as a whole. The public must be convinced that the profession is not only willing to consider but actively seeks out information about unethical lawyers and will protect those who attempt to present it.[7]

The fact that formal complaints may be required to be verified by way of statutory declaration[8], and a wilfully false statement in such a declaration would still constitute a criminal offence[9], provides some protection to lawyers from patently false allegations. The American experience suggests that systems which provide absolute immunity for complainants and conduct fully open proceedings do much to sustain public support and confidence with little consequential harm to lawyers' reputations.[10]

4.11 In conjunction with the passage of the *Legal Profession Act* in 1987, the *Defamation Act* 1974 (NSW) was amended[11] to provide for a defence of absolute privilege for a publication to or by the Bar Council, the Law Society Council, the Conduct Review Panel, the Standards Board, the Disciplinary Tribunal, or a member of any of these bodies[12] (in his or her capacity as a member), as well as any report of a decision or determination by one of these bodies. The *Defamation Act* also characterises the proceedings of the legal professional Councils and disciplinary bodies as "proceedings of public concern" for the purposes of permitting a "fair protected report" of the proceedings, which carries a defence to any action for defamation.[13]

4.12 These provisions might be sufficient to protect individual complainants and the public interest in encouraging prospective complainants to come forward without fear of intimidation or retribution. There are some uncertainties which need to be clarified, however. The most pressing point is that, at present, the initial complaint is not made directly to the professional Councils, but to designated officers of the professional associations: the Law Society's Community Assistance and Professional Conduct Departments and the Bar Association's Professional Affairs Director. The Law Society's complaints form is addressed to the Law Society Council, but all of the communications with the Community Assistance and Professional Conduct Departments which lead up to the formal, written complaint arguably are not covered. The Bar's complaints form is addressed to the "Bar Association" rather than to the Bar Council, and in any event the status of communications occurring before the tendering of the written complaint is unclear. Neither of the Explanatory Brochures provided to prospective complainants by the Law Society and the Bar Association discuss this issue or reassures prospective complainants about their position in this respect.

4.13 Legislation should make clear that all communications made in the course of making a complaint, and in the subsequent proceedings involving the resolution of that complaint, whether involving the complainant, the respondent lawyer, any person responding to a request for information from the authorities, the authorities involved, or the agents or staff of any of the aforementioned, should be privileged in respect of defamation and that complainants are absolutely immune from other civil actions. (It is already the case that members of the Standards Board, the Disciplinary Tribunal, the Review Panel, and the Bar and Law Society Councils, are immune from liability for any act done in good faith as part of their disciplinary responsibilities.)[14] The same principles apply whether complaints in future will be made to the professional associations, to a Complaints Commission, or to a Legal Services Ombudsman.

The right to be kept informed

4.14 One major source of complainant dissatisfaction seems to stem from the absence of regular communication from the professional associations and disciplinary bodies informing the complainant of the progress of the case. In those cases in which the complaint is dismissed summarily or after investigation- which means the great majority of cases[15] - the complainant sometimes receives a rather terse letter with the technical reason for the decision (such as, "the complaint did not disclose evidence of unsatisfactory professional conduct or professional misconduct") but without a *full* explanation in "Plain English".[16] While the technical assessment of the merits of the complaint are no doubt usually correct, the manner of its communication may give rise to doubts about the probity of the process.

4.15 The ABA Disciplinary Evaluation Commission described a similar phenomenon in the United States:

> In the vast majority of matters the only communication between the complainant and the [disciplinary] agency is by mail. Complainants file a complaint and weeks or months later receive a dismissal letter. The complainant has no way of judging how much consideration the complaint has received. Even in those cases in which charges are filed and further proceedings held, complainants are not routinely informed of the status or development of the case. Complainants in many jurisdictions are notified of the dismissal by a form letter that states only that the complaint failed to allege a violation of the ethics rules or that sufficient evidence of a violation was not found. The complainant is not informed of the facts considered or the reasoning used to arrive at a decision to dismiss. Of all complaints summarily dismissed, a significant portion arises from lawyer behaviour that *does* constitute legitimate grounds for client dissatisfaction but does not violate the rules of professional conduct. This distinction is meaningless to most complainants.[17]

4.16 Complainants should be entitled to routine communication about the status of their complaint. In order to ensure that this actually occurs in practice, an officer in the complaints-handling agency should be designated to serve as the point of contact for the complainant in respect of each individual complaint, and the complainant should be so informed. That officer would be responsible for periodically reporting (say, every 60 days) in writing to the complainant about the progress of the matter, and for answering any direct inquiries from the complainant. Complainants also should be entitled to a clear and *full* explanation of the reasons for any dismissal. The letter notifying the complainant of a dismissal should include a statement to the effect that "if you do not understand the result or wish to discuss this matter further, please contact [the designated officer]". The same general principles should apply to the determinations of the Legal Profession Standards Board, which currently conducts its proceedings *in camera*. Nothing in the Act requires the Standards Board or the Disciplinary Tribunal to

communicate its determinations to the original complainant, who is not necessarily a party to the proceedings (see below).

Alteration of secrecy provisions

4.17 Under the Act, the Law Society may appoint inspectors to examine the trust accounts or investigators to scrutinise the affairs of a solicitor of firm of solicitors.[18] The Act makes it an offence, however, to make an unauthorised disclosure of the fact of the appointment of inspectors or investigators, or the contents of any report produced by such inspectors or investigators.[19] Authorised disclosure may be made to the Attorney General, members of the Law Society Council, agents or officers of the Law Society, the Supreme Court, the Standards Board, Disciplinary Tribunal and Review Panel, a member of the police force, and others who are required by the Act to be furnished with a copy of the report.[20] Where the action was taken following information provided by a complainant, the complainant is *not* among those who is informed that a trust account inspection or a financial investigation has been ordered or is under way, and the complainant is not entitled to receive a copy of the report. There may be a long period of time involved in the Council deciding to appoint an inspector or investigator, the inspector or investigator completing the report, and then the report being considered by Council, and the matter determined by Council or referred to the Board or Tribunal. In the meantime, the complainant may be left in the dark about the status of their matter, and under the false impression that the matter is not being dealt with seriously. As a matter of policy and good practice, the complainant should be entitled to be kept informed of the progress of the investigation by the complaints-handling agency and informed, at least in general terms, of the reason for any significant delay.[21]

The rights to appear as a party and to be present

4.18 A complainant is only entitled to appear *as a party* at a hearing before the Standards Board or the Disciplinary Tribunal if he or she has requested the making of an order in relation to fees, compensation or waiver of a lien,[22] and that entitlement extends only to "those aspects of the hearing that deal with the loss (if any) suffered by the complainant as a consequence of the conduct the subject of the hearing".[23] The Commission proposes that a complainant should always be entitled to appear as a party to the hearing. Where the complainant takes an active role in the proceedings, it may be that such participation should be subject to a risk as to costs.

4.19 The complainant's right *to be present* also should be a fundamental entitlement. However, under the present legislation,[24] the hearings of the Standards Board are to be held "in the absence of the public" (*in camera*), and the complainant has no statutory right to be present other than the limited right to appear as a party in respect of a request for compensation, as described in the preceding paragraph. The Commission understands that complainants are occasionally allowed to be present at Board hearings, in practice, but there should be general provision for this in the Act. At present, the Registrar of the Board and the Tribunal only notifies *parties* to the proceedings about the time and place of a hearing, so that if a complainant is not a party the only way he or she will learn of the hearing is, fortuitously, through the relevant professional association. Hearings of the Disciplinary Tribunal are normally conducted "in the presence of the public", except that the Tribunal has discretion to close proceedings to all but the parties and their representatives in the interests of

justice.[25] Again, the complainant should have a statutory right to be present at the Tribunal even if he or she is not formally a party to the proceedings.

4.20 As a general matter, the disciplinary system should be open to the public to the extent possible. This is discussed in further detail in the section on "Open Justice", below.

Parallel rights and responsibilities for complainants and lawyers

4.21 The tenor of much of the *Legal Profession Act* 1987 suggests that complainants and complaints are to be treated with caution, while legal practitioners who are the subject of a complaint are to be accorded full procedural rights. Without derogating from the natural justice requirements which must be applied in favour of those who are in jeopardy of being sanctioned, the rights and responsibilities of complainants and legal practitioners should be constructed in a parallel manner.

4.22 For example, the professional Councils currently may require the complainant to verify the complaint in writing in the form of a statutory declaration.[26] However, there is no parallel provision requiring the responses of legal practitioners to be verified in the form of a statutory declaration. Indeed there is no direct statutory requirement *at all* for lawyers to respond, much less to respond in a timely fashion, except that the Law Society may cancel or suspend the practising certificate of a solicitor who fails, and continues to fail, to give a satisfactory explanation to the Law Society Council after being required to do so.[27] Although there is nothing in the Act which specifically authorises it, the Law Society's Explanatory Brochure for complainants states that if a complainant is requested by the Law Society to provide further particulars and fails "to do so within one month of such a request, ... the Society may dismiss your complaint". Despite placing such a narrow time limit on complainants, the legal practitioner is not under any equal or similar obligation to respond promptly. Similarly, a Council may not dismiss a complaint with a reprimand without the consent of the legal practitioner involved,[28] yet there is no parallel requirement to gain the consent of the complainant to a dismissal, with or without a reprimand, or to give the complainant an opportunity to be heard on the matter.

Establishing a "Complainant's Charter of Rights"

4.23 Consideration should be given to the legislative statement of a "Charter of Rights" for complainants,[29] in order to make clear the position of complainants and to emphasise the integrity of the system. The Charter could enshrine, for example, the following principles:

> Complainants are entitled to receive sufficient advice and assistance in order to prepare a complaint in writing in the prescribed form, and to understand the nature of their rights and responsibilities in the disciplinary process.

Complainants shall be absolutely immune from civil suit for all communications made to the officers of the agency responsible for the handling of complaints, for all communications made to the various disciplinary bodies exercising direct or delegated statutory powers, and for all statements made within the disciplinary proceedings.

Complainants must receive regular and adequate notice of the status of disciplinary proceedings at all stages of the proceedings. In general, a complainant should receive, contemporaneously, the same notices and orders the respondent receives as well as copies of the respondent's communication to the agency, except information that is subject to another client's privilege.

Complainants must be permitted a reasonable opportunity to rebut statements of the respondent before a complaint is dismissed.

Complainants must be notified in writing when a complaint has been dismissed (with or without a reprimand to the legal practitioner). The notice should include a concise recitation of the specific facts and reasoning upon which the decision to dismiss was made. The complainant should normally be given a copy of the investigator's report, unless there are good reasons for doing so in a particular case (such as problems of confidentiality).[30]

Complainants must be given effective notice of the date, time, and location of any proceedings before the Legal Profession Standards Board or the Legal Profession Disciplinary Tribunal,[31] and shall have the rights to attend, to appear as a party, and to testify at the hearing.

Complainants shall have the right to have any decision of the Law Society Council or the Bar Council, or any official or body acting on the delegated authority of one of those Councils, reviewed by the Legal Profession Conduct Review Panel. (This assumes the retention of the existing system.)

The Commission would welcome submissions on these issues.

ACCESS TO THE COMPLAINTS-HANDLING SYSTEM

Access to information

4.24 Brochures, pamphlets, videos and other means of communication should be used to provide a clear statement (in Plain English) of: the rights and responsibilities of complainants; the assistance which is available to prospective and actual complainants; the general nature of the disciplinary process, including the remedial orders which may be given; and the other forums for the resolution of disputes about the provision of legal services (mediation, civil suits, the Consumer Claims Tribunal, etc). It must be remembered that while some complaints are received from other lawyers, judges, court officials and public officials, the great bulk of complaints are initiated by members of the public (usually clients),[32] who begin the process with very little information about how the disciplinary system works.

Assistance to non-English speakers

4.25 All literature produced in relation to complaints about lawyers should be available in a wide range of community languages.[33] However, the production of brochures should not be regarded as fully satisfying the requirement to assist complainants or to overcome barriers to effective access. A recent report by the Administrative Review Council on access to administrative review by members of the ethnic communities found that there has been an over-reliance on the perfunctory production of pamphlets and brochures by organisations and service-providers, without any careful assessment of how to convey the information to targeted groups in a manner which most effectively identifies the way in which they *actually, commonly receive information*.[34] Migrant resource centres apparently are flooded with brochures, pamphlets, notices and posters, with little real prospect for this information to be disseminated to those in particular need. More imaginative marketing techniques must be employed to reach more people and convey the information more effectively.[35]

4.26 Further, sufficient interpreter services must be made available to assist persons who are communicating with "the front counter" by telephone or who are in need of assistance to provide the details of the complaint in writing, as is required. In the first instance, this would be likely to involve making greater use of the existing Telephone Interpreter Service (TIS), followed by the making, there and then, of an appointment between the complainant, a competent interpreter, and someone (preferably a senior officer) from the professional body involved, to assist the complainant in formulating the detailed, written complaint. The submission from the NSW Combined Community Legal Centres Group emphasised that, in its experience, the existing complaints mechanisms were clearly inadequate to meet the needs of persons from non-English speaking backgrounds, or persons with low literacy skills or other disabilities, preventing them from making an effective complaint.[36]

Access to offices and officials

4.27 The submission from the NSW Combined Community Legal Centres makes the useful point that the disciplinary system should be made more "accessible" to complainants not only in terms of language, but also in respect of location, working hours and minimal formality, as well as ancillary services such as costs assessment and counselling.[37]

CONSENSUAL DISPUTE RESOLUTION

General issues

4.28 The disciplinary system established by the *Legal Profession Act* 1987 is a legalistic one, relying on hearings before bodies with varying degrees of procedural formality. No provision was made for other forms of dispute settlement. In our recent Report on dispute resolution,[38] we noted the increasing acceptance and use of non-adversary and non-adjudicative dispute resolution techniques, whether as an alternative to the use of the courts and tribunals or as an adjunct (official or unofficial) to those more formal methods. The Commission is

generally supportive of these developments, while recognising that "alternative dispute resolution" (or, preferably, "additional dispute resolution") is not a panacea for the notional ills of the judicial system but rather a set of further options to be carefully considered in each case. Depending upon the broader social consequences of a dispute, the nature and relationship of the parties, the imbalance in resources or power, and other factors, there are often very good reasons why matters are *best* handled in open court, using formal rules of evidence and procedure, and concluding with an adjudicated result by an impartial finder of fact.

4.29 In the area of conflicts between lawyers and their clients, there is certainly room for and advantage in the use of additional dispute resolution techniques, such as mediation and conciliation. The preponderance of complaints by clients relate to problems of delay, poor communications, discourtesy, and disputes over fees. Many of the allegations, even if true, will not amount to "unsatisfactory professional conduct" or "professional misconduct" within the meaning of the Act. Few of these disputes require, or would profit from, a formal hearing. Most of these disputes would no doubt be resolved quickly and effectively, from the client's point of view, by mediation, so long as there is not an implicit assumption that "mediation" means that "each party has to give a little bit".

4.30 However, a smaller proportion of complaints, which raise questions about the character, honesty or competence of the lawyer involved, will still require a formal hearing (instead of or in addition to mediation) so that disciplinary action may be considered. Other complaints may raise issues in which there is a general public interest beyond the resolution of the particular dispute, and these also should be referred back into the system so that general issue may be ventilated. For example, it may be that the lawyer involved has acted in accordance with standard practice, but the practice itself is open to question.

4.31 The submission of the Law Society, to which we will return below, strongly endorses the idea of mediating disputes between clients and lawyers, and contains a specific proposal for the insertion of this process into the existing disciplinary system. The Bar Association's submission also states that:

> The use of informal mediation is also to be explored in appropriate matters where both the complainant and the barrister are willing to participate. The types of matters which readily lend themselves to such an approach include complaints about delays with chamberwork, delays in returning a brief, misunderstandings about the role of a barrister, and where there is an apparent failure on the part of the barrister to properly explain things to the client. There may be many other cases where mediation would assist.[39]

4.32 The submission of the Australian Consumers' Association also urges that priority be given to the resolution of the complainant's particular grievance, with the disciplinary aspects of the complaint handled later:

> Many complaints against lawyers will involve both a compensation aspect and a disciplinary aspect. In our opinion a scheme will be most successful if it can deal with the consumers' primary objective first, that is, to recover compensation and then deal with disciplinary aspects. If a scheme attempts to deal with disciplinary matters first than the scheme is likely to be seen as inefficient from the consumer's point of view and therefore is less likely to be used.[40]

4.33 The Law Society's submission suggests that in many, if not most, of the complaints it receives about solicitors, the complainant is principally interested in obtaining "redress of a grievance rather than retribution against the solicitor involved."[41] The Law Society already has proceeded to establish a voluntary scheme of dispute resolution. The Law Society has hired a full-time legal officer with responsibility for serving as a mediator, and has utilised the services of LEADR (Lawyers Engaged in Alternative Dispute Resolution) to provide training for staff members.[42] The Law Society has recognised that there will be circumstances in which, despite the satisfaction of a complaint through mediation and the willingness of the complainant to withdraw it, the Law Society will be constrained by law[43] to refer the matter to the Standards Board.[44]

4.34 The Law Society proposes two things in relation to dispute resolution. First, that in a case which has been resolved to the client's satisfaction by mediation, but conduct by the solicitor constituting unsatisfactory professional conduct is involved, the Law Society Council should be able to dismiss the complaint or make other appropriate orders, such as issue a reprimand. The Law Society Council already has the power to dismiss a complaint with a reprimand, and even to dismiss without a reprimand, where it is satisfied that the complaint involves a question of unsatisfactory professional conduct, so long as it is also "satisfied that the legal practitioner concerned is generally competent and diligent and that no other material complaints have been made against the legal practitioner".[45] The Law Society suggests that "alternative dispute resolution will, except in cases of professional misconduct, produce the most effective and just result."[46] Secondly, the Law Society proposes that:

> In order to develop more effectively the mediation processes it has already in hand, the Council of the Law Society, the Legal Profession Standards Board and the Legal Profession Disciplinary Tribunal need a broader discretion under the Act for the determination of complaints which are justly resolved to the satisfaction of both the complainant and the practitioner.[47]

4.35 The enthusiasm of the Law Society for mediation stems in part from the experience of similar schemes in Victoria and England, which report very high "success rates" for mediated settlement of complaints.[48] In the scheme operated by the Law Institute of Victoria, professional conduct issues are separated from "non-conduct" (or "disputes") issues, and only the latter are sent for "conciliation" if the parties agree. Naturally, some complaints contain both conduct and non-conduct issues. If the dispute is not settled by conciliation, the Law Institute has no power to dismiss it - the Institute must refer the complaint to the Registrar of the Solicitors Board for determination (ie, effectively, by arbitration).

Concerns and qualifications

4.36 Given the nature and substance of many of the complaints, it is very likely that a high proportion will be happily resolved by mediation, as the submissions from the professional associations suggest. It may also be that the availability of a quick, responsive mediation process will encourage more mildly disgruntled clients to come forward in the first instance.[49]

Preservation of the dual nature of the disciplinary system

4.37 However, the experience elsewhere also suggests a number of concerns which should be kept in mind. First, the *dual* nature of the disciplinary system must not be lost. The system certainly should be reformed so that it becomes more attuned to redressing the grievances of individual complainants, but this should not be at the expense of the general public interest in ensuring that licensed legal practitioners conduct their work with honesty, diligence and competence, and that the standards of practice required of lawyers generally are maintained at a sufficiently high level. Of course, there is no reason why both aims of the system cannot be accommodated. The Law Society's apparent view that "minor matters" of unsatisfactory professional conduct should, in effect, be ignored if the client is satisfied by the outcome of mediation, must be treated with some caution.

4.38 The creation of the Legal Profession Standards Board, based on the Commission's earlier recommendations, was meant to address the significant concern that these "minor matters" were not being treated with sufficient gravity, given the prevalence of these sort of complaints, their adverse impact on clients, their potential for eroding respect for the work of the profession, and the possibility that patterns of persistently poor work could not be detected if the focus remained only on the more obviously serious acts of professional misconduct, such as trust account defalcations and other acts of dishonesty. Matters which raise suggestions of "unsatisfactory professional conduct" should be sent to the Standards Board (or any successor body) for consideration of the disciplinary aspect of the complaint, even where there has been a successful mediation. Similarly, there may be circumstances in which a complaint raises issues in which there is a general public interest beyond the satisfactory resolution of the particular dispute. These matters should be referred back into the main disciplinary system for exploration. For example, it may be that the lawyer involved has acted utterly in accordance with standard legal practice, but the practice itself is arguably contrary to the public interest.

Sensitivity to the imbalance of power and knowledge in the lawyer-client relationship

4.39 If informal dispute resolution is to be promoted, there must be due sensitivity to the considerable imbalance in the relative positions of lawyers and clients in terms of power and knowledge.[50] It will be the rare case in which the client has as much negotiating experience as the lawyer, has as much knowledge about the alternatives to settlement by mediation, has as clear an idea of the likely outcome of any future disciplinary or legal proceedings, and so on. While noting the obvious trend towards the increased use of additional dispute resolution techniques (beyond formal adjudication in the courts), we did sound this cautionary note in our recent report on the training and accreditation of mediators:

> [T]he contention [that mediation is unproblematic] ought to be regarded with caution given that empirical studies of informal dispute resolution have found that *the rhetoric of self-determination and voluntary participation is matched with the realities of capitulation and coercion.* The potential for clients to be harmed is exacerbated by the nature of the process which is inherently imprecise and manipulable.[51] [Emphasis supplied]

The independence of mediators

4.40 Perhaps the mediators used should *not* be staff members of the Law Society or Bar Association, and particularly not staff members who are involved in any way in the investigation or prosecution of complaints. Mediators must be independent of the professional associations to assure complainants of their impartiality. There is already a danger that the dynamics of the mediation situation will inherently favour the lawyer, who is

used to negotiating and operating in such an environment, rather than the lay complainant. While it is not really the role of the mediator to redress the balance of power or sophistication between the parties, an experienced mediator should be able to restrain one of the parties from being overbearing. In order to assure complainants that the system is not weighted against them, independent mediators should be used. Depending upon the nature of the complaint, the mediators need not necessarily be legally trained. For example, disputes about discourtesy or poor communications would not require the mediator to be a lawyer. Where an understanding of the exigencies of legal practice would be a major advantage for the mediator, such as in the case of a dispute arising out of the tactics or strategy employed by a barrister in the course of a trial, then it may be best to seek the services of an academic lawyer, a retired judge, a government lawyer or some other lawyer who is not readily associated with the interests of the professional associations.

4.41 The independence of the mediator also is very important from the point of view of the legal practitioner who is the subject of the complaint. The lawyer should be able to participate in the mediation effort in a full and frank manner, without fear that any admissions or concessions made in the process will be used against him or her in a subsequent disciplinary hearing or civil proceeding.

Training and qualifications of mediators

4.42 In any event, the mediators who are used to handle disputes between clients and lawyers should be specifically trained for this purpose. It is not sufficient to assume that, for example, lawyers are "natural" or appropriate mediators by virtue of their legal training or experience. To quote again from the Commission's recent report on mediation:

> The Commission accepts that training for mediators is necessary for competence as a mediator and to enhance the credibility of mediation. We accept that no one is automatically qualified to perform the role of a mediator simply by virtue of professional or occupational qualifications in another discipline, or because of appropriate personal qualities. The role requires knowledge and skills of a distinct process. Training is the most effective way for a person to acquire expertise. Failure to undergo training in the process increases the risk that a mediator's behaviour will be incompetent and unethical, and of harm to clients.[52]

THE OPERATION OF THE LEGAL PROFESSION STANDARDS BOARD AND DISCIPLINARY TRIBUNAL

Merger of the Board and Tribunal?

4.43 The *Legal Profession Act* 1987 established a bifurcated hearing system in which allegations of "unsatisfactory professional conduct" are heard by the Legal Profession Standards Board, while (more serious) allegations of "professional misconduct" are heard by the Legal Profession Disciplinary Tribunal. The Act follows recommendations made by the Law Reform Commission in 1982, in our earlier reference on the Legal

Profession.[53] The logic behind the establishment of a two-tier process was that poor work falling short of professional misconduct (such as cases of delay or negligence) also should be dealt with by the disciplinary system, but that "it would be unfair and counterproductive if less serious breaches were made subject to the same procedures and sanctions as the serious breaches. The system therefore provided for a formal body, a Tribunal, to deal with serious breaches and a less formal body, a Board, to deal with less serious breaches."[54]

4.44 To employ a rough analogy drawn from the criminal justice system, allegations of unsatisfactory professional work are like summary offences, dealt with by the lower courts, while allegations of professional misconduct are like indictable offences, triable by the superior courts. Prior to the advent of the new system, these lower level complaints were not dealt with effectively (or, often, at all) by the disciplinary system, since the focus of the system at all levels was on professional misconduct. Yet complaints amounting to unsatisfactory work were far more common than those alleging misconduct. By splitting the process, the Commission hoped that these "less serious" complaints would now receive more attention, and that the Councils of the professional associations would be more willing to refer them to a disciplinary body for hearing.

4.45 Given the prevalence of complaints amounting to allegations of unsatisfactory professional conduct, it could be expected that there would be many more referrals to the Standards Board than to the Tribunal. However, this is far from the case. For example, according to figures supplied by the Law Society of New South Wales, in 1990, there were 1245 written complaints against solicitors.[55] Of these, at least 80 per cent seemed to relate to issues of unsatisfactory professional conduct: 264 involved undue delay; 37 involved discourtesy; 254 related to negligence or quality of work; 79 involved poor communications; 104 involved allegations of overcharging; and 256 related to conduct or standards breaches. Yet only 12 matters (1% of the total number of complaints)[56] were referred by the Law Society Council to the Standards Board. Only eight matters had been referred in 1988, 15 in 1989, and one in 1991 (of the over 700 matters finalised). By contrast, 61 matters were referred to the Disciplinary Tribunal in 1988, 43 in 1989, 55 in 1990 and 25 in 1991 (of those cases finalised). In the last four years, the number of matters referred by the Bar Council to the Standards Board amounted to: 3, 1, 4 and 2, respectively, while the numbers referred to the Tribunal were: 2, 4, 9, and 6, respectively.

4.46 Thus, over the four years since the new system was put into place, only 46 complaints[57] were referred to the Standards Board from the two Councils, while 205 complaints were referred to the Disciplinary Tribunal.[58] During the same period, about 2-3% of written complaints to the Law Society and 7-12% of written complaints to the Bar Association have resulted in reprimands[59] administered to the legal practitioners involved. No doubt many or most of these cases involved unsatisfactory professional conduct. However, what is clear is that the Commission's earlier belief that the creation of a two-tier system would result in the regular referral of less serious matters to the Standards Board has not eventuated. Instead, only a small proportion of these matters are referred, while the remainder either are dismissed or result in a reprimand. (It may be that the selection of Options Two or Three for the future regulation of the profession would increase the workload of the Standards Board, however, as neither a Legal Services Ombudsman nor a Legal Services Complaints Commission would have the dispositive powers currently vested in the professional Councils, and thus could be expected to push a higher proportion of complaints through to the Board level.)

4.47 Apart from the failure to utilise the mechanism of referral to the Standards Board to deal with sub-standard work, there are other problems associated with the two-tier system of hearings which have been identified by the Commission and in some of the submissions. Dual complaints involving elements of both unsatisfactory professional conduct and professional misconduct, or complaints which tread the fine line between unsatisfactory professional conduct and professional misconduct, place the Bar and Law Society Councils in the difficult position of having to decide whether to send a particular matter to the Board or to the Tribunal, or whether to divide the complaint and refer aspects to each body for hearing.[60] Finally, there are suggestions from the profession that the Standards Board is not operating as the simple, summary, inquisitorial proceeding that was

originally intended, but instead has become a more adversarial process not unlike that of the Disciplinary Tribunal.

4.48 The submissions from the New South Wales Bar Association and the President of the Legal Profession Disciplinary Tribunal, Mr David Hunt, both recommend the merger of the Standards Board and the Disciplinary Tribunal into a body which may hear and determine both forms of complaint. The Bar's submission suggests that the "two-tier approach involves additional expense and bureaucracy which is unwarranted. Secondly, the two-tier system creates difficulties and restrictions which are inimical to an efficient and streamlined system of dealing with complaints from the public."[61] Mr Hunt's submission suggests that the present system of hearings is "clumsier" than before and has contributed to the delays in the handling of complaints.[62]

4.49 It is worth noting here that the Board and Tribunal together hear only a tiny percentage of the original complaints lodged, and the Commission has emphasised other aspects of complaint-handling in this Discussion Paper. Nevertheless, the experience of the past several years and the desire for streamlining the rather complex disciplinary system both suggest that the merger of the Board and Tribunal is an idea worth serious consideration. The Commission's concern of over a decade ago, that less serious matters involving unsatisfactory professional conduct should not be "made subject to the same procedures and sanctions as the serious breaches",[63] could be met in a different way. There is no reason why, when hearing a complaint about unsatisfactory professional conduct, that a merged body could not conduct itself in a somewhat less formal manner, be given a different range of sanctions to be applied, and so on. Indeed, there is an important general issue about how disciplinary proceedings are conducted. Given that the Board and Tribunal both exercise an essentially "protective" function (see para 5.109) rather than a punitive one, there is a strong argument that the process should be inquisitorial. The Commission is especially interested in receiving further submissions on these questions.

The question of open justice

General principles

4.50 The right of the complainant to be present at disciplinary proceedings and to appear as a party is considered above.[64] As a general matter, the restoration and maintenance of public confidence in the legal profession's disciplinary processes is dependent upon clear evidence that the system is fair, open and accountable. As many elements of the system as possible should be open to the public and on the record, and reasons for decisions should be available. The ABA Disciplinary Evaluation Commission recently reported that it was:

> convinced that secrecy in discipline proceedings continues to be the single greatest source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and the media will be able to freely comment on the proceedings. The public does not accept the profession's claims that lawyers' reputations are so fragile that they must be shielded from false complaints by special secret proceedings. The irony that lawyers are

> protected by secret proceedings while earning their livelihoods in an open system of justice is not lost on the public. On the contrary, it is a source of great antipathy toward the profession. ... The arguments against open disciplinary systems are based on conjecture and emotion, not experience.[65]

Hearings of the Standards Board

4.51 Under the *Legal Profession Act* 1987, the hearings of the Legal Profession Standards Board in New South Wales are to be held "in the absence of the public" (*in camera*), with only parties to the hearing and their representatives entitled to be present.[66] By way of contrast, however, a common law action filed by a client against his or her solicitor alleging professional negligence would be heard in open court. The Commission agrees with the view of the American Bar Association that secrecy is likely to engender suspicion. The threat to the reputation of the legal practitioner before the Board is no greater than that of the lawyer sued for negligence - nor, for that matter, is the threat greater than that to the ordinary citizen who is charged with a minor criminal offence and subjected to open justice in the Local Courts.

4.52 The secrecy of the Standards Board's proceedings may cause some unnecessary problems in practice. For example, if the Board orders that a legal practitioner pay compensation to a complainant[67] but the lawyer does not comply with the order,[68] there are some doubts about how the complainant may enforce this "judgment", which is itself secret. At a minimum, the compensation order ought to be able to be extracted in order to be enforced in a civil court.

Hearings of the Disciplinary Tribunal

4.53 Hearings of the Disciplinary Tribunal are "held in the presence of the public", except that the Tribunal may close the proceedings (to all but the parties and their representatives) "if it is of the opinion that the absence of the public will aid the ends of justice".[69] The Commission understands that the discretion to close proceedings has been exercised in only a few cases, but is nevertheless concerned that the wording of the Tribunal's statutory power is too open-ended. It would be preferable if the presumption of openness was somewhat stronger and the Tribunal's discretion to close proceedings was the same as that of the Supreme Court: that is, limited to those rare cases "where the presence of the public will defeat the ends of justice".[70]

Powers of the Board and Tribunal

Gaps and inconsistencies in the statutory allocation of powers

4.54 The Commission's own research, as well as many of the submissions received (including those of the Law Society, the Bar Association, and the President of the Disciplinary Tribunal), point to some anomalies and inconsistencies in the distribution of powers between the disciplinary bodies provided for in the *Legal Profession*

Act 1987, and in the sanctions and orders available in respect of members of the different branches of the legal profession. For example, under the prior legislation, it was generally considered that the Solicitors' Statutory Committee had the same powers to discipline solicitors as the Supreme Court had in relation to solicitors and barristers. However, the Standards Board and the Disciplinary Tribunal have only those powers which are specifically enumerated in ss 149 and 163 of the 1987 Act. In this respect, the previous position is to be preferred. One current uncertainty is whether the Disciplinary Tribunal's specified powers to make orders against a legal practitioner found guilty of professional misconduct[71] implicitly subsume the (more varied) powers that the Tribunal and the Standards Board have with respect to practitioners found guilty of the lesser charge of unsatisfactory professional conduct.[72]

Powers in relation to barristers

4.55 When the Standards Board is satisfied that a barrister is guilty of unsatisfactory professional conduct, it may, under s149 of the *Legal Profession Act*, reprimand the barrister, order a course of further legal education, and/or impose a fine of up to $2000. (Compensation also may be ordered in certain circumstances. See para 4.61 *et seq*, below.) If the lawyer found guilty of unsatisfactory professional conduct is a solicitor, however, the Board may do any of those things, *as well as* subject the solicitor's practice to periodic inspection, order the solicitor to seek management advice, order that the solicitor cease to employ certain persons or require the solicitor to employ a certain class of person(s), order that the solicitor cease to accept instructions in certain areas of work, and/or order that the solicitor's practising certificate be restricted so that he or she may only practise in the employ of a senior solicitor.

4.56 Although the organisation of work is essentially very different for solicitors and barristers, of course, there is no good reason for this statutory disparity. The 1987 Act required barristers, for the first time, to hold current practising certificates, but the disciplinary provisions in Part 10 of the Act seem to be based on the previous position. There is no reason why the Board should not be able to place conditions or restrictions on a *barrister's* practising certificate; for example, to cease to accept briefs in a particular area of legal work.[73] The Bar Association's submission agrees that there should be more flexibility in this respect.[74]

Powers in relation to practising certificates

4.57 In the Commission's view, the power to impose a condition on a practising certificate - whether in relation to a barrister or solicitor - should not be limited to restricting the legal practitioner's right to practice as a sole practitioner or without collegial supervision.[75] Rather, the Board or Tribunal should be given some latitude to fashion conditions appropriate to the circumstances of the individual case, in the same way that courts are given wide discretionary powers to impose conditions upon the granting of bail or the imposition of a suspended sentence or a good behaviour bond.[76]

4.58 Where the Disciplinary Tribunal is satisfied that a legal practitioner is guilty of serious professional misconduct, it may, under s163 of the *Legal Profession Act*, cancel or suspend that person's practising certificate, order that the person be struck off the roll of barristers or solicitors, and/or impose a fine of up to $25,000. If the Tribunal finds that the legal practitioner is only guilty of the less serious charge of unsatisfactory professional conduct, however, it has the same powers available to the Standards Board under s149. There is some question about whether the powers in relation to the more serious charge subsume those in relation to the lesser charge. Upon a finding of professional misconduct, the Tribunal should be able to fashion an order appropriate

to the particular circumstances of the case, including, where it sees fit, to impose conditions on a lawyer's practising certificate (rather than cancel or suspend it), order a course of further education, limit areas of professional practice, require the lawyer to employ or cease to employ certain persons, and so on. The Commission proposes that this should be made clear in the legislation.

Powers where the evidence indicates a systemic failure

4.59 In a number of matters observed by the Commission or which have been brought to our attention, the complaint and the ensuing investigation indicated that, in addition to (or instead of) personal failings on the part of the legal practitioners concerned, there was evidence of broader, *systemic* problems in the law *firms* concerned. It should be possible for the various legal profession disciplinary bodies to make appropriate orders in respect of a firm of solicitors - short of putting in a receiver[77] - aimed at rectifying any perceived systemic problems. For example, it should be possible to order the establishment of an internal Ethics Committee, or to improve internal systems of management and supervision, with the firm required to approach the disciplinary body after a specified period of time to demonstrate what changes have been made and their effectiveness.[78] The Commission would welcome submissions on this issue.

The need to increase the present limits on fines

4.60 As mentioned above, the Standards Board may fine a barrister or solicitor an amount not exceeding $2000 where the Board is satisfied that the legal practitioner is guilty of unsatisfactory professional conduct.[79] The Disciplinary Tribunal may fine a legal practitioner guilty of serious professional misconduct an amount up to $25,000.[80] It may be that these limits are sufficient in the majority of cases. However, the Commission believes that the limits should be raised to afford the Board and the Tribunal (or a merged body) sufficient flexibility to impose a substantially greater fine in an appropriate case. A (Medical) Professional Standards Committee, for example, which is the equivalent of the Legal Profession Standards Board, may impose a fine not exceeding $5000.[81] The Commission notes that the maximum fines applicable to company directors and other professional advisers who act improperly have been increasing markedly in recent years. For example, the public exposure draft of the *Corporate Law Reform Bill* 1992 (Cth) provides for a pecuniary (civil) penalty of up to $200,000 for a contravention of a civil penalty provision by an individual.[82]

Compensation orders

4.61 *Powers to make compensation orders*. The Standards Board and the Disciplinary Tribunal both have the power to make an order that the legal practitioner waive or repay fees, carry out certain legal work free of charge or for a specified fee, waive any lien in respect of documents, or pay a specified amount of compensation, upon a finding of unsatisfactory professional conduct or professional misconduct, respectively.[83] However, such an order may be made only where the complainant has specifically requested such a remedy in his or her complaint, with supporting particulars,[84] and two other qualifications are met.

4.62 The first qualification is that an order for compensation not exceeding $2000 may be made without the consent of the legal practitioner involved, but the consent of both the practitioner and the complainant is required for an order above that cash amount, or for any of the other three compensatory orders.[85] This provision

creates the anomalous situation that the complainant may be awarded cash compensation of $2000 without the consent of the lawyer involved, but cannot get a fee waiver or specific performance worth, say, $500, without the practitioner's consent. In the Commission's view, the same principle should apply across the board, with consent required only where the cash amount *or the deemed value* (as determined by the Board or Tribunal) exceeds the specified amount.

4.63 The second qualification is that the complainant has not received and is not "entitled to receive compensation pursuant to an order of a court or compensation from the Fidelity Fund".[86] The Commission also has a concern about the wording of this provision. If the meaning here of "entitled to receive" is that the complainant already has been granted an order for compensation from a court, or a claim against the Fidelity Fund has been allowed, but the person has not yet actually received the cash in hand, then there is no problem. However, if the phrase could be construed to refer to the entitlement of a complainant subsequently *to seek* compensation from a court or the Fidelity Fund, then we believe that this outcome would be wrong on policy grounds. The Act already contains provisions against "double-dipping" by complainants, by requiring that any award of compensation by the Board or the Tribunal must take into account any other compensation granted to the complainant in respect of the same loss.[87]

4.64 These conditions appear to be weighted too heavily against the complainant. The Board and Tribunal should have the power to make any or all of the orders referred to above if the interests of justice and fairness so require. Complainants will often not be aware of the nature or existence of a solicitor's lien, for example, or understand in advance the sort of compensation they may be entitled to. Where a Board or Tribunal is satisfied on the evidence that a complainant has suffered as a result of a legal practitioner's poor professional work, and such harm may be rectified in whole or in part by an award of compensation or other remedial order, it should be free to make such an order whether or not the complainant has specifically requested such a course of action and whether or not the legal practitioner consents to such an order. The consent requirement is particularly difficult to understand in view of the requirement that the Board or Tribunal may make a remedial order only if it is first satisfied that the legal practitioner is guilty of unsatisfactory professional conduct or professional misconduct and the complainant has suffered loss as a consequence.

4.65 *The limits on compensation.* The current upper limit of $2000 for compensation orders under the Act also is open to question. In Victoria, the current limit is $2500, but there is a move to raise this to the more realistic sum of $10,000. The point of providing for compensation within the disciplinary process is to avoid the need for the complainant to go to yet another civil court or tribunal (such as the Consumer Claims Tribunal) to seek redress. However, this aim is not achieved where the compensation ceiling is so low that it forces complainants to go elsewhere to get a proper remedy.

The power to deal with matters arising in the course of proceedings

4.66 The Bar Association's submission points out that, at present, the Standards Board and the Disciplinary Tribunal have no powers to deal with matters involving professional conduct (or misconduct) which are revealed in the course of a hearing but which were not the subject of the particular complaint being heard.[88] The Law Society also has raised this issue in discussions with the Commission. The Commission sees merit in the suggestion of the professional associations that the Board and the Tribunal should have the power to deal with matters which arise before them. This power, of course, should be exercised subject to considerations of natural justice in each case.

Joinder of complaints

4.67 There may be some cases in which it is difficult to determine before hearing whether one or another legal practitioner (or both) is responsible for the conduct or failing complained of. Absent a formal hearing there may be insufficient information for the relevant Council to make the determination, or it may be one practitioner's word against the other. Consideration should be given to permitting the joinder of complaints in these circumstances, to permit the Board or Tribunal, as appropriate, to make the determination after hearing from all of the parties. This may be especially important where the legal practitioners involved are a barrister and a solicitor, in which case neither professional Council would have sufficient jurisdiction to handle the matter properly. In such cases, the composition of the Board or Tribunal should include equal numbers of members from both branches of the profession.

Membership of the Board and Tribunal

Composition

4.68 For the purposes of conducting a hearing into a complaint, the Standards Board is constituted by two of its barrister or solicitor members (depending upon the subject of the complaint) plus one of its lay members.[89] Under the original provisions of the *Legal Profession Act* 1987, the President of the Disciplinary Tribunal was to have been the Chief Justice of the Supreme Court of New South Wales, who would appoint two other Supreme Court judges to be members of the Tribunal.[90] For the purposes of conducting a hearing, the Tribunal *was* to have been comprised of a judicial member as well as a legal member and a lay member (or two legal members and two lay members, as the President considered appropriate in the circumstances of the case).[91] In 1989, the legislation was amended to remove the judicial members of the Tribunal,[92] apparently in keeping with the general policy of utilising judges to reduce delays in the courts and appointing instead senior lawyers (usually barristers) to quasi-judicial bodies and tribunals. At the time, the then Attorney General, the Hon JRA Dowd, QC MP, stated in Parliament that "I am of the view that valuable judicial time should not be spent on tribunals unless there is some very special reason. No such reason has been shown to support the appointment of judges to the Legal Profession Disciplinary Tribunal."[93] (It is noted that a District Court Judge still presides over the Medical Tribunal in New South Wales, however.)[94] Thus, for the purposes of conducting a hearing into a complaint, the Disciplinary Tribunal is now constituted by two of its legal members (depending upon whether the complaint concerns a solicitor or barrister) and one of its lay members, as nominated by the President in each case.[95]

Judicial involvement?

4.69 There is question whether, whatever the general policy on the allocation of judges to tribunals, there may be a special case for having a judicial presence on (and supervision of) the Legal Profession Disciplinary Tribunal. Such a presence would go some way towards ensuring that complainants and the general public regard the Tribunal as being sufficiently independent of the practising profession. In the United States judges traditionally have been centrally involved in the disciplinary system. The ABA Disciplinary Evaluation Commission has recently recommended that the "American Bar Association should continue to place the highest priority on promoting, developing, and supporting judicial regulation of the legal profession and professional

responsibility."[96] The Commission makes no proposal in this respect at this time, but is interested in receiving submissions on this question.

Lay participation

4.70 *Current acceptance of the principle.* Although there was very strong opposition to non-lawyer ("lay") involvement in the disciplinary process when the Commission first considered these issues over a decade ago,[97] especially from the Bar Association, it is now widely accepted that this is an important feature of the system and is essential in providing sufficient external accountability to maintain public confidence in the integrity of the system which is largely controlled by the legal profession. A few submissions have called into question the value of lay members in the disciplinary process, asserting variously that lay participants do not possess sufficient expertise or experience to understand fully the legal or practical issues involved in many complaints, and that lay members actually often tend to be "softer" than the legal members when it comes to disciplining the lawyer complained about. However, the aim of lay participation in the disciplinary system was not to "balance" the voting but rather to provide additional perspectives and to introduce a measure of external accountability into a system which is otherwise largely closed and dominated by lawyers. As the Commission wrote in 1979,

> without [lay participants], there cannot be public confidence that decisions will be made with due regard to the interests of both non-lawyers and lawyers.[98]

4.71 This position is now accepted by both legal professional associations, and neither submission contained a call for the end of lay participation in the legal disciplinary system. Indeed, after the commencement of this inquiry the Bar Association increased lay participation on its Professional Conduct Committees from one to two members, having placed newspaper advertisements to attract a field of candidates for this purpose.

4.72 *The meaning of "lay".* There are some concerns, however, about two aspects of the manner in which lay participation has been handled in the several years since the new legislation came into effect. The first concern relates to the appointment and qualifications of lay members. The purposes of lay involvement, again, are to provide diverse perspectives and external accountability. Unfortunately, some of the appointments appear to be contrary to these purposes. For example, in previous years the "lay" appointees to the Bar Association's committees have included retired Queen's Counsel and other persons with long associations with the legal profession. The Act provides only that "a lay member is a person who is not a barrister or solicitor".[99] Technically, this might be construed to include a legally qualified person who does not hold a current practising certificate; but clearly this is not what was intended. The most recent lay members are more genuinely "external" appointees.

4.73 *A Public Council on Legal Services?* In its earlier work on the legal profession, this Commission recommended the creation of a broadly constituted Public Council on Legal Services as an important part of the general regulation and structure of the legal profession.[100] As we wrote then,

> [T]he Council will provide a pool of non-lawyers who have special interests in, and experience of, the law and the legal profession. It is our view that the Council could become a valuable aid to the

Law Society. It could, for example, be responsible for, or advise the Society in relation to, the appointment of lay members of the Council's committees, including the Complaints Committee.[101]

4.74 In the end, the *Legal Profession Act* 1987 did provide for a more limited "Legal Profession Advisory Council", comprised of two barristers, three solicitors and four community representatives (one of who may be a lawyer), with responsibilities to "keep under constant review the structure and functions of the legal profession" and to report and make recommendations to the Attorney General on any matter relating to the legal profession.[102] However, in the period since the commencement of the Act, the Council has never been constituted. As a consequence, the appointments process for lay members has been rather ad hoc and uninformed. The Commission believes that serious consideration should be given to the establishment of the Legal Profession Advisory Council or, preferably, to the Commission's original recommendation for a more broadly constituted Public Council on Legal Services.[103] In any event, the appointment of lay participants in the disciplinary process should follow a system of advertising, interviewing and selection on merit, in the manner normally associated with appointment to important public bodies.

4.75 *Support for lay participants.* Another important concern is that greater support should be made available to lay members, in particular, to ensure that they can participate in the process in a meaningful way. This may involve special training courses, research and secretarial assistance, and other resources. Lay members should also receive a realistic level of compensation for the work involved, in order to continue to attract and retain members with outstanding personal qualities and community standing. In any event, the remuneration offered to the lay participants should be the same as that offered to the professional members on the same body.

CONFIDENTIALITY AND THE PROTECTION OF COMMUNICATIONS

Confidentiality and investigative procedures

4.76 The *Legal Profession Act* 1987 contains no provisions which expressly deal with the question of privilege from discovery of confidential material gathered or produced in the course of investigations, trust account inspections or other aspects of the administration of the disciplinary process. There is no doubt that a public interest immunity attaches to confidential documents and other confidential communications gathered in the course of an investigation into a complaint against a legal practitioner, or a review of the handling of that complaint.[104] This immunity is based on the public interest in the maintenance of a body of competent barristers and solicitors with high ethical standards and on the availability of a proper system of handling complaints against lawyers.[105] The public interest immunity amounts to a *qualified* privilege, however, and not an absolute privilege against discovery. For example, disclosure can not be resisted if the material is necessary for the defence of a person charged with a criminal offence. With respect to civil litigation, the disclosure of the documents is subject to a "balancing exercise" in each case, weighing the detriment to the public interest involved in the disclosure of the material against the detriment involved in denying a litigant access to material relevant to the prosecution or defence of his or her case.[106] Consequently, this sensitive material is arguably open to subpoena in any State court (eg, for the purposes of a negligence action) or Federal court (eg, upon application by the Australian Taxation Office or the National Crimes Authority).[107] The policy of the professional

associations is to resist to the highest level the release of investigative files on public interest grounds, but this has not always been successful.[108]

4.77 There are similar issues with respect to Freedom of Information. Concern over whether Freedom of Information principles apply to the Conduct Review Panel led the Bar Association to refuse to turn over any files to that body for over three years, prohibiting any external review of the handling of complaints against barristers by the Bar Council for that period despite the requirements of the Act. Under the *Freedom of Information Act* 1989 (NSW) (hereafter, the "FOI Act"), the principal objects[109] are to allow wider public access to the rules and practices of Government and to permit individuals to check the accuracy of information about them held in the files and databases of public agencies.[110] Certain documents are exempt from discovery under the FOI Act, including documents affecting law enforcement or public safety, documents affecting personal or business affairs, documents relating to judicial functions, and documents concerning the operations of public agencies.[111] This *may* cover most communications made in connection with the disciplinary process, but the exemption must be claimed, argued and proved in each case. The FOI Act also exempts specified bodies, wholly or in part, from the operations of the Act, including the Director of Public Prosecutions (wholly), the Independent Commission Against Corruption (wholly), and the Ombudsman (in respect of complaints-handling and investigations).[112]

4.78 The absence of clear provisions on the question of privilege has several important negative consequences for the investigation of complaints against legal practitioners. In Chapter 5, the Commission proposes that the complaints-handling agency - whether this continues to be the professional associations or a Complaints Commission or a Legal Services Ombudsman - be given increased powers to compel the production of files, documents and other material, and be directed to take an active approach to investigation rather than largely relying upon voluntary disclosure of information from the respondent lawyer. It would be difficult to justify these increased powers, however - or even to expect a reasonable level of voluntary disclosure - if the material may be discovered by subpoena or under FOI. For example, a solicitor may prejudice his or her rights under professional indemnity insurance by answering a complaint in a full and frank manner which effectively makes admissions about liability for negligence. At a minimum, delays may be occasioned while the lawyer seeks legal advice from the insurer about how to answer the complaint, and candour may be compromised by financial considerations. Even more difficult issues arise in respect of the disclosure of material which raises the possibility of criminal liability.

4.79 The disciplinary process should not be used as a form of discovery in contemplation of civil litigation, nor as a means of commercial debt recovery. There is a strong public interest in ensuring that the investigation of complaints against lawyers is conducted in a thorough, active manner, and that lawyers are under an obligation to be candid with the disciplinary authorities. Confidentiality is an essential part of any *investigative* procedure, while subsequent proceedings should, to the greatest extent possible, be subject to principles of open justice. The confidentiality of other investigative agencies, such as the police, the Director of Public Prosecutions, Independent Commission Against Commission, and the Ombudsman is already recognised in the FOI Act. The Commission proposes that the investigation of complaints against legal practitioners be treated in the same way, and be given express protection in the *Legal Profession Act* and the *Freedom of Information Act*.

Confidentiality and mediation

4.80 As discussed above,[113] there is a strong trend towards the use of mediation and other informal conflict resolution techniques to settle disputes between lawyers and clients. This raises confidentiality issues outside of

the more formal disciplinary system. Under the voluntary mediation scheme currently operated by the Law Society, the complainant and the respondent lawyer are asked to sign a standard confidentiality agreement (which is drafted in Plain English) , although the parties may agree to waive this. Unless the mediation process is confidential or "without prejudice", it is unlikely to achieve its purpose, as the parties should be encouraged to be candid and lawyers may wish to offer a settlement even if they do not believe that they are at fault, legally or otherwise.

4.81 Confidentiality provisions, thus, should cover the mediation process as well as the mediator. That is, as a general matter, the mediator should not be able to called at a subsequent proceeding to testify about any communication made in connection with the mediation process. For example, conferences with court counsellors and welfare officers which occur as part of the processes of the Family Court are made expressly privileged under the *Family Law Act*.[114]

Qualification in the case of certain disclosures?

4.82 There are sometimes exceptions made to the general rule about confidentiality. To use the Family Court mediation example again, recent amendments to the legislation now oblige court counsellors and welfare officers to report any reasonable suspicions about child abuse to the appropriate authorities.[115] In the legal complaints context, the parallel circumstance may be the present requirement that solicitors are required to report (to the President of the Law Society) any reasonable suspicion that another solicitor has dealt with trust money or controlled money in a manner that may be dishonest or irregular.[116] The Commission proposes that admissions or communications which reveal such alleged dishonesty or irregularities should not be subject to confidentiality or privilege.

THE ENHANCEMENT OF PROFESSIONAL STANDARDS

Feedback from the disciplinary system

4.83 The existing disciplinary system for lawyers, in common with most quasi-judicial systems, proceeds on a case-by-case basis with the focus on the handling of individual complaints. There is no person or institution charged with maintaining an overview of the whole process, to ascertain trends in the demography or subject matter of complaints or to make recommendations about changes in legal education or practice aimed at remedying common problems. By way of contrast, the Complaints Unit of the Department of Health sees one of its major roles as monitoring the whole system of health care provision as well as processing individual complaints against doctors and other health care providers. The Complaints Unit has developed a sophisticated, computerised data base which can cross-reference the information using a number of variables. For example, the data base can provide information about trends in complaints according to geographic region, area health authority, medical speciality, hospital, and so on. The information gained may then be fed back to the specialist medical colleges, the Department of Health, hospitals and others in order to address specific concerns and to assist in education and policy development. Whatever mode of regulation is adopted after this inquiry, the Commission believes that this feature should be integral to the system.

4.84 At present, the decisions of the Disciplinary Tribunal are published, but the decisions of the Standards Board are not. In Victoria, the same situation generally applies, but the Lay Observer has taken to publishing the results of proceedings before the Standards Board with the names and other identifying material removed. This allows practitioners to become familiar with the sorts of conduct which is found to constitute unsatisfactory professional conduct, and the sorts of sanctions which are applied in the circumstances. This approach is quite common in the United States as well, where State Bar journals publish this information. In New South Wales, the Chief Executive Officer of the Law Society does from time to time gather up some of the more interesting Standards Board determinations and publishes a summary of them (without identifying material) in the *Law Society Journal*. Consideration should be given to doing this on a regular basis.

The provision of ethics information and advice to practitioners

4.85 Many of the complaints made about lawyers involve allegations of discourtesy or dishonesty, and the most effective antidote to this sort of conduct is a disciplinary system which reacts promptly, consistently, and firmly to professional misbehaviour. However, there also are many situations in which lawyers find themselves in difficult ethical quandaries which are not easily solved by a resort to "common sense" or old canons of conduct. The nature and organisation of legal work in Australia both have changed very dramatically in recent decades with, among other things, the emergence of new areas of legal practice, greater specialisation, substantial growth in the employment of lawyers in the public sector, increased national and international practice, and the rise of the "mega-firm" of solicitors.[117] The old paradigm of legal practice - the private solicitor in a small firm or sole practitioner dealing with relatively routine matters for individual clients - no longer holds true for a great many lawyers, and the ethical standards of the profession must develop accordingly.

Codes of Ethics

4.86 One obvious way to provide general information to legal practitioners about ethics and professional responsibility is for the professional associations to produce Codes of Ethics and Codes of Practice. The New South Wales Bar Association has produced for some time a set of Rules for barristers. The Law Society has included a considerable amount of material on ethics in the loose leaf service that is provided to all solicitors,[118] in the form of textual discussion, annotated legislation, rules and regulations, and a collection of ethical rulings, practice guidelines and special bulletins from the Law Society Council. The Law Society also is now in the process of formulating a comprehensive Ethics Code for solicitors, with the final version expected in the middle of the year. Such developments obviously are to be encouraged, particularly to the extent that a practical, modern, *client-centred* approach is taken. One common criticism of the traditional approach to professional ethics has been that:

> By far the most attention is paid ... [to] detailing the professional's obligations to his colleagues, to matter of etiquette between colleagues, and to carrying his professional practice in ways which do not infringe colleague-prerogatives or give him a professional (especially an economic) advantage.[119]

While there is a need to preserve professional comity, legal ethics should be about defining and encouraging the provision of proper services to clients, having regard to general concerns about candour, fairness, and social

responsibility. Ethical behaviour, for example, will sometimes require counselling clients that they may *not* pursue a certain course of action.

Ethics Hotlines

4.87 Another means of providing immediate advice or information to legal practitioners is through the institution of a "Ethics Hotline" by the professional associations. Such hotlines, which are in common use in the United States, offer free advice by senior lawyers who are expert in ethics to legal practitioners who want immediate, confidential, independent advice about their ethical position in a given situation. It may often be the case that a lawyer faced with an ethical dilemma will feel that he or she has no one to speak to, and it is inappropriate or improper (eg, for reasons of client confidentiality) to discuss the matter openly with professional associates. In California, the State Bar's Office of Professional Competence, Planning and Development[120] has established an Ethics Hotline which is highly regarded and heavily utilised. In 1990, the Hotline handled 22,000 calls from lawyers, which amounts to one inquiry from every six lawyers in that state.

4.88 A hotline mechanism will be of particular assistance to solicitors in small firms and sole practices, where it is very difficult to get an independent or "outside" opinion. Although the most striking trend in the legal profession is the growth in the number and size of the "mega-firms", it is still the case that solicitors overwhelmingly practice in small firms. According to the Law Society, nine out of ten firms have five or fewer solicitors, and 97% of suburban firms fall into this category.[121]

Ethics committees and internal Ombudsman

4.89 In recent times concerns have been widely expressed within and outside the legal profession that the pronounced trend toward "corporatisation" of the large firms of solicitors ("mega-firms"), in which the traditional structure of a "partnership of equals" is being replaced by specialised management structures which borrow from the commercial world, could result in the further subordination of ethical or professional concerns in relation to commercial ones. The Commission believes that the larger firms should be encouraged, if not required, to establish internal Ethics Committees which have a real role in policy-making and in advising on particular ethical issues, such as on questions of confidentiality, conflicts of interest, and possible contravention of social obligations. Earlier in this Paper, we considered the possibility that courts and disciplinary bodies might be given the power to order such developments, where the evidence indicated a systemic problem.[122]

4.90 The Commission understands that it is now a practice requirement in England and Wales under the Law Society's "Client Care" scheme for each firm of solicitors (of whatever size) to designate a senior lawyer as the complaints officer or to establish some other in-house complaints handling procedure, to deal with matters initially and to liaise with the appropriate bodies and officers in the disciplinary system.[123]

4.91 Serious consideration must also be given to the use of external or independent members on the Ethics Committees, perhaps in the form of an internal Ombudsman. Matters of confidentiality and commercial sensitivity would prevent the use of practising lawyers in this capacity, but the position could no doubt be filled from among the ranks of senior academics, retired judges and others with sufficient legal expertise and sensitivity to the imperatives of professional practice. All law firms, and especially the larger ones, should examine their

in-house training programs and the sufficiency of the supervision placed on new or inexperienced solicitors and other staff.

A Director of Professional Standards?

4.92 In the Commission's earlier work on the legal profession, we briefly considered the establishment of the position of "Director of Professional Standards", with responsibility for the receipt and investigation of complaints.[124] The idea was not taken up in the Commission' eventual recommendations. However, reconsideration of the establishment of such a position may be timely, if the Director has a much more general brief to assist in the enhancement of professional ethics and standards of conduct. In Option 3, below, this function would likely be subsumed in the responsibilities of the Legal Services Ombudsman. In the present Option, this function could be assumed by the chairperson of the re-vamped Conduct Review Panel (or Lay Observer, as the Law Society prefers), or else special provision would need to be made for such a position (including financial provision).

Ethics as part of a basic legal education

4.93 In order to qualify for admission to practice law in New South Wales, a person must satisfy the Joint Qualifications Committee of the Supreme Court that he or she has a sufficient educational background in law. This is typically achieved by evidence of a University law degree (LL B) or a diploma from the Admission Board. In the case of solicitors, successful completion of the postgraduate certificate course offered by the College of Law is also required. New barristers are obliged to undergo a "reading" course run by the Bar Association in order to gain an unrestricted practising certificate. Clearly, then, one important way of educating aspiring lawyers about legal ethics and professional (and social) responsibility is through the existing systems of academic and practical legal training.

4.94 Among the University law schools in this state, only the University of New South Wales (UNSW) and the University of Wollongong have compulsory subjects exclusively dedicated to the legal profession, legal ethics and professional responsibility. The new law school at the University of Newcastle, which takes its first students next year, is planning the introduction of a later-year compulsory subject along similar lines. The University of Technology, Sydney (UTS), offers nine "skills subjects" from which students are require to complete any three. Two of the subjects are "The Legal Profession" and "Legal Ethics", and although students are not obliged to choose these subjects, the law school reports that Legal Ethics, which focuses on the position of advocates, is a popular option.

4.95 The law schools at the University of Sydney, the Australian National University (ANU), and Macquarie University, do not currently require students to take any subjects in this area, although elective subjects are sometimes available, and issues of ethics and professional responsibility naturally may arise interstitially in other subjects.[125] The Admissions Board course requires students to complete subjects on Legal Ethics and Trust Accounting, but the quality of this program often has been called into question.[126] The College of Law's Practical Legal Training course includes eight sessions on Professional Responsibility spread throughout the course, and the Bar Association's reading program includes a two-hour lecture on Ethics and an examination, but neither course comes close to satisfying the requirements for a lawyer's complete education in this area.

4.96 The position in New South Wales is, perhaps, somewhat better than in other states. Among the established law schools, only the University of Tasmania has a compulsory subject on legal ethics, although the newer law schools appear to be more open to the idea of providing training in this area. The Pearce Committee inquiry on legal education in Australia surveyed recent law graduates for its 1987 report to the federal government, and found that only two law schools in Australia (Macquarie and UNSW) had a majority of graduates (surveyed) who reported that they were "stimulated by their law courses to think of the social, political and ethical dimensions of legal issues". Nearly three-quarters of graduates surveyed expressed the view that it was the role of the university law school to teach professional and ethical standards, but only one-third believed their own law course had made a substantial contribution in this area.[127]

4.97 By way of contrast, courses on professional responsibility are available in virtually every American and Canadian law school, and are compulsory in many. Most American states also require applicants for admission to practise law to successfully complete an examination on professional responsibility as part of the system of "Bar exams".[128]

4.98 The Commission believes that the study of legal ethics and professional responsibility should be an integral part of any law school program, whether this involves mounting a discrete, compulsory subject or dealing with these questions as a significant part of a larger subject. It is only during this formative period in a lawyer's education that there is the opportunity for sustained study, discussion and reflection. Consideration should also be given to the institution of a requirement of successful completion of an examination on legal ethics and professional responsibility in New South Wales as a condition of admission to legal practice.

Continuing and further education

4.99 The foundations of understanding of professional responsibility gained at law school must be regularly reinforced in practice. In New South Wales, there is now a Mandatory Continuing Legal Education (MCLE) requirement imposed on solicitors by the Law Society requiring eight hours per year of continuing education,[129] in order to maintain a current practising certificate.[130] It may be that part of this requirement - or perhaps an additional requirement - should be continuing education in the area of professional responsibility. Again, this is an area that barristers' chambers and the larger firms, at least, could consider handling on a regular, in-house basis. There is no MCLE requirement for barristers at present. The Commission would be interested in receiving comments or submissions on this issue.

4.100 *CLE as a disciplinary sanction.* It was suggested above that the various bodies with disciplinary responsibilities - the professional Councils, the Standards Board, the Disciplinary Tribunal (and the Courts) - should have far more flexibility to fashion appropriate orders, penalties and remedies where the conduct of legal practitioners fall short of the expected standards. For example, it should be possible to place appropriately customised conditions on a barrister's or solicitor's practising certificate. One order which should be utilised, whether as a direct sanction or as a condition of maintaining a practising certificate, is that the lawyer involved undertake and successfully complete an approved course of continuing or further education relating *specifically* to legal ethics and professional responsibility.[131]

4.101 In California, the State Bar has established an "Ethics School" for the purpose of facilitating such orders, and lawyers in that state may be required to attend for a specified period of time and successfully complete a designated program at the School. The Commission can see some virtues in the establishment of a similar institution in New South Wales, although it is recognised that this State has only about 5% the number of lawyers that California has, and economies of scale may limit such innovations here. Nevertheless, this is a matter worthy of consideration, perhaps in conjunction with associations representing other professions and with bodies devoted to ethical training, such as the St James' Ethics Centre in Sydney.

Specialist accreditation

4.102 In our earlier work on the legal profession, the Commission considered the benefits to both consumers and lawyers of specialisation, and the introduction of specialist accreditation schemes, and generally endorsed movements in this direction.[132] The Commission identified the advantages of specialisation as follows:

> [The] benefits relate partly to the speed and cost of legal services ... [b]ut they relate also to quality of service. A practitioner who is specially familiar with a field is less likely to be unaware of, or to misinterpret, the relevant law and practice. Moreover, detailed knowledge of official procedures and personalities in a particular field is often of great importance. These advantages of specialisation have increased in significance as the growing complexity and diversity of Australian society has been reflected in the laws and legal system by which we are governed. The emergence of new fields of practice, and the rapid changes in law and technique in many traditional fields, have made it increasingly difficult for a practitioner to provide skilled service across a wide range of areas. Furthermore, specialisation enables lawyers to restrict their work largely to those fields which interest them most or to which their talents are best suited. Increased job satisfaction can improve greatly the quality of a practitioner's work.[133]

4.103 As a general matter, specialisation is likely to improve the quality of services available to consumers, assist consumers to identify the particular lawyer or legal firm that they wish to retain, and enhance the standards and levels of satisfaction of the legal profession. The Law Society's plans to develop a specialist accreditation scheme are at an advanced stage,[134] and the Commission supports and encourages such developments.

FUNDING THE REGULATION OF LAWYERS

Present and possible sources of funding

The Statutory Interest Account

4.104 All solicitors are obliged to deposit with the Law Society a portion of the funds held in their trust accounts.[135] The interest income on this Statutory Interest Account amounts to about $7-10 million per year and is used, among other things, to pay for the costs of running the disciplinary system - that is, the costs of the Law Society and Bar Councils and their committees and departments involved in the investigation of complaints,[136] the costs of operating the Standards Board, Disciplinary Tribunal and Conduct Review Panel, and any other costs (eg court actions) involved in prosecuting "unqualified practitioners"[137] or lawyers whose professional conduct has been complained about.[138] Other disbursements from this Account are made for the purposes of legal aid, the supplementation of the Fidelity Fund, legal education, the Law Foundation, and the operation of the Legal Fees and Costs Board.[139] The disbursement of funds from the Statutory Interest Account is "determined" by the Law Society Council and "approved" by the Attorney General.[140]

4.105 The Law Society also maintains another special trust fund, known as the Law Society's Solicitors Trust Accounts Fund,[141] which accrues the interest income on residual funds held in solicitors' trust accounts. The trustees of this Account are the President and Treasurer of the Law Society and a nominee of the Attorney General. The fund is "applied to purposes similar to those of the statutory interest account".[142]

Practising certificate fees

4.106 In contrast with the position in New South Wales, the rather elaborate and expensive disciplinary system in California[143] is paid for entirely by the legal profession itself, out of annual membership dues (the equivalent of fees paid for practising certificates in New South Wales). The Legal Services Trust Fund Program in California, which is the equivalent of the Statutory Interest Account, devotes its resources exclusively to funding legal aid and *pro bono publico* (public interest) programs. This approach is based on the notion that, given the high level of self-regulation and the profession's self-interest in maintaining its reputation and standards, the principal responsibility for funding the regulatory system should lie with the profession through its own system of licensing fees.

Consolidated Revenue

4.107 At the opposite end of the spectrum, the budget of the New South Wales Department of Health's Complaints Unit comes entirely from Consolidated Revenue, with no direct contribution from the medical profession or other health care professionals. It is anticipated that the same position will obtain after the reconstitution of the Complaints Unit as an independent Health Care Complaints Commission.

4.108 This approach is based on the notion that the regulation of health care professionals is a matter of general public interest of sufficient importance to warrant the expenditure of public funds. Having given up their own regulatory responsibilities to an independent body, the medical and allied health professions have likewise been relieved of the responsibility for funding the system. Unlike lawyers, of course, health care professionals do not hold clients' funds in trust, and thus there is no equivalent ancillary source of funding.

Relationship with the different regulatory options

Costing the different Options

4.109 In the next Chapter, the Commission presents three regulatory Options for consideration: (1) improvement of the present system, which places most of the responsibilities with the Law Society and Bar Association, their Councils, and various committees and staff; (2) the replacement of professional associations by an independent Legal Services Complaints Commission based on the model currently used to regulate doctors and most other health professionals; and (3) the establishment of an office of Legal Services Ombudsman, which would handle the initial intake and investigation of complaints (replacing the professional associations in this respect) and provide an external check on the subsequent processing of complaints by the professional Councils.

4.110 Given the range of suggested improvements to the existing system (Option One), and the replacement of some volunteers by paid staff in the other two Options, it is possible that whichever Option is preferred there will need to be additional funds provided for its successful operation. It is not at all obvious, however, that any of the Options is more or less expensive than the others. The current annual budget for the disciplinary system covering over 11,000 solicitors in New South Wales is "in excess of $2.6 million", excluding "the costs of various Investigators and Receivers".[144] The current annual budget for the Health Complaints Unit, which covers 20,000 doctors, 80,000 nurses and 300,000 other health care providers, is $2.5 million. The Commission is not suggesting that an independent investigative commission is *necessarily* more efficient, but nor is it clear that such a body is inevitably more expensive.

Access to the Statutory Interest Account and other sources

4.111 As discussed above, the funding of the administration of the current disciplinary system, including the activities of the professional Councils, is drawn entirely from the interest on *clients' moneys* which are under the temporary control of solicitors and the Law Society. Although the profession tends to view the Statutory Interest Account with a proprietorial eye, it must be emphasised that if the interest income on trust money is not to be returned directly to clients on a *pro rata* basis, this income must be disbursed for the benefit of the general public rather than for the benefit of the profession. Consequently, this source of funding should be equally available whichever of the three Options presented in Chapter 5 is ultimately preferred. Given that a Legal Services Ombudsman or a Legal Services Complaints Commission would supplant the role of the Councils and their committees and staff in varying degrees, the entitlement to this source of funding could be shifted accordingly.

4.112 The Commission believes it is worth raising the question, however, about whether the Statutory Interest Account should continue to be used to pay for all or part of the disciplinary system. Any contribution made by legal practitioners towards funding the disciplinary system would free up the equivalent amount for application for other public purposes, such as for the provision of legal aid or for community legal education. Consideration should be given to whether a portion of barristers' and solicitors' practising certificate fees be applied for, or an additional levy made for, the purposes of funding the regulatory system, including those measures which are aimed at the enhancement of professional standards and the prevention of substandard or unethical professional conduct as well as the system of handling complaints.

4.113 There is also a question about whether the general revenue should be committed for these purposes, as is presently the case with the regulation of health care professionals. Arguably, the community has as great an interest in the proper and effective regulation of lawyers as it does in the regulation of doctors.

4.114 It may be that the sliding scale of relative "independence" of the three proffered Options should also serve as a guide to the source of funding. The more control that the profession has over its own regulation, the stronger the argument that the profession should itself contribute to the costs of the process through practising certificate fees; conversely, to the extent that regulatory responsibilities may be vested in an independent agency, the argument for public funding through the Statutory Interest Account or Consolidated Revenue gains strength.

DISPUTES OVER FEES AND COSTS

The present system

4.115 The issue of barristers' and solicitors' remuneration[145] is not explicitly part of the Commission's terms of reference for this inquiry. However, disputes about legal fees, costs and disbursements do represent a significant proportion of the complaints received by the professional associations about lawyers.[146]

4.116 Under the *Legal Profession Act*, a solicitor may not sue for costs until at least one month after the delivery of a bill of costs to the client.[147] The Supreme Court may order a solicitor to provide a detailed bill of costs to a client, and may order the surrender of documents held pursuant to a solicitor's lien.[148] In the event of a dispute about the amount of the bill, a client may apply to the Supreme Court to have the bill "taxed" (appraised) by Court officers.[149] If the bill is reduced by a factor of at least one-sixth by taxation officers, the client has "won", and the losing party bears the expenses of the process.[150]

4.117 It is widely accepted that taxation is a cumbersome, little-understood, and generally unsatisfactory method of resolving disputes about fees and costs.[151] It is well beyond the reach of most clients to initiate an action in the Supreme Court simply to require a solicitor to render a proper bill of costs, or to have a lien lifted, or to have the fairness or otherwise of a bill of costs assessed. Nor is there any special reason why, if the formal Courts must play a role, such matters could not be heard in the lower courts. Alternatively, the resolution of fee disputes could be entrusted to the Standards Board and Disciplinary Tribunal, with increased powers and resources given to the Registrar.

The Working Party on Legal Costs

4.118 A Working Party on Legal Costs has been established by the Attorney General, with representation from the Attorney General's Department and the profession. It is understood that the Working Party is moving

towards: (1) the abolition of the Legal Fees and Costs Board, which sets fee scales for non-contentious matters (such as conveyancing) subject to Parliamentary disallowance (in the manner of a regulation), and its replacement by indicative (non-compulsory) fee schedules issued by the Law Society; and (2) the abolition of the taxation system, and its replacement with a two-phase system of mediation and determination. Under this proposed system, all fee disputes would initially be subject to mandatory mediation between lawyer and client; in the event that the dispute is not consensually resolved by mediation, it would be heard promptly by a Fee Review Panel designed to provide a relatively informal and inexpensive summary determination.

4.119 The Commission is in general accord with this approach and considers that these developments make it unnecessary for us to review this area in further detail at this time. However, there are two matters which may warrant the Commission's later attention if they are not adequately dealt with by the process in train. These matters are set out below.

Preventive measures: disclosure and fee agreements

4.120 Any system designed to reduce the level of conflict between lawyers and clients over fees must address the *prevention* of such disputes as well as prompt and effective resolution. This is best achieved by ensuring that there is clearly communicated, "up-front", written disclosure to clients (and prospective clients) of all reasonably foreseeable fees, costs and disbursements, followed by written fee agreements in Plain English. These documents should include information about the scope of the retainer, the basis of charges, the nature of disbursements, the method by which clients will be kept informed of the progress of the matter and the accrual of costs, and a contact person in the event of questions or problems. This "Client Care" approach was adopted by the Law Society of England and Wales about one year ago,[152] and appears to be working well.

4.121 Similarly, every bill of costs rendered by a legal practitioner should contain a clear, brief statement at the end about what to do in the event of any question or problem, and how to seek external review.

Assessment of barristers' fees

4.122 At present, and traditionally, there is no taxation of barristers fees' available. This is based on the premises that there is no direct relationship between clients and barristers, and that solicitors are best positioned to determine whether to engage a particular barrister and at what cost. The Commission believes that consideration should be given to treating barristers' fees and solicitors' fees in the same manner and resolving fee disputes using the same processes. The Bar Association reports almost precisely the same proportion of complaints received about fee disputes as does the Law Society over the past four years.[153] Few clients will appreciate the details and nuances of the divided profession, and it is not clear why, in the contemporary regulatory environment, barristers' fees alone are exempt from review. Section 195 of the Act permits the making of a remuneration agreement between *solicitor* and client in respect of non-contentious business, and s197 permits the Supreme Court to enforce, vary or set aside any such agreement. In respect of contentious business, the Supreme Court Rules provide for the taxation of a solicitor's bill of costs, but there is no provision for the taxation or other review of a fee agreement between a barrister and a client (made through a solicitor).[154]

It may be that the rules should be the same in respect of contentious and non-contentious business, and in respect of solicitors and barristers.

OTHER MATTERS

Why are there so few complaints against barristers?

4.123 One of the most striking features of the statistical profile of the complaints system is the relative rarity of complaints against barristers. In 1990, there were 1245 complaints lodged with the Law Society against solicitors and solicitors' firms, while only 89 complaints were lodged with the Bar Association against barristers. Even allowing for the much larger number of active solicitors, there were still twice as many complaints lodged against solicitors on a per capita basis.[155] Despite the wealth of anecdotal evidence from within the profession and the judiciary about instances of poor performance on the part of barristers, this does not translate into formal complaints.

4.124 The Commission noticed this phenomenon in its previous inquiry into the legal profession. At that time, the Commission was only able to find 48 complaints filed against barristers in the three-year period 1975-1977.[156] The relative infrequency of complaints made against barristers appears to be a general feature of the divided profession. In England "there are less than a fifth as many complaints per practising barrister as there are complaints per practising solicitor".[157]

4.125 There are some ready explanations for the imbalance in complaints. The average solicitor is likely to handle a much greater number of client transactions per year than the average barrister, increasing the odds of receiving a complaint. Barristers do not handle clients' money, do not directly bill clients, and have little or no contact with clients which is not mediated through the solicitor. Further, few clients are in a position to assess the quality of advocacy, the thoroughness of preparation, the tactical wisdom, or other performance standards on the part of their barristers.[158] Abel has noted that in England, the "fact that nearly a quarter of complaints [against barristers] are filed by prisoners suggests that complaining is an act of desperation by those with low opportunity costs".[159]

4.126 Although other lawyers are in the best position to discern and report misconduct on the part of barristers, they do not do so with regularity. In New South Wales in 1990, two-thirds (66%) of complaints against barristers came from members of the public (including clients and former clients), with only 18% from solicitors, 12% from barristers and three percent from judges.[160] The experience in England is roughly similar, although judges and court officials there account for about 14% of complaints.[161]

4.127 The Commission would be interested in receiving submissions on the question whether a greater onus ought to be placed on legal professionals and on judges and court officials to report instances of perceived unsatisfactory professional conduct and professional misconduct on the part of barristers. One problem in this regard may be that the complaints of judges would be given too much weight, raising natural justice issues.

However, as a general matter, it seems unlikely that the professional standards of barristers can be effectively monitored, much less raised, without the more active cooperation of the profession in reporting poor work.

Solicitors' liens

4.128 A number of individual submissions as well as the submissions of the Australian Consumers' Association (ACA) and the NSW Combined Community Legal Centres Group (CCLCG) called into question the fairness of the common law "solicitor's lien", whereby a solicitor may withhold all files, documents and other personal property of the client from the client until the solicitor's bill of costs has been paid in full[162] or there is a Supreme Court order requiring the solicitor to give up the documents.[163] The ACA's submission states that: "The present lien which solicitors have over files until fees are paid is a substantial barrier to consumers being able to seek advice, complain, or take action against their previous lawyer. This barrier to accountability needs to be removed."[164] The CCLCG submission identifies a particular problem with "the use of liens in disputes involving costs to impede access to documents necessary if the client is to obtain a second opinion about the matter".[165]

4.129 Solicitors' liens can be a considerable source of tension in circumstances in which the client is already dissatisfied with the standard of service being provided. Solicitors have as much right to receive payment for their work as any other service-provider, but they do not deserve any *special* privileges in this regard. The dispute - and the relevant files and documents - belong to the client and not to the solicitor. Solicitors have access to the courts to recover unpaid fees, and are obviously in a better position than clients to make the running in a civil action. Serious consideration should be given to the abolition of solicitors' liens, or closer supervision by the courts. The legitimate interests of solicitors also may be protected in other ways, such as by giving the first solicitor in a personal injury case a charge for the amount of the taxed or agreed costs upon the judgment money.

Limitation period on complaints

4.130 The Bar Association's submission recommends the institution of a limitation period for the lodgment of complaints of six months from the time when the complainant became aware of the conduct which is the subject of the complaint. In appropriate cases, late complaints could be considered with the leave of the Council. In support of this submission, the Bar Association refers to the obvious problems in trying to defend allegations which are based upon events which occurred some time in the past.[166]

4.131 As discussed above, one of the most frequently cited problems with the legal disciplinary system has been delay in the *processing* of complaints, including review of decisions, rather than delay in the *lodgment* of complaints. The Commission is not aware of particular cases in which practitioners have been forced, to their disadvantage, to defend "stale" allegations of unsatisfactory professional conduct or professional misconduct. We suggest in Chapter 5 that time constraints ought to be built into the system to assure the expeditious processing of complaints. Nevertheless, the Commission accepts that some limitations period ought to be considered, subject to extension in appropriate cases, particularly where the allegations go to the more serious

charge of professional misconduct. Even if this were not expressly included in the legislation, it is likely that the courts would develop the principle in this context by reference to the recent run of "abuse of process" decisions involving disciplinary proceedings.[167] The legislative prescription of the time period is preferable from the point of view of certainty. As for the period itself, six months may be far too short; rather, the limitations period should be on the order of three years, or perhaps even six years - the limitations period which obtains in respect of civil actions for professional negligence.[168] The Commission notes that in Victoria, the time limit for complaints in respect of a bill of costs is six months, but for all other types of complaints the time limit is six years. Submissions on this point would be welcomed.

The clarification of transitional provisions

4.132 Complaints about the conduct of legal practitioners which occurred before the entry into force of the Legal Profession Act 1987 (in January 1988) raise some difficulties. The Act, unfortunately, does not contain clear transitional provisions to deal with such cases. In practice, complaints which raise issues going to professional misconduct are being dealt with, since this was recognised prior to the Act by both the common law and the earlier legislation. However, there is less certainty about what to do with complaints which allege, in effect, unsatisfactory professional conduct, a head of professional impropriety which did not explicitly exist under the earlier law. This is obviously a problem which will invariably diminish over the next few years, but it is not yet a moot point. In 1990, the Bar Association still received five complaints (out of 84, or 6%) which related to pre-1988 events.[169] The Commission proposes that Schedule 8 of the Act be amended to make clear that these complaints - whether about professional misconduct or unsatisfactory professional conduct - may be dealt by the Councils, the Standards Board and the Disciplinary Tribunal, subject to whatever general limitation period is adopted.

Requiring the legal practitioner to plead

4.133 Under the present scheme, there is no statutory requirement for the legal practitioner to "plead" with respect to any allegations made against him or her. The submission of the Bar Association suggests that as a result of this failure, "a lot of unnecessary costs are incurred in that the matters have to be prepared on the basis that everything in the Complaint is in issue", and that "it would save time and costs to require the barrister to file a Reply to the Complaint."[170]

4.134 As discussed in more detail in the next Chapter, there are serious concerns about delays in the handling of complaints, many of which stem from the unresponsiveness of legal practitioners to complaints forwarded to them by the professional associations. The disciplinary process probably would be expedited and facilitated by requiring legal practitioners to formally respond to complaints (to "plead") in a timely fashion and in a manner which serves to narrow the issues for investigation and hearing. The legal practitioner's candour - or lack of candour - in this respect should itself be matter for consideration by the disciplinary authorities.

FOOTNOTES

1. See D Weisbrot, *Australian Lawyers* (1990) at 210-216. (Hereafter, "Weisbrot".)

2. See Weisbrot, Ch 7: "The Changing Face of Legal Practice".

3. See N Christie, "Conflicts as Property" (1977) 17 British Journal of Criminology 1, and L Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353.

4. There is a terminological problem in the *Legal Profession Act* 1987 in that "complainant" is used to refer to both the individual who makes the original complaint (under s130) and the professional Council which takes up the complaint and subsequently refers it to the Standards Board or the Disciplinary Tribunal for determination (under s134). A Council also may commence an investigation on its own motion (under s135). This may cause confusion where a member of the public hears the Law Society or Bar Council referred to as the complainant. It also confuses the position regarding the enforcement of a compensation order made under s163, for the benefit of "the complainant". The Law Society has suggested, and the Commission agrees, that the Act should be amended to clarify that the "complainant" is the maker of the original complaint, while the Council which refers the complaint to a disciplinary body should be the "informant".

5. See Chapter 3 for a discussion of the system in Victoria.

6. Justice Slattery's main recommendations in this area were that: (1) All causes of action for defamation or malicious prosecution for communication or actions referring to the professional conduct of any mental health professional should be abolished; and (2) Those who take part in the decision-making process - professional bodies, boards, Complaints Units and so on - should be granted either absolute privilege subject to claims for intentional malice or recklessness or alternatively should be granted qualified privilege.

7. *Report of the Commission on Evaluation of Disciplinary Enforcement to the American Bar Association* (May 1991) (hereafter, "ABA Report"), at 28.

8. *Legal Profession Act* 1987 (NSW), s131. Unless otherwise indicated, all section references in this chapter refer to the *Legal Profession Act*.

9. Under the *Oaths Act* 1900 (NSW), s25, it is a misdemeanour if a person "wilfully and corruptly makes any such declaration, knowing the same to be untrue in any material particular".

10. ABA Report, at 28.

11. No. 111 of 1987, Sch 1.

12. *Defamation Act* 1974 (NSW), s17J(1).

13. *Defamation Act*, s24 and Sch 2, cl 16.

14. Sections 172 and 211. Members of conduct committees, acting under delegated authority from the Councils, are also expressly covered by s172(3).

15. Submission of the Law Society of New South Wales, 31 January 1992, (hereafter, the "Law Society submission") Appendix 2, at 12-13. According to the Law Society's figures, 59% in 1988, 65% in 1989, and 60% in 1990. The Law Society does not count in these figures the category of "Matters closed with the consent of the complainant containing no evidence of unsatisfactory professional conduct or professional misconduct resolved between the parties directly or by mediation", which actually amount to dismissals and would bring the total percentage to over 75% in each year.

16. Section 134(3) states that "A Council shall cause its decision with respect to a complaint, together with its reasons for the decision, to be notified to the complainant."

17. ABA Report, at 30.

18. Section 55. The instrument making the appointment must be signed by the President or two members of Council.

19. Section 56.

20. Section 56(5).

21. One possible complexity is that, once a complaint is made against a solicitor and investigated, the report of the investigator may well go far beyond the original complaint. For example, if a solicitor has misapplied the trust funds of one client, and this is detected, it often happens that the investigation reveals the misapplication of the funds of other clients.

22. Section 130(3).

23. Under ss 144 and 158.

24. Sections 144-145.

25. Section 159.

26. Section 131.

27. Section 35(2)(c). There is no similar provision in the Act in respect of barristers, although the *Legal Profession (Practising Certificates) Amendment Bill* 1992, which is presently before Parliament, would give the Bar Council the same powers as the Law Society Council in this regard. Rule 67 of the NSW Bar Association Rules provides that: "A barrister shall comply promptly with every reasonable request for information or explanation by the Council or a Committee of the Council pertaining to his conduct as a barrister, unless the barrister receiving such request informs the Registrar in writing that in his opinion the reply that he would need to make would expose him to prosecution for a criminal offence."

28. Section 134(2). The consent requirement is no doubt present because of natural justice concerns, which require a hearing before punishment, but it nevertheless highlights the general disparity between the level of concern shown for the position of the respondent lawyer and that shown for the complainant.

29. This list is adapted from the recommended Charter in the ABA Report, at 29.

30. The Bar Association reports that this is now its policy: Submission of the New South Wales Bar Association, 20 February 1992, (hereafter, the "Bar Association submission") at 7.

31. Later in this chapter, the Commission considers the merger of these bodies.

32. According to figures supplied by the Bar Association and the Law Society, two-thirds of complaints against barristers and three-quarters of complaints against solicitors in 1990 came from members of the public (usually clients). This excludes the small proportion of cases which are initiated by the professional Councils themselves.

33. Bar Association submission, at 15. The Bar is planning to produce its explanatory brochure provided to complainants in five languages. The Law Society has notified the Commission of its intention to produce its literature in 20 languages.

34. Administrative Review Council, *Report No. 34: Access to Administrative Review By Members of Australia's Ethnic Communities* (1991) at 51. (Hereafter, the "ARC Report".)

35. ARC Report, at 32.

36. Submission of the NSW Combined Community Legal Centres, 28 February, 1992, at 2-3. (Hereafter, the "Community Legal Centres submission".)

37. At 3.

38. New South Wales Law Reform Commission, *Alternative Dispute Resolution: Training and Accreditation of Mediators* (LRC 67, 1991).

39. Bar Association submission, at 16.

40. Submission of the Australian Consumers' Association, 23 December 1991, at 2. (Hereafter, the "ACA submission".)

41. Law Society submission, at para 13.

42. At paras 18-19.

43. Section 134 of the Act.

44. Or, presumably, the Disciplinary Tribunal , in the case of evidence of professional misconduct.

45. Section 134(1)(b) and (1A).

46. At para 22.

47. At para 23.

48. According to the New South Wales Law Society, 80% of matters in Victoria and 85% of matters in England are successfully resolved by mediation.

49. The Victorian experience seems to suggest that the availability of a conciliation procedure, particularly where compensation is a likely outcome, will lead to an increase in the number of complaints filed.

50. Community Legal Centres submission, at 3-4.

51. LRC 67, at paras 4.19-4.20.

52. LRC 67, at para 3.6.

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

54. LRC 32, at para 3.26.

55. This was comprised of 1189 complaints received by the Law Society under s130, and 56 investigations commenced by the Law Society on its own initiative.

56. The true proportion may be even smaller, given that a number of complaints are sometimes aggregated into a single "matter" referred.

57. Involving fewer than 30 legal practitioners.

58. It is interesting to note, by way of contrast, that in the period between 1968-1978 - that is, in the decade before the Commission's previous inquiry into the legal profession - the Law Society and Bar Association between them referred fewer than ten complaints to the Supreme Court, and the Law Society referred fewer than 60 complaints to the Solicitors' Statutory Committee, the predecessor to the Disciplinary Tribunal. See New South Wales Law Reform Commission, *Complaints, Discipline and Professional Standards - Part 1* (DP 2, 1979) at para 5.19.

59. Informally, or under s134(1)(b)(ii).

60. See s134 of the Act.

61. Bar Association submission, at 10-11.

62. David Hunt, Submission on Scrutiny of the Legal Profession, 5 February 1992, at 2.

63. LRC 32, at para 3.26.

64. See paras 4.18-4.20, above.

65. ABA Report, at 23.

66. Section 145. The parties are enumerated in s144. Under s148, the Board may give directions preventing or restricting the release or publication of any information arising from the hearing, with the penalty for breach a fine of up to $2000. Cf s22 of the *Consumer Claims Tribunal Act* 1987, which also provides for claims to be heard in private.

67. Under s149(3).

68. A solicitor may have his or her practising certificate suspended or cancelled for failing to comply with an order of the Board or Tribunal, under s35(2)(e), but this only indirectly assists the complainant to receive the compensation awarded. Barristers are not presently covered by any similar provision, although the *Legal Profession (Practising Certificates) Amendment Bill* 1992 would achieve this effect.

69. Section 159. Section 162 gives the Tribunal the same powers to restrict the release of information given to the Standards Board. See the note immediately above.

70. This wording is taken from the *Supreme Court Act* 1970 (NSW) s80(b).

71. Under s163.

72. Under s149. See para 4.58, below.

73. The *Legal Profession (Practising Certificates) Amendment Bill* 1992, currently before Parliament, would achieve this effect.

74. Bar Association submission, at 10.

75. Under s149(2)(h).

76. The Bar Association's submission makes a similar point, at 11.

77. See ss 91 et seq.

78. There are parallels here with the more innovative sanctions being developed in connection with corporate liability. See B Fisse, "Sentencing Options Against Corporations" (1990) 1 *Criminal Law Forum* 211-258, regarding court-ordered internal discipline and organisational reform.

79. See s149(1)(c) in relation to barristers; s149(2)(i) in relation to solicitors.

80. Section 163(1)(d).

81. Under the *Medical Practitioners Act* 1938 (NSW) s32I.

82. Clause 1317AJ(1)(b). If the act is done knowingly, intentionally or recklessly, and with the intention to defraud or to gain through dishonesty, the person may be fined up to $200,000 and imprisoned for up to five years, under clause 1317AT.

83. Sections 149(3) and 163(3).

84. Section 130(3)-(4).

85. Sections 149(4)(b) and 163(4)(b).

86. Sections 149(4) and 163(4).

87. Sections 149(5) and 163(5).

88. Bar Association submission, at 12.

89. Section 142.

90. Section 128.

91. Section 151.

92. *Legal Profession (Amendment) Act* 1989.

93. See New South Wales Parliamentary Debates (Hansard), 2 August, 1989, at 9144, per the Attorney General, Mr Dowd (Legislative Assembly).

94. See the *Medical Practitioners Act* 1938, ss 32M and 32N.

95. Section 156.

96. ABA Report, Recommendation 2.1, at 6.

97. See DP 2, at paras 5.19-5.24; and LRC 32, at paras 2.15-2.17, 3.19-3.21, 4.4, 6.24-6.25, and 6.36-6.37.

98. DP 2, at para 5.23.

99. See ss 50(4) and 53(4).

100. New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure* (LRC 31, 1982).

101. LRC 32, at para 6.22.

102. Section 58 and Schedule 3.

103. See also the Submission of the Lawyers Reform Association, 8 April 1992, at paras 1.8 and 4.7.

104. See *Borg v Barnes* (1987) 10 NSWLR 734, at 738.

105. At 737-738.

106. At 739-740.

107. In the event of confidentiality provisions in State legislation, the matter becomes one for argument under s109 of the federal Constitution to determine whether State or Commonwealth legislation takes precedence in the particular area.

108. For example, in the *Barnes* case, above, Carruthers J held against the Law Society and the Bar Association and permitted the subpoena of documents produced for the purposes of the disciplinary system but which were relevant to the plaintiff's suit for professional negligence.

109. The *Freedom of Information Act* 1989 (NSW) ("FOI Act"), s5.

110. As defined by s6 of the FOI Act.

111. FOI Act, Sch 1, esp clauses 4, 6, 7, 11 and 16.

112. FOI Act, s9 and Sch 2.

113. See paras 4.28 et seq.

114. *Family Law Act* 1975 (Cth) s62(5).

115. The *Family Law Amendment Act* 1991 (Cth) adds a s70BB(1) to the *Family Law Act*, to this effect.

116. *Legal Profession Regulation* 1987 (NSW), reg 21.

117. See Weisbrot, at Ch 7.

118. F Riley, *New South Wales Solicitors Manual: A Commentary on the Law and Practice Relating to the Profession of the Solicitor in New South Wales*. (Hereafter, "Riley".)

119. B Maley, "Professionalism and professional ethics", in D Edgar (ed), *Social Change in Australia* (1974) 397.

120. In California, the legal profession is merged (ie, there is no division into barristers and solicitors), and the State Bar is the professional body responsible for, among other things, administering the admission examinations, and the continuing education, of all lawyers.

121. Law Society of New South Wales Research and Policy Planning Unit, *Trends in Firm Size, Structure and Growth 1984-1991* (1991). See also N Vithanage, "Movements in firm size: Smaller firms - a threatened species?", (December 1991) 29 Law Society Journal 30-31; and Weisbrot, at 249-266.

122. See para 4.59, above.

123. See (1991) 5 *Law Society's Gazette* 6.

124. DP 2, at para 6.7.

125. For example, there is a segment on "Litigation Ethics" in the compulsory subject Litigation at Macquarie Law School.

126. See the *Report of the Committee of Inquiry into Legal Education in New South Wales* (1979) ("the Bowen Report") ch 7; and D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) ("the Pearce Report") ch 23, esp at 969-970. This material is summarised in Weisbrot, at 141-143.

127. The Pearce Report, Appendix 5, at 164 and 199. See Weisbrot, at 128-136, for a summary of the main findings and recommendations of the Report.

128. See Weisbrot, at 133.

129. This is an attendance requirement - there is no examination or other assessment.

130. The Bar's position is, essentially, that barristers' work almost invariably requires wide reading and research, and a degree of specialisation, obviating the need for a specific MCLE requirement. Many barristers do attend CLE sessions of their own volition, of course.

131. See s149(1)(b) (regarding barristers) and (2)(b) (regarding solicitors), which permit the Board to make orders that the legal practitioner undertake a specified course of further education. The Commission is not aware of any cases in which the order has been tailored to education in legal ethics and professional responsibility.

132. New South Wales Law Reform Commission, *Third Report on the Legal Profession: Advertising and Specialisation* (LRC 33, 1982), Recommendations 5-6, considered in paras 6.22-6.42.

133. LRC 33, at para 5.10.

134. See Law Society of New South Wales, *Discussion Paper: Specialist Accreditation* (June 1991).

135. Section 64. The amount is determined by a formula contained in the *Legal Profession Regulation* 1987, clauses 22A-22D.

136. Section 6(3)(d)-(e).

137. Such as conveyancing companies.

138. See ss 67(3)(c) and 168, regarding the funding of costs incurred in enforcing Parts 9 and 10 of the Act.

139. Section 67(3)-(4).

140. Section 67(2)(b).

141. Sometimes referred to colloquially as the "Westpac Account", although there a number of banks involved.

142. Riley, at para 1070.

143. The 1992 budget for the disciplinary system in California is over $40 million, for about 132,000 lawyers.

144. Law Society submission, at para 28.

145. See Part 11 of the Act.

146. For example, in 1990, the Law Society received 104 complaints (or 8.4% of the total number) about "overcharging". Other fee disputes may be categorised under other headings, such as "No communications".

147. Section 198.

148. Section 208.

149. Sections 199 and 206.

150. See the *Supreme Court Rules*, Part 52, r56.

151. See Weisbrot, at 216-222, regarding the regulation of legal fees and costs, including taxation of bills of costs (at 221).

152. See (1991) 5 *Law Society's Gazette* 6. See the discussion of the Client Care system in Chapter 3.

153. 22 out of 263 complaints received (or 8.4%) by the Bar Association in the period 1988-1991.

154. See the *Supreme Court Rules*, Part 52.

155. In 1990, there were 1595 barristers holding current practising certificates, so that there was one complaint for every 18 barristers. There were 11073 solicitors with current practising certificates, so that there was one complaint for every nine solicitors.

156. DP 2, at para 4.4.

157. R L Abel, *The Legal Profession in England and Wales* (1988) at 134.

158. See DP 2, at para 4.3.

159. Abel, at 135.

160. Figures supplied by the Bar Association, 8 April 1992. In the same year, about three-quarters of complaints against solicitors came from members of the public (including clients and former clients).

161. Abel, at 135-136.

162. See *Barratt v Gough-Thomas* [1950] 2 All ER 1048, at 1053. See Riley, at paras 2506 et seq, for a good discussion of general and particular solicitors' liens.

163. See s208(1)(b).

164. ACA Submission, para 8.

165. Community Legal Centres submission, at 2.

166. Bar Association submission, at 12-13.

167. See, eg, *Herron & Gill v McGregor* (1986) 6 NSWLR 246, at 254 (NSW CA), per McHugh J, Street CJ and Priestley J agreeing. In this case, which arose out of the Chelmsford Hospital inquiry, the Court of Appeal granted a stay of the proceedings before the Medical Tribunal because delays in the launching of the disciplinary action made the charges difficult to defend. The basis of the decision is that the Supreme Court has inherent supervisory and protective powers to stay proceedings in disciplinary tribunals on the ground that their institution is harsh and oppressive and an abuse of process. The High Court recently has granted special leave to appeal. See also *Gill v Walton* [1992] ACL Rep 10 NSW 1 (NSW Court of Appeal, unreported, CA Nos 40347-9/91, 19 Nov 1991). Cf *Jago v District Court* (NSW) (1989) 168 CLR 23, in which the High Court of Australia ruled that the same considerations do not necessarily apply to *criminal* proceedings.

168. See the *Limitation Act* 1969 (NSW), s14(1)(b).

169. Down from 24 in 1988 and 14 in 1989.

170. Bar Association submission, at 14.

5. Three Options for Regulatory Reform

INTRODUCTION

5.1 The three options presented below are intended to focus discussion and debate about the regulation of the legal profession. These are not the only *possible* options, of course, but have been selected, having regard to the terms of reference, to offer three realistic avenues for reform incorporating different models of regulation. **The Commission has no preferred option at this time and makes only tentative proposals.** No conclusion should be drawn one way or the other, for example, from the length of the discussion of Option One as against the length of the discussion of the other two Options. Obviously it is easier to critique an existing system in fine detail than to describe in equal detail the nature and potential flaws in an inchoate system. However, we do wish to make explicit our view that it is *not* an option to do nothing, given the range of problems mentioned in the submissions and identified by the Commission's own research.

5.2 The time constraints and the limited resources available have precluded the sort of empirical work, research, and travel which might have allowed the Commission to develop its views more fully at this stage. Depending upon the results of the Commission's further research and community consultation, we will ultimately report to the Attorney General recommending one of these options - possibly in a modified form - for implementation.

OPTION ONE: IMPROVEMENT OF THE EXISTING LEGAL PROFESSIONAL DISCIPLINARY SYSTEMS

Assumptions and general principles

5.3 The submissions from the legal professional associations - the Law Society and the Bar Association - both assert that the existing disciplinary system putin place by the provisions of the Legal Profession Act 1987 are generally working well, but that there are a number of areas in which improvements could be affected. For example, the New South Wales Bar Association's submission to the Commission concludes that:

> The Legal Profession Act brought about a radical change in procedures. Some fine-tuning is usually necessary when new procedures are adopted. That is the situation here. The system is working well and with the changes in progress and proposed would be very effective indeed.[1]

Similarly, the Law Society Council's submission to the Commission states that "The Society is not aware of any significant level of criticism of the way in which the Society discharges its functions under Part 10 of the Act",[2] but the submission also contains several significant proposals for restructuring the system in relation to the handling of complaints against solicitors. This Option proceeds from the assumption that the existing complaints system is generally working in a satisfactory manner and should be retained, but that a number of changes need to be

made in light of the experience of lawyers and clients in the past few years and the Commission's analysis of the system contained in the preceding chapter.

5.4 From the time of its earliest work on the legal profession over a decade ago, the Commission has noted the arguments about the possibility of an inherent conflict present in a single body having simultaneous responsibility for advancing the interests of its membership (the "sectional" or "trade union" function) as well as regulating and disciplining that membership in the public interest, and the consequent need for, at the least, a clear separation of the administration of those two functions.[3] This point is raised again in a number of the submissions to the Commission in the current inquiry. For example, much of the submission of the Lawyers Reform Association is devoted to this issue, with the Association concluding that:

> There is an inherent conflict of interest in the Law Society and the Bar Association simultaneously maintaining representative and both statutory and non-statutory regulatory functions. The community cannot be expected to have confidence in the regulation of the profession and the investigation of complaints while these dual roles continue.[4]

5.5 Within the central assumption contained in this Option - that the profession should largely retain its leading role in the disciplinary process - the Commission proposes that sufficient "Chinese Walls" be developed to re-assure the public that sectional interests are not given prevalence over the public interest. This may involve such *physical* separation as is appropriate and logistically sensible, and will certainly involve a separation of the management and administration of the two functions, with guarantees of independence for those responsible for regulatory activities.

5.6 The Commission has had the opportunity to observe first-hand the system in operation, including the deliberations of the Law Society's Complaints Committee and the Law Society Council. The Commission has been greatly impressed by the high levels of integrity demonstrated by, and by the frankness of the discussions conducted among, the participants in the system. Apart from a small number of salaried employees, the disciplinary system largely operates on the basis of volunteer labour, and there are some lawyers and lay persons who have made very substantial time commitments to the system. Without doubting the sincerity or integrity of the principal actors, the Commission has nevertheless identified a range of significant problems with the existing system which require reform, and which are discussed below.

The reception of complaints

5.7 The initial step in the complaints-handling process may well be the most important, especially from the point of view of the complainant. Persons making complaints must be assured that their problems will be handled promptly, efficiently, sensitively and impartially. Below, we list a number of suggestions for improving services at the (actual or metaphorical) "front counter".

Access to information

5.8 *The Explanatory Brochures.* Both the Law Society and the Bar Association produce an "Explanatory Brochure" for persons who are considering lodging complaints. The brochures, which are very similar in content and layout, describe the disciplinary system in rather dry and technical legal language, often lifted directly from the relevant provisions of the *Legal Profession Act* 1987. The Law Society brochure occupies four pages of single-spaced material, the Bar Association's six pages of mainly double-spaced material. Neither brochure refers to the fact that the Act *requires* the professional associations to "take all reasonable steps to ensure that a person who wishes to make a complaint is given such assistance as is necessary to enable the person to make the complaint in accordance with [the statutory requirements]",[5] yet this could be the single most valuable piece of information for prospective complainants.

5.9 Similarly, there is no clear statement in either of the brochures to the effect that "If you have any questions or problems at all, please contact us at once". It may be that many members of the community can cope with the level of detail and complexity found in the brochures, but many others will find them rather intimidating. While some complaints come from other lawyers, public officials, judges and court officials, and other "insiders", the great majority of complaints come from clients or former clients.[6] The brochures should be re-focussed so that they look and read less like legal documents and more like simple advice in "Plain English" on what to do and how to get help.

5.10 *Assistance to non-English speakers.* At present, neither the Community Assistance and Professional Conduct Departments of the Law Society nor the Professional Affairs Director of the Bar Association has the facilities to communicate effectively with or provide advice to a person with a limited grasp of the English language (whether this a person from a non-English speaking background or a person with disabilities affecting his or her comprehension or expression). According to the Bar Association submission,[7] the Bar is planning to produce its explanatory brochure provided to complainants in five languages. The Law Society has notified the Commission of its intention to produce its literature in 20 languages. As noted in the previous chapter,[8] however, the production of brochures should not be regarded as fully satisfying the requirement to assist complainants. Thought must be given to methods of dissemination of information in ways that will actually reach the target groups. Interpreter services must be reasonably available to assist individual complainants.

5.11 *Community education.* Steps should be taken by the professional associations to ensure that the community is regularly made aware of the existence and general nature of the complaints system. This will involve greater use of paid and "community service" advertising in the print and broadcast media and other marketing techniques, as well as the production of appropriate literature. Literature should be made widely available, including by prominent display at solicitors' offices and barristers' chambers, community justice centres, community health centres, community legal centres, courthouses, and the head offices of the legal professional associations.

Record-keeping and follow-up

5.12 The statistics relating to complaints about lawyers used in this Discussion Paper were provided to the Commission by the professional associations and by the Registrar of the Disciplinary Tribunal,[9] and are limited to

those complaints made formally in writing in compliance with s130 of the *Legal Profession Act* 1987 and the smaller number of investigations initiated by the professional associations on their own motion.[10] The statistics provide no indication of the number of *potential* complainants who make initial contact but do not follow this up with a written complaint for one reason or another, however. The Community Assistance Department and the Professional Conduct Department of the Law Society, and the Professional Affairs Director of the Bar Association, do not keep detailed records of telephone calls to, or personal attendance at, their offices by persons who may wish eventually to complain about the conduct of a legal practitioner.

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

5.14 Although the Act does require the Councils of the Law Society and the Bar Association to "take all reasonable steps to ensure that a person who wishes to make a complaint is given such assistance as is necessary to enable the person to make the complaint"[11] in accordance with the specified formalities, and help is in fact provided to those who request it, there is no *active* pursuit of potential complainants by Law Society's Community Assistance Department or Professional Conduct Department, or the Bar Association's Professional Affairs Director. There are many reasons why people may fail to follow up their concerns about a lawyer's conduct with a formal complaint. These include: the perception (correctly or incorrectly formed) that they were treated unsympathetically when they made the initial contact; the inability or unwillingness to put things in writing; the lack of opportunity to make use of the complaints assistance services provided during working hours; uncertainty over costs; or a sense of futility in complaining about a lawyer to that lawyer's professional association.

5.15 The statutory requirement to take "all reasonable steps" to assist complainants should involve a proper system of recording, monitoring and following up initial contacts from *potential* complainants. Further, if there is to be increased use of mediation and conciliation, as suggested by both the Law Society and Bar Association, then persons who contact the professional associations with complaints should be encouraged to participate in these informal dispute resolution processes even where the complaint does not raise obvious issues on its face of unsatisfactory professional conduct or professional misconduct.

5.16 Apart from facilitating the effective processing of individual complaints, this approach also provides far more information about the general pattern of complaints, which is ultimately useful for developing policies and strategies aimed at preventing disputes and raising the standards of professional conduct and ethics. (See the discussion of "Enhancement of professional standards", in Chapter 4.)

Independence from the professional associations

5.17 As mentioned above, the Commission is aware of the general issue of the conflict in the dual roles of the professional associations.[12] The fact that a complaint about a lawyer must be made to that lawyer's professional association may have the effect of dissuading some dissatisfied clients and others from lodging a complaint. The American Bar Association's Commission on Evaluation of Disciplinary Enforcement has characterised this as "the familiar criticism that the fox is guarding the henhouse", which, given the level of public distrust, is likely to be levelled even where the disciplinary system is in fact "fair to both respondents and complainants".[13]

5.18 This problem is addressed more directly in the other two Options presented below. However, there are some steps which may be taken to reinforce the actual and perceived independence of the complaints-handling system even if control is retained by the professional associations. For example, the head of the Community Assistance Department and the Manager, Professional Conduct, of the Law Society, as well as other significant staff members, could be appointed by a committee with broad representation - including non-lawyers - rather than by the Law Society Council.

5.19 It is most important that a "culture" of independence develop such that complainants believe that they are being taken seriously and that the system is not weighted in favour of lawyers. This may be somewhat difficult to do where the staff members involved are employees of the Law Society or Bar Association and have been for some time, but it is not beyond reach if the message comes through clearly from the top. One way to emphasise this would be to quarantine the administration of the regulatory responsibilities of the professional associations from the associations' membership responsibilities.

5.20 The independence of complaints-handlers also may be reinforced - in their own minds as well as in the perception of the public - if there was a *physical* separation from the head offices of the respective professional associations. This is the case in England and Wales, where the Solicitors' Complaints Bureau is housed separately from the offices of the Law Society.[14] In New South Wales, the Community Assistance and Professional Conduct Departments are both housed within the Law Society Building. The Community Assistance Department has a separate telephone number from the Law Society's central switchboard, but is listed under "The Law Society of New South Wales" in the telephone book and is routinely referred to as the "Law Society's Community Assistance Department". Any distinction is likely to be lost on potential complainants, even if they are aware of the role of this Department in the complaints system.

The initial assessment of complaints

Introduction

5.21 At present, when a formal complaint is made about a solicitor, the Law Society's Community Assistance Department forwards the complaint to the Law Society's Professional Conduct Department. The Professional Conduct Department then categorises the complaint according to its view of the level of seriousness, and commences its investigations by writing to the complainant and the solicitor(s) involved.[15] There is no lay participation in the process at this stage. When the Department ultimately compiles its report on the matter, this is sent to the Law Society's Complaints Committee, to which the Law Society Council has delegated its powers of

investigation under the Act.[16] The Complaints Committee, which must be presided over by a member of the Council, does have two lay members (and eight solicitors).

5.22 A complaint about a barrister is first received by the Bar Association's Professional Affairs Director, who forwards it to one of the four Professional Conduct Committees (depending upon the workload of each of the committees) which operate under delegated authority from the Bar Council. Given the much smaller number of complaints against barristers, there is no initial assessment of the nature or relative merits of each complaint before the matter is sent to the Committee. Each Professional Conduct Committee consists of 7-9 members, and includes at least one member of the Bar Council, a number of barristers of varying degrees of seniority, and two lay members.[17] The Committee itself undertakes the investigation, usually through one or two of its members, and in liaison with the Professional Affairs Director.

5.23 The nature and sufficiency of the investigation of complaints is a key matter which is considered in more detail below. There are a number of other matters in respect of the first assessment of complaints, rather than the ensuing investigation, which are worth discussing here.

Imposition of a time discipline

5.24 According to the figures supplied by the Law Society, the average "turn around time" for investigation of a complaint against a solicitor (being the average time between receipt of a complaint and its settlement, withdrawal or resolution by the Complaints Committee or Council) was 5.1 months in 1988, 5.3 months in 1989, and 4.6 months in 1990.[18] According to the figures supplied by the Bar Association, the average turn around time for the investigation of complaints against barristers was 6.3 months in 1988, 7.8 months in 1989, and 5.4 months in 1990. This does not take into account the time taken for any further proceedings which are necessary, such as proceedings before the Standards Board or the Disciplinary Tribunal, or any reviews which are held by the Conduct Review Panel. These are average figures - some investigations no doubt move more expeditiously, while others move rather more slowly.

5.25 The professional associations recognise the problem of delay, and have taken some steps to speed up the process. At least some of this problem may be due to the absence of any time discipline imposed by the legislation. The Act provides that, for the purposes of seeking external review by the Conduct Review Panel, a complaint may be deemed to have been dismissed by a Council if a decision has not been made within six months after the making of the complaint.[19] This strongly suggests that it was contemplated by Parliament that the process of investigation and determination by committees and Councils would normally be completed within this time frame. However, the Act does not expressly require the Councils to act within any particular time limit, or even to act expeditiously.

5.26 It is standard practice in respect of complaints against both barristers and solicitors that the subject of the complaint is written to, with a copy of the complaint, and a reply is requested within 14 days.[20] There is no specific statutory penalty for failure to respond within this time limit, however, and the Commission gathers that it is not uncommon for responses to be late and for some to be very late. The Commission is aware of individual cases in which the investigative process was delayed for lengthy periods - sometimes over a year - due to the failure of the lawyer involved to respond, or respond in a meaningful way, despite numerous letters from the

professional association. As mentioned above,[21] the Law Society warns complainants in its Explanatory Brochure that the failure to provide further particulars within one month of a request may result in the dismissal of the complaint, yet practitioners are not placed under a reciprocal obligation.

5.27 In Victoria, a legal practitioner is also asked to respond to a complaint within 14 days.[22] If no response is received in that time, a second letter is sent. Failure to reply to this letter within seven days is itself considered a "standards breach", and often results in a fine for the practitioner as well as the recording of a standards breach, which is equivalent to "unsatisfactory professional conduct" in New South Wales. A similar requirement should be imposed under the legislation in this State.[23] A persistent failure to respond to a complaint, or a pattern of persistent delay in responding to complaints, should result in the suspension of the legal practitioner's practising certificate.

5.28 The Law Society Council - but *not* the Bar Council - has the statutory power to cancel, suspend, or refuse to issue, a practising certificate to a legal practitioner who has been asked by the Council to "explain specified conduct" and fails, and continues to fail, to give a satisfactory explanation.[24] The Law Society Council has adopted the procedure of passing a resolution seeking an explanation for the lack of response to the Society's correspondence, and adverting to its powers with respect to practising certificates. The Law Society has informed the Commission that the communication of this resolution is usually "very effective" in producing a response.[25] Since the introduction of the *Legal Profession Act*, the Council has passed 131 such resolutions, with only five practising certificates ultimately cancelled for continued failure to reply. This power ought to be retained and extended to the Bar Council in respect of barristers.[26]

Substantive problem areas: the gap between what lawyers and clients believe is important

5.29 One of the clearest problems to emerge in the Commission's earlier work on the legal profession was the profound gap between what angered clients and what lawyers and their professional associations saw as important enough to merit disciplinary action. Clients most frequently complained about matters of negligence, incompetence, delay, poor communications, discourtesy and over-charging, while the professional associations almost never considered that these matters amounted to "professional misconduct".[27] In response to this criticism, the Law Society Council passed a resolution, which it issued as a Special Bulletin to solicitors, which "reminded" solicitors that acting for a client in a matter: (1) with "culpable irresponsibility", or (2) with "gross negligence", or (3) incompetently, or (4) with undue delay or failure to keep the client informed, could amount to professional misconduct.[28]

5.30 The solution to the disjunction between consumer and professional expectations then proposed by the Commission, and eventually contained in the Act, was the creation of a second head of "minor professional misconduct", later amended to "unsatisfactory professional conduct",[29] which is defined as "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 legal practitioner".[30] The Commission also recommended, and the Act established, a Legal Profession Standards Board to hear complaints about unsatisfactory professional conduct, while more serious complaints involving professional misconduct are heard by the Legal Profession Disciplinary Tribunal.

5.31 It is still the case that the substantial majority of complaints involve allegations of what would, at most, amount to unsatisfactory professional conduct if proved. There still appears to be a substantial gap between the expectations of at least some clients and complainants on the one hand, and at least some lawyers and their professional associations on the other.

5.32 For example, according to figures supplied by the Law Society, there were 1245 written complaints against solicitors in 1990.[31] Of these, at least 80 per cent seem to relate to issues of unsatisfactory professional conduct: 264 complaints of undue delay; 37 for discourtesy; 254 for negligence or quality of work; 79 for poor communications; 104 involved allegations of overcharging; and 256 related to conduct or standards breaches. Yet only 12 matters (1% of the total number of complaints) were referred to the Standards Board by the Law Society Council, while most of the rest were dismissed by the Complaints Committee with no action taken against the solicitors involved.

5.33 Given the small number of complaints involved, the Bar has taken the approach that *all* written complaints will be passed from the Professional Affairs Director to the Professional Conduct Committees (PCCs) for investigation without any screening at this stage. The PCCs have the power, under delegation from the Bar Council, to dismiss complaints which are frivolous or vexatious, or where the complainant fails to provide further particulars as requested. However, as a matter of practice, this screening power is not used and all complaints, together with the investigative report, are forwarded to the Bar Council for determination. Nevertheless, while complaints about such matters as negligence, poor communication, poor attitude, delay, discourtesy, failure to appear, and the exerting of undue pressure amount to about half of all complaints received (42 out of 84 in 1990; 40 out of 81 in 1991), only a handful of complaints (3 in 1990, 2 in 1991) are referred by the Bar Council to the Standards Board for a hearing.[32]

5.34 These statistics[33] suggest, then, that the new legislation has not been entirely successful in getting the professional associations to regard unsatisfactory professional conduct as a matter of sufficient seriousness to warrant formal hearing. This may be a reason for public scepticism about the control of the disciplinary system by the professional associations, since complainants could perceive that their concerns are not being addressed. This is an area in which there is an important need for empirical research to be undertaken, but the Commission has not been able to do this work itself because of time and funding constraints.

5.35 *Allegations of professional negligence*. One area of special concern is the apparently inconsistent treatment of allegations of professional negligence by solicitors. Over 20% of the formal complaints to the Law Society and roughly the same proportion of complaints to the Bar Association alleged negligence or poor standards of work. As noted above, this also was a concern of the Commission in its earlier work on the legal profession. At that time, the Law Society made a submission to the Commission which stated that:

> It has been accepted for many years that *the Law Society has no power to discipline a solicitor for mere negligence or delay* on his part. [Emphasis supplied.]

Following some controversy over this position, the Law Society issued its Special Bulletin in 1979 affirming that "gross negligence", "incompetence" and "undue delay" may amount to professional misconduct.

5.36 Despite the Commission's earlier recommendations, the Special Bulletin, the statutory creation of a second head of "unsatisfactory professional conduct" in the 1987 Act, and the ability of disciplinary bodies to make compensation orders, it is the Commission's observation that there is still a substantial degree of ambivalence in the professional Councils about whether negligence should be the subject of disciplinary action. The view seems to be, at least among some members of the professional Councils and their complaints committees, that only a *pattern* of negligent conduct, or perhaps a particularly outrageous single instance, merits a disciplinary sanction. "Mere negligence", according to this view, is remedied by compensation and is a matter for the civil courts rather than disciplinary bodies.

5.37 There is a double problem for complainants here. The first problem is in getting the complaint accepted, as there is some anecdotal evidence that prospective complainants who make inquiries about lodging a complaint based on negligent conduct are advised that the better course is to pursue a civil action. The second problem is in getting the investigators, complaints committees and Councils to treat such complaints as raising issues of public importance which require the disciplinary action.

5.38 The New South Wales Court of Appeal has ruled that clients are entitled to rely upon at least a minimum standard of competence from a licensed legal practitioner, which includes a basic knowledge of the law and practice, and familiarity with developments in the lawyer's field of practice (including ethical requirements).[34] Unless allegations of negligence are brought to the attention of the disciplinary authorities, it is impossible to monitor the standards and conduct of individual practitioners, who are held out to consumers as persons of integrity and skill by the professional associations (who issue practising certificates for this purpose) and the courts (who have inherent powers to regulate the legal profession). Further, if the disciplinary authorities do not concern themselves with individual matters of negligence, it becomes impossible to detect more general patterns of poor practice in the profession, which might require continuing education, changes in the law, ethical rulings or other remedies. The isolated nature of an act of professional negligence and mitigating circumstances going to the lawyer's normal standards or character are matters to be taken into account in disposition, rather than matters precluding referral to a disciplinary body which may proceed to a finding.

5.39 *Complaints by persons who are not clients*. The Commission is aware of a small number of cases in which prospective complainants have been told by the Law Society's Community Assistance Department (and at least one case in which it was confirmed in writing) that a person may not make a complaint against a solicitor unless the person was a client of that solicitor. Leaving aside the fact that this is obviously not the case in respect of complaints lodged by other lawyers, judges, or court officials, it is also clearly wrong in respect of other prospective complainants. Under the Act, a complaint may be made by "*any person* who considers that a legal practitioner is guilty of professional misconduct"[35] (emphasis supplied). There is no reason in law or in policy to limit the class of complainants to those who are in a client-lawyer contractual relationship with the lawyer who is the subject of the complaint. On the contrary, the need to maintain proper standards of professional practice and demeanour requires that, as the Act provides, *any person* be entitled to bring to the attention of the professional associations evidence of dishonesty or substandard professional conduct. Part of the confusion in this area may stem from the fact that the Law Society's "Explanatory Brochure to the Complainant" commences its advice on how to make a complaint with the following phrase: "If you have a complaint against <u>your</u> solicitor, you should first consider going to another solicitor for help in sorting out the problem ..." (emphasis in the original). This is not intended to restrict the category of complainants, but it could be read in that way. The Law Society has assured the Commission that whereas in past years there may have been some reluctance to accept "third-party" complaints, this is no longer the case and all complaints are treated on the merits.

Conclusion

5.40 As we have pointed out repeatedly in this Discussion Paper, the disciplinary system has multiple aims: to remedy the genuine problems of consumers, to sanction individual legal practitioners for poor work, and to maintain and enhance the general standards of competence and propriety in the legal profession. The public interest is not being served unless all three aims are pursued with equal vigour.

Additional, informal dispute resolution

5.41 In the previous Chapter,[36] the Commission referred to the development of a voluntary scheme by the Law Society to mediate lawyer-client disputes, the Law Society's proposals for extending this scheme to make it a central part of the complaints-handling system, and the proposal of the Bar Association also to incorporate informal dispute resolution into its complaints-handling system. While generally accepting the trend towards the introduction of consensual dispute resolution, the Commission also expressed some concerns and qualifications, particularly in relation to the need to maintain the dual nature of the disciplinary system (individual complainant satisfaction and the general public interest in the maintenance of proper professional standards); the imbalance of power and knowledge which may occur in a mediation process involving lawyers and clients; and the need for independent, trained mediators.[37]

The investigation of complaints

Complaints against solicitors.

5.42 The principal responsibility for the investigation of complaints against solicitors lies with the Law Society's Professional Conduct Department. The Department has a salaried staff of ten lawyers and six support staff, under the supervision of a full-time Manager (who is a solicitor),[38] and operates on a budget of $2.6 million per annum, not including the cost of investigators, inspectors, auditors and receivers who may be appointed from time to time. Generally, a complaint is assigned to one of the legal officers in the Department, who prepares a report containing a recommendation about what action (if any) should be taken. This report is then sent to the Law Society's Complaints Committee, which operates under delegated statutory authority from the Law Society Council.[39] The members of the Law Society's Complaints Committee are volunteers, who fit their disciplinary responsibilities in and around their own busy practices (in the case of the legal members), careers (in the case of the lay members), and other responsibilities. One or more legal members of the Committee is assigned to review and comment upon the report before the matter is heard by the full Committee.

Complaints against barristers.

5.43 With complaints against barristers, the matter is referred by the Professional Affairs Director directly to one of the four Professional Conduct Committees, which act under delegated authority from the Bar Council.

Each matter is assigned to one of the legal members to prepare a report for consideration of the full Committee. These Committees also are comprised of volunteers who perform their regulatory duties part-time, in addition to running their own practices. The speed at which an investigation proceeds is contingent upon the time and the availability of the Committee member (who may, for example, have to go on circuit to country courts) and the cooperation of the barrister who is the subject of the complaint (and possibly other persons with material evidence, such as solicitors and judges). The Bar Association has given its Senior Vice-President the responsibility for monitoring the whole process for delays.

The mode of investigation.

5.44 In its earlier inquiry into the legal profession, the Commission was critical of the inadequacy of the investigation of complaints by the professional associations, condemning, for example, the "perfunctory investigation of many complaints".[40] One of the main concerns at that time was that the professional associations relied very heavily on the information provided by the complainant to determine the validity of the complaint, often making a final decision on this basis without further investigation. If the investigation proceeded the next step was to contact the lawyer concerned for a reply. In the not infrequent event that the matter hinged on the word of one party to the dispute against the word of the other, the lawyer was generally given the benefit of the doubt without the matter being referred for a formal hearing.[41]

5.45 Some of the submissions in the current inquiry question whether the investigation of many matters is adequate to define all of the possible issues and to ascertain all of the relevant facts, particularly in relation to the far more numerous complaints against solicitors. The chief technique employed in most cases for compiling the facts and preparing the report and recommendations for Council remains the "paper chase" of acquiring the written complaint, requesting a written response from the legal practitioner involved, and subsequently comparing them. Sometimes one party or the other is asked for further particulars. However, only in a very small proportion of cases is there a fuller examination using trained investigators or auditors, and these cases almost invariably involve allegations of fraud, trust account violations or other financial impropriety. In the circumstances, it is arguable that the bulk of complaints are *processed*, and not actively, thoroughly, *investigated*.

5.46 In the absence of an inquisitorial procedure focussed on the active pursuit of the relevant facts, the result is often that the report made on the complaint is equivocal, pointing out that the complainant has made certain allegations, the legal practitioner has denied them, and there is no independent evidence to sustain either version of the facts. Given the requirement in the legislation that the professional Councils must be "satisfied" about the allegations before a complaint is referred to the Standards Board or the Disciplinary Tribunal,[42] the legal practitioner is effectively given the benefit of any doubt by the dismissal of the complaint, even though this may be due as much to the style of investigation as the actual state of affairs.[43]

5.47 It is not hard to see that some complainants may be dissatisfied with this procedure, particularly when a notice of the dismissal follows a long period of silence. It is likewise easy to see that some complainants could draw the conclusion that the system is "fixed" or biased - a case of lawyers simply "protecting their own". However, the Commission believes that any problem lies more in the inadequacy of the system than in any lack of impartiality or integrity. The method of investigation of complaints that is used now is essentially the same one that was examined by the Commission over a decade ago. The new disciplinary scheme established by the 1987 Act has effected many changes in the handling of complaints, but the actual manner of investigation has survived largely intact. This appears to be a matter that is determined more by traditions and received wisdom - that is, by a local "culture" - than by legislation.

5.48 The Commission believes that a much more active, inquisitorial form of investigation should be considered. This would require Councils expecting and demanding more from their complaints committees, and the committees expecting and demanding more from the investigative staff utilised by the professional associations. This in turn will require better training of investigative officers, more resources devoted to investigation, and. a different, more active, approach.

Resources devoted to investigation

5.49 In England, the Law Society's Complaints Bureau employs about 160 staff. Twenty staff lawyers are involved in the mediation and conciliation of complaints alone. A "diagnostic unit" of three to four staff members is assigned to each complaint received, to analyse the matter thoroughly and determine the nature and extent of the investigation to be undertaken. With a staff of this size, the Bureau also is able to keep complainants notified regularly of the status and progress of the case, and to take active measures to secure the necessary information to complete its investigations.

5.50 In New South Wales, the Law Society has 17 (professional and support) staff members in the Professional Conduct Department. The Bar Association has no permanent staff devoted to the investigation of complaints. Even allowing for the differences in size of the general populations and legal professions in England[44] and New South Wales, the English system allocates considerably more resources to the proper investigation of complaints and the monitoring of complainant satisfaction with the process.

5.51 One immediate suggestion is that the Law Society consider altering its Complaints Committee structure. As mentioned above, the Bar Council uses four committees (in rotation) to process fewer than 100 complaints annually, while the Law Society uses a single committee (albeit supported by a much larger staff in the Professional Conduct Department) to process well over one thousand complaints annually. Consideration should be given to using a larger number of Complaints Committees (with, say, six members rather than the present 10) to ensure that each complaint is given more attention. Committees of Council exercising delegated authority must be chaired by a Council member, under the Act, but the general membership is not so limited. However, of the seven solicitors on the Complaints Committee in 1990-1991 (leaving aside the Executive Member), six were members of Council. Given the fact that the reports and recommendations of the Committee must go to the Council anyway, it appears that much greater use could be made of non-Council members in order to provide the numbers to operate several Complaints Committees in tandem.

Power to compel the production of evidence.

5.52 One of the significant problems with investigating complaints against lawyers in New South Wales is that the professional Councils (and their complaints committees and officers) do not have clear powers to require the production of files and other relevant documents. In Victoria, the Law Institute may require the production of files upon the serving of a notice signed by the Professional Conduct Manager and at least two Councillors. In New South Wales, there are considerable powers available to those investigating complaints against *medical*

practitioners to enter and inspect premises, compel the production of records, compel the answering of any questions or the furnishing of any information "in relation to the carrying out of that professional practice", and so on.[45] However, the Law Society and Bar Councils have no direct powers to compel the production of material evidence - they may only *request* such evidence, although the request may be backed up by the threat to suspend or cancel a practising certificate for failure to provide the Council with a satisfactory explanation of conduct when required to do so.[46] Consideration should be given to providing the Councils (and thereby their complaints committees exercising delegated authority) with powers to compel the production of files and other relevant material necessary for the active, thorough investigation of complaints.

The powers of the professional Councils

Rationalising the existing statutory powers

5.53 The submissions from the Law Society and the Bar Association suggest, not surprisingly, that the powers of their respective Councils ought to be increased. The Commission has noted, throughout the discussion of this Option, a number of anomalies and curiosities in the allocation of powers to the professional Councils. For example, the powers of the Bar Council, in particular, are quite inadequate in relation to placing conditions on a barrister's practising certificate,[47] particularly when compared with the powers of the Law Society Council in respect of solicitors. To date, the Bar Council mainly has seen the new practising certificate system as a means of more closely supervising the entry into practice of new barristers and of restricting the prior practising rights of "non-traditional" barristers, such as legal academics and government lawyers, rather than as a means of regulating more senior barristers or as an important adjunct to the disciplinary system. Another change which suggests itself is that the Councils should have clear powers to compel a prompt, genuinely responsive, answer to a complaint from the legal practitioner who is the subject of the complaint.[48]

5.54 The Bar Association's submission points out that, under the existing legislation, if the Bar Council (or the Law Society Council) investigates matters of its own motion rather than after a complaint, it can only refer the matter to the Standards Board or the Disciplinary Tribunal.[49] The Bar Council cannot, for example, reprimand the legal practitioner involved.[50] The Bar Association submits that the "powers available to the Council should be the same regardless of how the investigation has arisen."[51] There does not appear to be any good reason for this discrepancy. Identical remedial orders should be available to a Council whether the investigation commenced on the complaint of a client or a court or some other agency, or on the motion of the Council itself.

5.55 *Dismissals with compensation.* If a Council is satisfied that a complaint involves a question of unsatisfactory professional conduct, it may do one of three things: refer the complaint to the Standards Board, reprimand the practitioner (with his or her consent), or dismiss the complaint.[52] If the matter is referred to the Board, the Board may order compensation for the complainant. However, if the Council dismisses the complaint (despite a finding of unsatisfactory professional conduct) or reprimands the practitioner, it has no power to order compensation. A complainant should not be disadvantaged in this way. Where a complainant has requested the making of a compensation order and the Council is satisfied that there is a question of unsatisfactory professional conduct[53], it should be obliged to refer the matter to the Standards Board.

5.56 *The standard of proof for referrals to the Board and Tribunal.* The professional Councils only may refer complaints to the Standards Board or the Disciplinary Tribunal if they are "*satisfied*" that the complaint involves a question of unsatisfactory professional conduct or professional misconduct, respectively.[54] However, if a Council is acting on its motion rather than on an outside complaint, it may refer the matter to the Board or Tribunal "if it *appears* to the Council that the legal practitioner *may* be guilty of unsatisfactory professional conduct or professional misconduct".[55] In the former case, a Council which is simply unsure about the evidence or the guilt of the practitioner would not be "satisfied" and thus could not refer the matter to the appropriate disciplinary body for a hearing and determination. It is odd that a Council's uncertainty effectively serves to pre-empt the consideration of a complaint by an independent Board or Tribunal. There should be no difference in the onus between "external" complaints which come to the Councils from clients and others, and "internal' complaints which are made on the initiative of the professional body. In both cases, the appropriate standard for referral should be that "it appears to the Council that (a) the legal practitioner may be guilty of unsatisfactory professional conduct or professional misconduct, or (b) the interests of justice so require".

The problem with expanding the role and powers of Councils

5.57 While accepting the need for the dispute resolution procedures which permit the professional Councils to deal with appropriate (non-conduct) matters more quickly and flexibly, the Commission is aware of the tension between increasing the role and powers of the Councils and the need for open, accountable, independent decision-making in the disciplinary system. The Council stage in the complaints-handling process is closed to the complainant and the general public and it is difficult to see how it could be otherwise, given the nature of the proceedings. However, of the other bodies hearing complaints, the Disciplinary Tribunal and the Supreme Court conduct their proceedings in public, and we have proposed that the Standards Board do the same in future.[56] At a minimum, as we have suggested above, the complainant should be entitled to be present at any hearing of his or her complaint, and to appear as a party subject to a risk as to costs. From the legal practitioner's point of view, there also would be natural justice concerns if the Councils were given powers to *punish*, beyond the issuing of a reprimand, without affording the practitioner a reasonable opportunity to be heard and to contest adverse evidence.

5.58 These concerns would be alleviated somewhat if, as the Law Society submitted and we later propose, the external monitor of the system (whether this is the Chairperson of the Conduct Review Panel, a Lay Observer, or an Ombudsman) attended the meetings of the Complaints Committees and Councils. This would reinforce the external scrutiny supplied by the lay members of the Council and their committees. However, there is no real substitute for the process being open to complainants and the public in order to provide assurance that the system is fair and impartial. The greater the role of the professional Councils, the greater the prospect that there will be lingering suspicions that the system operates as a "club" run by and for members of the legal profession rather than the public. This *perception* may remain irrespective of the *actual* integrity and impartiality of the system. For example, doubts may arise where a Council moves to dismiss a complaint notwithstanding a finding that the legal practitioner is guilty of unsatisfactory professional conduct.[57]

5.59 We have noted above the infrequency with which the Councils refer matters to the Standards Board and Disciplinary Tribunal. According to Law Society figures, of the 1245 formal complaints in 1990 considered by the Law Society Council, only 12 (1%) were referred to the Standards Board and 55 (4%) to the Disciplinary Tribunal.[58] It is impossible, and quite unwise, to specify a more "appropriate" quota of matters which should be referred. Nevertheless it seems clear that the present practice does not meet the intention of the new legislation, which was to reduce significantly the proportion of matters being disposed of "in-house" by the professional associations.

5.60 In practice, the Law Society's Complaints Committee, and subsequently the Law Society Council, only discuss in detail those complaints in which there is a report which recommends some positive action against the solicitor involved (ie, at least a reprimand). The vast majority of complaints, however, involve recommendations for dismissal, and these are treated as "unstarred items" which do not receive individual consideration unless specifically requested by a Committee member. Given the methods of investigation currently employed (discussed above), there may be complaints in which the Complaints Committee or Council would recognise the need for further investigation and analysis leading to disciplinary action. Thus there exists the possibility that some complaints of substance are lost in the system.[59]

The need for training

5.61 Many of the solicitors and barristers involved in the administration of the disciplinary process through their work on complaints committees and the Councils have extensive experience in this area. This has some important advantages, in that it provides stability, consistency and a corporate memory about how things are done. There also may be some disadvantages, in that less successful aspects of the process are perpetuated without the opportunity for a fresh approach. The professional associations have been concerned in recent times to achieve a balance in the disciplinary committees between long-serving and new members (both legal members and lay members), and this is a policy which should be encouraged. A number of the new members of the complaints committees have mentioned to the Commission that it is difficult to assume these new and important responsibilities which are in addition to their other commitments, without any training or orientation programs available for the new members (especially the lay members). New members, especially (but not limited to) lay members, would profit from information about the Act, the procedures used by the professional associations, the system of Boards and Tribunals, and so on. Seminar and workshops should be conducted periodically to address specific issues for continuing members.

Upgrading of reporting requirements

5.62 The *Legal Profession Act* imposes a number of reporting requirements on the professional Councils. The Councils are directed to report to the Attorney General at least once per year on the nature, composition and functions of the committees of the Law Society and Bar Association.[60] By implication, the Councils also must report on the role of lay representatives on the various committees.[61] The Councils also must submit their annual reports to the Attorney General for tabling in Parliament.[62] The professional Councils, the Conduct Review Panel, and the Standards Board also are obliged to report to the Attorney General on the investigation of complaints, review of dismissal of complaints, and hearings into complaints, respectively. These reports are to be submitted "at such times and in respect of such periods as the Attorney General directs".

5.63 Two issues arise in respect of the reporting requirements for the Councils on the administration of their disciplinary responsibilities. First, the legislation probably should require that the reports be submitted to the Attorney General at least annually, *and* at such other times as the Attorney directs. The present wording[64] leaves open the possibility that reporting could be less frequent than once per year.

5.64 Secondly, the standard of reporting needs to be addressed. In New South Wales, the Law Society produces an Annual Report[65] which is designed to meet all of the reporting requirements discussed above. There is a list of the membership of the Complaints Committee, followed by a very brief description of the role of the Committee in the disciplinary process, with a two-sentence summary of the statistics for the year in question. Later in the Annual Report there is another brief description of the statutory basis of the Law Society's disciplinary responsibilities and a somewhat fuller statistical portrait.[66] However, there is no explanation or analysis of the raw data; no detailed comparison with previous years or with other jurisdictions; no attempt to discern trends or identify problems; and no recommendations for consequential changes to the disciplinary process, educational standards and so on. Similarly, the Bar Association produces an Annual Report[67] which contains brief reports from its four Professional Conduct Committees, but is no more fulsome than the Law Society's version.

5.65 The Commission is not suggesting that the Law Society has failed to meet its reporting requirements. To the contrary, there never appears to have been any clear guidelines or expectations set about the nature of these requirements. If the profession is to retain control over the disciplinary process, which is the assumption contained in this Option, the public interest requires that the annual reports of the Bar and Law Society Councils be as full, frank and informative as is possible. The half-yearly report of the Victorian Law Institute's Professional Standards Department provides one good (although not optimal) example. It contains a clear summary of statistics (also presented graphically), some attempts at analysis and cross-tabulation of the data, figures on "the average life of a complaints file", and other relevant material. The Law Institute's report is distributed widely, including to all Members of Parliament, the major media outlets, consumer organisations, community legal centres and others.

5.66 One important and admirable feature of the Law Institute's latest report is a summary of the findings of a survey administered by the Solicitors' Board given to complainants and respondent solicitors measuring their levels of satisfaction with the dispute resolution process.

5.67 The Commission proposes that it become standard practice for the professional Councils each to produce an Annual Report on regulation and discipline which contains a full treatment of statistics, empirical and comparative analysis, case studies, satisfaction surveys, recommendations for consequential legislative or administrative change, and so on. The report should be to the Attorney in the first instance for tabling in Parliament, but should then be distributed much more widely.

Standing of the Councils before the courts

5.68 The High Court of Australia has recently heard and reserved judgment in a case testing the right of the Bar *Association* to appear as a party in proceedings before a court to determine whether a person should be admitted as a barrister. Under s51 of the Act, the Bar *Council* is authorised: (a) to take such steps as are necessary and proper to deal with professional misconduct by barristers or the unauthorised practice of law by unqualified persons;[68] and (b) to appear by counsel before, and be heard by, the Supreme Court in relation to barristers or candidates for admission as a barrister. Section 54 contains similar provisions in respect of the functions of the Law Society Council.[69] The High Court has been asked to consider whether (1) the Bar Association or Bar Council is the appropriate party to contest the admission, and (2) whether the appropriate body is entitled to call evidence and cross-examine, or merely to address.

5.69 The Bar Association's submission[70] proposes that, whatever the outcome of the High Court hearing, the matter should be put beyond doubt by an amendment to the *Legal Profession Act* 1987 providing that the appropriate party is the Bar Association and that the Bar Association is entitled to call evidence and cross-examine the applicant for admission in any proceedings to oppose admission. The Commission agrees that this ought to be clarified by amending legislation.

External review - the Legal Profession Conduct Review Panel or a Lay Observer?

The existing system.

5.70 Apart from the inclusion of some lay members on the professional bodies which deal with disciplinary matters, the principal mechanism for external accountability in the *Legal Profession Act* 1987 is the Legal Profession Conduct Review Panel, which, upon the application of a complainant, reviews the dismissal of a complaint against a legal practitioner by the Law Society Council or Bar Council.[71] The Review Panel consists of one barrister and one solicitor appointed by the Attorney General on the nomination of the relevant professional association, as well as four lay persons appointed by the Attorney after consultation with the Legal Aid Commission, the Law Foundation and other appropriate bodies.[72] A complainant whose complaint has been dismissed by a Council may apply in writing within two months after the dismissal for a review of the decision. In a particular case, the Review Panel is comprised by one of its legal members (depending upon whether the subject of the complaint is a barrister or solicitor) and two lay members, selected by the Chairperson of the Panel. In practice, the Panel conducts its reviews on the basis of the documentary evidence collected in the course of investigation by the professional association, andMer$consultation with the relevant Council. It does not hear any of the parties or conduct any independent investigations. At the conclusion of its review, the Panel may uphold the decision of the Council to dismiss the complaint, or recommend to the Attorney General that the matter be referred to the Standards Board or the Disciplinary Tribunal.[73]

5.71 The Law Society's submission[74] was particularly critical of the Review Panel, and called for its abolition and replacement by a "Lay Observer".[75] The Law Society identified four alleged deficiencies in the existing system. First, the Law Society suggested that there had been "unacceptable delay" in the Review Panel's handling of matters referred to it. Second, the Law Society considered that the Review Panel's exclusive reliance on information obtained derivatively from the Law Society's investigation was a significant weakness. Third, the Law Society noted the limited jurisdiction of the Review Panel - in particular that the Panel may not consider a complaint prior to its dismissal by one of the professional Councils, and that the Panel may not deal with matters which have been disposed of other than by way of dismissal. Finally, the Law Society noted that the Panel is not required to provide any detailed reasons for its decisions nor to report periodically to the public or the Government. These issues, and others identified by the Commission, are discussed below.

The problem of delay

5.72 The Law Society is correct in pointing out that there have been considerable delays in the work of the Review Panel since its establishment. However, the factors causing these delays have mainly been beyond the control of the Panel itself, which, particularly in recent times, has met frequently and endeavoured to reduce the backlog of cases. One of the reasons for the delays is that the Act initially made no express provision for the appointment of alternate members to the Panel.[76] After the legislation was amended in 1989,[77] it still took some time before the alternates actually were appointed. The solicitor member was seriously ill for some considerable time and, despite the efforts and representations of the Chairperson of the Panel to have an alternate or replacement member appointed, this did not happen. Thus, for about nine months the Panel was unable to conduct any reviews in relation to solicitors. There is now an alternate solicitor member, but unfortunately no alternate barrister member has yet been named.

5.73 The other main reason for delay was the fact that the Bar Council did not turn over any of its files to the Review Panel from the time the Act came into force in January 1988 until early in 1992, on the basis that the Bar was concerned about confidentiality and the possibility of Freedom of Information legislation applying to the documents once they came into the possession of the Panel. The Bar Council took the position that the Panel's statutory entitlement "to view (a) the record of the Council's investigation of a complaint; and (b) all other documents held by the Council in relation to that investigation"[78] was to be interpreted quite literally: The Panel could *view* the relevant files and documents but could not take them away or copy them. This made it practically impossible for the Panel to carry out its work. Consequently, for three and one-half years the Review Panel was unable to review a single decision by the Bar Council to dismiss a complaint despite 30 applications for review from disappointed complainants.

5.74 In the circumstances, the Commission is unwilling to attach any blame to the Review Panel for the delays, and believes that the external review system can be made to work in a timely manner by altering or clarifying the legislation and procedures. The Chairperson of the Panel informed the Commission that all 1991 matters should be finalised by April 1992, and the backlog would effectively be over from that time.

The limited jurisdiction

5.75 The Commission agrees with the Law Society that the Review Panel's jurisdiction is far too limited. The Panel should be empowered to review every decision made by the professional associations and their Councils, whether this involves a decision to dismiss a complaint, or to issue a reprimand, or to take some other action short of referral to the Standards Board or the Disciplinary Tribunal. A complainant may feel no less aggrieved by a Council decision to issue a reprimand to a legal practitioner than by a decision to dismiss the complaint entirely. The aim of external accountability is not met in such circumstances if there is no recourse by the complainant to the Review Panel, and the complainant may well feel that the lawyer's interests were better looked after than his or her own. The need for increased review jurisdiction will be particularly important if the professional Councils are successful in gaining further powers to deal with what they regard as "minor" complaints, and if mediation and other more informal dispute resolution techniques are to be used more frequently. The Review Panel should have the same powers in New South Wales as the Legal Services Ombudsman has in England - to be able to review every decision in the disciplinary process (or a failure to make a decision), except a decision made by a court or tribunal.[79]

The meaning of "review"

5.76 The Act states that the Review Panel "shall review" decisions to dismiss a complaint, upon application from the complainant. To this end, the Panel is required to consult with the relevant professional Council and is entitled to view the records and documents held by the Council in relation to the investigation of the particular case.[80] As a matter of practice, the Review Panel generally conducts only an administrative "paper review", *in camera*, based upon the application of the complainant and the existing files. On occasion, the Panel has requested the Law Society[81] to produce further information - that is, to present fresh evidence. Having regard to its resources and its own interpretation of the relevant sections of the Act, however, the Review Panel does not undertake any fresh investigation or re-investigation, does not receive submissions from the parties, and does not hear from the parties or from any other witnesses.

5.77 As members of the Panel have acknowledged, in discussions with the Commission, this procedure often comes as a disappointment to complainants, who assume that they will be notified of the time of the review, will be entitled to be present and to be heard (in person or through a representative), and will be able to put on and challenge evidence. That is, complainants assume that they will receive the opportunity to "appeal" against the Council's decision. One experienced member of the Panel described this as "an austere, dehumanised procedure which does not satisfy the public". The Chairperson of the Panel, Mr John O'Neill, described the Panel's powers in this regard as "deficient".

5.78 The general procedure of the Panel is determined by the Chairperson.[82] It is arguable that the Panel may have taken too narrow a view of the powers it is already accorded in the *Legal Profession Act* 1987.[83] In considering the meaning of "review" in the particular context of the powers of the Compensation Court,[84] the New South Wales Court of Appeal determined that it connoted "a very large power", at least as wide as that comprehended by the term "appeal", and that it was open to the judge conducting the review to permit evidence to be adduced, whether fresh evidence or not - at least "on a proper case".[85] Whatever the correct interpretation of the breadth of the term "review" in the context of the powers of the Conduct Review Panel, there is little doubt that these powers ought to be clarified and significantly increased by legislation in order to permit the Panel to conduct an effective review of the decisions of Councils to its own satisfaction and that of complainants.

5.79 The weakness of the current system of review is neatly illustrated by reference to one of the provisions in the Act meant to benefit complainants: under s134(4), if a Council fails to deal with a complaint within six months, it may be deemed to have been dismissed for the purpose of the complainant seeking a review of the "decision" by the Conduct Review Panel. However, in practice, this would likely be a futile exercise. Given the Panel's inability to properly investigate the matter itself, including discussing the matter with the complainant, there would be little or nothing on the record for it to examine. To give meaning to this provision the Panel would be required to step into the shoes of the Council and conduct a thorough investigation of the original complaint - as well, perhaps, as examining why the Council failed to deal with the matter in a timely fashion.

5.80 It should be noted by way of contrast that the Legal Services Ombudsman in England has more thorough-going powers to review dismissed complaints, including re-investigation where appropriate. The Legal Services Ombudsman may require any person to furnish information or produce documents considered relevant, and has the same powers as the English High Court to compel attendance, examine witnesses, and so on.[86] The Legal Services Ombudsman also may make recommendations of an advisory nature to the professional bodies about the nature or sufficiency of the arrangements they have in place for the investigation of complaints, and the professional bodies are under a statutory obligation "to have regard" to any such recommendation.[87]

5.81 As mentioned earlier, the Panel's view of the extent of its own powers is no doubt coloured by practical considerations about the resources which currently are made available to it, and which currently are not calculated to support a system of full hearings. The resources issue is discussed more fully, below.

The Panel's power to order a hearing

5.82 After conducting a review, the Panel may, if it sees fit, recommend to the Attorney General that the matter be referred to the Standards Board or the Disciplinary Tribunal. It has made such a recommendation only 14 times out of a total of about 400 matters considered (all, of course, in relation to solicitors). According to the Registrar of the Disciplinary Tribunal, who also has responsibility for the Panel, the Attorney General has only formally notified the Panel in respect of two of these matters. The remainder are still awaiting a decision - some for over a year.

5.83 The Act contains other provisions which would indicate that the review process is weighted against complainants. For example, the Panel is required "to consult with a Council before it completes its review of the Council's decision to dismiss a complaint",[88] but it is not required to consult with the complainant. Similarly, before the Panel decides to recommend to the Attorney General that a matter be referred to the Board or Tribunal, it must notify the appropriate Council,[89] giving it the opportunity to pre-empt a report to the Attorney by referring the matter itself.[90] Yet there is no parallel requirement that the Panel notify the complainant where it intends to *uphold* the decision of a Council to dismiss a complaint, affording the complainant the opportunity to come forward with more information. In 1990, the Law Society Council only changed its decision to dismiss on one occasion following notification by the Panel of its intention to recommend referral of the matter to the Board or Tribunal.

5.84 It is difficult to see why the recommendation of the Panel should not be given *direct* effect, rather than triggering yet another review by the Attorney. In recent discussions with the Commission, the Bar Association supported this view. The Attorney General is required to "take into consideration, but is not bound to follow, the recommendation made by the Panel".[91] If the Panel's only power is to refer the matter for hearing, there is little danger in giving this direct effect. The added layer of the Attorney General, who would no doubt act on the advice of departmental officers or the Crown Solicitor, only contributes to delays in the final determination of a complaint, and leads to the view that the system is balanced against the complainant. Where the Panel resolves to uphold the decision of the professional Council, it should be required to provide the complainant with written reasons.

Membership

5.85 Under the Act, the only qualification for appointment as a lay member of the Review Panel is that the person is not a legal practitioner.[92] In the Commission's view, it is important that the person be of sufficient integrity, strength of character, independence, experience and community standing that he or she will be capable of questioning the decisions of a Council of eminent lawyers in a fair but firm manner, and of assuring the general public of the probity of the disciplinary system. These qualifications should be spelled out more fully in the legislation.

5.86 The Commission understands that it has *not* been common practice for such positions to be advertised. In order to attract the best possible candidates and to assure the public of the independence of the persons appointed to the Panel, such appointments should only take place following a proper advertising and selection process.

Resources

5.87 As indicated in the discussion above, one of the key factors in making the system of external review work is the proper resourcing of the Review Panel. At present, the expenses of running the Panel, as well as most of the rest of the disciplinary system,[93] are reimbursed from the Statutory Interest Account[94] - that is, the interest which accrues on clients' money held in trust by solicitors. Both the submission from the Law Society and the submission from the Bar Association refer to the need for the external review mechanism to be resourced more "adequately"[95] and "effectively"[96] than has occurred to date.

5.88 Given the essential role of external review in promoting public confidence in the integrity of the disciplinary system, sufficient resources must be made available (whether from the Statutory Interest Account, General Revenue, or some other source) to: (1) provide adequate levels of remuneration to the lay members of the Panel, having regard to the time commitment and complexity of the work involved, in order to attract and retain competent people; (2) establish a small, full-time secretariat, to facilitate the work of the part-time Panel; (3) provide the necessary legal and technical advice and research to the lay members of the Panel; (4) make possible the active investigation or re-investigation of complaints in appropriate cases; (5) conduct relatively informal hearings at which the parties may be heard; and (6) run training programs for the lay members. (General issues regarding the funding of the disciplinary system are discussed in Chapter 4.)[97]

The Law Society's proposal for a Lay Observer

5.89 After offering a critique of the existing system of external review, the Law Society's submission contained an interesting proposal for the introduction of a "Lay Observer" to replace the Review Panel.[98] Under this proposal, the Lay Observer would assume the powers currently available to the Panel. The Lay Observer would be empowered to review the investigation of any complaint, whether at the request of the complainant, the Attorney General, or on his or her own initiative. The Lay Observer also would be entitled to refer a matter dealt with by the Complaints Committee for reconsideration by the full Law Society Council.

5.90 A major innovation in the proposal is that the Lay Observer would participate throughout the disciplinary process, rather than simply reviewing some decisions at the end of the line. Thus, the Lay Observer would be entitled to attend and participate in the meetings of the Complaints Committee and the Council, and could attend the hearings of the Standards Board and the Disciplinary Tribunal as an observer. The Lay Observer would also be entitled to attend any dispute resolution conference as an observer. The Lay Observer would have full access to the files of the Law Society's Professional Conduct Department, which handles the initial investigations, on the basis of strict confidentiality.

5.91 The Law Society suggests that the Lay Observer is a full-time position, to be appointed by the Attorney General. The Lay Observer should be a person of some standing in the community and not be a member or an employee of a member of any branch of the legal profession. The Lay Observer should be required to report to the Attorney General at least once per year and this report should be made public. The Lay Observer should also be required to report to the professional Councils at least twice per year, so that the Councils may deal with any concerns at a relatively early stage.

5.92 In its submission,[99] the Bar Council stated that it did not object to the Law Society's proposal, but it could "see difficulties for the Lay Observer being genuinely able to perform the intended function." The Bar Council's preference is to "leave the Panel intact but resource it more effectively than has occurred in the past."

Conclusions

5.93 *The functions of the external monitor*. The Commission agrees with much of the Law Society's proposal - in particular, that the role of the external monitor should not be limited to a partial, *post hoc*, review of some decisions of the professional Councils. In our view, the external monitor should:

> be entitled to, and practically assisted to, scrutinise the initial handling of complaints, to determine whether potential complainants are given the appropriate advice and assistance to make complaints or pursue other avenues and remedies;
>
> have access, on a confidential basis, to all of the files and other records relevant to the assessment and investigation of complaints against lawyers;
>
> be entitled to review *all* of the decisions of the professional Councils and bodies exercising delegated powers (such as the Complaints Committees), and not merely dismissals;
>
> be entitled to undertake a review upon an application from the complainant, or the Attorney General, or on its own initiative;
>
> be entitled to attend and participate in the meetings of the Complaints Committee and the professional Councils;
>
> be entitled to attend the hearings of the Standards Board and the Disciplinary Tribunal as an observer;
>
> be entitled to attend any dispute resolution (mediation or conciliation) conference as an observer;
>
> be entitled to conduct a thorough review of the complaint, including investigation, re-investigation, and holding hearings where appropriate; and
>
> be required to report annually to Parliament through the Attorney General, and at least semi-annually to the professional Councils.

5.94 *The head of the Panel.* The Commission has doubts whether the external monitoring functioning would be most effectively discharged by a single person, no matter how eminent. The Victorian Lay Observer, who is part-time official, has told the Commission that she believes that it would be desirable to have two full-time persons, in order to satisfactorily fulfil the roles of discipline monitor and community educator. Our preference,

at this time, would be to maintain the Panel structure for monitoring the disciplinary system, but with a high profile, full-time, appropriately qualified and remunerated, head. Whether this person is called the "Chairperson of the Legal Profession Conduct Review Panel", as at present, or the "Lay Observer", as the Law Society suggests, or the "Legal Services Ombudsman", as in England, is not critical, although the title used should be one which is capable of readily gaining public recognition and indicates the importance and independent status of the office. Such a person would be responsible not only for participating in the process in the manner described in the previous paragraph, but also for stimulating community education and debate about the role and conduct of the legal profession. This will be a demanding enough job. For the purposes of reviewing individual complaints, and bringing a range of viewpoints and expertise to bear, the multi-member Panel - which includes a legal representative, who can offer technical and practical insights - is better placed to get through the work. The Commission would welcome further submissions on this issue.

5.95 *Relationship with complainants*. A complainant who is dissatisfied with the handling of his or her complaint and has taken the trouble to apply to the external monitor for a review is unlikely to be reassured by a subsequent, dry letter which upholds the professional Council's decision to dismiss. In Victoria, the Lay Observer often also brings complainants into the office as a courtesy to explain her decision, and the factors behind it, in person. At the time of his appointment, the Legal Services Ombudsman for England and Wales suggested that he would also follow this practice. In Victoria, the Lay Observer also is permitted to recommend that compensation be paid to a complainant from a discretionary fund maintained by the Law Institute for this purpose. These practices should be considered for New South Wales.

OPTION TWO: A LEGAL SERVICES COMPLAINTS COMMISSION

Introduction

5.96 The terms of reference for this inquiry specifically direct the Commission to consider the introduction of a "complaints unit". This concept, in New South Wales, comes from the Complaints Unit already in operation in the health care area. In designing this Option, the Commission has looked to the Complaints Unit's structures and operation to provide a model for an independent Legal Services Complaints Commission.

5.97 Of the three Options presented, this one involves the most fundamental change to the existing approach to handling complaints against barristers and solicitors, substituting an independent commission for the role of the Law Society and Bar Association.

The Health Complaints Unit

5.98 In Chapter 3 of this Discussion Paper we consider in some detail the nature and operations of the Complaints Unit of the NSW Department of Health. The Unit receives, investigates and prepares for

prosecution[100] before the various Boards and Disciplinary Tribunals complaints about health care service providers (mainly doctors, but also nurses, psychologists, and others).[101]

5.99 The Complaints Unit was established administratively within the Department in 1984, and operates largely under delegated powers drawn from a number of different pieces of legislation which deal with the registration of health care professionals and with hospital administration. As a matter of policy and practice, the Complaints Unit has acted independently of ministerial direction and public service constraints. The State Cabinet has recently approved, in principle, the reconstitution of the Complaints Unit as an independent statutory authority, the Health Care Complaints Commission (HCCC).

5.100 The Complaints Unit has a staff of about 50, including five doctors and eight lawyers. Frequent use is made of consulting medical practitioners to provide an independent assessment of the treatment of a particular patient, and the specialist medical colleges also have cooperated in providing this sort of expert advice.[102] The Complaints Unit currently receives, and the HCCC will receive, its funding from the State's Consolidated Revenue (at present through the budgetary allocation to the Department of Health).

The need for an independent Legal Services Complaints Commission

5.101 The system proposed in this Option could be adapted readily from the medical to the legal context. Indeed, the Commission understands that the Health Complaints Unit's regime was devised based on the principles of professional regulation contained in the Law Reform Commission's earlier Reports on the Legal Profession.

5.102 The decision to establish such a system is contingent upon reaching the conclusion that the most effective way to ensure the actual and perceived independence and integrity of the disciplinary process is to remove the responsibility for reception, investigation and assessment of complaints from the legal professional associations and to place that responsibility in the hands of an independent commission. Apart from the health care area, no other *private* professions[103] or service-providers (journalists, accountants, engineers, bankers, architects, etc) are regulated in this way.

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

5.104 If this course is chosen, then it will be necessary to establish an independent statutory authority known as the Legal Services Complaints Commission, constituted under its own legislation. Given that the independence of the institution is its most salient feature, it would be inappropriate, for example, to establish administratively a legal complaints unit within the Attorney General's Department with the promise of a subsequent clarification of status.[104]

The role of a Complaints Commission

5.105 Under this proposal, the independent Complaints Commission would replace the Law Society and Bar Councils, and their committees and officers, as the agency primarily responsible for all aspects of complaints-handling up to the point that a matter is sent to a court, Standards Board or Disciplinary Tribunal for hearing and determination.

5.106 The professional Councils would have a residual role in the disciplinary process, however, in that the Councils would still control the issuing of practising certificates, and it may be that a Council should still be free to refer a matter to the Standards Board or the Disciplinary Tribunal on its own motion.

5.107 The Legal Services Complaints Commission (Complaints Commission) would be responsible for the receipt of all complaints, with the concomitant obligations to make the process reasonably accessible to complainants through the direct provision of assistance as well as the availability of appropriate literature, translation services, and so on.

5.108 The Complaints Commission would itself make an initial assessment of all complaints to determine whether to divert a matter for mediation (by an agency outside the Complaints Commission[105]); whether (and exactly how) to investigate a matter which apparently raises issues of professional misconduct or unsatisfactory professional conduct; and whether to discontinue an investigation.

5.109 Subject to basic considerations of administrative natural justice, the Complaints Commission should be given sufficient powers to conduct its investigations effectively,[106] noting that it is exercising an essentially *protective* function (ie, protective of the public interest) rather than a prosecutorial or punitive one.[107]

5.110 At the conclusion of its investigation, the Complaints Commission would itself determine whether to refer a matter for hearing before the Standards Board or the Disciplinary Tribunal. The Complaints Commission also should be free to forward to the professional Councils any material which it considers may bear upon the issuing, suspension or cancellation of a practising certificate.

5.111 Unlike the role of the professional Councils in the current system, however, the Complaints Commission should *not* have any power to reprimand (or otherwise sanction) a legal practitioner. If the Complaints Commission believes that such action is warranted, then the proper course would be to refer the matter to the

Board or Tribunal. Similarly, the Complaints Commission should not have any power to award compensation, this being the proper province of the disciplinary bodies.

The structure of a Complaints Commission

5.112 There are several models of governance to choose from for a Complaints Commission. The first is to appoint a Commissioner (or "President", or "Chairperson") with statutory decision-making powers in relation to the operation of the Commission. The Commissioner may be supported by one or more Deputy or Assistant Commissioners, who may serve on a full-time or part-time basis, but do not have statutory decision-making powers, except in the case of a Deputy filling in for an absent Commissioner. Below this level, there should be an administrative head, with responsibility for day-to-day supervision of the professional and support staff. The Office of the Director of Public Prosecutions and NSW Law Reform Commission are constituted in this way, for example.

5.113 A second possibility is to establish a governing board for the institution with plenary powers, which establishes policies and priorities, and to which the Commissioner is responsible. The various State and Territory Legal Aid Commissions mainly operate in this way, for example.[108]

5.114 The Independent Commission Against Corruption is constituted by a Commissioner with significant operational authority, and Assistant Commissioners.[109] However, there also is an Operations Review Committee established by the legislation which advises the Commissioner on the conduct of particular investigations as well as on matters of general policy.[110] There is also a Parliamentary Joint Committee which is charged with monitoring the exercise by the Commission of its functions, but the Committee is *not* authorised to consider the investigation or determination of a particular complaint.[111]

5.115 A third model, combining some features of the first two, is to place the statutory authority for operating the Commission in its Commissioner (or Director, or whatever other nomenclature is used to designate the head), but to provide as well for a broadly constituted Advisory Council which assists (but does not bind) the Commissioner by offering a diversity of views and experience.

5.116 At this stage, we are somewhat inclined towards the third approach, which would allow for the representation of various interests on the Complaints Commission - consumers, barristers, solicitors, public sector lawyers and others - in an advisory capacity which could augment the expertise of the Complaints Commission without compromising its independence. The role of the Advisory Council should be limited to consideration of matters of general policy and procedures, and it should not in any way be involved in the handling of individual complaints nor should members of the Advisory Council have access to the Complaints Commission's working files. We would be interested in receiving submissions on this question.

The appointment and qualifications of Commissioners

Appointment

5.117 The head of the Legal Services Complaints Commission must be, and be seen to be, above partisan political and sectional interests. The method of appointment should reflect and reinforce this status. As with all statutory office holders, the formal appointment should be by the Governor in Council (that is, the Governor acting on the advice of the Cabinet), after nomination by the Attorney General. The position should first be advertised in the media to attract a suitable field of candidates. The same considerations apply to the appointment of Deputy or Assistant Commissioners.

5.118 In the discussion of Option One,[112] we proposed that the Legal Profession Advisory Council provided for in the legislation[113] should be established or, preferably, that the Commission's earlier recommendation[114] for the creation of a more broadly constituted Public Council on Legal Services be implemented. Either of these bodies would be in a good position to advise the Attorney General on the appointment of Commissioners.

Qualifications

5.119 Commissioners should possess highly developed investigative and managerial skills, as well as the capacity to promote public discussion and community education about the role of lawyers and about professional standards. Commissioners certainly should be aware of the nature and context of legal practice. Legal qualifications should be a requirement for the head of the Complaints Commission, perhaps, but should not be required of *all* commissioners. It must be remembered that in this Option the independent Complaints Commission replaces the professional Councils, and it is correspondingly necessary to replace at least some of the accumulated legal experience which would be lost. The Complaints Commission also will be able to achieve this through the employment of senior staff lawyers, the use of experts and consultants for peer review, and other methods.

Reporting requirements

5.120 The Legal Services Complaints Commission should be required to report annually to the New South Wales Parliament through the Attorney General, with such report to be tabled within 14 sitting days. The report shall adequately describe the experience of the disciplinary system for the preceding year, and may contain general observations and recommendations relating to the maintenance and enhancement of professional standards.

Public accountability and external monitoring

5.121 Although this proposal establishes an independent mechanism for the receipt and investigation of complaints, there inevitably will continue to be occasions when a complainant is dissatisfied with the handling of his or her particular matter, particularly where the Complaints Commission decides not to proceed with an investigation or, having concluded an investigation, decides not to refer the matter to the Standards Board or the Disciplinary Tribunal.

5.122 One possibility would be to retain an external monitoring mechanism in the system, such as the Legal Profession Conduct Review Panel. However, the principal reason for external monitoring in the current system is to provide an independent check on a process which is largely dominated by the legal profession. This justification falls away in a system which is predicated on a process which is clearly independent of sectional control. Complainants should be entitled to an independent assessment of their claims, but not necessarily to a *sequence* of independent reviews.

5.123 Consequently, we do not propose at this stage that this Option include a *specific* external monitoring feature. As a public agency, of course, the Legal Services Complaints Commission would be accountable to the Ombudsman, the Independent Commission Against Corruption, the Privacy Committee, and other bodies charged with monitoring the exercise of public authority.[115] The Health Complaints Unit has established its own Consumer Advisory Committee with representation from consumer groups, community groups, and others, to assist with consultation and information exchange.[116] A Legal Services Complaints Commission may find it useful to follow this precedent.

Potential advantages

5.124 The main advantages of this approach could be:

the perceived and actual independence of the Complaints Commission from the profession(s) it regulates, thus promoting public confidence in the integrity of the system;

the potential for a more active, thorough and "professional" approach to investigation by a full-time, expert body dedicated to that activity;

the creation of a streamlined process with a single point of contact for complainants, replacing the existing complexity of multiple levels of departments, committees and Councils with separate responsibilities in respect of barristers and solicitors;[117]

the ability to cover impartially the whole of the legal services industry, including para-professionals, at a time when the deprofessionalisation of some areas of traditional legal work (such as conveyancing) calls into question the existing professional-based regulatory system;

the absence of any real need for a specific external review mechanism, while maintaining public accountability through existing means, such as ICAC and the Ombudsman;

the potential for the maintenance and enhancement of standards through the feedback of information to major service-providers and to those responsible for education and training; and

the ability of a Commission with a high-profile head to promote community education and discussion about the legal profession, the complaints system and other relevant matters.

5.125 In the submissions which the Commission has already received, this approach is generally favoured by the Australian Consumers' Association,[118] the Combined Community Legal Centres Group,[119] the NSW Council for Civil Liberties,[120] and the Lawyers Reform Association,[121] as well a number of individuals.

Potential disadvantages

5.126 The main disadvantages of this approach could be:

the more adversarial nature of this process;

hostility and lack of cooperation from the legal profession;

increased expense, as the many volunteers from the professional Councils may need to be replaced by salaried employees and paid consultants; and

the possible loss to the system of accumulated expertise, at least in the transition.

5.127 The submissions from both the Law Society and the Bar Association strongly oppose the removal of the legal professional Councils from the disciplinary process and their replacement by an independent complaints unit or commission (anticipating this Option from the terms of reference). For example, the Bar Association submitted that:

> The establishment of additional structures which are separate and apart from the professional bodies creates tension between the profession and those organisations. They may give an appearance of accountability, but they do so at the expense of a quick, effective, protective regulation and dispute resolution. ... There is a fundamental and vital reason for not establishing such organisations [as a Complaints Unit or an Ombudsman's office] to receive and deal with complaints. The existence of "external regulators" effects a shift in responsibility away from the individual professional, and the profession generally. That is a most retrograde step, and a difficult one to reverse.[122]

5.128 However, it should be noted that professional hostility is not in itself an argument against change, if this is clearly in the public interest. The initial antipathy of the medical profession towards the Health Complaints Unit now seems to have largely dissipated, and the current debate about the reconstitution of the Unit as a Health Care Complaints Commission is more about the details than about the general principle. The experience in this area also suggests that there will be sufficient cooperation from senior members of the profession to provide the necessary expertise to permit peer review and expert assessment of particular cases.

OPTION THREE: A LEGAL SERVICES OMBUDSMAN

Introduction

5.129 In the terms of reference, the Commission is asked specifically to consider the need for a Legal Services Ombudsman. No doubt this term was inspired by the recent introduction of a Legal Services Ombudsman in the England and Wales. In the manner in which we have structured it, this Option is something of a compromise between the first two. It seeks to address the "weakest links" in the existing, largely self-regulatory, system of complaints-handling: namely the real and perceived lack of independence from the legal profession, the doubts about the initial intake of complaints and the adequacy of the investigation and, at the other end of the process, the efficacy of the external monitoring mechanism.

5.130 Unlike the second option, which also is intended to meet these specific objectives, this proposal preserves much of the remainder of the existing disciplinary system, at least to the extent that we have not already suggested changes in our discussion of Option One, above. The principal difference between this proposal and Option Two is that in Option Three, the roles of the Law Society Council and the Bar Council are preserved as the initial bodies for the determination of complaints and referral to the Standards Board or Disciplinary Tribunal. As in Option One, however, the performance of the Councils is to be monitored by an external agency, being the Conduct Review Panel, but in this case under the leadership of the Legal Services Ombudsman.

The establishment of an office of Legal Services Ombudsman

5.131 The Commission has chosen to use the title "Ombudsman" for the head of the proposed office which will receive and investigate complaints and perform the external monitoring function for the rest of the disciplinary system. The term is well-known and understood by the general public and the media (notwithstanding its Swedish origins), and carries the clear connotation of the independent and impartial investigation of complaints.

5.132 While the title Ombudsman initially was used mainly in relation to complaints against governments or government officers,[123] there is a recent trend towards a more general usage. There is already an Ombudsman for the banking industry,[124] and there are similar plans for the insurance and telecommunications industries. A number of newspapers have experimented with an in-house Ombudsman, apart from the loose regulation otherwise provided by the Australian Press Council. As the submission from the Australian Consumers' Association suggests,

> It is possible for either an ombudsman or a complaints unit to meet the principles of accessibility, accountability, fairness and efficiency, but we believe an ombudsman has an advantage. A single

ombudsman can achieve a higher public profile, leading to greater public awareness, trust and therefore greater accessibility.

5.133 The term "Ombudsman" suggests certain essential qualities, but it is not self-defining when it comes to the precise role that the office-holder or the office is meant to play in the disciplinary system. As discussed in Chapter 3, the Legal Services Ombudsman in England and Wales has a far more limited role than the one which we propose here.

5.134 In England and Wales, the main function[125] of the Legal Services Ombudsman is to review the way in which complaints have been handled by the professional associations. This may involve some re-investigation of the complaint, both in terms of the sufficiency of the initial investigation as well as the substance of the complaint. The Ombudsman's office may not commence an inquiry until after the professional body has finished dealing with the matter (unless there has been unreasonable delay). The Ombudsman is not permitted to investigate issues which have determined by the courts or the statutory disciplinary tribunals. Once the Ombudsman has commenced an inquiry, he or she has the same powers as the English High Court (Supreme Court) to compel the attendance of persons, to compel the production of documents or other information, and to examine witnesses.[126]

5.135 Having completed an investigation, the Ombudsman must report in writing to the complainant, the practitioner who is the subject of the complaint, and the relevant professional association. The Ombudsman may make *recommendations* that: (1) the complaint be reconsidered by the relevant professional association; (2) the professional association exercise its powers; (3) the subject of the complaint and/or the professional association involved pay specified compensation to the complainant for any loss, distress or inconvenience suffered; and (4) the complainant be reimbursed whole or in part for the costs of making the allegation.[127] The Ombudsman also may make recommendations of an "advisory nature" to the professional associations about their arrangements for the handling of complaints, and the professional associations are under an obligation "to have regard" to any such recommendation.[128] Finally, the Legal Services Ombudsman may refer matters to the Lord Chancellor's Advisory Committee on Legal Education and Conduct, as part of the general duty to assist in the maintenance and development of standards in the education, training and conduct of those offering legal services.[129]

5.136 In the English system, therefore, the powers of the Legal Services Ombudsman do not extend much beyond those of the Lay Observer proposed by the Law Society of New South Wales in its submission to the Commission on this reference.[130] That is, the English Legal Services Ombudsman is charged with reviewing the handling by the legal professional associations of complaints against lawyers, and making non-binding recommendations about particular cases and general issues.

5.137 By way of contrast, the jurisdiction of the Justice Ombudsman in Sweden is very wide - indeed, remarkably so for persons accustomed to the separation of powers doctrine and the primacy of the private legal profession found in common law countries such as Australia. The Justice Ombudsman has responsibility to ensure that the courts and administrative authorities observe Constitutional and administrative law requirements regarding "objectivity and impartiality and that the fundamental rights and freedoms of citizens are not encroached upon".[131] In order to carry out this function, the Justice Ombudsman has the right to attend any judicial or administrative proceeding, has access to all official files and documents, and can compel any official - including a judge - to cooperate in an investigation. The Justice Ombudsman's chief weapon is the power to issue a public admonition; there is no direct power to overrule a decision of a public official or direct that any remedial action be taken.

5.138 The Justice Ombudsman's writ extends to lawyers (and judges) to the extent that a very high proportion of lawyers in Sweden are found in the courts, the public prosecutor's office, the public service, and other government or publicly-funded agencies. The processes for disciplining these lawyers are likewise to be found in public sector management practices rather than in the hands of private professional associations (as is typically the case in common law countries). Thus, the context of the regulation of lawyers in Sweden is quite different: most lawyers are found in the public sector, the judiciary is bureaucratically organised (as is the case in most of the civil law countries of Western Europe), and lay people commonly sit together with judges on courts and tribunals (in the absence of a jury system). In these circumstances, the Justice Ombudsman's jurisdiction over lawyers and judges (and the apparent acceptance of this jurisdiction by lawyers and judges) is more explicable.

5.139 In this Option, the Commission envisages the role of the Legal Services Ombudsman in New South Wales as extending beyond the limited review function of the English counterpart, to include as well the responsibility for the initial intake, assessment and investigation of complaints. However, given the very different context, traditions and organisation of our legal profession and judiciary, the Legal Services Ombudsman should have no role in the review of the decisions of courts or tribunals, nor in the investigation of judicial officers.

The intake and investigation of complaints

5.140 As we stated in the discussion of Option One, the phases of initial intake, assessment and investigation of complaints are arguably the most important.[132] We suggested above that the fact that complaints about lawyers currently must be made to the professional associations which represent the interests of lawyers created the suspicion of bias, and that the mechanism for receiving complaints thus should be made as separate and as independent from the profession as possible.[133] We also expressed some serious concerns about the adequacy (in terms of methodology) of investigations in general,[134] and about the substantial gap between the sort of conduct that clients commonly complain about and the sort of conduct which the professional associations treat seriously enough to prosecute through the formal disciplinary system.[135]

5.141 To correct these problems, it is proposed in this Option that the Legal Services Ombudsman take over these functions. All complainants[136] would go to the independent Office of the Legal Service Ombudsman, which would: offer full assistance in the preparation of formal complaints; make the initial assessment of the complaints, culling those which are frivolous or vexatious or do not disclose relevant issues; divert the appropriate matters to mediation; and actively investigate those complaints which are to be pursued further, culminating in the production of a thorough dossier or report on the matter in question.

The hearing and determination of complaints

5.142 At this point, the work of the Legal Services Ombudsman would feed back into the existing disciplinary system, as modified by the suggestions the Commission has made in Option One. Having completed an

investigation, the Legal Services Ombudsman would send the resulting report to the relevant professional Council, which would determine whether to dismiss the complaint, reprimand the legal practitioner involved, or refer the matter to the Legal Profession Standards Board or the Disciplinary Tribunal (or a merged body[137]).

5.143 As the Law Society submitted[138] and the Commission proposed in Option One,[139] the Legal Services Ombudsman should be free to attend any Council meeting, dispute resolution meeting, disciplinary hearing or other related proceeding in order to satisfy himself or herself that the proceedings are conducted in a fair and effective manner.

External monitoring of the disciplinary system

Introduction

5.144 Under this proposal, the role and responsibilities of the Legal Services Ombudsman would re-emerge later in the disciplinary process as the external monitor of the integrity of the system.

Ombudsman to chair Review Panel

5.145 If a complainant is unhappy with the handling of his or her complaint by a Council, then he or she may apply for a review to the Legal Profession Conduct Review Panel, of which the Legal Services Ombudsman would be the Chairperson. The Review Panel should be able to consider not only matters which have been dismissed by the Councils, as at present, but also those which have resulted in a reprimand or other action short of referral to the Standards Board or the Disciplinary Tribunal. Complaints which have not been disposed of by the Council within six months of receipt would also be reviewable, as at present. However, it is unlikely that many matters for review would arise in this way, since most delays now come at the investigation stage rather than at the Council stage.

5.146 The Review Panel, as we proposed above, should have adequate powers and resources to investigate matters effectively, including by way of a hearing. At the conclusion of its deliberations, the Panel should then have the power to refer matters directly to the Standards Board or the Disciplinary Tribunal (or a merged body) if it is satisfied that the matter has not been handled properly by the relevant Council, or if the interests of justice so require.

5.147 The Review Panel should not have any power to review the particular decisions or determinations of the Standards Board or Disciplinary Tribunal (or any merged successor body), or of the courts.

Advisory powers

5.148 The Legal Services Ombudsman should be under a general duty to assist in the maintenance and enhancement of professional ethics and standards, and to this end should also liaise with other institutions providing education and training for persons supplying legal services (including para-professional services, such as conveyancing).

5.149 The Ombudsman also should be under a specific duty to promote community education and discussion about the legal profession and the legal system. This will involve promoting and conducting research; holding seminars, conferences and public meetings; publishing materials for public and professional use; utilising the media, and so on.

Reporting requirements

5.150 The Legal Services Ombudsman should be required to report annually to the New South Wales Parliament through the Attorney General, with such report to be tabled within 14 sitting days.

5.151 The Legal Services Ombudsman also should be required to report to the professional Councils at least once per year, but may do so more often. Portions of the report to a Council may be designated as confidential if, for example, this is appropriate to preserve the integrity of a current investigation.

Appointment and qualifications

Method of appointment

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

5.153 In the discussion of the other Options, we proposed that the Legal Profession Advisory Council provided for in the *Legal Profession Act* 1987[140] should finally be established or, preferably, that the Commission's earlier recommendation[141] for the creation of a much more broadly constituted Public Council on Legal Services be implemented. The Public Council, with representation from different parts of the legal profession as well as from consumers and the general public, would be the ideal body to advise the Attorney General on the appointment of a Legal Services Ombudsman.

Qualifications

5.154 The threshold question is whether appointment to the office of Legal Services Ombudsman should be limited to persons without legal qualifications.

5.155 Prior to *Legal Profession Act* 1987, the Law Society of New South Wales operated a Lay Observer scheme for several years, in which a distinguished layperson monitored the complaints-handling process and reported to the Law Society. Under the Act, the Conduct Review Panel must be chaired by one of its lay members, who is appointed by the Attorney General.[142] The Law Society's submission to the Commission in this inquiry contains a major proposal to replace the Conduct Review Panel with a Lay Observer who has enhanced powers and resources.[143] In England and Wales, the legislation specifies that the Legal Services Ombudsman "shall not be an authorised advocate, authorised litigator, licensed conveyancer, authorised practitioner or notary".[144]

5.156 The main rationale for limiting the position to non-lawyers is that the external monitoring functioning is best performed by a person who is not, and would not be suspected of being partial to the interests of the legal profession.

5.157 The Commission agrees that the external monitor, whether a Legal Services Ombudsman or some other officer, must be free from any reasonable suspicion of bias (for *or against* the profession). However, it is less certain that the essential characteristic of independence means that anyone with legal qualifications automatically should be debarred from holding the office of Legal Services Ombudsman. Among practising lawyers, academic lawyers, magistrates, judges and non-practising lawyers (ie, those with legal qualifications who are working in management, banking, journalism and so on), there must be many persons with sufficient personal qualities of independence, fairness and integrity to warrant appointment. Conversely, among non-lawyers, there obviously will be many persons who would be inappropriately sycophantic, insensitive to the needs of consumers, or otherwise unsuitable for appointment.

5.158 The Commission believes there are some important advantages in having a Legal Services Ombudsman who understands the substance, context and procedures of legal practice. The *process* of appointment, discussed above, which involves consultation and careful consideration, should ensure that the particular person chosen has the attributes and community standing to be, and be seen to be, independent of the profession. If a lay person was appointed as the Legal Services Ombudsman, he or she should could, where appropriate, take legal advice from some perceptibly neutral lawyer, such as an academic lawyer or retired judge.

5.159 In this connection, the Commission notes that the Swedish Justice Ombudsman is usually an experienced (legally trained) judge, and that the "independent discipline monitor" in California, who reports annually to the State Legislature, is currently a law professor.[145]

5.160 Further, the appointment of a Legal Services Ombudsman certainly will not affect the continued (indeed, the increased) involvement of lay participants in the rest of the disciplinary system. For example, there already is lay representation on the committees of the professional associations, on the Standards Board and Disciplinary Tribunal, and on the Conduct Review Panel.

Advantages and disadvantages

5.161 The main advantages of this Option are that it specifically addresses two of the most controversial phases of the system, and is calculated to ensure greater independence and accountability of the whole system, without requiring a radical restructuring of the existing system. It is not likely to be bureaucratic, expensive or "oppressive" (from the profession's point of view). Having a high profile Legal Services Ombudsman, who could be involved in continuing and community legal education, would have positive effects in itself.

5.162 The major disadvantage is that it fails to address fully the third controversial phase of the existing system - the role of the professional Councils. This may be overcome, however, by the proposals we make in Option One to make the Councils more accountable, and by the strengthening of the external monitoring function (by the Legal Services Ombudsman and the Conduct Review Panel. As with Option Two, there may be some additional costs beyond those in the existing system in properly resourcing an Office of the Legal Services Ombudsman.

FOOTNOTES

1. Submission of the New South Wales Bar Association, 20 February 1992, (hereafter, the "Bar Association submission") p17.

2. Submission of the Law Society of New South Wales, 31 January 1992, (hereafter, the "Law Society submission") para 30.

3. See New South Wales Law Reform Commission, *Discussion Paper No 1: General Regulation* (DP 1, 1979) at 29-31, 52, 86, 122-127, 136, 138, 149-152, 159, 166, and 185-187. These observations are not, of course, original to the Commission. See, for just one example in the wide literature in this area, B Abel-Smith and R Stevens, *In Search of Justice* (1968) 316.

4. Submission of the Lawyers Reform Association, 8 April 1992, at para 1.3. See also paras 2.5-2.7 and 3.1-3.7.

5. *Legal Profession Act* 1987 (NSW) s130(5). Unless otherwise indicated, all section references in this chapter refer to the *Legal Profession Act*.

6. According to figures supplied by the Law Society and Bar Association, about three-quarters of complaints against solicitors and two-thirds of complaints against barristers in 1990 came from members of the general public (mainly clients).

7. At 15.

8. See paras 4.24 et seq.

9. The Registrar of the Disciplinary Tribunal is also the Registrar of the Standards Board and the Conduct Review Panel.

10. See s51 regarding the powers of the Bar Council in this regard, and s54 regarding the powers of the Law Society Council.

11. Section 130(5).

12. See para 5.4, above.

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

14. See the discussion of the English system in Chapter 3.

15. Law Society submission, App 2, at 26-27.

16. Section 136.

17. Lay representation was increased in 1992 from one to two members, following advertisements for these positions.

18. Law Society submission, App 2, at 23. The Law Society expressed its figures in days (155, 161 and 140, respectively), which we have converted to months using a factor of 30.4.

19. Section 134(4).

20. Bar Association submission, at 4; Law Society submission, at 27.

21. See para 4.22

22. *Solicitors' (Professional Conduct and Practice) Rules* (Vic) r6 requires within 14 days "a full and accurate account of the solicitor's conduct in relation to the subject matter of the complaint, unless the solicitor has a sufficient and satisfactory reason for not furnishing an account thereof".

23. The legislation will need to provide for sufficient discretion to cope with the normal events of life, such as illness, holidays, absence on circuit and so on.

24. Section 35(2)(c). The *Legal Profession (Practising Certificates) Amendment Bill* 1992, currently before the Parliament, would give the Bar Council the same powers as the Law Society Council in this regard. See also r67 of the NSW Bar Association Rules, which is set out in Chapter 4, fn 27, above.

25. Letter to the Commission of 16 March, 1992, from Mr Frederick Smith, Manager of the Law Society's Professional Conduct Department.

26. The *Legal Profession (Practising Certificates) Amendment Bill* 1992, which is currently before Parliament, would achieve this result.

27. See New South Wales Law Reform Commission, *The Legal Profession - Background Paper III* (1980) at 51, Table 3.

28. Law Society Special Bulletin No 1 of 1979.

29. By the *Legal Profession (Amendment) Act* 1987, Sch 8. This change was urged by the Law Society.

30. Section 123.

31. Law Society submission, App 2, at 9 and 11-12. This was comprised of 1189 complaints received by the Law Society under s130, and 56 investigations commenced by the Law Society Council on its own motion. According to separate figures supplied by the Law Society to the Commission, a total of 820 solicitors

were complained about in 1990, with 182 solicitors attracting multiple complaints, and 168 complaints against firms rather than individual solicitors.

32. Figures supplied by the Bar Association.

33. See the Submission of the NSW Combined Community Legal Centres, 28 February, 1992. (Hereafter, the "Community Legal Centres submission".) This submission makes a similar point, noting (at 1) that in its particular experience the principal sources of client dissatisfaction are costs, poor communications, failure to be kept informed of the progress of their cases, and unwillingness to undertake or continue with Legal Aid Commission-funded work.

34. *Re Moulton* [1981] 2 NSWLR 736.

35. Section 130(1).

36. See paras 4.28-4.42, above.

37. See paras 4.36-4.42, above.

38. The Professional Conduct Department is divided into three sections: Complaints, Litigation and Ethics. At least six of the staff are located in the Complaints section.

39. Section 136. The presiding member of the committee, at least, must be a Council member for the delegation to be effective.

40. New South Wales Law Reform Commission, *Complaints, Discipline and Professional Standards - Part 1* (DP 2, 1979) para 3.64.

41. DP 2, at paras 3.76-3.83.

42. Section 134.

43. In the case of the smaller number of complaints against barristers, the Bar Council has told the Commission that its position is to refer equivocal cases to the Board or Tribunal for determination.

44. There about 55,000 solicitors in England and Wales. In New South Wales, there were 11,428 solicitors in July 1991. The 1989 lawyer-to-population ratio in England and Wales was 1:950; in NSW it was 1:557.

45. See Part 5 of the *Medical Practitioners Act* 1938 (NSW), ss 39 et seq.

46. Section 35(2)(c). Only the Law Society Council has this power at present, although pending amendments would afford this power to the Bar Council as well. See also r67 of the NSW Bar Association Rules.

47. Sections 32 and 35. *NB*: Just prior to the publication of this Discussion Paper, the *Legal Profession (Practising Certificates) Amendment Bill* 1992 received its first and second readings in State Parliament. The Bill would amend these sections to provide for the imposition of certain conditions on a barrister's practising certificate.

48. Under s35(2)(c) the Law Society Council may refuse to issue, suspend, or cancel, a solicitor's practising certificate, for failure to give a satisfactory explanation to the Council after having been required to explain specified conduct. The Bar Council does not have the equivalent power at present, although the *Legal Profession (Practising Certificates) Amendment Bill* 1992 would amend s35 to this effect. See the preceding footnote. See also r67 of the NSW Bar Association Rules.

49. Section 135.

50. Under s134(1)(b)(ii).

51. Bar Association submission, at 12.

52. Section 134(1)(b).

53. See s149.

54. Section 134.

55. Section 135.

56. See paras 4.50-4.53, above, regarding "The question of open justice".

57. Section 134(1)(b) and (1A). The Council must be satisfied that "the legal practitioner is generally competent and diligent and that no other material complaints have been made against the legal practitioner". This is the disciplinary equivalent of a s556A discharge in the criminal process. The significance of the finding may be lost on complainants, however.

58. See the discussion below under "The possible merger of the Board and Tribunal" regarding the under-utilisation of these bodies, especially the Standards Board.

59. Because of the much smaller number of cases involved, this is less likely to happen to complaints against barristers, which receive individual attention at the PCC and Bar Council stages.

60. Sections 49 and 52.

61. Section 53 permits the Attorney General to direct the Councils to include lay representatives on their committees, but not exceeding 25% of a committee's membership. The reporting implication derives from the requirements under ss 49 and 52 to detail the composition of committees.

62. Section 57.

63. Section 171.

64. Section 171(1).

65. The last Annual Report of the Law Society examined by the Commission is for the year 1990-1991. The Complaints Committee material appears on the top of p11.

66. At pp 28-30.

67. See New South Wales Bar Association, *55th Annual Report, for 1991* (1991), at pp 17-21.

68. See Part 9 of the Act in respect of "Unqualified Practitioners".

69. The Law Society Council's powers also extend to "any other improper conduct" besides professional misconduct, and to solicitors' clerks, under s54(a)(1)-(2).

70. Bar Association submission, at 13-14.

71. Or a dismissal by one of the complaints committees acting under the delegated authority of a Council.

72. Section 126.

73. Sections 137 and 141.

74. Law Society submission, at para 9.

75. See the discussion of this proposal at paras 5.89-5.92, below.

76. See now Sch 4, cl 3A of the *Legal Profession Act* 1987.

77. Schedule 4, cl 3A.

78. Section 139(3).

79. *Courts and Legal Services Act* 1990 (UK) s19.

80. Section 139.

81. Again, only reviews of matters involving solicitors have taken place to date, because of the Bar Council's position on the release of files to the Review Panel. It is interesting to note, however, that the Bar Association's "Explanatory Brochure for Persons Lodging Complaints Against Barristers" states that the Panel "has the power only to review the material on the Association's file; *it may not take fresh evidence*." [Emphasis supplied.]

82. Schedule 4, cl 10.

83. Under s139.

84. See the *Compensation Court Act* 1984, s36(1).

85. *Watson v Hanimex Colour Services Pty Ltd* (unreported) NSW Court of Appeal, 28 November 1991, CA 40277/90; CC 6630/89. See also *Schweppes Limited v Archer* (1934) 34 SR (NSW) 178 at 183.

86. *Courts and Legal Services Act* 1990 (UK), s19.

87. *Courts and Legal Services Act* 1990 (UK), s21.

88. Section 139(2).

89. Section 140(2).

90. Cf ss 137(1) and 140(2).

91. Section 141.

92. Section 126(2)(c). Schedule 4, cl 2(1), originally provided that the person must be under 70 years of age, but this has been repealed.

93. Section 168.

94. See section 67.

95. Law Society submission, at para 10.10.

96. Bar Association submission, at 17.

97. See paras 4.104-4.114, above.

98. Law Society submission, at para 10, pp 4-5. The proposal only deals with relationship between the Lay Observer and the Law Society. There is no discussion of whether the same Lay Observer should also have responsibility for complaints against barristers.

99. Bar Association submission, at 17.

100. The Complaints Unit briefs counsel to appear for it, using the Crown Solicitor's Office as the instructing solicitor.

101. Complaints about doctors go to the (Medical) Professional Standards Committees and the Medical Tribunal under the *Medical Practitioners Act* 1938 (NSW). Registration of doctors is in the hands of the Medical Board. There are similar but separate Boards, Standards Committees, and Tribunals which hear complaints against the other categories of health care professionals. Dentists, however, are *not* covered by the Complaints Unit.

102. The Complaints Unit pays for these peer assessments at the rate of $135 per hour, but some of the Colleges and individual doctors waive this fee.

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

104. While the Health Complaints Unit started in this manner, for historical rather than policy reasons, the clear lesson from this experience is that a fully independent commission is preferable, if not inevitable.

105. Although mediation and conciliation sessions should be accorded absolute privilege to promote full and frank discussion without prejudice to subsequent civil or disciplinary proceedings, it is still preferable to separate the investigative and prosecutorial functions of the Complaints Commission from the disposition of complaints. The proposed Health Care Complaints Commission will send matters appropriate for dispute resolution to the Department of Health's Health Conciliation Registry.

106. See, eg, Part 5 of the *Medical Practitioners Act* 1938 (NSW).

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

108. The situation in New South Wales is somewhat different, however. In the other states, the Director is appointed by the Commission. In NSW, under the *Legal Aid Commission Act 1979* (NSW), the Attorney General makes this appointment and the Commission has no role. Under the Act the Director is accountable to the Attorney General, but the Director's employment agreement specifies that the Director undertakes to implement the policies of the Commission.

109. *Independent Commission Against Corruption Act* 1988 (NSW) ss 4-6 and 107. (Hereafter, the *"ICAC Act*".) Under s104, the Commission may employ a Director of Operations, a Director of Administration and other senior support staff.

110. Sections 58-62 of the *ICAC Act*.

111. Sections 63-72 of the *ICAC Act.*

112. See paras 5.116-5.117.

113. Section 58 and Sch 3.

114. New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure* (LRC 31, 1982) para 6.22.

115. According to its *Annual Report 1990*, at 44, the Health Complaints Unit was the subject of 13 complaints in the preceding year, made to a variety of different bodies, such as the Ombudsman's Office, the Consumer Advisory Committee, the Medical Defence Union and the Royal Australian College of Surgeons. Ten of the complaints were not substantiated, while three remain under consideration.

116. See para 3.193, above.

117. For example, a single Complaints Commission would effectively replace (for the purposes of handling complaints): the Law Society's Community Assistance and Professional Conduct Departments,

Complaints Committee, and Council, and the Bar Association's Professional Affairs Director, four Professional Conduct Committees and Council.

118. Submission of the Australian Consumers' Association, 23 December 1991, at 1-2. (Hereafter, the "ACA submission".) The ACA supports "an independent complaints and compensation mechanism", with an Ombudsman slightly preferred to a Complaints Unit.

119. The Community Legal Centres submission, at 3-4, proposes the establishment of an independent "Complaints Board".

120. Submission of the New South Wales Council for Civil Liberties Inc, 21 February 1992, at 1 ("NSWCCL submission").

121. Lawyers Reform Association submission, at paras 1.6 and 4.3.

122. Bar Association submission, at 16-17.

123. There is an Ombudsman, in this sense, in New South Wales as well as for the Commonwealth. See, eg, the *Ombudsman Act* 1974 (NSW).

124. This is a voluntary scheme developed (in the face of calls for legislation) and funded by the Australian Bankers Association. It is modelled, to some extent, on the English Banking Ombudsman. See G Burton, "A Banking Ombudsman for Australia" (1990) 1 *Journal of Banking and Finance Law and Practice* 29-55, and JG Starke, "Establishment of a non-governmental national banking ombudsman system" (1989) 63 *Australian Law Journal* 454-456.

125. *Courts and Legal Services Act* 1990 (UK) s22.

126. *Courts and Legal Services Act* 1990 (UK) s25.

127. *Courts and Legal Services Act* 1990 (UK) s23(2).

128. *Courts and Legal Services Act* 1990 (UK) s24.

129. *Courts and Legal Services Act* 1990 (UK) s24.

130. Law Society submission, at 3-5.

131. A Wigelius, "The Ombudsman and the Judiciary" (unpublished manuscript, nd). The Commission wishes to thank Mr John Hatton, MP, for providing us with the material on the Ombudsman system in Sweden.

132. See paras 5.7 et seq, above.

133. See paras 5.17-5.20, above.

134. See paras 5.44-5.52, above.

135. See paras 5.29-5.38, above.

136. That is, individual complainants. The Law Society and Bar Councils should still be able commence investigations and disciplinary proceedings on their own initiative.

137. See paras 4.43-4.49, above.

138. Law Society submission, at 3-5.

139. See para 5.93, above.

140. Section 58 and Sch 3.

141. LRC 31, at para 6.22.

142. Section 126(3).

143. Law Society submission, at 3-5.

144. *Courts and Legal Services Act* 1990 (UK) s18(5).

145. See the discussion of the Californian system in Chapter 3.

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