

11.5 Compensation

11.5.1 The provision of compensation to complainants is not one of the goals of the scheme (established in sections 123 and 124 of the Act). While compensation of up to \$10,000 can be paid to claimants either by order of a Council or the LSC made in the course of mediation or by the Tribunal, if the practitioner is guilty of unsatisfactory professional conduct or professional misconduct¹, compensation orders made by the Councils and the LSC are not enforceable. Further, compensation orders are not available for consumer disputes, which comprise the bulk of complaints. The LRC examined this issue and concluded that the powers of the LSC and the Councils should remain unchanged, but that the Tribunal should have a broader power to award compensation, on the basis of its findings as part of disciplinary hearings.²

11.5.2 The LSC has argued that the Tribunal's compensation powers should be expanded, or that the LSC should be empowered to make compensation orders in certain cases, consistent with the goal of providing redress to consumers. However, it might be argued that the primary purpose of the scheme is to protect professional standards, and that questions of compensation should properly be dealt with through the civil courts, consumer tribunals or alternative dispute resolution.

Questions

21. Should steps be taken to ensure that the existing power of the LSC and the Councils to award compensation is enforceable?

22. Should the power to award compensation be expanded?

¹ Legal Profession Act s155(3); s171C(1)(h).

² Report 99, at 115-116, 166-167.

11.6 Funding of the scheme

11.6.1 The costs of the exercise of regulatory functions by the Councils, the LSC and the Legal Services Division of the Administrative Decisions Tribunal are paid from the Public Purpose Fund (the PPF). The PPF is also distributed for other purposes, such as Legal Aid. The PPF is established under section 69B of the Act and comprises interest on the trust accounts held by solicitors, and interest on deposits of funds made by solicitors to the Law Society. The PPF is distributed by a board of trustees, chaired by an independent trustee, and administered by the Law Society, at the direction of the trustees.

11.6.2 Payments from the PPF for the purposes of the exercise of the regulatory functions in the Act must be approved by the Director General of the Attorney General's Department, and the Director General may require the budgets of the Councils to be submitted to him.

11.6.3 Under these arrangements, instead of interest on funds held on trust being paid to clients or other persons, the interest is used to support the disciplinary scheme for the profession, as well as other activities. The arrangements for scrutiny of budgets and the control of the Fund by the trustees guarantees that the PPF is administered fairly and at arm's length from the Law Society. It is noted that practitioners or their insurers may be required to bear the legal costs of proceedings in the Tribunal or Court.

11.6.4 The arrangements applying to the disciplinary schemes for other occupational groups are diverse. In the case of the occupational licensing schemes applying to health practitioners, such as doctors, nurses, physiotherapists and psychologists, licence fees are applied to maintain professional registration boards, and conduct panels. Some of these bodies exercise investigative functions. However, most investigations for health professionals are conducted by the Health Care Complaints Commission, which is publicly

funded. The disciplinary tribunals governing practitioners licensed to work in the health sector are also publicly funded.

11.6.5 Occupational licences for builders, conveyancers, real estate agents and other occupational groups are administered by the Department of Fair Trading. Licence fees are remitted to public revenue, which in turn provides the Department with an allocation for registrations, investigations and the exercise of disciplinary functions. In the case of real estate agents, this funding is supplemented by interest earned from trust funds from deposits held on behalf of clients.

11.6.6 The current arrangements might be seen to offer insufficient incentives for the LSC, the Councils or the Tribunal to operate in an efficient manner, because instead of the practitioners who are the subject of complaints paying for the costs of investigations, the costs are largely borne by their clients. It might be considered that it is fundamentally unfair for clients to have to bear the cost of maintaining and enforcing professional standards, and that this should be the responsibility of practitioners themselves. If the scheme was funded directly by the profession, the Councils and Commissioner might be perceived as having a higher degree of accountability to the profession for the efficient disposition of funds.

11.6.7 Conversely, it might be argued that the maintenance of professional standards in the legal profession is in the interests of all clients of legal practitioners, and that it is therefore appropriate for interest earned on clients' trust funds to support the scheme. The funding of the disciplinary scheme by the practising fees paid by practitioners might simply result in higher costs of legal services being passed on to clients. A further alternative would be for the scheme to be partly or wholly funded by the Government, in recognition of the broad public interest in resolving disputes and maintaining professional standards.

Question**23. How should the regulatory system be funded?****12 MODELS**

12.1 The following parts of this Option Paper outline a number of options for reform. The models are not intended to be exhaustive.

12.2 Model 1: Procedural changes to enhance accountability

12.2.1 Model 1 is directed to improving the accountability of the LSC and the Councils, while leaving the existing scheme substantially intact.

12.2.2 This model would introduce an advisory body, to enhance the external accountability of the LSC and ensure that there is sufficient community and consumer representation in its processes.

12.2.3 The functions of this advisory body might include examining the criteria for referring complaints to the Councils and the investigation of complaints by the LSC, the policies of the LSC for investigating matters, mediation and decision-making, providing advice on difficult dispute resolution matters, providing input and feedback on issues such as the LSC's policies and procedures for dealing with consumer complaints, the process of monitoring complaints, and considering other matters relating to the LSC's objectives and duties under Part 10 of the Act, such as community education and the enhancement of professional ethics.

12.2.4 Alternatively, legislative amendments might be made to prescribe the methods of complaints handling, mediation, when and how matters are to be referred and monitoring process as well as how complainants are to be kept informed.

12.2.5 A difficulty inherent in legislative prescription is its potential for inflexibility to changes in consumer needs, the types of complaint that the LSC receives, the nature of the individual complaints as well as other variables.

12.2.6 A more flexible alternative would be to require the LSC and the Councils to prepare procedural guidelines and formal protocols for complaints handling. These guidelines and protocols would cover matters such as the referral of complaints to the Councils, processes for LSC and Council investigations, and monitoring³. The guidelines could include key performance indicators in complaints handling, covering matters such as the length of time taken for investigations, the provision of information to complainants, and prioritising of complaints according to factors such as the seriousness of the allegations, and the past disciplinary history of the practitioner.

12.2.7 A further option would be directed at addressing operational weaknesses from within the legal profession. One means of underpinning and complementing an effective disciplinary system is the internal management of client concerns by the legal practitioner or the firm⁴. A requirement for legal practitioners to develop or adopt complaint handling guidelines could improve the ability of practitioners to deal with complaints and allow the LSC and Councils to concentrate on disputes which are particularly difficult, conduct issues, and on the monitoring of the scheme⁵.

12.3 Model 2: Changes to the existing system of referral and investigation

12.3.1 Model 2 would introduce more radical amendments to the complaints handling system.

³ It is noted that the LSC is empowered to develop protocols relating to the exercise of regulatory functions by the Councils.

⁴ See Christine Parker, *Just Lawyers: Regulation and Access to Justice* Oxford University Press, Oxford 1999 at 153 and following.

- 12.3.2 The Act would be amended to provide for the LSC to make all decisions on what further action is to be taken at the conclusion of investigations, including investigations conducted by the Councils.
- 12.3.3 The LSC could continue to monitor investigations being carried out by the Law Society or the Bar Association and make directions with respect to the handling of an investigation⁶.
- 12.3.4 This change would strengthen the independence of the disciplinary process, by removing the Councils from their role as decision makers in conduct matters, but would result in the legal profession losing “ownership” of a vital component of the disciplinary process⁷.
- 12.3.5 This proposal would be likely to result in the duplication of functions because of the need for files to pass between the LSC and the Councils in order for decisions to be made. As noted above, decisions of the Councils which are reviewed by the LSC are rarely varied. It might be argued that in the absence of a demonstrated need for decision making to be shifted from the Councils to the LSC, the change would simply result in unnecessary duplication of resources and work

12.4 Model 3: Investigations to be conducted by the LSC

- 12.4.1 Model 3 shifts the investigative and decision making role played by the Councils to the LSC.
- 12.4.2 Consumers would continue to make complaints to the LSC. However, investigative and decision making powers would be conferred solely on the LSC. In order to maintain access to the expertise of the Councils, and some

⁵ Christine Parker, *Just Lawyers: Regulation and Access to Justice* Oxford University Press, Oxford 1999 at 153

⁶ *Legal Profession Act (NSW) 1987* section 150.

⁷ D Wilkins Who should regulate lawyers? 105(4) *Harvard Law Review*, 799-887 at 863.

ownership by the legal profession, the LSC would consult with the Councils on investigations and decision making.

12.4.3 To ensure accountability, it would be necessary to introduce a process for the review of decisions of the LSC. Reviews might be conducted by the Tribunal or another suitable body. A review process would allow legal practitioners to continue to have an interest in the process of enforcement of professional standards.

Question

24. Which features, if any, of the proposed models should be adopted?

13 KEY ISSUES FOR CONSIDERATION

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?
2. Should there be a nationally uniform scheme for regulating complaints against, and discipline of, the legal profession?
3. Should the investigation of complaints be the responsibility of an independent regulator, or the Councils, or should a co-regulatory scheme be retained? What should the respective roles of these bodies be?
4. Are changes to the respective roles of the Councils and the LSC required to protect consumer interests and the broader public interest?
5. Does the system for dealing with consumer complaints strike the right balance between providing redress to consumers and ensuring the protection of professional standards?

6. Is the current level of participation by non lawyers in the complaints and discipline scheme adequate? What should the level of participation be?
7. Does the scheme include adequate mechanisms for monitoring the decisions and performance of the Councils and the Legal Services Commissioner?
8. Does the scheme include adequate mechanisms for ensuring that the complaints and disciplinary process is an educative tool for the legal profession and the broader community?
9. Would the formal separation of the investigative procedures for consumer disputes from those applying to conduct complaints, as in the Victorian model, enhance the scheme, or introduce undue rigidity?
10. Should a public register of matters in which sanctions were imposed on legal practitioners be established? What information should be included on the register?
11. Is it appropriate for licensed conveyancers to be subject to the scheme for complaints and discipline set out in Part 10?
12. Are the current definitions of unsatisfactory professional conduct and professional misconduct adequate?
13. Should the definitions be further codified?
14. What types of behaviour would be included?
15. How should the scheme deal with the incapacity of a practitioner?
16. Should the Act be revised to simplify the procedural requirements for conducting investigations?

17. Should a broad discretion be conferred on the Tribunal to dispense with the need to comply with procedural requirements, in circumstances where the interests of the practitioner, LSC, Council or complainant are not compromised?
18. Should the LSC, Councils and/or Tribunal have the power to suspend the practising certificates of legal practitioners who are subject to complaints until the matter is resolved? If so, at what point in the disciplinary process should the suspension take place?
19. Should the Councils and/or the LSC have a broad power to audit legal practices, modelled on the power of the LSC to audit incorporated legal practices?
20. Should the Councils, the Commissioner and or/the Tribunal be required to conduct investigations and dispose of matters within a fixed time period?
21. Should steps be taken to ensure that the existing power of the LSC and the Councils to award compensation is enforceable?
22. Should the power to award compensation be expanded?
23. How should the regulatory system be funded?
24. Which features, if any, of the proposed models should be adopted?

