NSW Law Reform Commission

REPORT 32 OUTLINE (1982) - SECOND REPORT ON THE LEGAL PROFESSION: COMPLAINTS, DISCIPLINE AND PROFESSIONAL STANDARDS

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Preface

The Law Reform Commission of New South Wales has a reference from the Attorney General and Minister for Justice, the Honourable FJ Walker, QC, MP, to inquire into and review the law and practice relating to the legal profession.
This document is an outline of the second Report published in the course of the Legal Profession Inquiry. The Report deals with complaints, discipline and professional standards, and contains our final recommendations on these matters.

The Report has been prepared by a Division of the Commission. By virtue of the Law Reform Commission Act, 1967, a Division is deemed, for the purposes of the reference in respect of which it is constituted, to be the Commission. At the time of the preparation of the Report, the Division consisted of the following Commissioners:

Mr RD Conacher (Deputy Chairman of the Commission)

Mr Julian Disney

Mr Denis Gressier

His Honour Judge Trevor Martin, QC

The Chairman of the Commission, Professor Ronald Sackville, presides over meetings of the Division but is not a member of it.

Not everyone will have the time or inclination to read the full Report. Accordingly, we publish this Outline of the Report, for the benefit of those who seek a brief statement of the Commission's views and recommendations. Any person who would like a copy of the full Report should contact the Secretary of the Commission, Box 6, GPO, Sydney 2001 (telephone: 238 7213).

REPORT 32 OUTLINE (1982) - SECOND REPORT ON THE LEGAL PROFESSION: COMPLAINTS, DISCIPLINE AND PROFESSIONAL STANDARDS

Outline of the Report

I. INTRODUCTION

1. We have made a Second Report under our reference to inquire into and review the law and practice relating to the legal profession. It is limited to matters of complaints, discipline and professional standards.

2. This document is an outline of the Report. It contains, amongst other things, a summary of many of our principal recommendations. It also indicates, in short form, our reasons for making some particular recommendations. We do not, however, attempt to state here the effect of all our recommendations or all our reasons. This Outline must therefore yield to the words of the Report itself. The balance of the Outline contains the following parts:

II. The Discussion Paper (paras. 3 to 8)

III. Central Issues (paras. 9 to 23)

IV. The Professional Standards Boards (paras. 24 to 32)

V. The Disciplinary Tribunal (paras. 33 to 42)

VI. Lay Review Tribunal Lay Observer (paras. 43 to 46)

VII. A Code of Professional Conduct (para. 47)

VIII. Assistance to the Public and to Complainants (paras. 48 and 49).

II. THE DISCUSSION PAPER

Its Substance

3. The scope of the Report is substantially the same as that of the Discussion Paper we published in April, 1979, entitled *Complaints, Discipline and Professional Standards -Part I.*

4 . The view put in the Discussion Paper was that there was need for a complaints, discipline and professional standards system which incorporated major changes. In contrast with the then systems of the Law Society and the Bar Association, we suggested that a new system:

(1) should be concerned with a much wider range of professional conduct, particularly in the areas of incompetence, negligence and delay;

(2) should do more to improve the performance of practitioners who are providing inadequate legal services;

(3) should not be controlled and operated by any association of practitioners, and non-lawyers should play active roles in both its control and operation;

(4) should apply to all practitioners, whether barristers or solicitors;

(5) should ensure that complaints are investigated more rigorously, thoroughly and fairly and that investigations are more frequently undertaken on the initiative of the investigating body;

(6) should operate more openly and provide more opportunities for the involvement of complainants; and

(7) should do more to assist people seeking to remedy harm that they have suffered in consequence of an inadequate legal service.

We did not suggest that there should be any diminution of the powers of the Supreme Court with respect to barristers and solicitors.

The Law Society

5. In response to these suggestions, the Law Society of New South Wales said:

> "It is the taking away of the control of the administration of the complaints and discipline function from the Law Society which the Law Society considers to be the major fault in the proposed new system recommended by the Commission."

The Society did, however, propose a new complaints, discipline and professional standards system for its members. With some exceptions, the system proposed by the Society bears a striking similarity to the systems suggested in the Discussion Paper and now recommended in the Report.

The Bar Association

6. The substance of the New South Wales Bar Association's submission on the Discussion Paper was that the level of complaints against barristers is so extraordinarily low that no significant change in its disciplinary procedure was necessary. In its words, "what is required is necessary modification to the existing system to curb any weaknesses in it".

Other Responses

7. The Discussion Paper evoked responses other than those of the Law Society and the Bar Association. They came from judges, individual legal practitioners, representatives of organisations, private citizens, and editors of legal and other publications, including newspapers. Many responses reflected a careful reading of the Paper and a thoughtful consideration of the issues raised in it. In the Report, we quote, by way of example, from four such responses.

Later Developments

8. Many developments have occurred in the fields of complaints, discipline and professional standards since the Discussion Paper was published. In the Report, we consider recent developments in Victoria, Western Australia, New Zealand, England, Scotland and Ontario. The changes which have been proposed in these places are many but, in general, there is an emphasis on

(1) Lay participation.

(2) Lay Observers

(3) The extension of disciplinary systems to a wide range of professional conduct.

(4) The granting of power to disciplinary tribunals to impose a wide range of sanctions.

(5) The need for a disciplinary system with two tiers.

(6) The need to assist the public and complainants.

It is notable that many of the suggestions made in the Discussion Paper accord with later suggestions made by other bodies working in the same field, whether in Australia or overseas.

III. CENTRAL ISSUES

9. Three issues on which much of the Report turns are:

Two Systems or One System

Should there be one complaints, discipline and professional standards system for legal practitioners who practise in the style in which barristers now practise and another for other practitioners, or one system for all practitioners, or a system which has parts which apply to all practitioners and parts which distinguish between practitioners?

Bad Professional Work

Should any complaints, discipline and professional standards system for legal practitioners be concerned with bad professional work which falls short of professional misconduct or of conduct which shows unfitness to practise?

Lay Participation

Should lay people have a role to play in any complaints, discipline and professional standards system for legal practitioners and, if so, what role, and in what part or parts of the system should it be played?

The First Report

10. Before stating our recommendations with respect to each of the above mentioned issues, we note that at the time we publish the Report we publish another Report, *The First Report on the Legal Profession.* Its subject matter is the general regulation and structure of the legal profession. For present purposes, relevant recommendations made in that Report include the following.

(1) All persons should be admitted to the legal profession under a com-mon title (we use the title "barrister and solicitor").

(2) A person who is admitted as a barrister and solicitor should not be entitled to practise unless he or she holds a current practising certificate (we use the expression "legal practitioner" to denote a barrister and solicitor who is entitled to practise).

(3) The Bar Council and the Law Society Council should continue to be the general regulatory bodies for the legal profession (this recommendation should be read in the light of other recommendations made in the First Report, one of which is a recommendation for lay membership of both Councils).

(4) The Bar Council should be the general regulatory body for legal practitioners who elect to be governed by it, and who undertake to comply with its rules concerning professional practice.

(5) The Law Society should be the general regulatory body for all other legal practitioners.

(6) A new body, the Public Council on Legal Services, should be created by statute to act as a reviewing and advisory body in relation to the regulation of the legal profession and the delivery of legal services.

One of us, Mr Conacher, does not join in recommendations (1) and (6) above, and would qualify recommendation (2) to the effect that it should apply only if there is common admission.

Two Systems or One System

11. The Second Report examines many of the arguments for and against separate disciplinary systems for barristers and solicitors. But, notwithstanding all that can be said on the subject, we are faced with

practical considerations of cost and convenience. The facts of the matter are that the great majority of serious complaints against legal practitioners in this State involve allegations concerning money entrusted to them, whether for particular purposes or for investment generally. The Law Society already has a highly developed, and usually efficient, system for investigating complaints of this kind. Unless the Law Society's system became the one disciplinary system for all legal practitioners, any new disciplinary system would involve the destruction of the Society's system and the creation of a new system. We are not satisfied, at least at this time, that the cost and inconvenience of an exercise of this magnitude can be justified. On the other hand, we are of the view that, for reasons which the Bar Association sees as being powerful, the Association would not voluntarily surrender its disciplinary system to the Law Society.

12. In the event, considerations of cost and convenience, and respect for widely held professional views on matters of principle, persuade us that two separate investigatory systems should be substantially retained. In this, as in other matters relating to the legal profession, future events in an evolving community may call for change. In the meantime, the Bar Council and the Law Society Council should continue to have separate systems for the investigation of complaints. These Councils should be empowered to investigate the conduct of practitioners subject to their respective governance, and each Council should have statutory powers of investigation. There should be, however, some features of the system for the adjudication of complaints that are common to all practitioners (see paragraph 33 below).

Bad Professional Work

13. We are satisfied that there is a strong case for the extension of the disciplinary systems of the legal profession to embrace bad professional work which falls short of professional misconduct or of conduct showing unfitness to practise. By "bad professional work" we mean carelessness, incompetence, and failures to meet accepted standards of work. Variations of this general principle have been adopted, or have been proposed for adoption, in New Zealand, England, Scotland and Ontario. In Western Australia, it has long been the position that the disciplinary authority there has power to investigate complaints of neglect or undue delay.

14. We do not restate in the Report the arguments for and against adoption of the principle in question. We do, however, adopt, in respect of both governing bodies in New South Wales, the following words of the Hughes Commission in relation to the Law Society in Scotland:

> “The Society should be concerned not only with misconduct but with incompetence ... The body which issues practising certificates to solicitors cannot, in our view, disregard evidence of possible incom-petence simply because the client affected may have a civil remedy in the courts. The public interest in such matters goes beyond the interest of that particular client; and we are in no doubt that a more vigorous attitude by the Law Society is needed.”

15. The Law Society wishes to adopt the more vigorous attitude to which the Hughes Commission refers. On the other hand, the Bar Association acknowledges that lack of competence and negligence are most important matters but says that none of the courses of action proposed in the Discussion Paper would in any way assist to eliminate either problem. In the Associations words:

> “The Association attempts to minimise problems by continuing to improve the reading and pupillage system applicable to all new members. Any problem which continues to exist in this regard would, to the extent that it can be overcome at all, be best overcome by some combination of steps such as the following:
>
> (a) The maintenance of higher standards of admission to the Bar including greater emphasis in tertiary tuition on 'practical subjects';
>
> (b) The widening of the disciplinary powers of the Supreme Court;

(c) By Judges taking stronger control of their own Courts and the practices adopted in them. Often slackness occurs due to practices adopted and encouraged by some judges in the name of efficiency and expediency."

16. We consider in the Report whether the Supreme Court is the appropriate forum in which to consider every problem of bad professional work on the part of individual barristers. For reasons given in the two following paragraphs, we conclude that it is not.

Disciplinary Systems with Two Tiers

17. The disciplinary system we have in mind would be concerned not only with serious breaches of professional standards but also with less serious breaches, including, in our present terminology, bad professional work. We think that it would be unfair and counter productive if less serious breaches were made subject to the same procedures and sanctions as the serious breaches. The system therefore provides for a formal body, a Tribunal, to deal with serious breaches and a less formal body, a Board, to deal with less serious breaches. This idea of a disciplinary system with two tiers has been adopted, or proposed for adoption, in England, Scotland and New Zealand. And, in this State, the Law Society has also proposed its adoption for practitioners subject to its governance.

18. We see no reason why such a system should not extend to practitioners who are subject to governance by the Bar Council as well as to practitioners who are subject to governance by the Law Society Council. In a sense, our views in this respect are a development of the present arrangements of the Bar whereby major matters are taken to the Supreme Court but minor matters are dealt with by the Bar Council. As we see it, the seriousness of a question raised about the professional conduct of a practitioner should determine the forum in which the question is to be decided. If, for example, the question is whether the practitioner has been negligent in a minor way, we do not believe that the Supreme Court should be the only Tribunal with power to decide the issue. If there is a forum constituted for the purpose of deciding such issues, that forum should generally be regarded as appropriate to decide them.

19. In short, we recommend in the Report,

(1) that the legal profession's complaints, discipline and professional standards system should be concerned not only with conduct which shows that a practitioner is unfit to practise but also with less serious conduct, we call this less serious conduct "unsatisfactory conduct" and we define it so as to include bad professional work;

(2) that the system should have two tiers, one tier for conduct showing unfitness to practise and another tier for unsatisfactory conduct (see paragraphs 24 and 33 below); and

(3) that the system should permit the making of a wide range of orders, particularly orders aimed at reducing the incidence of bad pro-fessional work (see paragraphs 28 and 37 below).

Lay Participation

20. There has been much talk in recent years in English-speaking countries about lay membership of professional bodies. The need for it, its advantages and disadvantages, and the extent to which it is likely to be effective in promoting the public interest have been debated at length in many places. In our Discussion Paper, *General Regulation,* we referred to many examples of lay participation in professional regulation. In our Discussion Paper, *Complaints, Discipline and Professional Standards - Part I*, we spoke of lay participation in the context of a complaints, discipline and professional standards system for the legal profession in this State.

21. There seems to be little doubt that a strong case has been made for lay participation in the disciplinary processes of the legal profession. Variations of this general principle have recently been adopted, or have been proposed for adoption, in Victoria, Western Australia, New Zealand, England, Scotland and Ontario. Similar action has been taken in other parts of Canada and in the United States

of America. In this State, the Law Society's proposed scheme incorporates the notion of lay participation, and the Bar Association's submission to us in 1979 said:

> "The Association can seen no reason why a lay person should not be appointed to perform both the functions of observer and member on the Ethics Committee [of the Bar Council (the Committee which investigates complaints about barristers)] and feels that such an appointment would be more than adequate to protect the interests of the public in relation to disciplinary procedures relating to barristers."

22. I n these circumstances, we do not restate in the Report the arguments for and against lay participation in the disciplinary processes of the legal profession. We do, however, quote from one paragraph of the Discussion Paper:

> "5.23 ... effective regulation of the legal profession, including the area of complaints, discipline and professional standards, calls for the striking of a delicate balance. There is a need for lawyers to be involved in this task of regulation. Without them, and the knowledge and skill which they have, there cannot be professional or public confidence that the relevant authority will perform its task properly. Also, there is a need for non-lawyers. Without them, the authority is without proper access to public attitudes, and different and wider viewpoints. And, without them, there cannot be public confidence that decisions will be made with due regard to the interests of both non-lawyers and lawyers."

We recommend that lay participation in the disciplinary processes of the legal profession should be required by law. Lay people ("public members") should serve on the Complaints Committees of the Law Society Council, the Ethics Committees of the Bar Council, and on the tribunals referred to in paragraphs 24 and 33 below, namely, the Professional Standards Boards and the Disciplinary Tribunal. The Complaints Committees and Ethics Committees should include not less than three public members with the same rights, including voting rights, as other members of the Committees.

23. One of us, Mr Conacher, concurs in this last mentioned general recommendation by way of acquiescence rather than positive conviction that it is right. He is impressed by the large body of opinion amongst people whose views he respects. The change must, he thinks, involve trouble and expense, but only experience can tell whether the trouble and expense are worthwhile. As in all other matters, it must be for those in charge in the future to say how far lay participation has earned its keep.

IV. THE PROFESSIONAL STANDARDS BOARDS

General

24. There should be separate Professional Standards Boards for practitioners subject to governance by the Councils of the Bar Association and the Law Society. These Councils should be empowered to refer questions concerning the conduct of practitioners subject to their respective governance to the relevant Board. The Attorney General should also be empowered to make such references. Mr. Disney, but not the majority of us, considers that, subject to certain safeguards, members of the public should also be entitled to make references to a Professional Standards Board. In general, the Board should be concerned with unsatisfactory conduct, not with conduct which shows a temporary or permanent unfitness to practise.

Composition and Sittings

25. The practitioner members of the Board for practitioners subject to governance by the Bar Council should be appointed by the Bar Council, and the practitioner members of the Board for practitioners subject to governance by the Law Society Council should be appointed by the Law Society Council. The public members of each Board should be appointed by the Attorney-General and they should be eligible for appointment to both Boards. For each sitting of a Board, the Board should comprise two practitioner members and one public member.

26. A Board should sit in private unless it otherwise orders. This recommendation is prompted by three considerations. In the first place, conduct the subject of a reference would be, by definition, conduct not so serious as to call for withdrawal of a person's right to practise. Publicity given to the inquiry could have the effect of destroying a person's practice almost as effectively as the withdrawal of his or her right to practise. In such an event, publicity would invoke harm grossly disproportionate to the gravity of the conduct in question. In the second place, if harm of this kind can flow from a reference to a Board, responsible people might be extremely reluctant to make references. If this were to occur, the Boards would be unable to discharge their intended functions. In the third place, it is intended that inquiries before a Board would be less formal than proceedings before the Disciplinary Tribunal and that, where possible, they should be characterized by an atmosphere of frankness and constructive co-operation. As we see it, frankness and co-operation on the part of practitioners are more likely to be achieved in private than in public.

Rights to Appear or to be Present

27. We recommend in the Report:

(1) that the Bar Council (as regards the Board for practitioners subject to its governance), the Law Society Council (as regards the Board for practitioners subject to its governance), and the Attorney General should be entitled to appear by any practitioner;

(2) that a practitioner whose conduct is the subject of an inquiry should be entitled to appear either personally or by another practitioner or, with the leave of the Board, by any other person;

(3) that a person who is a claimant for compensation for bad professional work should be entitled to appear on the question of compensation either personally or by a practitioner or, with the leave of the Board, by any other person,

(4) that subject to (3), where a person has complained to the Bar Council or to the Law Society Council about a practitioner and the conduct the subject of the complaint is to be investigated in the course of an inquiry before a Board, that person should be entitled to appear if, and only if, the Board gives leave;

(5) that where a person to whom paragraph (4) applies is not given leave to appear in the inquiry, he or she should nonetheless be permitted to be present during the inquiry, subject to a power in the Board to exclude that person from particular parts of the inquiry on the ground that his or her presence would constitute an unreasonable infringement of a right to confidentiality of any person concerned with the inquiry;

Mr. Conacher does not join in recommendations (4) and (5) above.

Orders

28. In general, where a Board makes a finding against a practitioner it should be empowered to make one or more of the following orders:

(1) that the practitioner s practising certificate be restricted to the effect that he or she shall not practise on his or her own account or in partnership for such time, not exceeding one year, as the Board determines;

(2) that the practitioner commence and complete to the satisfaction of the Board such course of legal education as the Board determines;

(3) that the practitioner make his or her practice available for inspection at such times and by such persons as the Board determines;

(4) that the practitioner report on his or her practice at such times, in such form, and to such persons as the Board determines,

(5) that the practitioner takes advice in relation to the management of his or her practice from such persons as the Board determines;

(6) that the practitioner cease to accept work, or to hold himself or herself out as competent, in such particular fields of practice as the Board determines;

(7) that the practitioner employ in his or her practice a member of such class of persons as the Board determines;

(8) that the practitioner not employ such persons as the Board specifies (an order of this kind should not be made unless a person specified in it has been heard by the Board);

(9) that, for the purpose of remedying the consequences of the conduct the subject of the inquiry, the practitioner do such work for such persons within such time and for such fees, if any, as the Board determines;

(10) that, subject to such conditions as the Board determines, the practitioner waive any lien;

(11) that the practitioner reduce his or her charges for any work done by him or her which is the subject of the inquiry before the board by an amount not exceeding $2,000;

(12) that the practitioner pay compensation in an amount not exceeding $2,000 to such clients, or former clients, of the practitioner who are claimants for compensation as the Board determines;

(13) that the practitioner be fined an amount not exceeding $5,000; and

(14) that the practitioner be reprimanded.

A Board should not be empowered to make an order under sub-paragraphs (9), (11) or (12) unless, first, the practitioner has consented to the Board exercising the jurisdiction referred to in those sub-paragraphs and, secondly, a claimant for compensation has released his or her right to pursue a civil remedy for damages in respect of the conduct the subject of inquiry by the Board. Two of us, Mr Conacher and Mr Gressier, say that compliance with these conditions should be a condition precedent to the exercise of the jurisdiction conferred by sub-paragraph (10). Two of us, Mr Disney and Judge Martin, say that the exercise of that jurisdiction should be unconditional.

29. At present, it would be inappropriate to make some of the orders listed above with respect to practitioners who are subject to governance by the Bar Council (for example, they do not practise as employees or in partnership and hence an order under sub-paragraph (1) would now be inappropriate) and some of the relevant recommendations are qualified accordingly.

30. A Board should also be empowered to make orders with respect to the costs of an inquiry by it, including the costs of any prior investigation.

Appeals

31. A party to an inquiry who is aggrieved by a finding or order of a Board should have a right to appeal (in the sense of a hearing *de novo*) to the Disciplinary Tribunal (as to which see paragraph 32 below). Where, however, a party has an interest in only part of the issues before a Board (for example, a claim for compensation), his or her right of appeal to the Disciplinary Tribunal should be limited to a finding or order relating to that interest. In another context, we recommend the creation of a right of appeal from the Disciplinary Tribunal to the Court of Appeal. There should be, however, no appeal to the Court of Appeal against a finding or order of the Disciplinary Tribunal made in an appeal to it from a Board, except by leave of the Court of Appeal.

Procedural and Miscellaneous Matters

32. Included in our recommendations with respect to procedural and miscellaneous matters affecting the Boards are recommendations:

(1) that a Board should not be bound by the rules of evidence;

(2) that a Board should have power to make rules with respect to its practice and procedure; and

(3) that where, in the course of an inquiry, a Board forms the opinion that the conduct under consideration is, or may be, conduct showing unfitness to practise and not merely unsatisfactory conduct, and that the conduct may therefore call for the withdrawal of the right to practise of the practitioner concerned, the Board should transfer the reference to the Disciplinary Tribunal.

V. THE DISCIPLINARY TRIBUNAL

General

33. There should be one Disciplinary Tribunal for all practitioners. The Tribunal should be constituted in one form when dealing with a practitioner who is subject to governance by the Bar Council and in another form when dealing with a practitioner who is subject to governance by the Law Society Council. The Bar Council and the Law Society Council should be empowered to refer questions concerning the conduct of practitioners subject to their respective governance to the Tribunal. The Attorney General should also be empowered to make such references. In general, the Tribunal should be concerned with conduct showing unfitness to practise, that is, it should deal mainly with breaches of professional standards which may call for the withdrawal of a practitioner's right to practise, whether permanently or temporarily just as the Supreme Court now has jurisdiction over all practitioners, the Tribunal should have a concurrent jurisdiction over all practitioners, but the jurisdiction of the Supreme Court should remain unchanged.

Composition and Sittings

34. In this context, we recommend:

(1) that there should be a Chairman of the Tribunal, and that the Chairman should be the Chief Justice;

(2) that there should be practitioner members of the Tribunal who are subject to governance by the Law Society Council and practitioner members who are subject to governance by the Bar Council, and that the practitioner members should be appointed by the Chief justice, after consultation with the President of the Law Society and the President of the Bar Association;

(3) that there should be members of the Tribunal who are not practitioners ("public members"), that they should be appointed by the Attorney General, and that they should be appointed after consultation with the Public Council on Legal Services (see paragraph 10(6) above);

(4) that when holding an inquiry into the conduct of a practitioner who is subject to governance by the Bar Association, the Tribunal should comprise:

(i) one Supreme Court judge, one practitioner who is subject to governance by the Bar Association, and one public member;

(ii) two practitioners who are subject to governance by the Bar Association, and one public member; or

(iii) one Supreme Court judge, two practitioners who are subject to governance by the Bar Association and two public members;

(5) that when holding an inquiry into the conduct of a practitioner who is subject to governance by the Law Society, the Tribunal should comprise;

(i) one Supreme Court judge, one practitioner who is subject to governance by the Law Society, and one public member;

(ii) two practitioners who are subject to governance by the Law Society, and one public member; or

(iii) one Supreme Court Judge, two practitioners who are subject to governance by the Law Society and two public members;

(6) that, subject to sub-paragraphs (4) and (5), the Chairman or, in his absence, the Acting Chief justice, should nominate the persons who are to comprise the Tribunal for a particular inquiry, and the person who is to preside over the inquiry.

One of us, Mr Conacher, does not join in the recommendations for the creation of the Public Council on Legal Services and qualifies his assent to sub-paragraph (3) accordingly.

35. We have in mind that the Chief Justice will nominate the judge who is to sit on the Tribunal for particular inquiries. We would not regard it as out of place for conventions to be developed by the Chief Justice with respect to the kind of inquiry which does not call for the presence of a judge.

36. The Tribunal should conduct its business in the presence of the public except where that presence would defeat the ends of justice.

Orders

37. The Tribunal should be empowered to make orders in respect of both unsatisfactory conduct and conduct showing unfitness to practise. As to unsatisfactory conduct, the Tribunal should be empowered to make any one or more of the orders listed in paragraph 27 above. As to conduct showing unfitness to practise, the Tribunal should be empowered to order:

(1) that the practitioner's name be struck off the roll of barristers and solicitors;

(2) that the practitioner's practising certificate be cancelled;

(3) that a practising certificate be not issued to the practitioner during such time or until the happening of such event as may be specified in the order, or without the leave of the Tribunal; and

(4) that the practitioner be fined in an amount not exceeding $25,000.

In addition, the Tribunal should be empowered to make such order or other provision with respect to the practitioner as the Supreme Court might now make with respect to a barrister or a solicitor.

38. The Tribunal should also be empowered to make the orders listed above on the grounds now specified in sections 71 and 71A of the Legal Practitioners Act, 1898. (Section 71 of the Act lists six grounds on which the Council of the Law Society may refuse to issue a practising certificate, or to cancel a practising certificate already issued. One of these grounds is where an applicant for, or the holder of, a certificate, when called upon by the Council to do so, fails to give a satisfactory explanation touching any matter relating to his conduct as a solicitor, and the failure continues. Also, under section 71A of the Act, in some circumstances, the Council may refuse to issue, or may cancel a certificate on the ground of a solicitor's "infirmity, injury or illness (whether mental or physical)").

39. On the grounds referred to in paragraph 37, the Bar Council and the Law Society Council should also be empowered to cancel the practising certificates of practitioners subject to their respective governance, or to refuse to renew certificates, but only for a period of up to 21 days. An appeal against cancellation or refusal by either Council should lie to the Tribunal but the appeal should not have the effect of permitting the practitioner to practise pending its determination. The Tribunal should, however, be empowered to grant that permission. Also, upon application by a Council, the Tribunal should be empowered to extend the period of an order made by the Council. Appeals of this kind may often need

to be disposed of quickly and, in these instances, the Tribunal might consist of one member only, a Supreme Court judge. There should be a further appeal to the Court of Appeal, but only with the leave of that Court.

40. The Tribunal should also be empowered to make orders with respect to the costs of proceedings before it.

Appeals

41. We have said earlier in this outline that there should be no appeal against a finding or order of the Tribunal made in an appeal to it from a Professional Standards Board, except to, and by leave of the Court of Appeal. In respect of any other finding or order of the Tribunal, there should be an appeal as of right to the Court of Appeal. The appeal should be a rehearing *de novo.*

Procedural and Miscellaneous Matters

42. The Tribunal's practice and procedure should be modelled on those of the ordinary courts, and the members of the Tribunal should be empowered to make practice and procedural rules. In general, the Tribunal should be bound by the rules of evidence to the extent that the Supreme Court is bound by those rules in civil proceedings.

VI. LAY REVIEW TRIBUNAL/LAY OBSERVER

43. Generally speaking, a Lay Observer is a non-lawyer appointed by a minister or officer of the Crown to exercise the statutory function of investigating allegations that a lawyer's professional organisation has not adequately investigated a complaint about a member. A Lay Observer was appointed in England in 1975, in Scotland in 1976, and in Victoria in 1979. Proposals for the appointment of Lay Observers are current in New Zealand and Ontario.

44. In June, 1979, in pursuance of a resolution of the Council of the Law Society in April, 1979, a Lay Review Tribunal was appointed. The terms of the resolution included the following:

> "The Tribunal is to investigate and examine any written complaint made by or on behalf of a member of the public concerning the Society’s treatment of a complaint to it by or on behalf of that member about a solicitor or an employee of a solicitor."

The Tribunal has one member, a non-lawyer, and its functions are broadly similar to those of the Lay Observers in England, Scotland and Victoria. The Lay Review Tribunal in this State was not, however, created by statute. As noted, it was created in pursuance of a resolution of the Council of the Law Society. In accordance with that resolution the first appointment to the Tribunal was made by the Chief justice. The Bar Association has not created the office of Lay Review Tribunal or Lay Observer.

45. We recommend in the Report that there should be one Lay Review Tribunal, or Lay Observer, for all practitioners, whether they are subject to governance by the Bar Council or the Law Society Council. The persons holding the office should be empowered to recommend to the Law Society Council, the Bar Council, and the Attorney-General that particular conduct of a practitioner should be referred to a Professional Standards Board for inquiry and determination.

46. We also recommend in the Report that the Council of the Law Society should be asked to consider changing the title of the existing Lay Review Tribunal to that of the Lay Observer. Consideration should also be given to giving statutory form to the office. In the meantime, the present functions of the non-statutory Lay Review Tribunal should be extended to include reviews of the complaints work of the Bar Council. Mr Conacher does not join in this recommendation. In his opinion, there should be separate Tribunals or Observers for practitioners subject to governance by the Bar Council and the Law Society Council, but tenure of one office should not disqualify the holder for appointment to the other.

VII. A CODE OF PROFESSIONAL CONDUCT

47. We have recommended that a new complaints, discipline and professional standards system should apply to any conduct of a legal practitioner which constitutes a breach of the standards of conduct with which it is reasonable to expect a legal practitioner to comply. If this recommendation is adopted, the legal practitioners of this State will stand in special need of a clear understanding of the standards by reference to which their conduct is to be judged. This need will be greatest when questions arise whether, for the purposes of a possible inquiry by a Professional Standards Board, their conduct might be considered to be "unsatisfactory conduct". In time, judgments of the Boards, the Disciplinary Tribunal, and the Supreme Court will aid the determination of some questions of this kind. But practitioners will still need general guidance from their governing bodies. It is for this reason that in the Report we make some general comments on Codes of Professional Conduct and recommend that preparation of a Code of Professional Conduct for the legal profession of this State should be undertaken, preferably by the Bar Council and the Law Society Council jointly. The three of us who recommend the creation of the Public Council on Legal Services suggest that the Code should be developed in consultation with, amongst others, that Council.

VIII. ASSISTANCE TO THE PUBLIC AND TO COMPLAINANTS

48. One test of the effectiveness of any complaints, discipline and professional standards system is the assistance that the system provides for members of the public and for complainants. For this reason, we recommend in the Report that the Law Society Council and the Bar Council should each adopt policies and procedures designed to ensure:

(1) that a leaflet or brochure is prepared which explains in simple terms the operations of their respective complaints, discipline and professional standards scheme;

(2) that every complainant to the Law Society Council and the Bar Council is given a copy of the leaflet, and that ways and means of making it readily available to the public generally are investigated;

(3) that complainants are given all reasonable assistance to put their complaints in writing;

(4) that no complainant is deterred from pursuing a complaint unless the complaint is clearly trivial or vexatious;

(5) that investigatory, disciplinary or other action in respect of a complaint is not discontinued merely because a complainant's cause of dissatisfaction is removed;

(6) that all communications with complainants are couched in language as clear and as free from technicalities as the circumstances permit;

(7) that a complainant's right, if any, to sue a practitioner for damages is not seen to be a reason for not taking disciplinary or other action against the practitioner;

(8) that a practitioner's willingness to pay compensation in respect of any negligence on his or her part is not seen to be a reason for not taking disciplinary or other action against the practitioner;

(9) that a complainant with a reasonable chance of a successful action against a practitioner is given reasonable assistance to find a capable practitioner willing to undertake the action;

(10) that, where a complainant does not terminate the services of a practitioner complained of, later inquiries are made of the practitioner or the complainant to ensure that the matter complained of is proceeding satisfactorily;

(11) that, where a practitioner is called upon to give an explanation of his or her conduct and the practitioner refuses to allow a copy of the explanation to be given to the complainant, notice of the refusal is given to the appropriate committee investigating the complaint;

(12) that, where a complaint is not fully investigated within six months after its receipt, notice of the complaint is given to the Lay Review Tribunal Lay Observer;

(13) that where disciplinary action is to be taken against a practitioner in respect of conduct the subject of a complaint, the complainant is told the nature of the action to be taken and is kept informed of its progress; this information to include the date of any hearing and a statement of the complainant's rights, if any, to be represented or to be present; and

(14) that when a decision is made to take no action against a practitioner whose conduct is the subject of a complaint, a statement in writing of the reasons for the decision is given to the complainant and, upon application by the practitioner, to the practitioner. Where, however, it is the opinion of the professional council concerned that considerations of confidentiality preclude the giving of particular reasons, these reasons should not be given, but the complainant should be so advised. The Lay Review Tribunal, or Lay Observer, would have access to these reasons and the complainant should be advised accordingly.

49. In general, civil or criminal proceedings against a practitioner arising out of his or her professional conduct should not result in a stay of investigation of that conduct by a governing body, or a stay of proceedings before a Professional Standards Board or the Disciplinary Tribunal. A practitioner seeking a stay of disciplinary proceedings should have the onus of showing that the stay should be granted. In short, proceedings should be commenced and then the Board or the Tribunal should decide whether or not there should be a stay.

REPORT 32 OUTLINE (1982) - SECOND REPORT ON THE LEGAL PROFESSION: COMPLAINTS, DISCIPLINE AND PROFESSIONAL STANDARDS

Legal Profession Inquiry Publications

The following publications have been issued up to the present time in the course of the Legal Profession Inquiry. An asterisk indicates that an Outline of the publication has also been issued.

REPORTS

First Report. (General Regulation, The Division into Barristers and Solicitor's, Queen's Counsel, and Court Dress) *

Second Report. (Complaints, Discipline and Professional Standards) *

DISCUSSION PAPERS

1. General Regulation. *

2. Complaints, Discipline and Professional Standards - Part 1. *

3. Professional Indemnity Insurance. *

4. (1) Structure of the Profession - Part 1. *

(2) Structure of the Profession - Part 2.

5. Advertising and Specialisation.

6. Solicitors' Trust Accounts and the Solicitors' Fidelity Fund.

BACKGROUND PAPERS

1. Background Paper - I (Complaints, Discipline and Professional Standards)

2. Background Paper - II (Professional Indemnity Insurance)

3. Background Paper - III (Complaints, Discipline and Professional Standards)

4. Background Paper - IV. (Structure of the Profession)

5. Background Paper - V. (Solicitors' Trust Accounts and the Solicitors' Fidelity Fund)