

*A Further Review of
Complaints
Against Lawyers:
Issues Paper*

November, 2001

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1 INTRODUCTION

- 1.1 The New South Wales Law Reform Commission produced *Complaints Against Lawyers: An Interim Report (Report 99)* in August 2001. The terms of reference identified by Report 99 were:

to review the procedures for dealing with complaints against legal practitioners under Part 10 of the Legal Profession Act 1987, taking into account recent case law on the operation of Part 10 and the practical experience of the operation of the statutory provisions¹.

- 1.2 Report 99 focused on the procedural aspects of the operation of Part 10 of the *Legal Profession Act (NSW) 1987* (the **Act**). However, a number of submissions made to the Law Reform Commission (the **LRC**) raised issues about aspects of the existing co-regulatory model for processing and investigating complaints². Principally, the concerns related to:

- a. the categories of unsatisfactory professional conduct and professional misconduct;
- b. the objectivity and independence of the investigative procedures; and
- c. the role of the Law Society, the Bar Association and the Office of the Legal Services Commissioner.

- 1.3 The LRC was of the view that the review of these aspects of the existing system were outside the terms of reference given to the LRC and commented that:

this is an interim report which focuses on procedural questions about the current system for dealing with complaints against lawyers. However the

¹ New South Wales Law Reform Commission, *Complaints against Lawyers: An interim report* (Report 99, April 2001) at 2.

² New South Wales Law Reform Commission, *Complaints against Lawyers: An interim report* (Report 99, April 2001) at 2

Commission considers that there is merit in reviewing more fundamental aspects of the current co-regulatory model³.

- 1.4 This Issues Paper examines and evaluates the fundamental aspects of the existing co-regulatory system, in the light of the submissions made to the LRC and other evidence about the performance of the scheme. The scheme also applies to conveyancers licensed under the Conveyancers Licensing Act 1995, and many of the issues canvassed in the paper also apply to conveyancers.
- 1.5 Once this review is complete consideration will be given to the recommendations made by the LRC in Report 99.

2 SUBMISSIONS

- 2.1 The Attorney General's Department is seeking submissions from any interested person or organisation, on the matters discussed in this paper.
- 2.2 Submissions should be made to the Director General, Attorney General's Department, Level 19, Goodsell Building Chifley Square, Sydney.
- 2.3 The closing date for submissions is Friday, 14 December, 2001.

3 PRINCIPLES FOR THE PERFORMANCE OF COMPLAINTS SYSTEMS

- 3.1 Any assessment of a scheme for dealing with complaints and the discipline of legal practitioners needs to be measured against best practice principles for complaints schemes generally. The use of principles enables the effectiveness of a system to be judged by objective standards for assessing key issues affecting the operation of a regulatory scheme. Principles can also facilitate discussion of the performance of a regulatory system by focussing assessment of a scheme on a number of specified indicators. Consideration is given to the

³New South Wales Law Reform Commission, *Complaints against Lawyers: An interim report* (Report 99, April 2001) at 186.

performance of the existing co-regulatory system, assessed against objective indicators, in this Issues Paper.

3.2 For this purpose the following indicia for determining the merits of a professional regulatory system were identified by the LRC in Report 99⁴ (similar indicia were identified in a recent review of the operation of the Victorian regulatory scheme for legal practitioners)⁵:

- the complaint handling system must be independent and impartial. Public confidence in the operation of the system requires that it be free from real or perceived bias, external influence or conflict of interest;
- recognition of the multiple aims of a professional disciplinary system. These are (amongst other things) redressing consumer complaints, protecting the general public by ensuring the highest ethical and professional standards in individual lawyers and the profession as a whole;
- accessibility - the complaints handling system must be widely accessible, allowing access to information as well as help from officials involved in the process with few disincentives such as costs or complexity;
- efficiency and effectiveness - a simple and comprehensive range of effective processes, services and techniques must be available to address the legitimate needs of consumers, legal practitioners and wider society. This involves prompt and thorough investigations, effective dispute resolution mechanisms, a range of sanctions and remedies, the availability of education, counselling and assistance for legal practitioners to help them minimise poor practice behaviour, continuous monitoring and co-ordination amongst the various operators in the system;
- procedural fairness - complainants and legal practitioners must be treated with fairness and justice during the investigation, hearing and determination of a matter;

⁴ New South Wales Law Reform Commission *Scrutiny of the Legal Profession Complaints Against Lawyers* Report 70, February 1993 at 66.

⁵ Peter A Sallmann and Richard T Wright, *Legal Practice Act Review: Issues Paper*, Victorian Government, Department of Justice, undated at 10.

- openness and accountability - Subject to the need for confidentiality in certain circumstances, as many elements of the system should be open to the public and on record. Reasons for all decisions should be provided.
- Non lawyers must meaningfully participate at all levels of the process to ensure that different experiences and perspectives are represented, and to reassure complainants that the system is not operated solely by and for the benefit of lawyers;
- external scrutiny and review - the existence of one or more agencies with a monitoring role provides an important means of guarding against bias, arbitrariness, complacency and other problems that can erode public confidence. Amongst other things, the system the system should afford a complainant the opportunity for a meaningful external review of an adverse decision;
- contribution to the general enhancement of professional standards - the knowledge gained from the operation of the complaints handling system must feed back into the legal profession and contribute to the enhancement such as through changes to the professional rules or legal education; and
- proper funding and resources - it is essential that adequate resources are provided to allow the complaints handling system to operate effectively. The sources of funding should recognise the interests of both the legal profession and the general public in maintaining the highest professional standards⁶.

3.3 This Issues Paper examines the existing system in the light of these principles. This Issues Paper describes the scheme set out in Part 10 of the Legal Profession Act 1987 and considers the respective roles of the Legal Services Commissioner (the LSC), the Law Society Council, the Bar Council, and the Department of Fair Trading (which investigates complaints against conveyancers) in the scheme. The paper then considers the definitions of professional misconduct and unsatisfactory professional conduct, which

⁶ See Access to Justice Advisory Committee *Access to Justice an Action Plan*,

determine the manner in which professional standards are made and applied. The paper then turns to other issues, including the manner in which the scheme deals with the incapacity of a practitioner, the procedural complexity and overlap of the scheme, and the funding of the scheme.

- 3.4 The paper concludes with the presentation of models of possible options for reform.

4 OBJECTIVES OF PART 10

- 4.1 The objectives of Part 10 of the Act generally, as set out in section 123, are to:
- a. redress consumer complaints by users of legal services;
 - b. ensure that individual practitioners comply with professional standards;
and
 - c. maintain the standards of the profession as a whole⁷.
- 4.2 Section 124 sets out the objectives of Part 10, in relation to users of legal services. The objectives include: to give every person the right to complain about the conduct of legal practitioners; to give complainants access to advice and assistance; to provide an opportunity for mediation; to ensure that complainants receive adequate notice of the institution and status of disciplinary proceedings; and to give complainants access to independent review mechanisms.
- 4.3 The objectives of the Act express the dual nature of the complaints system. On one hand, the scheme is intended to ensure that consumers receive redress, and on the other, to protect the broader public interest. A complaint that a consumer may consider to be serious, such as a dispute about legal costs, may not mean that the practitioner is guilty of unsatisfactory professional conduct or

Commonwealth of Australia Access to Justice Committee 1994 at 202 to 203.

⁷ New South Wales Law Reform Commission *Complaints Against Lawyers: An Interim Report* Report 99, April 2001 at 191.

professional misconduct, and should be subject to sanctions. Conversely, consumer complainants are not parties to complaints which are taken to the Legal Services Division of the Administrative Decisions Tribunal (unless a claim for compensation has been made). These matters are prosecuted by the LSC or the Councils.

Question

- 1. Do the objectives set out in sections 123 and 124 of the Act correctly identify goals of a disciplinary scheme for the legal profession, having regard to the principles identified at paragraph 3.2, and the public interest?**

5 DESCRIPTION OF THE CURRENT SCHEME

5.1 The scheme addresses these objectives through a co-regulatory approach, which involves the participation of the Councils, the Department of Fair Trading, and an independent statutory office holder, the Legal Services Commissioner, in handling complaints and discipline⁸. A description of the operation of the scheme is shown in the diagram attached to the end of this Issues Paper.

5.2 The legislative functions of the LSC include:

- receiving complaints;
- assisting and advising complainants;
- making complaints (or taking over complaints from the Councils at the discretion of the LSC);
- monitoring investigations and giving directions to the Councils;
- assisting the Councils with respect to professional and community education;
- laying charges against practitioners;

⁸ This Issues Paper recognises the role of numerous other bodies with regard to regulation of the legal profession, such as NSW Courts, the Australian Securities and Investments Commission and the NSW Auditor General.

- g. reviewing decisions of the Councils; and
- h. reporting on the activities of the LSC to Parliament.⁹

5.3 In general, all complaints are received by the Legal Services Commissioner (LSC). The LSC makes a decision whether to refer complaints to the Law Society Council (in the case of complaints against solicitors) the Bar Council (in the case of complaints against barristers), the Department of Fair Trading (in the case of licensed conveyancers) or to investigate complaints himself¹⁰. In practice, around three quarters of complaints are dealt with by the LSC. The bulk of these complaints relate to matters which the LSC determines to be consumer disputes, rather than conduct matters. Consumer disputes are complaints about solicitors and barristers that do not indicate that the professional conduct of the practitioner amounts to unsatisfactory professional conduct or professional misconduct, such as disputes about costs, for example, poor communication, and other matters of client service. A small number of complaints are found to be frivolous or vexatious.

5.4 The remaining complaints (those complaints which are accepted as legitimate complaints by the LSC) warrant investigation as to whether the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, as defined in the Act and under the general law¹¹. These complaints largely comprise the matters dealt with by the Law Society Council or the Bar Council (the Councils).

5.5 The LSC and the Councils must investigate complaints. The powers of the LSC and the Councils in resolving complaints are the same. Complaints can be resolved by mediation, and in practice, most complaints handled by the LSC are resolved in this manner. Complaints can also be dismissed. If the Council or LSC is satisfied that there is a reasonable likelihood that the Tribunal will find

⁹ LPA, section 59D.

¹⁰ LPA, sections 134, 142.

¹¹ While the consumer aspect of a complaint may be mediated and settled, if any part of the investigation involves issues of unsatisfactory professional conduct or professional misconduct, section 144(2) of the LPA requires that these be investigated.

the practitioner guilty of unsatisfactory professional conduct, the complaint can either be dealt with by a reprimand given to the practitioner, by referral to the Legal Services Division of the Administrative Appeals Tribunal or by dismissal. However, if the practitioner appears to the Council or LSC to be guilty of professional misconduct, the matter must (subject to section 155A of the Act) be referred to the Tribunal¹². The Tribunal has the power to strike the practitioner from the roll of legal practitioners, suspend or cancel a practising certificate, fine a practitioner, impose conditions on the right to practise of a legal practitioner, or in limited cases, to award compensation to a complainant¹³.

- 5.6 The LSC must monitor complaints handling by the Councils, and the Councils and the LSC must report annually to Parliament on their performance.¹⁴ At the conclusion of the investigation of a complaint by a Council, the LSC can review the handling of the complaint, at the request of the complainant¹⁵.

6 THE DEVELOPMENT OF THE CURRENT SCHEME FOR THE REGULATION OF THE LEGAL PROFESSION

- 6.1 Prior to 1994, the regulation of the legal profession, including complaints handling and discipline, were primarily the responsibility of the Law Society of New South Wales and the New South Wales Bar Association, the former Legal Services Tribunal, and the Supreme Court.
- 6.2 During the 1980s, systems of self-regulation came under attack, on the ground that they were not sufficiently responsive to the needs of consumers or transparent in their processes¹⁶.
- 6.3 A criticism of the previous system has been that the dual roles of the Councils (as representative bodies for lawyers and investigative bodies) gave rise to a real

¹² LPA, section 155

¹³ LPA, section 171C.

¹⁴ LPA, section ss 59D(1)(f), 57, 59G.

¹⁵ LPA, ss 159-160.

or perceived conflict of interest and possible bias in favour of legal practitioners against the interests of consumers. The Councils were perceived as:

generally speaking, bodies which investigate their own members, even if the investigating authority has a token “outsider”, fail to respond as effectively as some independent person or body¹⁷.

- 6.4 In recognition of these concerns, the LRC received a number of references relating to the legal profession¹⁸. In the 1980s and 1990s, the LRC produced six Reports (as well as a number of Discussion Papers and Background Papers)¹⁹ on aspects of the regulation of the legal profession.
- 6.5 The recommendations contained in these Reports²⁰ formed the basis of the existing co-regulatory scheme for dealing with complaints against and disciplining legal practitioners, set out in Part 10 of the Act.
- 6.6 This scheme was introduced in 1994, and largely implemented the recommendations made by the LRC in 1993. The main goals of the new scheme were to ensure external scrutiny of the performance of the Councils by

¹⁶ Christine Parker, *Just Lawyers: Regulation and Access to Justice* Oxford University Press, Oxford 1999 at 12.

¹⁷ New South Wales Law Reform Commission *Scrutiny of the Legal Profession Complaints Against Lawyers* Report 70, February 1993 at 24.

¹⁸ New South Wales Law Reform Commission *General Regulation and Structure* Report 31, April 1982; New South Wales Law Reform Commission *Complaints, Discipline and Profession Standards* Report 32, April 1982; New South Wales Law Reform Commission *Advertising and Specialisation* Report 33, July 1982; New South Wales Law Reform Commission *Solicitor's Trust Accounts* Report 44, December 1983; New South Wales Law Reform Commission *Scrutiny of the Legal Profession Complaints Against Lawyers* Report 70, February 1993; and New South Wales Law Reform Commission *Complaints Against Lawyers: An Interim Report* Report 99, April 2001.

¹⁹ See: New South Wales Law Reform Commission *General Regulation and Structure* Report 31, April 1982; New South Wales Law Reform Commission *Complaints, Discipline and Profession Standards* Report 32, April 1982; New South Wales Law Reform Commission *Advertising and Specialisation* Report 33, July 1982; New South Wales Law Reform Commission *Solicitor's Trust Accounts* Report 44, December 1983; New South Wales Law Reform Commission *Scrutiny of the Legal Profession Complaints Against Lawyers* Report 70, February 1993; and New South Wales Law Reform Commission *Complaints Against Lawyers: An Interim Report* Report 99, April 2001.

²⁰ New South Wales Law Reform Commission *Complaints Against Lawyers* Report 70, February 1993.

the LSC and to ensure that consumer complaints, which do not raise conduct issues, were taken seriously²¹.

7 OTHER AUSTRALIAN JURISDICTIONS

7.1 Most Australian jurisdictions continue to provide for the investigation of complaints to be the responsibility of the profession. However, Victoria has a system of independent oversight of complaints handling which has several features in common with the NSW scheme and some other States have a legal ombudsman, providing independent scrutiny.

7.2 Complaints management

7.2.1 Complaints about lawyers in the Australian Capital Territory, the Northern Territory, South Australia, Queensland and Tasmania are dealt with by the professional associations²². In Queensland and Tasmania, the relevant legislation also provides for the appointment of a Legal Ombudsman. However, that role is essentially limited to a monitoring capacity. In Victoria, complaints can be investigated by either the Legal Ombudsman or the professional associations²³. In Western Australia, complaints are dealt with by a Legal Practice Board consisting of a Chairperson and at least 6 other practitioners, and 2 community representatives²⁴.

7.3 Complaints process

²¹ The Hon John Fahey MP, Second Reading speech for the Legal Profession Reform Bill 1993 (No 2) and the Maintenance and Champerty Abolition Bill 1993, 9 November 1993, Legislative Assembly Debates at 4982.

²² *Legal Practice Act 1970 (ACT)*, Pt 8; *Legal Practitioners Act (NT)*, Pt 6; *Queensland Law Society Act 1952 (Qld)* Pt 2 and 2A; *Legal Practitioners Act (SA)* Pt 6; *Legal Profession Act 1993 (Tas)*, Pt 8 Div 4.

²³ *Legal Practice Act 1996 (Vic)* Pt 5.

²⁴ *Legal Practitioners Act 1893 (WA)* Pt 4.

7.3.1 In Western Australia²⁵, South Australia²⁶, Queensland²⁷ and Tasmania²⁸, the professional investigative bodies have a limited ability to resolve complaints,

²⁵ See *Legal Practitioners Act 1893 (WA)* Pt 4 - The *Legal Practitioners Act* establishes the Legal Practice Board which consists of the Attorney-General, the Solicitor-General (in ex officio capacities), all Queen's Counsel resident and practising within the State, and nine practitioners (of at least three years standing) annually elected by all practitioners of the Supreme Court. The *Legal Practitioners Act* provides a structure of disciplinary proceedings which regulate the conduct of practitioners. The *Legal Practitioners Act* establishes a Legal Practitioners Complaints Committee to receive and investigate complaints against practitioners. The Committee may with the consent of the practitioner impose disciplinary orders. In more serious cases it may lay charges before the Legal Practitioners Disciplinary Tribunal, which is established by the *Legal Practitioners Act*. The Tribunal may make disciplinary orders, including fines and suspensions from practice, or refer its findings to the Full Court of the Supreme Court in cases where it moves for a practitioner to be struck off the roll. A determination of the Tribunal can be appealed to the Supreme Court.

The behaviour that is made subject to disciplinary proceedings is defined by the *Legal Practitioners Act* to include; illegal conduct on the part of any practitioner, whether occurring before or after admission as a practitioner; unprofessional conduct on the part of any practitioner, whether occurring before or after admission as a practitioner; neglect in the course of the practice of the law; and Undue delay in the course of the practice of the law.

The Complaints Committee consists of a Chairperson and not less than 6 other practitioners appointed by the Legal Practice Board and not less than 2 other non-practitioners appointed by the Attorney General (after consultation with the Minister responsible for consumer affairs) as representatives of the community. A quorum of the Committee is constituted by 3 members, 2 of whom must be practitioners appointed by the Board and one of whom must be a representative of the community.

²⁶ See *Legal Practitioners Act (SA)* - In South Australia the Legal Practitioners Conduct Board investigates complaints (in relation to conduct issues only). The Legal Practitioners Disciplinary Tribunal takes disciplinary action against practitioners found to have engaged in unsatisfactory or unprofessional conduct²⁶. The Board may, in minor matters, exercise a limited jurisdiction provided the practitioner consents, including giving reprimands, imposing conditions on the practitioner's practising certificate, ordering payment to a person and order that a practitioner refrain from doing certain acts from the practice (see section 77AB).

²⁷ See *Queensland Law Society Act 1952 (Qld)* - In Queensland the complaints against solicitors are investigated by the Council. Resolution of the matter by way of mediation may be attempted provided both the legal practitioner and the complainant agree. The Councils may, after investigation, censure or admonish the legal practitioner, obtain undertakings from the legal practitioner, dismiss the complaint or bring charges before the relevant disciplinary tribunal. The Tribunal can (amongst other things) strike off the legal practitioner, dismiss the charges, lay fines and order compensation to a maximum of \$7,000 for financial loss. A complainant can contact the Legal Ombudsman if they are unhappy with the way which their matter was dealt with. The Legal Ombudsman may independently investigate complaints in some circumstances provided the Law Society has first examined the matter. The Queensland Bar Association is essentially self regulating. Complaints against barristers are also investigated by the Council in accordance with Article 76 of the *Bar Association of Queensland Articles of Association*. These Articles have recently been amended to give the Council the power to reprimand and impose penalties. The most serious matters are referred to the Supreme Court for hearing. The Legal Ombudsman does not have jurisdiction over barristers.

²⁸ See *Legal Profession Act 1993 (Tas)* - In Tasmania complaints are made to the Law Society of Tasmania. The Society must then make a record of the complaint and commence an investigation (see section 58). The Council may require the parties to attend a conference. The Council may convene a hearing by the Council (see section 61(2)) to determine a matter. and may (amongst other things, reprimand the legal practitioner, impose a fine of up to \$5,000, order compensation or require that all or part of the fees charged be waived, the legal practitioner may also be required to attend particular training or education courses. A copy of the complaint must also be sent to the Legal Ombudsman who monitors complaints handling and examines the manner in which an investigation or hearings are carried out (see section

through imposing lesser sanctions such as reprimands, or fines or mediation. In Tasmania, the Legal Ombudsman receives a copy of complaints and monitors complaints handling. In Queensland, the Legal Ombudsman's powers of review are confined to directing the Law Society to re-open a file at the conclusion of an investigation.

- 7.3.2 Complaints which are not dismissed after the investigative stage may lead to a sanction being imposed by the relevant professional association or by a disciplinary tribunal with an appeal to the Supreme Court. As with the co-regulatory system in NSW, the sanctions imposed are generally aimed at correcting the behaviour of the legal practitioner with the wider objective of the public interest, rather than compensating the client.
- 7.3.3 These systems of regulation are broadly similar in operation to that of NSW prior to the establishment of the LSC and the other substantive and procedural reforms which were implemented in 1994.
- 7.3.4 The Victorian scheme warrants closer examination, because it involves a level of independent assessment and scrutiny which is greater than that of other jurisdictions.
- 7.3.5 Complaints in Victoria are governed by the *Legal Practice Act 1996 (Vic)* and can be made to the relevant Recognised Professional Association (RPA) or the Legal Practice Board²⁹. The Victorian legislation distinguishes "disputes" from conduct matters³⁰. The role of the Legal Ombudsman is confined to the investigation of conduct matters. The Legal Ombudsman must refer disputes to the relevant RPA. The RPA must attempt to settle the dispute³¹. If settlement is achieved a written agreement is entered into which is enforceable as a court order³². If settlement can not be reached the RPA must notify the

85).

²⁹ *Legal Practice Act 1996 (Vic)* s123(4).

³⁰ *Legal Practice Act 1996 (Vic)* s122(1).

³¹ *Legal Practice Act 1996 (Vic)* s126(1).

³² *Legal Practice Act 1996 (Vic)* s127(3).

parties and the Legal Ombudsman. Either party to the dispute may refer the dispute to a conciliation hearing conducted by the Legal Profession Tribunal³³. If conciliation fails the tribunal can hear and determine the complaint and can order that the fees be reduced, waived, or paid as well as ordering compensation for financial loss up to a maximum of \$15,000.

7.3.6 There is a large degree of overlap in the roles of the Legal Ombudsman and the RPAs³⁴. If the complaint centres on issues of conduct, the Legal Ombudsman will investigate and, if satisfied that the practitioner would be likely to be found guilty of either unsatisfactory professional conduct or professional misconduct, the Legal Ombudsman may refer the matter to the Tribunal. If the matter relates to a costs dispute, the matter is be dealt with by the relevant RPA³⁵. The RPA must make a similar decision as to whether referral to the Tribunal is necessary. The Tribunal can fine, reprimand, suspend or cancel the legal practitioner's right to practise.

7.3.7 The object of these procedures is to ensure that consumer disputes are dealt with quickly and that clients receive redress where no conduct matter arises. During the Second Reading Speech of the *Legal Practice Bill* the (then) Attorney General commented:

*The reforms contained in the Bill form part of this Government's commitment to improving the administration of justice in Victoria. They aim to create an optimum regulatory environment in which the profession can provide effective and efficient service to the public*³⁶.

7.3.8 However, a recent discussion paper reviewing the scheme, commissioned by the Victorian Government, has noted widespread dissatisfaction with the scheme and internal tension amongst regulators as to which complaints should

³³ See *Legal Practice Act 1996 (Vic)* ss128 to 129.

³⁴ Peter A Sallmann and Richard T Wright, *Legal Practice Act Review: Discussion Paper*, Victorian Government, Department of Justice, March 2001 at 3.

³⁵ *Legal Practice Act 1996 (Vic)* section 122.

³⁶ Victorian Parliamentary Hansard, Assembly, 20 June 1996, Second Reading Speech at

be allocated to which regulatory body as well as wide dissatisfaction with the complexity of the scheme.³⁷ Further, complainants are often unsure where a complaint should be lodged.