

NSW Law Reform Commission

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

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

Terms of Reference and Participants

New South Wales Law Reform Commission

To the Honourable F J Walker, QC, MP,

Attorney General for New South Wales

SECOND REPORT ON THE LEGAL PROFESSION

(COMPLAINTS, DISCIPLINE AND PROFESSIONAL STANDARDS)

We make this Report under your reference from you to inquire into and review the law and practice relating to the legal profession.

Prof. Ronald Sackville (Chairman)

Denis Gressier (Deputy Chairman)

RD Conacher (Commissioner)

Julian Disney (Commissioner)

His Honour Judge Trevor Martin, QC (Commissioner)

Participants of the Commission

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

Chairman

Professor Ronald Sackville

Deputy Chairman

Mr RD Conacher

Full-time Commissioners

Mr Julian Disney

Mr Denis Gressier

Part-time Commissioners

Mrs Bettina Cass

Mr David Kirby

His Honour Judge Trevor Martin, QC

The Hon Mr Justice PE Nygh

The Hon Mr Justice Adrian Roden

The Hon Mr Justice Andrew Rogers

The present Report has been prepared by a Division of the Commission. The members of the Division are listed in the Preface.

The Commission's Director of Research is Ms Marcia Neave. Members of the research staff are: Mr Paul Garde, Ms Ruth Jones, Ms Gloria Lee (Librarian), Ms Philippa McDonald, Ms Helen Mills and Ms Fiona Tito.

The Secretary of the Commission is Mr Bruce Buchanan, and its offices are at 16th Level, Goodsell Building, 8-12 Chifley Square, Sydney, NSW 2000 (telephone: 02 - 238 7213).

This is the thirty-second Report of the Commission. Its short citation is LRC 32.

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

Summary of Principal Recommendations

INTRODUCTION

In summary form, we list here the principal recommendations made in this Report. Some of the recommendations must be read in the context of recommendations made in our First Report (LRC 31), on the general regulation and structure of the legal profession. The latter recommendations include the following:

- (1) that all persons should be admitted to the legal profession under a common title (we use the title "barrister and solicitor");
- (2) that a person who is admitted to practise 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) that 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) that 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) that the Law Society should be the general regulatory body for all other legal practitioners; and
- (6) that 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.

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 a common admission.

We turn now to our outline of the principal recommendations made in this Report.

THE ROLES OF THE BAR COUNCIL AND LAW SOCIETY COUNCIL WITH RESPECT TO COMPLAINTS, DISCIPLINE AND PROFESSIONAL STANDARDS

(paras.3.2-3.17, 4.2, 6.12-6.16, 6.33 and 8.1-8.10)

1. 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 11 below).

CONDUCT WITHIN THE APPLICATION OF OUR RECOMMENDED COMPLAINTS, DISCIPLINE AND PROFESSIONAL STANDARDS SYSTEM

(para.3.22-3.25, 4.9-4.10 and chapter 5)

2. 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, that is, work which indicates carelessness, incompetence, or a failure on the part of the practitioner concerned to meet the standards with which it is reasonable to expect a practitioner to comply.

LAY PARTICIPATION IN OUR RECOMMENDED COMPLAINTS, DISCIPLINE AND PROFESSIONAL STANDARDS SYSTEM

(paras.3.19-3.21, 4.8, 6.21-6.23, 7.2-7.5 and 8.11)

3. 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 4 and 11 below, namely, the Professional Standards Boards and the Disciplinary Tribunal.

THE PROFESSIONAL STANDARDS BOARDS (para.4.3 and chapter 7)

General (paras.4.3 and 4.9-4.11)

4. 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 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 Sitings (paras.7.2-7.4 and 7.11-7.14)

5. 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. A Board should sit in private unless it otherwise orders.

6. We recommend:

(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.

The majority of us think that there may be occasions when a complainant should be given leave to be represented, and hence we include paragraph (4) above. Also, the majority of us, think that, in general, a complainant should be allowed to be present at an inquiry which, in effect, is the result of his or her complaint and hence we include (5) above.

Orders (paras.7.17 and 7.32)

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

(i) 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;

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

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

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

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

(vi) 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;

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

(viii) 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);

(ix) 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;

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

(xi) 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;

(xii) 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;

(xiii) that the practitioner be fined an amount not exceeding \$5,000; or

(xiv) that the practitioner be reprimanded.

A Board should not be empowered to make an order under subparagraphs (ix), (xi) or (xii) unless, first, the practitioner has consented to the Board exercising the jurisdiction referred to in those 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 say that compliance with these conditions should be a condition precedent to the exercise of the jurisdiction conferred by sub-paragraph (x). Two of say that the exercise of this jurisdiction should be unconditional.

8. 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 paragraph (i) Would now be inappropriate) and some of the relevant recommendations are qualified accordingly.

9. 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 (paras.7.24-7.26)

10. A party to an inquiry who is aggrieved by a finding or order of a Board should have a right of appeal (in the sense of a hearings *de novo*) to the Disciplinary Tribunal (as to which see paragraph 11 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 (paras.7.27-7.29)

Matters

11. 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 it may therefore call for the withdrawal of the right to practise of the practitioner concerned, it should transfer the reference to the Disciplinary Tribunal.

THE DISCIPLINARY TRIBUNAL

(paras.4.4, 4.6, 4.11, 4.12-4.16 and chapter 8)

General

12. 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 practitioners 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 Sitings (paras.8.11, 8.14, 8.20)

13. 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;

(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 members;

(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.

14. 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.

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

Orders (paras.8.23-8.29)

16. 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 6 above. As to conduct showing unfitness to practise, the Tribunal should be empowered to order:

- (i) that the practitioner's name be struck off the roll of barristers and solicitors;
- (ii) that the practitioner's practising certificate be cancelled;
- (iii) 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
- (iv) 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.

17. 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 "infirmary, injury or illness (whether mental or physical)").

18. On the grounds referred to in paragraph 16, 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.

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

Appeals (para.8.30)

20. We have said earlier in this summary 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 (paras.8.31 and 8.32)

Matters

21. The Tribunal's practice and procedure should be modeled 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.

LAY REVIEW TRIBUNAL/LAY OBSERVER (paras.4.4, 6.24, 6.26 and 6.35-6.37)

22. 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.

23. 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.

CIVIL AND CRIMINAL PROCEEDINGS (para.9.4)

24. 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.

A CODE OF PROFESSIONAL CONDUCT (chapter 10)

25. The 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.

ASSISTANCE TO THE PUBLIC AND TO COMPLAINANTS (paras.9.10-9.11 and 6.28-6.29)

26. The Law Society Council and, to the extent that they are appropriate for adoption by the Bar Council, 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 should be given a copy of the leaflet, and that ways and means of making it readily available to the public generally should be 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; and
- (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.

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Legal Profession Inquiry Publications

The following publications have been issued up to the present time in the course of the Legal Profession Inquiry.

Reports

First Report.

(General Regulation, The Division into Barristers and Solicitors, 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)

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

Preface

The Commission 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 is the second Report published in the course of our Legal Profession Inquiry. It deals with complaints, discipline and professional standards. The Report contains our final recommendations on these matters.

Earlier in the Inquiry we published a Discussion Paper containing our tentative suggestions on the same matters, and two Background Papers containing reports and other relevant material. These and other Papers issued in the course of the inquiry are listed on page v.

This Report has been prepared by a Division of the Commission. By virtue of the Law Reform Commission Act, a Division is deemed, for the purposes of the reference in respect of which it is constituted, to be the Commission.¹ At the time of preparation of this 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, Q.C.

The Chairman of the Commission, Professor Ronald Sackville, presides over meetings of the Division but is not a member of it. The previous Chairman of the Commission, Mr Justice JH Wootten, was closely involved in earlier stages of the Legal Profession Inquiry and in the preparation of our Discussion Paper on the topics dealt with in this Report. He resigned from the Commission, however, prior to the commencement of work on this Report.

A large number of persons and organisations have made submissions to us on matters relevant to the Legal Profession Inquiry. We list them in Appendix II to our First Report. In addition, a number of articles, papers and editorials have commenced on tentative suggestions which we made in Discussion Papers published in the course of the Inquiry. We list some of these articles and papers in Appendix III to our first Report. We also list in Appendix IV to that Report some of the many persons and organisations, both in Australia and overseas, who responded to our requests for information or advice. We are most grateful to all the people who have assisted us in these ways.

The Commission expresses its appreciation of the important contribution made by its research, administrative, secretarial and library staff. Secretarial assistance was provided principally by Mrs Margaret Edenborough, Mrs Zoya Wynnyk, and Mrs Deborah Donnellan.

FOOTNOTE

1. Law Reform Commission Act 1967-1981, s.12A(3).

1. The Discussion Paper

I. Terms of Reference

1.1 We make this Report under our reference to inquire into and review the law and practice relating to the legal profession. The full text of the terms of reference is reproduced in Appendix I to this Report.

1.2 Amongst other things, the terms of reference require us to consider:

“the making, investigation and adjudication of complaints concerning the professional competence or conduct of legal practitioners and the effectiveness of the investigation and adjudication of such complaints by professional organisations.”

II. The Scope and Structure of This Report

1.3 This Report is limited to matters of complaints, discipline, and professional standards. 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*.

1.4 In this Report, we refer often to that Paper. Where we do so, we speak of it as “the Discussion Paper” or “the Paper”.

1.5 The Report itself is divided into the following parts:

PART I: INTRODUCTION (Chapters 1 and 2)

PART II: CENTRAL ISSUES AND BASIC RECOMMENDATIONS (Chapters 3 and 4)

PART III: OTHER ISSUES AND RECOMMENDATIONS (Chapters 5-10)

III. The Scope of Part I

1.6 In this Part, we are concerned with the Discussion Paper. In this Chapter, we state its substance, and we refer to some of the responses it evoked. In Chapter 2, we refer to some developments in the field of complaints, discipline and professional standards which have occurred since the Discussion Paper was published.

IV. The Discussion Paper

Its Substance

1.7 In the Paper, we considered how complaints against lawyers are handled in New South Wales. In particular, we considered the operations of the Law Society of New South Wales, the New South Wales Bar Association, the Solicitors' Statutory Committee, the Supreme Court, the Department of Consumer Affairs, the Ombudsman and the High Court. In terms of numbers of complaints handled, the systems operated by the Law Society and the Bar Association were the most significant and we concentrated upon them.

1.8 The extensive investigations we had made of the complaints work of the Law Society in the period 1974-1978 and of the Bar Association in the period 1975-1977 led us to the view that a significant number of complaints against lawyers were not being dealt with fairly and effectively. We listed what we saw as being the main shortcomings of the complaints systems of the Law Society and the Bar Association.

1.9 in the case of the Law Society's system, the shortcomings were:

- (a) the Society's excessive reluctance to take action in relation to complaints which were not seen by it as raising questions of serious professional misconduct; in particular, complaints of delay and negligence, and complaints which should have raised questions about the competence of the practitioners concerned;
- (b) the Society's unhelpful attitude to complainants; for example:
 - (i) little or no help given in the formulation of complaints;
 - (ii) little or no help given in cases where legal work complained of had been done badly or not at all; and
 - (iii) inadequate explanations of how the Society saw its role in relation to complaints;
- (c) the Society's unduly limited use of the complaints record of a solicitor when deciding what investigation, if any, would be made of a complaint about him;
- (d) the Society's perfunctory investigation of many complaints;
- (e) the Society's excessive sympathy for, and leniency to, solicitors whose conduct was the subject of investigation and adjudication; and
- (f) the Society's excessive reluctance to refer to the Solicitors' Statutory Committee any question about the professional misconduct of a solicitor if there was any substantial conflict in the evidence before it, if the evidence against the solicitor was less than overwhelming, or if the evidence did not relate to a well-recognised class of "professional misconduct".

1.10 In the case of the Bar Association's system, we saw the main shortcomings as being:

- (a) the Association's inadequate investigation of complaints;
- (b) the Association's unhelpful attitude to complainants, for example:
 - (i) little or no help given in the formulation of complaints; and
 - (ii) inadequate explanations of how the Association saw its role in relation to complaints; and
- (c) the Association's unduly narrow view that complaints of negligence or incompetence on the part of barristers rarely called for action through its complaints and discipline system.

1.11 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 systems of the Law Society and the Bar Association, we suggested that a new system:

- (a) should be concerned with a much wider range of professional conduct, particularly in the areas of incompetence, negligence and delay;
- (b) should do more to improve the performance of practitioners who are providing inadequate legal services;
- (c) should not be controlled and operated by any association of practitioners, and non-lawyers should play active roles in both its control and operation;
- (d) should apply to all practitioners, whether barristers or solicitors;

(e) 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;

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

(g) 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.

1.12 When we published *Complaints, Discipline and Professional Standards - Part I*, we also published another Discussion Paper *General Regulation*. In that Paper, we suggested that a Legal Profession Council ("the Council"), composed of lawyers and non-lawyers, should be created for the purpose of exercising general powers of regulation in relation to the legal profession. We suggested that the Council should play an important part in the system referred to in the preceding paragraph. In short, we said that the Council should take over the complaints work of the Law Society and the Bar Association.

1.13 We suggested that the system needed a Director of Professional Standards ("the Director"), a new Professional Standards Board ("the Board") and a new Disciplinary Tribunal ("the Tribunal"). In this context, we said that the functions and, perhaps, the powers of the Council should be wider than those of the Society and the Association. We suggested that not only should the Board and the Tribunal take over the adjudicatory functions of the Solicitors' Statutory Committee but also that those functions should be widened.

1.14 Special features of the suggested new complaints, discipline and professional standards system included the following:

(a) the system would concern itself with any conduct of a practitioner which constituted a failure to comply with the standards (including standards of honesty, competence, care and service) which, in all the circumstances, it is reasonable to require of a legal practitioner;

(b) the Board and the Tribunal would be empowered to direct a practitioner to take steps designed to improve his or her performance as a practitioner;

(c) the Board and the Tribunal would be composed of two-thirds lawyers and one-third non-lawyers;

(d) the system would apply to barristers and solicitors;

(e) the Council would be responsible for ensuring that the Director investigated complaints rigorously, thoroughly and fairly; also, the Council would review the Director's investigations, on its own initiative and on application made by complainants;

(f) complainants would have greater opportunities for involvement in the investigation and resolution of their complaints;

(g) the proceedings of the Tribunal would usually be open to the public and the proceedings of the Board would usually be closed to the public; and

(h) in limited circumstances, the Board and the Tribunal would be empowered to direct a practitioner to provide a remedy for any person whose work he or she had done badly or not at all.

1.15 Key concepts in the suggested new system were those stated in sub-paragraphs (a) and (b) of the preceding paragraph. The system was to concern itself not only with serious breaches of professional standards (for example, breaches of the kind which might now result in action on the ground of professional misconduct) but also with less serious breaches including those which indicate that a practitioner is providing an inadequate service. We expressed the view that it would be unfair and

counter-productive if the less serious breaches were made subject to the same procedures and sanctions as the serious breaches. The system therefore provided for a formal body, the Tribunal, to deal with the serious breaches and a less formal body, the Board, to deal with the less serious breaches.

1.16 The power to withdraw a practitioner's right to practise, whether permanently or for a fixed time, was to be confined to the Tribunal. Both the Board and the Tribunal were to have power to impose a wide range of measures, particularly measures aimed at improving the quality of work done by a practitioner. The Board, in particular, was to seek, wherever possible, to obtain a practitioner's co-operation in deciding whether, and, if so, what, measures were appropriate for this purpose. Among the measures that might be imposed were requirements that a practitioner make reports on his or her practice, that he or she submit to inspection or advice, obtain assistance in his or her practice, undertake a course of training or cease to practise in specified areas of law. While the selection of the measures appropriate in particular circumstances would ultimately involve a judgment by the Tribunal or the Board, any legislation introducing the system should distinguish, we suggested, between serious and less serious breaches of standards.

The Response from the Law Society

1.17 The Law Society's submission in relation to the Paper is dated September, 1981. In it, the Society speaks of what it sees as valid criticisms and shortcomings of the comments and proposals made in the Paper, and in the Background Paper which supplemented it.²

1.18 As to our comments, the Society criticised not only statements of fact made by us about the Society's complaints system but also our interpretation of some of its complaints files. These criticisms can speak for themselves and we shall not lengthen this Report with a detailed reply. But silence on our part should not be construed as acceptance of the criticisms. One statement in the Discussion Paper, however, does call for correction.³

1.19 As to our proposals, the Society says:

"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."⁴

The Society does not list the minor faults to which it impliedly refers. They can be identified only if the systems proposed in the Discussion Paper and in the Society's submission are compared. We comment later in this Report on many of the differences between the system we now recommend and the system proposed by the Society.⁵ With some exceptions, the system proposed by the Society bears a striking similarity to the systems proposed in the Discussion Paper and recommended in this Report.

The Response from the Bar Association

1.20 The New South Wales Bar Association responded to the Discussion Paper in August 1979. The response included criticism of some statements made in the Paper.⁶ Again, we do not reply in detail, but we should not be taken to acquiesce in the criticism. The response also included criticisms of some proposals made in the Paper. We reply to these criticisms later in this Report.

1.21 The substance of the Association's submission was that the level of complaints against barristers is so extraordinarily low that no significant change in its disciplinary procedures is necessary.⁷ In its words, "what is required is necessary modification to the existing system to cure any weaknesses in it."⁸ The Association says, for example, "jurisdiction de jure over *all* barristers is highly desirable".⁹ By way of explanation, we note that most, but not all, practising barristers are members of the Association and are bound by its rules. Practising barristers who are not members of the Association are not bound by its rules, but, in fact, the Association exerts considerable influence over their professional lives. The Association seeks the legal right to regulate all practising barristers, whether or not they are members of the Association.

1.22 The Association's submission also contains specific comment on particular issues. It refers, for example, to changes in the procedures of its Ethics Committee which were introduced in 1978.¹⁰ In the words of the Association:

"The essence of those changes is that in cases where there is a disputed question of fact, evidence is taken at a hearing before the Ethics Committee from the complainant, from the barrister and from any witness which either the complainant or the barrister wishes to call. It has only been necessary to conduct about 4 such hearings since the system was introduced. This indicates that real conflicts on questions of fact are the exception rather than the rule."¹¹

The Association also said:

"The Association has no charter to discipline or deal with persons who may, in a particular instance, display negligence or incompetent conduct which does not amount to a breach of ethics or professional misconduct."¹²

In the context of lay participation in the Bar's disciplinary processes, the Association said:

"The Commission's criticisms of the Bar Council's disciplinary procedures relate not to partiality nor to results arrived at, but to some of the administrative procedures adopted. All these criticisms, accepting for present purposes that they are valid at all, could be met by provision being made for a lay member or observer.

The Association can see no reason why a lay person should not be appointed to perform both the functions of observer and member on the Ethics Committee 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."¹³

Other Responses

1.23 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. Some responses reflect a careful reading of the Paper and a thoughtful consideration of the issues raised in it.

1.24 By way of example, we quote from four responses:

(a) "Recommendations by the New South Wales Law Reform Commission that new, authoritative bodies which include lay members should be established to set standards of conduct for the State's lawyers and to discipline any whose conduct falls below those standards will be broadly acceptable to the public if not to the legal profession. The Commission's attitude is in tune with a growing public consciousness of a need for the infusion of an independent, lay element in the tribunals of all bodies responsible for controlling the behaviour of professional groups."¹⁴

(b) "We support the establishment of the mechanisms proposed in the second discussion paper for the dealing with discipline and complaints. In particular we support the provision of adequate investigatory staff to handle the preliminary stages. We would, however, like to see some lesser mechanisms for conciliation, i.e. the resolution of minor complaints without reference to the Board. The invocation of the Board seems too extreme for some of the minor, but from a consumers' viewpoint, difficult, situations that may develop. There would, therefore, seem to be some mechanism needed by which, with consent of both parties, disputes can be mediated as they occur. A conference and voluntary undertaking by both parties may succeed in resolve in minor issues without resource to the Board, and without involving a public record of the complaint. This would provide adequate remedies, and avoid the problems of a too drastic a response discouraging the use of mechanisms. It would also encourage clients to use the system without it being overly formal and cumbersome."¹⁵

(c) "I think that my concern here is that the Commission does not examine the possibility of improving the existing machinery. While I have not been able to read the papers with sufficient particularity to say that I have not overlooked it, I have not seen in the papers a specific reason ascribed for not examining the existing machinery with a view to improving it.

I think that it is very easy to overlook two salient facts, or tendencies so pronounced that I would characterize them as facts. One is that any analysis of the detailed operations of any human institution of any significant size is almost certain to disclose grave deficiencies; this I think can be demonstrated with regard to any kind of institution, political, judicial, legal or otherwise. The second is that the legal profession has demonstrated a drive towards self-regulation long antedating the age of consumerism, and that elderly institutions tend to become complacent. To me, these considerations suggest that any investigation is likely to suggest the need for improvement, and that this particular one is likely to find that any but the most active and energetic professional governing body has been overtaken by the times and needs stimulation to get ahead of them again. If there is no philosophical barrier, I suggest that this is a suitable avenue to be investigated, or stone to be upturned, though of course the result of the investigation may be a determination that the institution is beyond redemption." 16

(d) "I do not like (and the Commission has not, in these papers, persuaded me to like)

(a) one disciplinary tribunal for both branches of the profession, where both branches are independently established;

(b) judges acting judicially otherwise than as members of their Court;

(c) the power to strike off or disbar being vested in a body other than the Court." 17

1.25 All responses are available for inspection at the Commission's offices.

FOOTNOTES

1. As to Part II, see paragraph 9.25.

2. See Law Society of New South Wales, Submission No.272 ("Submission on Discussion Paper No.2 Complaints and Discipline"), p.5 and, generally, pp.7-21. We refer to this Submission as "the Law Society's Submission".

3. We accept that we were wrong in saying, in respect of a particular period of five years, that the Council of the Society did not cancel any practising certificate under section 71(c) of the Legal Practitioners Act, 1898. In fact, in the period in question, the Council canceled five practising certificates. The Society had supplied us with this information and the error was ours.

4. The Law Society's Submission, p.21.

5. See generally, Chapter 6, Section II.

6. See New South Wales Bar Association, Submission No.267 ("Submission on Discussion Paper No.2 Complaints, Discipline and Professional Standards"), for example, paras.1.7, 2.4.1 and 2.5. We refer to this Submission as "the Bar Association's Submission".

7. The Bar Association's Submission, para.1.5.

8. *Ibid*, para.1.8.

9. *Ibid*, para.6.1 (a).

10. *Ibid*, para.2.3.1.
11. *Ibid*, para.2.3.2.
12. *Ibid*, para.2.6.1.
13. *Ibid*, paras.6.1 (c), 6.6.
14. Editorial entitled "A Case for Review", Newcastle Morning Herald, April 27, 1979.
15. Council of Social Services of New South Wales, Submission No.379.
16. Letter from William H Hurlburt, QC, University of Alberta, Edmonton, Alberta, to the Chairman of the Commission, dated 7th September 1979.
17. The Honourable Mr Justice RA Blackburn, Chief Judge, Supreme Court of the Australian Capital Court, Submission No.325.

2. Developments Since the Publication of the Discussion Paper

I. The Scope of This Chapter

2.1 In this Chapter, we refer to some developments in the field of complaints, discipline and professional standards which have occurred in New South Wales, and in some places outside New South Wales, since the Discussion Paper was published. It is notable, especially in the case of places outside New South Wales, that many of the suggestions made in the Discussion Paper accord with later suggestions made by other bodies working in the same field.

II. New South Wales

The Law Society

2.2 The Discussion Paper was published in April, 1979. In July, 1979, the Council of the Law Society resolved to take certain initiatives, some of them which are especially relevant to suggestions made in the Paper.¹ Amongst other things, the Society resolved that lay people should be appointed to the Solicitors' Statutory Committee. This has now been done. Also, the Society resolved that it should exercise remedial and punitive powers in respect of income petence, neglect, and delay on the part of solicitors. The complaints and discipline system proposed by the Society makes provision for the exercise of these powers,² but, pending publication of this Report, neither that system, nor any comparable system, has been instituted.

2.3 In June, 1979, in pursuance of a resolution of the Council of the Society in April, 1979, a Lay Review Tribunal was appointed.³ 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."⁴

The Tribunal has one member, a non- lawyer, and its functions are broadly similar to those of the Lay Observers in Victoria, England and Scotland. 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 lawyers' professional association has not adequately investigated a complaint about a member. The Lay Review Tribunal in this State was not 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.

2.4 If the resolution of the Council to which we refer requires the Lay Review Tribunal to make annual reports to the Council, the Chief Justice and the Attorney General. We have copies of all reports made to date and we have had regard to them in formulating the recommendations made in this Report.

The Bar Association

2.5 At our request, the Bar Association has supplied the following information concernings its complaints work in recent years:⁵

(a) In the 4 years 1978-1981, the Association received a total of 140 complaints about barristers. The annual figures were 1978 (33), 1979 (39), 1980 (32) and 1981 (36). The complaints are not classified into categories and it does not appear how many of the complaints were made with respect to such things as professional misconduct, neglect delay or fees.

(b) 13 of the complaints resulted in formal hearings by the Ethics Committees of the Bar Council. Of these, 6 were in 1978, 1 in 1979, 5 in 1980 and 1 in 1981. Five of the 13 hearing involved complaints against non- members of the Bar Association.

(c) Of the 36 complaints made in 1981, 17 were still being investigated at 1st March, 1982. Of the 123 complaints investigated in the 1978-1981 period, 18 resulted in disciplinary or other action being taken against the barrister complained of.

(d) In response to our question whether the Association wished to have the power to deal with barristers who, in a particular instance, are negligent or incompetent to a degree short of a breach of ethics of professional misconduct, the Bar Association said:

“Our Council does not see any need for greater powers to be conferred upon it. The present Memorandum of Association is wide enough for the Association to concern itself in professional conduct of members generally and is not limited to misconduct. In practise, isolated cases of incompetence, negligence or lack of diligence have been dealt with successfully by personal communication between the President and the member concerned. If the volume of complaints of this type rises significantly or if the present procedure appears unsuccessful it may be necessary for the Council to reassess how they should be dealt with. However, the Bar Council also notes recent developments in the law relating to the liability of barristers to clients.

As stressed in our submission, the Council is seriously concerned at the problem of ensuring adequate training of Counsel, many of whom these days upon first admission have no prior association with the practice of the Law, and of continuing education. These measures are most relevant to questions of negligence and incompetence. Council also notes that all of the work of barristers is scrutinised by either judges or solicitors and much of it is observed by other members of the Bar. This provides effective day to day sanction.”

(e) In response to our question whether, apart from hearings before the Ethics Committee, there have been any changes in the procedures of that Committee since 1977, the Association replied:

“No, but it should be noted that there have been two Ethics Committees since 1980 each Committee being presided over by a Vice President and including some members who are not members of the Bar Council. As you know, we continually review the efficacy of our systems and we are examining whether the investigatory and adjudication processes should be separated and if a decision is made on this issue in the near future, I will write and give you full details.”

In response to our question whether the Association wished to add anything to its submission on the Discussion Paper, the Association said:

“... the Bar Council would add but two thoughts to the 1977 submission that may indicate changed trends in complaints:

(a) A significant percentage of complaints arise not because of misconduct or incompetence but lack of communication between barrister, solicitor and lay client often caused by laudable attempts to cut costs;

(b) Pressure groups are bringing to the attention of the Bar Council alleged injustices in the court system for investigation where the complaint is not that a member of the bar failed in his duty to court or client but rather that justice was not done in the court process as a whole.”

III. Other Australian Jurisdictions

2.6 We refer here to recent changes in Victoria, and to recent proposals for change in Western Australia.

Victoria

2.7 In Victoria, by virtue of the Legal Profession Practice (Solicitors' Disciplinary Tribunal) Act 1978, new disciplinary procedures for solicitors took effect from 1st August, 1979. A new Solicitors' Disciplinary Tribunal was created. It conducts three forms of hearings; preliminary hearings, summary hearings and full hearings. Not all the differences between them are presently relevant but we note that full hearings, as distinct from summary and preliminary hearings, are usually held in public. Also, in the case of full hearings, one non-practitioner appointed in the public interest by the Attorney General must be assigned, with four practitioners, to the Tribunal. A non-practitioner cannot be assigned to the Tribunal for summary and preliminary hearings. The office of Lay Observer was also created by the Act. The Lay Observer reports to the Attorney General on complaints about the manner in which the Secretary of the Law Institute, the Council of the Institute, or the Tribunal handles cases of alleged misconduct. The definition of misconduct was also extended to include, amongst other things, "any failure by a solicitor in performing any work in connexion with his practice, being a failure which constitutes a gross breach of his duty to his client or the court".⁶ The term "misconduct", as now defined, is wider than the common law meaning of "misconduct", and much wider than the meaning previously given to that term in earlier Victorian Acts.

2.8 New disciplinary procedures for barristers in Victoria also took effect on 1st August, 1979. The Legal Profession Practice (Discipline) Act 1978 provided, amongst other things, for the creation of a Barristers' Disciplinary Tribunal and for the appointment of a Lay Observer. The Tribunal includes one person, not being a practitioner, nominated by the Attorney General, but this person does not have to be present at hearings of the Tribunal. For the purposes of the Act, a barrister commits a disciplinary offence if:

- (a) he is guilty of professional misconduct;
- (b) he is guilty of improper conduct in a professional respect;
- (c) he infringes a ruling made and published by the Victorian Bar Council on a matter of professional conduct or practice; or
- (d) he is guilty of any other conduct for which a barrister could be struck off the roll of practitioners kept by the Supreme Court."⁷

One significant effect of this provision is that some acts or omissions which were not disciplinary offences prior to its enactment are now disciplinary offences.

2.9 The Law Institute of Victoria opposed the Legal Profession Practice (Discipline) Act 1978 on a number of grounds. One ground was that barristers and solicitors have a common training and a common duty to the public, and that their patterns of work are not so substantially different as to warrant separate disciplinary procedures.⁸ In reply the then Premier of Victoria, Mr Hamer, said:

"This matter was fully discussed with the Attorney-General, but it was concluded that it was preferable at the present time to go ahead with a Disciplinary Tribunal for barristers, who are not at present covered under the Legal Profession Practice Act in disciplinary matters.

This does not, of course, preclude any further steps to unite the profession or to bring solicitors and barristers close together. It would not be difficult to convert [to] one overall Disciplinary Tribunal in the future, if that seemed desirable. At the moment the barristers appear to be unanimously opposed to it, and the only objective of the Government is to ensure that members of the public do have an assurance that disciplinary matters can, and will, be handled in an effective way."⁹

Western Australia

2.10 In February, 1980, a Committee of inquiry into the Future Organisation of the Legal Profession in Western Australia was constituted by the Government of that State. In July, 1981, the Committee published its First Working Paper. In summary form, recommendations of the Committee relevant to this Report are listed below. By way of explanation, we note that the Barristers' Board is a statutory board which, despite its title, has jurisdiction not only over people practising as barristers but also over people

practising as solicitors. The Board, for example, has statutory functions in relation to the issue of annual practising certificates, the review of annual audit certificates relating to trust accounts, and the investigation of the conduct of practitioners. We also note that the Law Society of Western Australia is an incorporated Society. Membership is not compulsory except in the case of members of the Bar Association who reside in Western Australia. The Society has many objects in its Constitution. One is: "To promote honourable practice, to repress malpractice, to settle disputed points of practice and to decide all questions of professional usage or courtesy between or amongst legal practitioners." The Society submitted to the Committee that in lieu of the Law Society and the Barristers' Board there should be three statutory bodies; the Law Society, a Legal Discipline Board, and a Legal Education and Admissions Board.¹⁰ At present, the Society has no statutory powers or functions.

2.11 In the event, the Committee made recommendations to the effect of the following:

- (a) The Barristers' Board and the Law Society of Western Australia should continue to co-exist.
- (b) The name of the Barristers' Board should be changed to the Legal Practice Board of Western Australia.
- (c) There should be created by statute the Office of Legal Practice Ombudsman, appointed by and accountable to the Attorney General, to receive, investigate and prosecute complaints against practitioners.
- (d) Membership of the Legal Practice Board should be increased to include one non-lawyer as a fully participating member, appointed by the Attorney General after consultation with the Minister for Consumer Affairs.
- (e) The Legal Practice Board should be constituted by 3 practitioner members and 1 non-lawyer when conducting disciplinary hearings. When so constituted it would be called a Disciplinary Tribunal. The non-lawyer should be the non-lawyer member of the Legal Practice Board or another chosen from a panel of non-lawyers to be appointed by the Attorney General after consultation with the Minister for Consumer Affairs.¹¹

2.12 The Western Australian Committee has not yet made its final Report.

IV. Overseas Jurisdictions

2.13 We refer here to recent developments in England, Ontario, Scotland and New Zealand. In England, the Report of the Royal Commission on Legal Services (Chairman: Sir Henry Benson, GBE) was presented to Parliament in October, 1979.¹² In Ontario, the Report of the Professional Organisations Committee (a Committee appointed to review the Architects Act, the Law Society Act, the Notaries Act, the Professional Engineers Act, and the Public Accountancy Act) was submitted to the Attorney-General of that Province in April, 1980.¹³ In Scotland, the Report of the Royal Commission on Legal Services (Chairman: The Rt. Hon. Lord Hughes, CBE) was presented to Parliament in May, 1980.¹⁴ And, in New Zealand a Law Practitioners Bill was introduced into Parliament late in 1981. Amongst other things, the Bill substantially rewrites the disciplinary provisions of the present Act.¹⁵ The Bill has been referred to the Statutes Revision Select Committee for consideration.

2.14 The changes which have been proposed in these overseas jurisdictions are many and varied but, generally speaking, there is an emphasis on:

- (i) Lay participation.
- (ii) Lay observers.
- (iii) The extension of disciplinary systems to a wide range of professional conduct.
- (iv) The granting of power to disciplinary tribunals to impose a wide range of sanctions.

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

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

In this part of this Chapter, we look briefly at each of these areas of interest.

Lay Participation

2.15 In the context of lay participation in disciplinary processes, it is necessary to distinguish between investigation and adjudication. It is also necessary to appreciate that the process of investigation includes the making of decisions whether or not to refer for adjudication questions touching the conduct of particular practitioners.

2.16 The Benson Commission said that lay people should be involved in the processes of investigation and adjudication of complaints against solicitors.¹⁶ It also referred to the recent introduction of lay members to the Professional Conduct Committee of the Bar Council in England and said that members of the Commission regarded this development as not only desirable but necessary.¹⁷ This Professional Conduct Committee is the body which, in the first instance, handles complaints about barristers. Under a self-imposed rule, no complaint is rejected by the Committee unless a lay member of the Committee agrees. The Hughes Commission said that the committee of the Law Society in Scotland responsible for investigating complaints against solicitors should include lay members appointed by the Secretary of State for Scotland.¹⁸ The Hughes Commission also recommended the creation of an *ad hoc* Discipline Tribunal to deal with complaints against advocates (the Scottish equivalent of barristers). It recommended that the tribunal be chaired by a judge and that it should have an advocate and a lay person as members.¹⁹ It did not recommend that lay people should participate in the investigation of complaints against advocates. The Ontario report referred to a 1979 initiative of the Law Society of Upper Canada in constituting a Complaints Review Committee composed of two lawyers and one non-lawyer to which a dissatisfied complainant could appeal.²⁰ The New Zealand Bill makes provision for lay people to serve on Disciplinary Tribunals but it does not provide for their participation in the process of investigating complaints.

Lay Observers

2.17 In England, the Lord Chancellor appointed a Lay Observer in 1975. The Benson Commission said that the need to continue the appointment should be reconsidered. It was thought by that Commission that the lay presence in the processes of investigation and adjudication may diminish the number of cases referred to the Lay Observer to the point where there ceases to be any need for his or her services.²¹ The Hughes Commission recommended that the Lay Observer in Scotland, whose office was created in 1976, should continue to receive and investigate complaints from clients who are not satisfied with the investigation and action taken by the Law Society. It went further and recommended that the Lay Observer should be empowered to take complaints to the Discipline Tribunal at his or her own instance.²² In Ontario, the Committee's recommendation for the creation of the office of Lay Observer was especially detailed.²³ The New Zealand Bill provides for the appointment of "one or more" Lay Observers.²⁴

Bad Professional Work

2.18 We use the expression "bad professional work" as a convenient short description of what we meant when we said that in the overseas jurisdictions we are examining there is an emphasis on the extension of disciplinary systems to a wide range of professional conduct. It is commonly said that incompetence, delay, and failure to meet accepted standards of professional work, or, in short, bad professional work, should be the subject of disciplinary proceedings.²⁵

2.19 The Benson Commission recommended that the Law Society and the Senate of the Four Inns of Court (the central governing body of barristers in England) should have the responsibility of taking action when cases of bad professional work are brought to their respective notice.²⁶ The Commission said

that this statement of policy would raise administrative problems which the bodies in question would need to consider, and it did not develop its basic policy. In the case of barristers in England, incompetence can already be dealt with by the Bar Council's Professional Conduct Committee or by the Disciplinary Tribunal of the Senate.²⁷ In relation to negligence on the part of Scottish solicitors, the Hughes Commission made a recommendation similar to that of the Benson Commission.²⁸ The Ontario Committee recommended that the disciplinary processes of the legal profession should apply not only to professional misconduct but also to professional incompetence.²⁹ The New Zealand Bill provides for the imposition of sanctions where a practitioner has been found guilty of, amongst other things, "negligence or incompetence in his professional capacity."³⁰

Sanctions

2.20 We suggested in the Discussion Paper that where the Disciplinary Tribunal or the Professional Standards Board made a finding against a practitioner it should be empowered to make many orders. We envisaged that a finding of bad professional work might result in orders such as the following:

- (i) that the practitioner commence and complete to the satisfaction of the Board such course of legal education as the Board determines;
- (ii) that the practitioner make his practice available for inspection at such time and by such persons as the Board determines;
- (iii) that the practitioner report on his practice at such times, in such form and to such persons as the Board determines;
- (iv) that the practitioner take advice in relation to the management of his practice from such persons as the Board determines;
- (v) that the practitioner cease to accept work, or to hold himself out as competent, in such fields of practice as the Board determines;
- (vi) that the Practitioner employ in his practice a member of such class of persons as the Board determines;
- (vii) that the practitioner do such work for such persons within such time and for such fee as the Board determines;
- (viii) that the practitioner reduce his charges for any work done by him which is the subject of the proceedings before the Board in such amount, not exceeding \$1500, as the Board determines;
- (ix) that the practitioner pay compensation in an amount not exceeding \$1500 to such persons as the Board determines.

2.21 In speaking of the orders that might be made against a practitioner in respect of bad professional work, both the Hughes Commission and the Ontario Committee referred to our Discussion Paper. The Hughes Commission recommended that its proposed Discipline Tribunal for solicitors and advocates should have a wide range of sanctions:

"An illustration of the range of sanctions we have in mind is to be found in ... recommendations made in a discussion paper by the Law Reform Commission of New South Wales."³¹

In the same context, the Ontario Report said that its recommendations followed closely proposals made by others, including those made by this Commission.³² The sanction provisions of the New Zealand Bill are also similar to those suggested in the Discussion Paper.³³ The Benson Commission, on the other hand, made only three recommendations concerning additional orders. It recommended that there should be power to order the repayment of any fee received in respect of work which is the subject of disciplinary proceedings, power to require the practitioner concerned to undergo a course of training,

and power to impose on the conduct of a solicitor's practice such restrictions or conditions, and for such periods, as the Professional Purposes Committee of the Law Society considers appropriate.³⁴

Disciplinary Systems with Two Tiers

2.22 In England, in the case of solicitors, the Professional Purposes Committee of the Law Society and the Solicitors' Disciplinary Tribunal share the work of solicitors' discipline. The Committee deals with the less serious cases and the Tribunal with the more serious cases.³⁵ In the case of barristers' discipline, there is a similar division of functions between the Professional Conduct Committee of the Bar Council and the Disciplinary Tribunal of the Senate.³⁶ In Scotland, in the case of solicitors' discipline, there is also a division of functions. The Hughes Commission recommended that some changes be made. It proposed that the initial investigation of complaints should remain the responsibility of a committee of the Law Society but that either that committee or the Lay Observer should be empowered to refer matters to a new Discipline Tribunal.³⁷ The New Zealand Bill provides not only for the creation of District Disciplinary Tribunals but also for the creation of the New Zealand Law Practitioners Disciplinary Tribunal. The Bill says that if a District Disciplinary Tribunal considers that a matter before it is of sufficient gravity to warrant its referral to the New Zealand Disciplinary Tribunal, it must refer the matter to that Tribunal.³⁸ In short, less serious charges will be dealt with by District Disciplinary Tribunals and more serious charges will be dealt with by the New Zealand Disciplinary Tribunal.

Assistance to the Public and to Complainants

2.23 The Benson and Hughes Commissions attached considerable importance to the view that the professional associations of lawyers in England and Scotland should do more to assist complainants and potential complainants. In England, the Law Society has published a pamphlet explaining how it handles complaints and the procedures which should be followed by complainants. A copy is sent to anyone who writes to the Society saying that he or she wishes to make a complaint about a solicitor. The Benson Commission commended the idea of the pamphlet but said that the pamphlet itself had not always been updated as promptly as it should have been. It suggested that arrangements should be made for regular revisions.³⁹ It also said that the standard of the Law Society correspondence with complainants should be improved. In the Commission's words:

"We observed that letters written to complainants were not always happily worded; although technically accurate, they showed a lack of understanding of the complainant's point of view and possible distress and thereby exacerbated existing ill-feeling. The effect in such cases is that the complainant does not feel that his complaint has been adequately dealt with, even if it has been."⁴⁰

In the case of complaints about barristers, the Benson Commission recommended that, wherever possible, complainants should be interviewed by the Professional Conduct Committee's investigation officer. In the Commission's words:

"We believe that if the public is to have confidence in the procedure whereby complaints are investigated, it is essential that this is seen to be thorough and that a complainant should normally be given the opportunity to explain his case, however trivial or misguided this might appear."⁴¹

2.24 The Hughes Commission recommended that a leaflet should be prepared which describes briefly the procedures for lodging complaints against solicitors and advocates, and that the leaflet should be readily available to the public. The Commission also recommended that the Law Society should make regular reports to complainants on the progress of its investigations. It added that where a complaint is outstanding for three months, the Law Society should be obliged to make a report to the Lay Observer.⁴²

FOOTNOTES

1. Law Society of New South Wales, Submission No.272 (“Submission on Discussion Paper No.2, Complaints and Discipline”), pp.128-131. We refer to this Submission as “the Law Society’s Submission”.
2. The Law Society’s Submission, pp.41-45.
3. The Law Society’s Submission, p.73.
4. The Law Society’s Submission, p.71 (para.6).
5. Letter from the New South Wales Bar Association to this Commission dated 1st March, 1982.
6. See section 3(1) of the Act cited.
7. See section 2(a) of the Act cited.
8. Law Institute Journal (March, 1979), Vol.53 No.3, p.81.
9. Law Institute journal (March, 1979), Vol.53 No.3, p.81.
10. Working Paper No. 1 (July, 1981), p.23.
11. Working Paper No. 1 (July, 1981), p.40.
12. Cmnd. 7648, Her Majesty’s Stationery Office, London.
13. Ontario Government Bookstore, Toronto, Ontario. We refer to this Report as the “Ontario Report”.
14. Cmnd. 7846, Her Majesty’s Stationery Office, Edinburgh.
15. The Law Practitioners Act 1955, as amended.
16. Cmnd. 7648, paragraph 25.45.
17. Cmnd. 7648, paragraph 26.14.
18. Cmnd. 7846, paragraph 18.35.
19. Cmnd. 7846, paragraph 18.46.
20. Ontario Report, page 33.
21. Cmnd. 7648, paragraph 25.45.
22. Cmnd. 7846, paragraph 18.37.
23. Ontario Report, page 43.
24. Clause 97.
25. See, for example, Cmnd. 7648, paragraph 25.24.
26. Cmnd. 7648, paragraphs 25.24-25.29 and 25.35, and 26.18.
27. Cmnd. 7648, paragraph 26.17.
28. Cmnd. 7846, paragraph 18.30.

29. Ontario Report, page 182.
30. Clauses 107(2)(c) and 113(l)(c).
31. Cmnd. 7846, paragraph 18.31.
32. Ontario Report, page 185.
33. Clauses 107 and 113.
34. Cmnd. 7648, paragraphs 25.50 and 25.46.
35. Cmnd. 7648, paragraph 25.33.
36. Cmnd. 7648, paragraphs 26-15 and 26.22.
37. Cmnd. 7846, paragraph 18.31.
38. Clause 107(2).
39. Cmnd. 7648, paragraph 25.13.
40. Cmnd. 7648, paragraph 25.38.
41. Cmnd. 7648, paragraph 26.12.
42. Cmnd. 7846, paragraphs 18.49 and 18.36.

3. Central Issues

I. INTRODUCTION

3.1 In this Chapter, we consider three issues on which much of this Report turns. They 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?

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?

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?

In this Chapter, we comment briefly on each issue.

II. Two Systems or One System?

The Present Background

3.2 In the Discussion Paper, we outlined a possible new complaints, discipline and professional standards system for all legal practitioners.¹ The outline assumed the creation of one regulatory body for the whole profession. As indicated already, the body we had in mind was the Legal Profession Council which we had suggested in our Discussion Paper *General Regulation*. We added, however, that if the Council was not created many of our suggestions about complaints, discipline, and professional standards could still be implemented, with appropriate modifications.²

3.3 At the time we publish this Report, we also publish our First Report, on the regulation and structure of the legal profession. In that Report we do not recommend the creation of a body such as the Legal Profession Council. Subject to qualifications, we recommend that the Council of the Law Society and the Bar Council should govern those practitioners who become subject to their respective jurisdictions.³ It does not necessarily follow from this recommendation that these Councils should continue to have separate complaints and disciplinary systems. As noted in paragraph 2.9, the Law Institute of Victoria has argued only recently that all practitioners should be subject to the one complaints and discipline system notwithstanding the fact that in respect of the regulation of other aspects of practice in Victoria there are two regulatory bodies, the Law Institute itself and the Victorian Bar Council.

3.4 In New South Wales, the Law Society and the Bar Association oppose the creation of one complaints, discipline and professional standards system.⁴ Both the Society and the Association say that they should retain and control their respective systems. We must give proper weight to these views but they do not necessarily conclude the matter. Considerations of the public interest, for example, must be weighed, as well as considerations of legitimate interests of professional bodies. The professional bodies have weighed these considerations but we must weigh them ourselves. In short, we think it

necessary to examine three alternatives, namely, two systems, one system, and what, for present purposes, we term a mixed system.

The Historical Background

3.5 It is not many years since the main responsibility for the investigation of complaints, and the institution of disciplinary proceedings, against solicitors and barristers passed from the Prothonotary of the Supreme Court to the Council of the Law Society and the Bar Council respectively. In the case of solicitors, the adjudication and punishment of most major misconduct passed from the Supreme Court to the Solicitors' Statutory Committee only after the creation of the Committee in 1935. In the case of minor misconduct by barristers, the Bar Council has exercised these functions in a systematic way only in recent years. This evolutionary process is continuing and has involved many changes. One major change has been the development by the Law Society of its systems for the inspection and investigation of solicitors' trust accounts. Another change has been an increased willingness on the part of the Court to recognize the claims of the professional bodies to a greater say in the discipline of their members. This recognition does not, however, preclude the court from taking disciplinary action itself in appropriate cases. In short, there are now two disciplinary systems but, as regards adjudication, they merge at the level of the Supreme Court. In that sense, we now have a mixed system.

The Alternatives

3.6 In the context of complaints, discipline and professional standards, the Law Society speaks of "the concept of peer judgment" and the Bar Association speaks of "the barristers professional peers".⁵ It is clear that solicitors do not want barristers to judge the professional conduct of solicitors, and that barristers do not want solicitors to judge the professional conduct of barristers. For this reason, amongst others, the Law Society and the Bar Association want separate disciplinary systems. In 1977, the Bar Association put its then view in these words:

"Matters of complaint [against barristers] are almost always peculiarly suitable to be dealt with by the barrister's professional peers. Certainly the only persons other than barristers who could properly adjudicate upon such complaints would be judges who themselves, by their training and experience, would have the necessary qualifications to deal with the matters of complaint."⁶

3.7 We cannot see any compelling reason why the work of barristers and of solicitors should be tested only by other barristers (or judges) or only by other solicitors. The Law Society is no longer opposed to lay participation in the investigatory and adjudicatory functions of its complaints system and, subject to qualifications, the Bar Association seems now to be of like view.⁷ In this circumstance, we see no reason why any aspect of the notion of review exclusively by one's peers is a valid objection to one complaints, discipline and professional standards system for all practitioners.

3.8 The Bar Association also says that the proposals in the Discussion Paper do not recognise the fact that the work of barristers and solicitors is fundamentally different and that the problems to which their respective work give rise can best be solved by separate disciplinary procedures.⁸ It is true that there are differences in the work of barristers and solicitors, but whether the work is so fundamentally different as to require separate disciplinary procedures is another question. The work, for example, of a surgeon is fundamentally different from that of a physician but both surgeons and physicians are subject to the jurisdiction of the same disciplinary tribunal.

3.9 In relation to the subject of this Report, an important difference in the work patterns of barristers and solicitors is that the work of most solicitors involves the receipt of trust money and that this feature is absent from the work of barristers. Proper recognition could be given to this difference in one disciplinary system for all practitioners. It would merely be necessary to ensure that the persons engaged in the work of investigation and adjudication have, in addition to other capacities, a capacity in relation to solicitors' trust accounts.

3.10 Another difference in the work patterns of barristers and solicitors is that barristers are engaged in the work of advocacy to a greater extent than solicitors. This difference is, however, not as marked

today as it was formerly. An important and growing part of the work of solicitors is in the field of advocacy. In many courts (notably, the Family Court) and in tribunals (notably, the Trade Practices Tribunal) barristers and solicitors appear side by side as advocates. In some courts (for example, Courts of Petty Sessions) solicitors appears advocates at least as much as barristers. It is likely that the role of solicitors as advocates will increase, given, for example, the emphasis on advocacy in the practical training course conducted by the College of Law and the growing interest of many solicitors in advocacy, as evidenced by their attendance at continuing legal education courses on the subject. If, as a majority of us recommend elsewhere,⁹ barristers and solicitors are allowed to appear together as advocates, these tendencies can reasonably be expected to increase. There is also a growing role for solicitors as specialist advisers and, in these instances, their functions are usually similar to those of barristers.

3.11 In short the argument for separate disciplinary systems based on fundamental differences between the work of barristers and solicitors is losing much of whatever strength it may have had.

3.12 The Bar Association also says that the confidence of the profession is of critical importance where a disciplinary body has the power to interfere with a barrister's right to practise.¹⁰ We accept that barristers, and also solicitors, in common with all people at risk of having conditions imposed on their right to work in their chosen field, are entitled to expect a high standard of investigation and adjudication in matters of discipline. We do not agree, however, that confidence and expectations of this kind would be at risk merely because barristers and solicitors were subject to one disciplinary system. The real test is the capacity and ability of the people responsible for the proper functioning of the system. Indeed, we do not understand the Association to question that complainants and members of the public also have expectations in relation to professional disciplinary bodies and that these expectations ought to be respected. If all the wishes of barristers and solicitors in respect of their disciplinary systems are acceded to, complainants and members of the public may well doubt the fairness and effectiveness of the systems, whether they are fair and effective or not.

3.13 Barristers and solicitors in this State have long been accorded the privilege of substantial self-government. It seems to us that their arguments for the retention of their separate disciplinary systems are based, at least in part, on the view that their position as self-regulatory bodies would be diminished if they were to become subject to a common disciplinary system.

3.14 There are good reasons why the legal profession is accorded a substantial degree of self-regulation. An independent legal profession is highly valued by most societies. For the protection of individual rights and civil liberties against incursions from any source, including the State, an independent legal profession can be expected to provide representation without fear or favour. But, it may be questionable whether this independence is threatened because members of the profession, whether barristers or solicitors, are subject to one disciplinary system, and are not, as barristers and solicitors, subject to separate systems. We have no reason to suspect that the legal profession in South Australia, Western Australia, or New Zealand is less independent than the profession in this State. Yet in these three places, as in most parts of the common law world, all practitioners are subject to the one discipline system.

3.15 With respect to the last paragraph, one of us (Mr Conacher) says: The paragraph speaks of the legal profession in the singular. Each of the professional councils, however, has put it to us, and it is a view which I share, that in many respects there are two professions, one of barristers, the other of solicitors.¹¹ Further, there is in my opinion a widely held view, again one that I share, that the public values of professional independence and self-regulation are values attaching to solicitors as one professional group and to barristers as another. The handling by a professional group of matters of complaints, discipline and standards is an important part of professional independence and self-regulation. These bodies of opinion are entitled to respect in dealing with the subjects of complaints, discipline and professional standards in this report.

3.16 Notwithstanding all that can be said for and against the principle of separate disciplinary systems for barristers and solicitors, we are faced with practical considerations of cost and utility. 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 that the cost and inconvenience of an exercise of this magnitude can be justified. On the other hand, for reasons which the Bar Association sees as being powerful, we are satisfied that it would not voluntarily surrender its disciplinary system to the Law Society.

Recommendations

3.17 In the event, considerations of cost and convenience and respect for widely held views on matters of principle, persuade us that the two separate investigatory systems should be substantially retained, and we recommend accordingly. In this, as in other matters relating to the legal profession, future events in an evolving community may call for change.

3.18 As things stand today, however, we are satisfied that considerations of principle, cost and convenience justify changes in the adjudicatory systems with the result that there would be some features common to both barristers and solicitors additional to the part now played by the Supreme Court. Our detailed recommendations relating to these changes, and our reasons for them, appear later in this Report. ¹²

III. Lay Participation

3.19 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. ¹³ 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. ¹⁴

3.20 There seems to be little doubt that a strong case has been made for lay participation in the disciplinary processes of the legal profession. As we indicated in Chapter 2, 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, as we noted in paragraph 2.8, the Bar Association's submission to us in 1979 says:

"The Association can see 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." ¹⁵

3.21 In these circumstances, we do not restate here 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 be required by law. We return to this general subject when, later in the Report, we make specific recommendations concerning lay participation in particular parts of the system we propose. One of us (Mr Conacher) concurs in the 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 worth while. As in all other matters, it must be for those in authority in the future to say how far lay participation has earned its keep.

IV. Bad Professional Work

The Problem

3.22 There seems to be little doubt that a strong case has also been made for the extension of the disciplinary systems of the legal profession to bad professional work which falls short of professional misconduct or of conduct showing unfitness to practise. We refer here to incompetence, delay and failures to meet accepted standards of professional work. As we indicated in Chapter 2, 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 has power to investigate complaints of neglect or undue delay.

3.23 We do not restate here the arguments for and against adoption of the principle in question. We do, however, adopt in respect of the 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 incompetence 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.”¹⁶

3.24 As its submission to us demonstrates, the Law Society of New South Wales wishes to adopt the more vigorous attitude to which the Hughes Commission refers.¹⁷ On the other hand, the New South Wales 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 as is to eliminate either problem.¹⁸ In the Association’s words:

The Association attempts to minimise these 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.”¹⁹

3.25 We do not question the value of steps (a) and (c) and we note that step (b) is an acknowledgement that bad professional work is, in part, a disciplinary problem. But, for reasons given in the three following paragraphs, we question whether the Supreme Court is the appropriate forum in which to consider every problem of bad professional work on the part of individual barristers.

Disciplinary Systems with Two Tiers

3.26 As indicated in paragraph 1.15, the disciplinary system suggested in the Discussion Paper 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. For reasons given in the Discussion Paper,²⁰ it was thought 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 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.

3.27 As indicated in paragraph 2.22, 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.²¹

3.28 We adhere to the views expressed in the Discussion Paper. We see no reason why they 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 recommendations in this respect are a development of the present arrangements at 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 such 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. In saying this, we do not mean that there should be any change in the present jurisdiction of the Supreme Court in respect of barristers and solicitors, nor that, as a matter of law, the Supreme Court should decline to exercise its powers on the ground of the existence of another special tribunal with appropriate jurisdiction.

Sanctions

3.29 We return here to a point made in paragraph 3.25, namely, that it would be unfair and counter-productive if less serious breaches of professional standards were made subject to the same sanctions as serious breaches. For this reason, we suggested in the Discussion Paper that (excepting the powers of the Supreme Court) the power to withdraw a practitioner's right to practise, whether permanently or temporarily, should be confined to the Tribunal. On the other hand, we also suggested that both the Board and the Tribunal should have powers to impose a wide range of measures, particularly measures aimed at reducing the incidence of bad professional work.

3.30 As indicated in paragraph 2.21, suggestions of this kind have now been made in England, Scotland and New Zealand. And, in this State, the Law Society has proposed the adoption of similar suggestions for practitioners subject to its governance. We are satisfied that our suggestions are sound in principle.

3.31 Specific recommendations in relation to the matters discussed in this Chapter under the heading "Bad Professional Work" are made later in this Report. For present purposes we say only that we recommend:

- (a) that the legal profession's disciplinary system should be extended to conduct which falls short of conduct showing unfitness to practise;
- (b) that the system should have two tiers: one tier for conduct showing unfitness to practise and another tier for unsatisfactory conduct; and
- (c) that the system should permit the making of a wide range of orders, particularly orders aimed at reducing the incidence of bad professional work.

V. General Comments

Introduction

3.32 In this concluding part of Chapter 3, we consider the recommendations we have made to this point in the light of some of the submissions made to us by the Law Society and the Bar Association.

The Law Society

3.33 The Society's proposed complaints, discipline and professional standards system is not significantly different from the basic system we have in mind. We do, however, describe our system in terms different from those used by the Society. Where, for example, the Society speaks of "professional misconduct" and "professional misdemeanours", we speak of "conduct showing unfitness to practice" and "unsatisfactory conduct". The conduct covered by these expressions is, we believe, intended to be substantially the same. And where the Society speaks of the Professional Misconduct Tribunal and the Professional Misdemeanours Tribunal, we speak of the Disciplinary Tribunal and the Professional Standards Boards. Again, the difference is largely one of terminology, not of substance.

3.34 Features common to the two proposals include the following.

- (a) After a complaint is investigated, the Council of the Law Society would be empowered to refer questions concerning the conduct of the practitioner in question to the Professional Standards Board or to the Disciplinary Tribunal.
- (b) Questions alleging unfitness to practise would be referred to the Disciplinary Tribunal, and those alleging unsatisfactory conduct would be referred to the Professional Standards Board.
- (c) Lay people would be appointed as full voting members of the Complaints Committee of the Council, and of the Board and the Tribunal.
- (d) There would be provision for review by the Lay Review Tribunal of any investigation undertaken by or on behalf of the Council and also of any decision taken by the Council in relation to an investigation.
- (e) The disciplinary jurisdiction of the Supreme Court would remain unchanged and, where the Council thought it appropriate to do so, it could commence proceedings against a practitioner in that Court.

There are other areas of general agreement between us but they need not be listed here.

3.35 It must be noted, however, that the system we have in mind presumes that lay people will also be appointed to the Law Society Council itself. The Society is opposed to any proposal of this kind.

The Bar Association

3.36 The Bar Association is opposed to major change in its disciplinary system and hence it has not submitted a model for a new system. In considering the Association's views, it is necessary therefore to look to the submission the Association made to us in 1977 and to the further submission it made in 1979 in response to the Discussion Paper.

3.37 It seems that the Association has not totally rejected the idea of lay participation in the investigatory part of its disciplinary processes.²² On the other hand, it seems that the Association would be opposed to any suggestion that conduct other than conduct showing unfitness to practise should be within the application of the Bar's disciplinary system.²³

3.38 What would be the practical consequences for the Bar Association of the implementation of our recommendations? As we see it, they would include the following.

- (a) The complaints workload of the Association would increase. This result would flow from two causes. First, an increase in the number of practitioners who would be subject to the Association's

disciplinary jurisdiction.²⁴ And, secondly, the wider class of conduct which would be within the application of the Association's disciplinary process.

(b) The complaints work of the Association would become more difficult. This result would also flow from two causes. First, a possible need to set standards of competence, diligence and the like with which it is reasonable to expect a practitioner to comply, and the need to apply those standards to a great variety of circumstances. And, secondly, the need to give necessary explanations to lay people, and the need to have regard to the responses of those people.

3.39 We do not underestimate the significance of these possible consequences. On the other hand, we see improvements in the Bar's disciplinary system as necessary in the public interest. The price of making the improvements is part of the price of self-government.

3.40 One especially desirable consequence of the implementation of our proposals concerning Professional Standards Boards would be that the processes of investigation and adjudication within the Bar Association could be separated. At present, in cases of serious misconduct, these processes are divided between the Association and the Supreme Court. In less serious cases, members of the Ethics Committee investigate the conduct in question and then, as members of the Bar Council, decide, with others, the issues raised by their own investigations. On our proposals, members of the Ethics Committee would still conduct the investigation but if a question arose whether the conduct the subject of the investigation was unsatisfactory conduct, the question could be referred to an independent body, the Professional Standards Board, for inquiry and determination.

FOOTNOTES

1. See chapter 6.

2. See paragraph 6.2.

3. *First Report on the Legal Profession*, chapter 4.

4. Law Society of New South Wales, Submission No.272 ("Submission on Discussion Paper No.2, Complaints and Discipline"), page 34 (paragraph 2(a)); New South Wales Bar Association, Submission No 267 ("Submission on Discussion Paper No.2 Complaints, Discipline and Professional Standards"), paragraph 4.1 and paragraph 4 generally. We refer to these Submissions as the Law Society's Submission" and "the Bar Association's Submission" respectively.

5. The Law Society's Submission, page 34 (paragraphs 2(b) and (c), and New South Wales Bar Association, Submission No.130 ("Adjudication of Complaints"), page 5.

6. The Bar Association's Submission No.130, page 5.

7. The Law Society's Submission, page 33 (paragraph 1(3)) and the Bar Association's Submission, paragraph 6.1 (c) and paragraphs 6.2-6.6.

8. The Bar Association's Submission, paragraph 4.1.

9. See *First Report on the Legal Profession*, chapters 7 and 9.

10. The Bar Association's Submission, paragraph 4.3.

11. See Law Society of New South Wales, Submission No.200 ("Division of the Legal Profession into Two Branches"), page 15, paragraph 7.5; New South Wales Bar Association, Submission No.266 ("Reply to Discussion Paper No.1 - General Regulation"), page 8, paragraph 302.

12. See paragraph 8.8.

13. See, for example, pages 77-105.
14. See, for example, paragraphs 5.19-5.24.
15. The Bar Association's Submission, paragraph 6.6.
16. Cmnd. 7846, paragraph 18.22.
17. The Law Society's Submission, pages 39-40 (paragraphs 4(b) and (c)).
18. The Bar Association's Submission, paragraph 2.6.2.
19. See paragraphs 2.18 and 2.20 above.
20. Paragraph 5.10.
21. The Law Society's Submission, pages 39-41.
22. The Bar Association's Submission, paragraph 6.1(c) and paragraphs 6.2-6.6.
23. The Bar Association's Submission, paragraph 2.6.2.
24. This result flows, in turn, from a recommendation made in our First Report. The effect of the recommendation is that the Council of the Bar Association should be empowered to investigate the conduct of all practitioners subject to its governance, whether they are members of the Association or not.

4. An Outline of Our Recommended Complaints, Discipline and Professional Standards System

I. Introduction

4.1 In this Chapter, we sketch in broad outline the complaints, discipline and professional standards scheme which we recommend. Our purpose is to draw together the themes of earlier Chapters and to provide an introduction to later Chapters.

II. Structure of the System

4.2 The Councils of the Bar Association and the Law Society should be empowered by statute to investigate the conduct of practitioners subject to their respective governance.¹

4.3 There should be separate Professional Standards Boards for practitioners subject to governance by the Councils of the Bar Association and the Law Society.

4.4 There should be a 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 Council of the Bar Association and in another form when dealing with a practitioner who is subject to governance by the Law Society Council.

4.5 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.

4.6 The Councils of the Bar Association and the Law Society, and the Attorney General, should be empowered to refer questions concerning the conduct of practitioners subject to their respective governance to the relevant Professional Standards Board, the Disciplinary Tribunal, or the Supreme Court.

4.7 The inherent power of the Supreme Court to discipline any practitioner should remain unchanged.

4.8 Lay persons should participate in the investigation and resolution of complaints, and in the work of the Professional Standards Boards and of the Disciplinary Tribunal.

III. Conduct Within the Application of the System

4.9 Where a practitioners conduct constitutes a breach of the standards of conduct with which it is reasonable to expect a practitioner to comply, the conduct in question should be within the application of the system. We include here not only conduct which shows unfitness to practise but also conduct which shows carelessness or incompetence or, in terms used in earlier Chapters, bad professional work.

4.10 The system should distinguish between these two classes of breaches of standards of conduct. The first should include only those breaches which show a temporary or permanent unfitness to practise and the second should include all other breaches. We speak of conduct within the first class as "conduct showing unfitness to practise" and of conduct within the second class as "unsatisfactory conduct".

4.11 In general, the Disciplinary Tribunal should be concerned with conduct showing unfitness to practise and the Professional Standards Boards with unsatisfactory conduct.

4.12 Where a Professional Standards Board forms the opinion that conduct under consideration is, or may be, conduct showing unfitness to practise and not merely unsatisfactory conduct, it should transfer the reference to the Disciplinary Tribunal.

IV. The Sanctions

4.13 The Disciplinary Tribunal and the Professional Standards Boards should be empowered to make four classes of orders. For convenience we describe them here as “protective”, “punitive”, “remedial”, and “compensatory”.

4.14 A protective order would usually be one intended to protect the public from future serious misconduct on the part of a practitioner. It might, for example, take the form of an order that the practitioner be suspended from practice for a time or that his or her name be struck off the Roll of barristers and solicitors. Protective orders would usually be made by the Disciplinary Tribunal, not by the Professional Standards Boards. In some cases, however, a Professional Standards Board might say that a practitioners conduct is so unsatisfactory that the public needs some limited form of protection against a recurrence of it, and make an order accordingly. It might, for example, order the practitioner not to practise in a particular field of law for a specified time. A protective order would also have a deterrent effect on others.

4.15 A punitive order, as its name implies, would be one intended to punish a practitioner for either serious misconduct or unsatisfactory conduct, and to deter him or her, and others, from like conduct in the future. A punitive order would usually take the form of a fine.

4.16 A remedial order would be one intended to help a practitioner lift the level of his or her professional performance. It might, for example, take the form of an order that the practitioner attend a specified course of continuing legal education.

4.17 A compensatory order would be one intended to assist a victim of bad professional work. It might, for example, take the form of an order to the practitioner concerned to complete the work in a proper manner at a reduced fee. Jurisdiction to make such an order would be only by consent of the practitioner.

V. General

4.18 We do not include in this outline a summary of our recommendations in relation to procedural and ancillary matters. They will be considered in later Chapters.

FOOTNOTES

1. See our *First Report on the Legal Profession*, chapter 4.

5. Conduct Within the Application of the Recommended System

I. Introduction

5.1 In speaking of its proposed complaints, discipline and professional standards system, the Law Society says:

“It ... would be concerned with a wide range of professional conduct, including not only professional misconduct but also professional misdemeanours by solicitors. Professional misdemeanours would be defined to include that lesser degree of incompetence, negligence or delay which does not amount to professional misconduct.”¹

For the purpose of its submission to us, the Law Society did not define “professional misdemeanours”.

5.2 In this Chapter, the problem of definition is our main concern. The question is how best to define the conduct which should be within the application of the complaints, discipline and professional standards system which we recommend. Because the system is intended to apply to all legal practitioners, the definition must cover not only the conduct of persons who practise in the style in which barristers now practise, but also the conduct of other practitioners.

II. Extra-Professional Conduct

5.3 A preliminary question is whether the system we recommend should extend to conduct of a legal practitioner outside the practice of his or her profession. We call such conduct “extra-professional conduct”. Should it extend, for example, to conduct in the course of a political protest rally leading to the conviction of a practitioner, to income tax evasion by a practitioner, or to a practitioner’s participation in a drunken fight?

5.4 The Supreme Court has undoubted jurisdiction to deal with a practitioner who has been guilty of conduct of a kind which unfits him or her to be a practitioner notwithstanding that the conduct is extra-professional misconduct.²

5.5 We do not intend that this jurisdiction of the Court should be affected by any of our recommendations. Our concern is whether we should recommend that the same, or a like, jurisdiction should also be given to the Disciplinary Tribunal we recommend. We would not recommend that the Professional Standards Boards be given jurisdiction of this kind. On our recommendations, the Boards are primarily concerned with conduct which does not show any unfitness to practise.

5.6 It can be said in favour of limiting the jurisdiction in question to the Supreme Court that decisions to attach professional consequences to private actions will usually be complex and difficult, and that the Court is well equipped to make them. On the other hand, it can also be said that members of the Court dealing with a disciplinary case may not have a close association with a wide cross-section of the profession and that it is difficult for them to be fully cognisant of current attitudes and standards of the profession as a whole.

5.7 It can be said in favour of conferring jurisdiction on the Tribunal that the Tribunal will include people who are currently practising, that the viewpoint of a non-lawyer will also be introduced into the process of judgment, and that this viewpoint should aid the determination of questions affecting a person’s fitness to practise. The view of a non-lawyer, properly chosen, on questions of this kind is, it can be argued, entitled to considerable weight. Against

part of this approach, it can be said that practitioners are especially well equipped to determine whether the private actions of another practitioner are such as to deny him or her the right to remain within their ranks.

5.8 In New Zealand, the 1981 Law Practitioners Bill speaks, in a disciplinary context, of “conduct unbecoming a barrister or a solicitor” and of the conviction of a practitioner “of an offence punishable by imprisonment” where “his conviction reflects on his fitness to practise or tends to bring the profession into disrepute”.³

5.9 On balance, we recommend that the Tribunal should be empowered to make an order against any practitioner in respect of conduct outside the course of practice where the conduct shows unfitness to practise, whether permanently or temporarily.

III. Conduct in the Course of Practice

5.10 There is general agreement that professional misconduct should be within the application of any complaints, discipline and professional standards system designed for legal practitioners, and we see no need to justify a recommendation that it be within the application of the system we propose. For present purposes, we describe professional misconduct as conduct in the course of practice which would reasonably be regarded as disgraceful or dishonourable by professional brethren of good repute and competence.⁴

5.11 Notwithstanding the submission to the contrary from the Bar Association,⁵ we have recommended that other conduct in the course of practice should also be within the application of the system we propose. As indicated already, we refer here to conduct which shows, for example, that a practitioner is careless or incompetent. Our reasons for making this recommendation are referred to in Chapter 3.

5.12 Our recommendation is expressed in general terms and needs to be re-expressed in a form suitable for adaptation to legislative language. We consider certain possibilities in the following paragraphs.

5.13 One approach would be to adopt the Law Society’s suggestion, referred to in paragraph 5.1, and use the well known expression “professional misconduct” and to define the new expression “professional misdemeanours”, or some similar expression, for use in relation to less serious conduct.

5.14 Other approaches were mentioned in the Discussion Paper. We said then:

“5.11 In order to reflect, and emphasize, this need for the two types of conduct to be dealt with in different ways, we suggest that there be two separate adjudicatory bodies for the two types of conduct....

5.12 The problem of distinguishing between classes of conduct for these purposes might be tackled in different ways. One approach would concentrate on the seriousness of the conduct itself, as do present definitions which use terms such as ‘gross’ to define misconduct attracting sanctions. Thus conduct might be divided into ‘reprehensible’ and ‘unsatisfactory’ conduct. ‘Reprehensible’ conduct would be conduct which represented a gross failure to comply with the standards (including standards of honesty, competence, care and service) which, in all the circumstances, it is reasonable to require of a legal practitioner. ‘Unsatisfactory’ conduct would be conduct which represented a failure, although not a gross failure, to comply with those standards....

5.13 Another approach is suggested by the judicial decisions which do not attempt to categorize the conduct revealed in evidence, but ask what it shows about the practitioner, for example, whether he is unfit to practise. This approach would look at a breach of standards by a practitioner, not as a thing which itself calls for measures against the

practitioner, but as a thing which, looked at alone or with other breaches, may indicate a weakness as a practitioner. Where the weakness is incompatible with the observance of proper standards or casts serious doubt on the likely future observance of those standards, there is a case for measures to be applied to the practitioner. Two kinds of case may be distinguished. In the first, there is a possibility that measures can be taken for the purpose of making good the weakness, or of guarding against its consequences, yet leaving the practitioner in practice. Then measures for those purposes would be appropriate. In the second, the practitioner's weakness is serious and measures for the purpose just described are not likely to be effective. Then his licence to practise should be withdrawn. Some breaches, for example, acts of misappropriation, may be so serious and incompatible with fitness to practise as to foreclose any inquiry as to the likelihood of repetition.

5.14 It may be doubted whether there would be much difference in practical result between the two approaches. In either case the person responsible for bringing a breach of standards before one of the two adjudicatory bodies would have to weigh up the conduct complained of in order to decide which body was appropriate. Under the first approach he would have to categorize the breach of standards as either gross or less than gross. This would appeal to those who felt it important to label separately breaches which attracted different liabilities, even if the labels fail to draw a clear line between the categories, and leave it to practice and precedent to give them content. On the other hand it may be said that in deciding whether or not a breach was gross, the main consideration would be whether the breach was thought to call for withdrawal of the licence to practise. The second approach would direct the mind explicitly to that issue, and in so doing keep the purposes of the system clearly in view."

5.15 Our recommended definitions of "conduct" and "unsatisfactory conduct" follow. The definitions are based on the assumption that a practitioner will be admitted as a barrister and solicitor and not, as now, as a barrister or as a solicitor. They are also based on the assumption that they will be included in a Part of an Act, and that that Part will apply to the complaints, discipline and professional standards system we recommend.

"1. (1) In this Part, except in so far as the context or subject matter otherwise indicates or requires

'conduct', in relation to a barrister and solicitor, includes any act or omission, or course of acts or omissions, or both, whether before or after admission as a barrister and solicitor, and whether or not in the course of practice.

'unsatisfactory conduct' means

(a) in relation to a barrister and solicitor holding a practising certificate issued by the Bar Council, conduct in breach of the standards with which it is reasonable to expect a holder of such a certificate to comply; and

(b) in relation to a barrister and solicitor holding a practising certificate issued by the Council of the Law Society, conduct in breach of the standards with which it is reasonable to expect a holder of such a certificate to comply,

whether or not the conduct shows unfitness to be a barrister and solicitor, or unfitness to be the holder of the practising certificate.

(2) Without limiting the generality of this part, for the purposes of this Part

(a) unfitness may be shown; and

(b) unsatisfactory conduct may be constituted

by conduct in the course of practice which is careless or incompetent, whether with or without other conduct.”

5.16 The definition of “unsatisfactory conduct” refers to standards of conduct with which it is reasonable to expect holders of practising certificates issued by the Bar Council and the Law Society Council to comply. The definition is not intended to suggest that the standards expected of the holder of a certificate issued by the Law Society Council are higher than those expected of the holders of a certificate issued by the Bar Council, or the reverse. The emphasis given in the definition to practising certificates is prompted only by the following considerations

(a) that an assessment of the conduct of a practitioner should take account of the laws and rules applying to the practitioner, and the laws and rules applying to the holder of a practising certificate issued by one professional council may differ from those applying to the holder of a practising certificate issued by the other; and

(b) that many orders of the professional Standards Boards and the Disciplinary Tribunal will affect a practitioner’s practising certificate, and, as expressed, the definition provides a necessary link with our recommendations concerning these orders.

5.17 The recommended definitions would not preclude particular conduct being deemed by Act or Regulation to be unsatisfactory conduct or conduct showing unfitness to practise. The Legal practitioners Act, 1898, for example, now deems certain breaches of its provisions relating to solicitors’ trust accounts to be professional misconduct. And, in Chapter 10, when speaking of codes of professional conduct, we refer to the possibility that particular breaches of any code might be deemed to be unsatisfactory conduct for disciplinary purposes.

5.18 Although the recommended definitions may extend to some conduct of a practitioner who is unfit to practise by reason of infirmity, injury, or illness (whether physical or mental), we make special recommendations in relation to these particular problems later in this Report.⁶

5.19 The definition of unsatisfactory conduct is intended to operate as an objective test in that the standards to be observed are not those with which it is reasonable to expect the practitioner to comply but those with which it is reasonable to expect practitioner to comply. The definition is also intended to provide a degree of flexibility in that the standards which it is reasonable to expect a practitioner to comply with today will not remain constant. The standards will change and the definition will allow due regard to be had to the changes. Also, the definition will allow existing professional practices to be reviewed. There may be, for example, some common practices amongst practitioners which are now regarded by them as satisfactory conduct but which, when reviewed by a Professional Standards Board or the Disciplinary Tribunal, may be seen to be unsatisfactory conduct.

5.20 We have not attempted to define “unfitness to practise”. The concept is well known and well understood and a statutory definition of the expression may fail to incorporate all the shades of its common law meaning. In short, a statutory definition may do more harm than good.

FOOTNOTES

1. Law Society of New South Wales, Submission No.272 (“Submission on Discussion Paper No.2, Complaints and Discipline”), p.34.

2. See, for example, *Re A Solicitor* (1938) Weekly Notes (NSW), vol.55, p.110.

3. Clause 107.

4. See, for example, *Re Veron: Ex parte Law Society of New South Wales* (1966) Weekly Notes (NSW), vol.84, part I, pp. 136, 143.

5. New South Wales Bar Association Submission No.267 (“Submission on Discussion Paper No.2, Complaints, Discipline and Professional Standards”), paragraph 2.6.2.

6. See paragraph 8.32.

6. The Roles of the Law Society and the Bar Association

I. Introduction

6.1 We have recommended that the Councils of the Law Society and the Bar Association should be empowered by statute to investigate the conduct of practitioners subject to their respective governance.¹ In this Chapter, we consider the investigatory role of the two Councils, and matters incidental to that role. When speaking of investigations, we include not only investigations which may result from complaints against practitioners made by other practitioners, clients, former clients, judges, court officials, and other people, but also investigations which may result from initiatives taken by a Council.

6.2 Our main concern in this Chapter is the effectiveness of each Council's system, or proposed system, for handling complaints. We concentrate on what we see as potential weaknesses in the systems, and we make recommendations which are intended to remove them or, at least, to lessen their impact.

II. The Law Society

The Relationship Between the Community Assistance Department and the Professional Conduct Division

6.3 The Law Society has a Professional Conduct Division and Community Assistance Department. They are separate parts of the Society's administrative structure but the Department is responsible to the Division. As its name implies, the Community Assistance Department, through its officers, provides a general advisory service to members of the public. In the course of this work, officers of the Department often receive complaints, or communications in the nature of complaints, about solicitors. It is a responsibility of these officers to ensure that these matters of complaint are referred to the Professional Conduct Division for investigation. In the context of complaints, the Department is merely a collection point for the Division. Its main work is in fields other than complaints.

6.4 In describing its proposed system, the Society says, in effect, that the Complaints Committee will supervise the functioning of the Professional Conduct Division.² It does not say what committee or person, if any, will supervise the complaints work of the Community Assistance Department. If an officer of the Department were to fail to refer a complaint to the Division, or to fail to perceive that a particular communication is, in fact, a complaint, an important part of the proposed system would break down. In referring to this possibility, the Law Society recently said to us that it is "not aware of any matter remaining with the Department where consideration of the possibility of disciplinary proceedings would be warranted".³ The Society added that the Manager of the Professional Conduct Division peruses the daily inwards and outwards correspondence of the Department, and that there are frequent meetings between the Managers of the Division and the Department to discuss current matters.⁴

6.5 Notwithstanding these administrative procedures, we recommend that members of the Complaints Committee be asked to accept special responsibilities and duties in relation to the supervision of the complaints work of the Community Assistance Department. In particular, they should be asked to review part of each week's work of the Department. Also, they should be given unlimited access to the records and files relating to that work, and to the officers who do the work. And, they should ensure that the records of complaints made to the Community

Assistance Department become part of the complaints records of the Professional Conduct Division.

The Relationship Between the Professional Conduct Division and the Complaints Committee

6.6 In its outline of its proposed complaints, discipline and professional standards system, the Law Society says:

“The Professional Conduct Division would investigate all complaints, make reports and recommendations thereon and such recommendations would be referred to the Complaints Committee of the Law Society.

The Professional Conduct Division would prepare a report on each complaint investigated and each report would contain a recommendation as to whether or not the matter should be referred to a Disciplinary Tribunal, and if so, to which Tribunal. The report and recommendation of the Professional Conduct Division would then be considered by the Complaints Committee and a decision made as to the disciplinary action, if any, to be taken against the solicitor, the subject of the complaint.”⁵

We attach particular importance to the Society’s proposals that the Professional Conduct Division should investigate all complaints, that it should prepare a report on each complaint investigated, and that each report should contain a recommendation as to whether or not the matter should be referred to a disciplinary tribunal, and if so, to which tribunal. In short, every complaint to the Society about a solicitor, whether made to the Community Assistance Department, the Professional Conduct Division, or otherwise, would be the subject of a separate recommendation to the Complaints Committee.

6.7 In the Discussion Paper, we were critical of the fact that of a sample of 1,296 of the 2,592 complaints against solicitors which were handled by the Law Society in 1974, 1975 and 1976, 1,235 (95.3%) did not go beyond the Society’s Legal Department. In other words, only 4.7% of these complaints were considered by the Complaints Committee. If the system the Society now proposes had then been in operation, the Complaints Committee would have received a report in relation to each of the 1,296 complaints.

6.8 In proposing, in effect, that the Complaints Committee consider a report on every complaint received by the Society, the Society is agreeing to assume an extremely heavy burden. Its proposal is a strong response to the criticisms to which we referred in the preceding paragraph. Indeed, when coupled with the further proposal that lay people should be full voting members of the Complaints Committee, the proposed system is a valuable response to a number of our criticisms of the system we investigated. If lay people were to become members of the Council of the Society, the response would be even more valuable. Nonetheless, we think it necessary to sound a warning. The burden to which we have referred may become so heavy that it may not be possible to maintain proper standards for the preparation and consideration of the reports in question. If reports are inadequate and their consideration is cursory, the proposed system will be less than effective.

6.9 One particular advantage of the Society’s proposal that the Complaints Committee receive a report from the Professional Conduct Division on every complaint received by the Society is that the Complaints Committee should then be in a strong position to supervise all the complaints work of the Division and of the Community Assistance Department.

6.10 The Society’s submission to us speaks of “new audit procedures by members of the Complaints Committee to ensure that complaints are dealt with completely in accordance with Council policy”.⁶ At our request, the Society has supplied the following particulars of these audit procedures. In its words:

“The decision was to introduce also a system whereby Councillors who are members of the Complaints Committee review, independently of matters which are otherwise referred to that Committee, a proportion of the department’s complaints files. One file in every five is subjected to this scrutiny, the Society’s consultants (W D Scott & Co Pty Limited) having advised that the original proposal of one file in ten would be a less satisfactory sampling procedure. Files are examined about six months after their inception, regardless of whether examination of the complaint has been completed or not and regardless of whether or not the matter has been or is expected to be referred to the Committee in the normal course.

In the great majority of cases the departments dealing with the file has been found to be satisfactory.”⁷

6.11 These procedures will require modification upon any adoption of the recommended system. We refer, in particular, to the fact that under the recommended system a report on every complaint will be referred to the Complaints Committee. In this circumstance, we recommend that in respect of every five reports made to the Complaints Committee by the Professional Conduct Division, the Complaints Committee be directed to call for the complaint file relating to at least one of the reports. Also, we recommend that the file, or files, to be produced to the Complaints Committee by the Division be nominated, in a random way, by the Committee.

Powers of Investigation

6.12 In describing its proposed complaints, discipline and professional standards system, the Law Society says nothing about the powers of investigation which should be conferred on the officers of the Law Society, members of the Council, or members of the Complaints Committee. An important question is whether statutory powers of investigation should be conferred on these people.

6.13 At present, some officers of the Society are appointed trust account inspectors. As their title implies, their primary function is to inspect the accounts kept by solicitors in relation to money entrusted to them. Section 42(8) of the Legal Practitioners Act, 1898, provides:

“Upon production by an inspector of the instrument of his appointment he may require any person to produce to him and to any assistant retained by him the accounts concerned and any books, papers, securities or other documents in the possession of the person or under his control relating to those accounts, and to give all information in relation thereto, and to furnish all authorities and orders to bankers and other persons that may be reasonably required of him.”

Similar powers are conferred on people appointed under section 82A of the Act to investigate “the accounts, transactions and affairs” of a solicitor. In practice, investigators are not officers of the Society but are solicitors and accountants in private practice. Every appointment of an investigator is subject to the approval of the Prothonotary of the Supreme Court.

6.14 In Victoria, the Legal Profession Practice Act 1958 empowers the Secretary of the Law Institute of that State to investigate any question concerning alleged misconduct of a solicitor and, for the purposes of the investigation, the Secretary may:

- (a) cause to be served on the solicitor concerned ... a written statement of the nature of the misconduct to which the complaint or question relates requiring the solicitor to furnish within a time specified in the statement an explanation of the alleged misconduct;
- (b) with the prior written approval of a member of the council in writing require the solicitor to deliver or produce to the secretary within a specified time such documents or class of documents as are specified by the secretary, being documents which the secretary believes on reasonable grounds relate to the alleged misconduct;

(c) with the prior written approval of a member of the council in writing require a solicitor to attend upon him at a specified time and place to furnish him with an explanation concerning the alleged misconduct; and

(d) obtain such other reports and make such other investigations as appear to him to be necessary to enable him to determine whether any further action should be taken in relation to the alleged misconduct.”⁸

The Act provides that a person is not, by reason of these provisions, compelled to deliver or produce any document which he would not be compellable to produce to a court.⁹ The Act is silent on the question of self-crimination.

6.15 We are satisfied that there is a need in this State for people other than inspectors or investigators to have statutory powers of investigation. The Victorian provision mentioned in paragraph 6.14 is an apt precedent. We recommend that powers of the kind listed in that paragraph be conferred and that they be exercisable by delegates of the Council of the Law Society. For particular purposes, the Council might delegate the powers to a member of the Council, a member of the Complaints Committee of the Council, or an officer of the Society.

6.16 We further recommend that these statutory powers of investigation be exercisable notwithstanding any “solicitor and client” or other privilege but that, unless there is waiver of the privilege, any privileged information thus obtained (a) be not admissible in any proceedings, other than disciplinary proceedings against the practitioner, and then only if the relevant part of the proceedings is closed to the public and (b) be not used for any other purpose.

Reasons for Dismissal of Complaint

6.17 If, after investigation, the Society decides to take no action against a practitioner whose conduct is the subject of a complaint, should the complainant, and the practitioner, be given reasons for the decision? The Society’s submission to us is silent on the question. It does say, however, that in these circumstances the complainant would be informed of his or her right to refer the matter to the Lay Review Tribunal.¹⁰

6.18 A statement of reasons is often a means of dispelling suspicion in a complainant that his or her complaint has not been properly investigated. If such a statement had this effect, the work of the Lay Review Tribunal would be reduced. In our view, the only grounds for not giving reasons are, first, the administrative cost and inconvenience which are involved in the process of giving reasons and, secondly, the possibility that in some cases the giving of reasons may involve an infringement of a right to confidentiality. In the light of the Society’s proposal that every complaint should be the subject of a report and recommendation to the Complaints Committee, the additional administrative cost and inconvenience of formulating reasons would, we believe, be small. The other objection is more serious. It would, however, be an unusual case where considerations of confidentiality would seriously hamper the giving of reasons. We recommend that, in general, where the Society decides to take no action against a practitioner whose conduct is the subject of a complaint, the Society should give a statement in writing of its reasons for its decision to the complainant and, upon application by the practitioner, to the practitioner. Where, however, it is the opinion of the Council 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 would, however, have access to these reasons and the complainant should be advised accordingly.

Multiple Complaints

6.19 We were critical in the Discussion Paper of the number of times the Law Society had failed to initiate an investigation of a solicitor’s practice despite the fact that many complaints

had been made to the Society about the practitioner.¹¹ We accept the Society's submission that in disciplinary proceedings against a practitioner, evidence of prior unsubstantiated complaints should not be admissible.¹² But this is not our present concern. We speak here of investigations, not of proceedings. We are of the view that where a practitioner is the subject of a number of complaints within a short time, say, four or five complaints within 12 months, the Society should initiate an investigation of the practitioners practice, even if, upon investigation, each of the complaints had been found to be unjustified. The fact that a number of people are prepared to go to the trouble of making a formal complaint does, to us, invite a suspicion that all may not be well with the practice in question. In cases of this kind, intervention by the Society may assist not only the public but also the practitioner.

6.20 We recommend that the Council of the Law Society direct its Complaints Committee to draw the Council's attention to any practitioner, or firm of practitioners, against whom more than four complaints have been made in any 12 months, whether or not, upon investigation, the complaints were found to be unjustified.

Lay Members

6.21 The Complaints Committee now has two lay members. In its submission to us, the Law Society proposes that the Committee should continue to have lay members.¹³ It does not, however, specify their number, the manner and duration of their appointment, or the special functions, if any, which the Society envisages that they should perform.

6.22 In our First Report, on the general regulation and structure of the legal profession, we recommend the creation of the Public Council on Legal Services. In broad terms, it is intended that the 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. This paragraph must be read, however, in the light of Chapter 11 of the First Report. In that Chapter, one of us (Mr Conacher) gives his reasons for dissenting from the recommendations relating to the Public Council on Legal Services.

6.23 We recommend:

- (a) that the Complaints Committee should include not less than three lay members with the same rights, including voting rights, as other members of the Committee;
- (b) that the lay members should be appointed for a term not exceeding three years but that they should be eligible for reappointment;
- (c) that the lay members be given special, but not sole, responsibilities in relation to the supervision of the complaints work of the Professional Conduct Division and the Community Assistance Department.

Our First Report, on the general regulation and structure of the legal profession, states our views on how the lay members of the Complaints Committee, and other Committees of the Council, should be appointed.¹⁴

The Lay Review Tribunal

6.24 In its submission, the Law Society says that its proposals would not affect the present role of the Lay Review Tribunal.¹⁵ We agree and, subject to few exceptions, we do not make any recommendations with respect to the Tribunal. One exception is that we recommend that where the Lay Review Tribunal is dissatisfied with the Society's investigation of a complaint, or of the decision made in relation to a complaint, the Tribunal should be empowered to recommend to the Law Society, or to the Attorney General, or to both, that the complaint be

referred to the Professional Standards Board for inquiry and determination. Another exception is that we recommend to the Council of the Law Society that consideration should be given to changing the title of the Lay Review Tribunal to that of Lay Observer. The latter is now used in Victoria, England and Scotland, and is proposed for use in New Zealand and Ontario. Also we recommend that consideration should be given to giving statutory form to the office. Although it is unlikely that statutory protections would often be needed for the holder of the office, the need could arise.

6.25 On the other hand, if the lay members of the Complaints Committee do their work well, and if lay members are also appointed to the Council of the Law Society, we anticipate that the work of the Lay Review Tribunal will diminish. As noted already,¹⁶ in England the Benson Commission said that the presence of lay people in the processes of investigation and adjudication may diminish the number of cases referred to the Lay Observer to the point where there ceases to be any need for the Lay Observer's services.

Admonitions

6.26 The Council of the Law Society now reprimands some solicitors whose conduct is not so serious as to warrant reference to the Statutory Committee but which is seen by the Council as warranting some criticism. In its submission to us, the Society makes no reference to this disciplinary alternative. We see merit in it and we recommend that the Council of the Society be empowered by statute to admonish a practitioner where in the opinion of the Council the conduct of the practitioner warrants criticism but is not so serious as to warrant a reference to the Professional Standards Board. We presume that a practitioner would not have a right to be heard on the question whether he or she should be admonished. For this reason, we recommend that a practitioner should be permitted to require the Council to choose between withdrawing the admonition or making a reference concerning the conduct in question to the Board.

6.27 Although we make these recommendations with respect to admonitions, we acknowledge that some people may object to them on the ground that the power may be used "to play favourites". This is a possibility but we do not believe that in practice the power would be abused. It is, however, an instance where the presence of lay members on the Council of the Law Society would be a safeguard not only against the evil suggested but also against unwarranted criticism of the Council.

Policy and Procedural Directions

6.28 In its submission to us, the Law Society speaks of the Society giving the Community Assistance Department and the Professional Conduct Division "appropriate guidelines and procedures to follow".¹⁷ We recommend that directions of this kind should include statements to the effect of the following:

- (a) that complainants must be given all reasonable assistance to put their complaints in writing;
- (b) that no complainant is to be deterred from pursuing a complaint unless the complaint is clearly trivial or vexatious;
- (c) that investigatory, disciplinary or other action in respect of a complaint should not be discontinued merely because a complainant's cause of dissatisfaction is removed;
- (d) that all communications in the nature of a complaint should be recorded in one records system for a period of, say, 5 years.

6.29 We also recommend that directions should be given to complaints officers and to the Complaints Committee to the effect of the following:

(a) that it is especially important that all communications with complainants be couched in language as clear and as free from technicalities as the circumstances permit;

(b) that a complainant's right to sue a practitioner for damages is not in itself a reason for the Law Society not taking disciplinary or other action against the practitioner;

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

(d) that a complainant with a reasonable possibility of a successful action against a practitioner should be given reasonable assistance to find a capable practitioner willing to undertake the action;

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

(f) 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 a complainant, notice of the refusal should be given to the Complaints Committee;

(g) that where a complaint is not fully investigated within six months after its receipt by the Law Society, notice of the complaint should be given to the Lay Review Tribunal;

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

(i) that, subject to the general law, to the recommendation relating to privilege made in paragraph 6.16, and to the prior approval of the Council (or in urgent cases, the President of the Council), where the conduct of a practitioner is reasonably believed to be criminal conduct, notice of the relevant facts may be given immediately to the police and thereafter, subject as above mentioned, but otherwise subject only to any applicable laws of confidentiality or privilege, requests by the police for information relating to the conduct in question should be complied with.

6.30 Many of the recommendations made in the two preceding paragraphs are prompted by considerations such as those mentioned in paragraphs 2.22 and 2.23. We spoke in Chapter 2 of the emphasis given in a number of overseas jurisdictions to the need to assist complainants to formulate and present their complaints. Our experiences with complainants in the course of our work on this present reference satisfy us that there is a marked need for complainants in this State to be afforded like assistance. Indeed, the nature and extent of the assistance given to complainants is one of the most important tests by which any complaints system will be judged.

III. The Bar Association

The Relationship Between the Bar Association's Administrators and its Ethics Committee

6.31 We are told by the Bar Association that all complaints made against barristers are considered by the Bar Council after having been first investigated by the Ethics Committee.¹⁸ There is, however, always a risk in any organisation that human error will sometimes result in an administrative procedure not being adhered to. In this context, our concern is that a complaint, or a communication in the nature of a complaint, may not come to the attention of

the Ethics Committee. If an administrative officer of the Association were to fail to refer a complaint to the Committee or to fail to perceive that a particular communication is, in fact, a complaint, an important part of the Association's system would break down.

6.32 We recommend that members of the Ethics Committee be asked to accept special responsibilities and duties in relation to the complaints work of the Association's administrative officers. In particular, they should be given unlimited access to the records and files relating to that work, and to the officers who do the work. Random reviews of this complaints work should be introduced. These recommendations have regard to the likely increase in the Association's complaints work following any implementation of the recommendations made in this Report

Powers of Investigation

6.33 In paragraphs 6.12-6.16, we discussed powers of investigation in the context of Practitioners subject to governance by the Law Society Council. We do not repeat the discussion here but we recommend that like statutory powers be exercisable by the Bar Council. At present, the Bar Council does not have any statutory powers of investigation.

Reasons for Dismissal of Complaints

6.34 For reasons stated in paragraph 6.18, we recommend that, in general, where the Bar Council decides to take no action against a practitioner whose conduct is the subject of a complaint, the Bar Council should give a statement in writing of its reasons for its decision to the complainant, and, upon application by the practitioner, to the practitioner. Where, however, it is the opinion of the Council that considerations of confidentiality preclude the giving of particular reasons, these reasons should not be given but the complainant should be so advised. If our later recommendation for the appointment of a Lay Observer for the Bar Council is adopted, the Lay Observer would have access to these reasons, and the complainant should be advised accordingly.

Lay Members

6.35 Under this heading we make recommendations similar to those made in paragraph 6.23. In their application to the Bar Association, the Ethics Committee fills the role of the Complaints Committee, and the administrative officers of the Association fill the role of the Professional Conduct Division and the Community Assistance Department.

Lay Review Tribunal

6.36 Unlike the Law Society, the Bar Association has not appointed a Lay Review Tribunal. If our recommendation that lay people be appointed to the Ethics Committee of the Bar Council is implemented, the need for a Lay Review Tribunal, or similar body, may be reduced, but only experience will tell if this is so. In the meantime, and for the reasons which have prompted the appointment of Lay Observers in other places, we recommend that a non-statutory office of Lay Observer be created. The primary function of the holder of the office should be to report to the Attorney General and to the Chief Justice on the Bar Council's handling of complaints against practitioners who are subject to the Council's governance. We see good reason why the person appointed by the Law Society Council to the office of Lay Review Tribunal should also be appointed to the office of the Lay Observer, and three of us recommend accordingly. Mr Conacher, however, would see a valuable flexibility in an arrangement by which there could be, but need not be, a common Lay Review Tribunal or Lay Observer. For example, he thinks that experience in accounting and financial affairs may be valuable in a Tribunal or Observer for practitioners under the governance of the Council of the Law Society, but that experience of that kind may have less bearing on the choice of a Tribunal or Observer for practitioners under the governance of the Bar Council. In his opinion there should be a separate Tribunal or Observer for each branch, but tenure of one office should not disqualify the holder from appointment to the other.

6.37 We note that in paragraph 6.24 we recommended that consideration should be given by the Council of the Law Society to changing the title of the Lay Review Tribunal to that of the Lay Observer, and to creating the office by statute rather than by resolution of the Law Society Council. If those last-mentioned recommendations are adopted, the recommendations made in the preceding paragraph will need to be reconsidered with a view to ensuring that the objective of one office of Lay Observer for all practitioners is achieved.

Admonitions

6.38 We recommend that the Bar Council be empowered by statute to admonish a practitioner where in the opinion of the Council the conduct of the practitioner warrants criticism but is not so serious as to warrant a reference to the Professional Standards Board. We also recommend that a practitioner should be permitted to require the Council to choose between withdrawing the admonition or making a reference concerning the conduct in question to the Board.

Procedural Directions

6.39 In paragraphs 6.28 and 6.29 we recommended that certain policy and procedural directions be given by the Law Society Council to the people who are involved in the complaints work of the Society. We recommend that the Bar Council give similar directions.

FOOTNOTES

1. See paragraph 3.16.
2. Law Society of New South Wales, Submission No.272 ("Submission on Discussion Paper No.2, Complaints and Discipline"), p.45 (paragraph 6(t)). We refer to this Submission as "The Law Society's Submission".
3. Letter from the Law Society to this Commission dated 22nd December, 1981.
4. Letter from the Law Society to this Commission dated 22nd December, 1981.
5. The Law Society's Submission, pp.36-37 (paragraphs 3(a)(ii) and 3(b)(i) and (ii)).
6. The Law Society's Submission, p.12.
7. Letter from the Law Society to this Commission dated 22nd December, 1981.
8. Section 28(2).
9. Section 28(3).
10. The Law Society's Submission, p.37 (paragraph ;(c)).
11. Paragraphs 3.90-3.95.
12. The Law Society's Submission, p.41 (paragraph 4(i)).
13. The Law Society's Submission, p.33 (paragraph 1(e)).
14. See paragraph 5.23.
15. The Law Society's Submission, p.13 (paragraph 1(d)).
16. paragraph 2.17.

17. The Law Society's Submission, p.36 (paragraph 3(a) (iii)).

18. New South Wales Bar Association, Submission No.130 ("Adjudication of Complaints"), page 3.

7. The Professional Standards Boards

I. Introduction

7.1 In this chapter, we turn to our more detailed recommendations concerning the Professional Standards Boards. For convenience, when speaking of the Board for practitioners subject to governance by the Law Society Council, we speak of "Board No.1", and when speaking of the Board for practitioners subject to governance by the Bar Council, we speak of "Board No.2".

II. Composition

7.2 Practitioners subject to governance by the Law Society Council can be expected to outnumber those subject to governance by the Bar Council by about ten to one. The work of Board No.1 can therefore be expected to be much heavier than that of Board No.2, but only experience will tell what the difference will be. We anticipate, however, that, in the short term at least, Board No.1 will need to sit in possibly three divisions and that Board No.2 will not need to sit in divisions at all. For this reason, Board No. 1 will need considerably more members than Board No.2. On the basis of three members for each sitting, we estimate that Board No. 1 may need fifteen members (ten practitioners and five public members) and that Board No.2 may need six members (four practitioners and two public members). In making this estimate we have regard to the fact that some members will not always be available.

7.3 We recommend:

- (a) that the practitioner members of Board No.1 should be appointed by the Law Society Council and that the practitioner members of Board No.2 should be appointed by the Bar Council;
- (b) that the public members of the Boards should be appointed by the Attorney General and that they should be eligible for appointment to both Boards;
- (c) that the Attorney General should consult the Public Council on Legal Services in relation to the appointment of public members of the Boards;
- (d) that no member of a Board should be, at the same time, a member of the Bar Council, the Law Society Council, or the Public Council on Legal Services;
- (e) that the Law Society Council should appoint a practitioner member of No.1 to be its Chairman and that the Bar Council should appoint a Practitioner member of Board No.2 to be its Chairman;
- (f) that the Boards should be empowered to sit in divisions;
- (g) that for each sitting of a Board, or a division of a Board, the Board, or division, should comprise two practitioner members and one public member;
- (h) that the Chairman of a Board should be empowered to nominate the members who are to comprise the Board, or the division of the Board, for a particular sitting, and the member who is to preside over the sitting.

7.4 We think that the Attorney General is the appropriate person to appoint the public members of the Boards. These members will be exercising quasi-judicial functions and Attorneys General have traditionally had substantial responsibilities in relation to the

appointment of judicial officers. Notwithstanding these comments, we have recommended that the Bar Council and the Law Society Council should have the right to nominate the practitioner members of the Boards. We see these recommendations as constituting a fair balance between, on the one hand, professional independence and, on the other hand, the public interest.

7.5 In general, the terms and conditions of appointment to the Boards are matters that may be left to the people who are responsible for making the appointments. We envisage, however, that members would be appointed for a term of about three years and that they would be eligible for reappointment. We also envisage that the Councils would reserve the power to remove a practitioner member from office on the ground of inability, misbehaviour, mental illness, or conviction of a serious crime. The Attorney General, or the Governor, might need a like power in respect of public members. Whether or not practitioner members should be paid for their services is another question that may be left to the Councils of the Bar Association and the Law Society. It is our view that both practitioner and public members should be paid an annual retainer fee and a fee for each sitting, and that government funds or the Statutory Interest Account could be the source from which payment is made. A primary function of the Boards is to lift the professional performance of the practitioners who come before them and it could be appropriate for the Statutory Interest Account to bear the cost of the discharge of this function. It now bears the cost of the Solicitors' Statutory Committee. One of us, Mr Conacher, abstains from expressing any views about funding from the Statutory Interest Account.

III. References to a Board

By Whom May References be Made?

7.6 Should the Bar Council and the Law Society Council be the only bodies empowered to make references to the Boards? Should, for example, dissatisfied clients, other members of the public, judges, or other public officials be so empowered?

7.7 We have considered this question at length and the majority of us recommend that only the Law Society Council and the Attorney General should be empowered to make references to Board No.1, and that only the Bar Council and the Attorney General should be empowered to make references to Board No.2. The majority says that if the Bar Council and the Law Society Council were given the exclusive right to make references to a Board, there would be the appearance that they could frustrate the system by refusing to make references or by making very few references. On the other hand, if every dissatisfied client had the right to make references, legal practitioners would be at serious risk of many irresponsible references. By giving the Attorney General the right to make references, the appearance that the professional bodies could frustrate our recommendations is removed. By denying members of the public, whether dissatisfied clients or not, the right to make references, the risk of irresponsible references is also removed. We would expect that in appropriate cases the Attorney General would make reference to the Boards. A decision to do this might be prompted by a complaint from a member of the public or from a judge or other public official, or by a recommendation from the Lay Observer or Lay Review Tribunal that the Bar Council or the Law Society Council has failed to make a reference in circumstances where it ought to have done so, or it might be prompted by an investigation ordered by the Attorney General on his or her own initiative.

7.8 Mr Disney, however, considers that it is of fundamental importance that members of the public should be entitled to refer a practitioner to the relevant Board rather than having to rely upon persuading that practitioners own professional association, or the Attorney General (whose officers may have little time to devote to investigation of such matters), to make a reference. Mr Disney's views are based on the assumption that, as we recommend later, proceedings before a Board will not be held in public, save in certain limited circumstances at the discretion of the Board. He suggests that the danger of irresponsible references is unlikely to be substantial, and would not outweigh the benefits of allowing the public to make references, provided that the following two measures are adopted. First, members of the

public should not be entitled to refer a practitioner to the Board unless they have requested the practitioner's governing Council to make such a reference and the Council either has refused to do so or has not done so within 3 months after the request was made. Secondly, the Boards should have power to order any party to an inquiry by the Board to pay costs in relation to that inquiry. All of us recommend later in this chapter that the Boards should have such a power.

7.9 Where a reference is made to a Board by either the Bar Council or the Law Society Council, all of us would also empower the Attorney General to intervene in the reference. If, for example, a reference was made to Board No.1 by the Law Society Council, the Council might argue that a particular standard is to be applied to the conduct in question. This standard may reflect a professional view and this view may have a potential impact on the public interest. In this circumstance, we think it right that the Attorney General should be empowered to put a case on the public interest. But, given that inquiries before a Board will not be open to the public, how can the Attorney General be told that a case on the public interest may need to be put to a Board? We do not see any simple answer to this question except to empower any member sitting on the inquiry to bring the matter to the attention of the Attorney General and that, pending a decision on intervention, the inquiry should be adjourned. If the Attorney did intervene, he or she would, of course, be bound by rules of confidentiality applicable to all proceedings of the Board.

The Form of the Reference

7.10 With one exception, we do not make any recommendations in respect of the form in which a reference to a Board should be made. We expect that the experiences of the Bar Council, the Law Society Council and the Boards will lead to experimentation in these procedural areas and we believe that maximum flexibility should be permitted. The exception to which we refer is that we recommend that any reference to a Board should specify the conduct to be inquired into with as much particularity as the circumstances of the case permit.

Open or Closed Hearings

7.11 Should inquiries before a Board be held in public or private? The view expressed in the Discussion Paper was that, in general, inquiries should not be open to the public unless a Board otherwise orders. This view was 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.

7.12 We adhere to the view expressed in the Discussion Paper and we recommend that inquiries before a Board should not be open to the public unless the Board otherwise orders.

7.13 The circumstances in which a Board might direct an inquiry to be open to the public should be strictly limited. We recommend that they be limited to cases where, in the opinion of the Board, the presence of the public will aid the ends of justice.

7.14 For present purposes, we do not consider certain people to be members of the public. In the case of an inquiry before Board No.1, we would allow two members of the Law Society Council (one practitioner member and one public member, each nominated by the President), two members of the Complaints Committee (one practitioner member and one public member,

each nominated by the Chairman), and, if the Public Council on Legal Services is constituted, one member of that Council (nominated by the Chairman) to be present at an inquiry. In the case of an inquiry before Board No.2, we would allow the counterparts of the people we have just mentioned to be present at the proceedings of any Board. In addition, we would allow any person holding office as the Lay Review Tribunal or the Lay Observer to be present. The right of these people to be present at inquiries should not, however, be unconditional. We recommend that the Boards should be empowered to exclude these people where their presence would constitute an unreasonable infringement on a right to confidentiality of any person concerned with the inquiry. Indeed, we would not expect the rights referred to in this paragraph to be exercised to any great extent.

Appearances Before a Board

7.15 We recommend:

(a) that the Bar Council (as regards Board No.2), the Law Society Council (as regards Board No. 1) and the Attorney General should be entitled to appear by any practitioner;

(b) 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;

(c) 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;

(d) that subject to (c), 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;

(e) that where a person to whom paragraph (d) 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.

7.16 The Law Society's submission to us indicates that it may not support paragraphs (d) and (e) of the recommendations made in the preceding paragraph. It proposed that a complainant should be entitled to be represented in his or her capacity as a witness but only where this is considered appropriate by the tribunal.¹ The majority of us, but not Mr Conacher, think that there may be other occasions when a complainant should be given leave to be represented. Also, the majority of us, but not Mr Conacher, think that in general a complainant should be allowed to be present at an inquiry which, in effect, is the result of his or her complaint. One of the criticisms made to us of the "closed court" of the present Solicitors' Statutory Committee is that complainants are unable to see whether justice is being done. In general, we believe that all courts and tribunals should be open to the public. For special reasons, we have recommended that inquiries before the Professional Standards Board should be closed to the public. In proposing an exception in the case of complainants, we believe that we are mitigating the dangers which are inherent in that recommendation.

Orders

7.17 We recommend that where Board No.1 makes a finding against a practitioner it should be empowered to make one or more of the following orders:

(a) that the practitioners 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;

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

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

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

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

(f) 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;

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

(h) 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);

(i) 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;

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

(k) 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;

(l) 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;

(m) that the practitioner be fined an amount not exceeding \$5,000; or

(n) that the practitioner be reprimanded.

We further recommend that the Board be not empowered to make an order under paragraphs (i), (k) or (l) unless the practitioner has consented to the Board exercising the jurisdiction referred to in those paragraphs and 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 the inquiry. In the case of paragraph (j) (liens), two of us (Mr Conacher and Mr Gressier) say that a Board should not be empowered to make an order in the absence of the practitioners consent, and two of us (Mr Disney and Judge Martin) say that a Board should be empowered to do so, whether or not the practitioner consents. We all agree, however, that where, in effect a person wishes to claim compensation under paragraph (l) on the ground that a practitioner has wrongfully asserted the existence of a lien, he or she should first release any right to pursue a civil remedy for damages for the wrongful assertion.

7.18 Some of the recommendations made in the preceding paragraph differ significantly from proposals made by the Law Society. In particular, we refer to:

Paragraph (a): The Society did not propose that its equivalent of Board No.1 should be empowered to impose any restriction on a practitioners' practising certificate.² It would confine that power to the Tribunal.

Paragraphs (c) and (g): The Society proposed that orders under these paragraphs should be made only with the consent of the practitioner concerned.³

Paragraph (j): The Society did not propose that its equivalent of Board No.1 should be empowered to make orders affecting practitioners' liens.

Paragraphs (c), (g), (i), (k) and (l): The Society proposed that if a practitioner did not consent to orders being made under these paragraphs, the matter should be removed to its equivalent of our recommended Disciplinary Tribunal. In this event, the Society proposed that the Tribunal should be empowered to make the orders, whether or not the practitioner consented to them.⁴

7.19 As to paragraph (a), we have recommended, in effect, that Board No.1 should be empowered to order a practitioner to practise as an employee for a period not exceeding one year. We think it right that the Board should have this power. It does not enable the Board to deny a person the right to practise but it does enable it to say that for a short time a person may practise only under supervision. The power could be used, for example, where a practitioner has shown that he or she does not fully appreciate some practical aspects of trust account bookkeeping. We see the power as mainly a means of assisting, not of punishing, a practitioner.

7.20 As to paragraphs (c), (g), (i), (k) and (l), we think that the Society's proposal is too harsh. A solicitor who refuses to consent to the exercise of the jurisdiction conferred by these paragraphs should not, for that reason, be forced to appear before the Disciplinary Tribunal. Proceedings before the Tribunal are public proceedings and we have said already that the publicity they can give rise to might totally destroy a practitioner's professional reputation. A practitioner may have good reason for refusing to consent to the Board exercising its compensatory jurisdiction and we think it wrong that conduct which the Society has alleged to be unsatisfactory conduct might attract publicity appropriate to alleged serious misconduct because of a refusal to give consent. In our view, there is potential for oppression in the Society's proposal.

7.21 In April, 1981, the Law Society established a Liens Conciliation Service. A panel of senior solicitors is available at the request of a solicitor or a client to conciliate informally in disputes concerning the delivery of documents and liens. The emphasis is on conciliation. The conciliators cannot impose sanctions and will not deal with disputes involving costs, litigation, or conduct warranting disciplinary proceedings. At 30th June 1981, the Service had satisfactorily resolved nine disputes.⁵ Our recommendation in paragraph (j) of paragraph 7.17 is intended to be supplementary to the Society's Service. Just as that Service recognizes that the solicitor's lien is a frequent cause of argument between solicitors and clients, so too does our recommendation. An order that a practitioner waive a lien is, in part, a compensatory order and hence two of us are of the view that it should be made only where the solicitor concerned has submitted to this particular jurisdiction.

7.22 We turn now to the orders which Board No.2 should be empowered to make. With few exceptions, we see no reason why they should not be the same as the orders we have recommended in paragraph 7.17 for Board No.1. The exceptions are those which it would be inappropriate to make in respect of a person who is practising in the manner in which a barrister now practises. Because barristers do not now practise as employees, it would not be appropriate for the Board No.2 to direct a practitioner to practise for a time as an employee. On the other hand, we have recommended in our First Report, on the general regulation and structure of the legal profession (subject to a dissent by Mr Conacher), that practitioners subject to governance by the Bar Council should be eligible to practise as employees. If this

recommendation is adopted, the exception to which we refer will cease to be an exception. Unlike the law relating to solicitors, it is not clear whether the law relating to barristers has special rules relating to liens. Hence it may not be inappropriate for Board No.2 to direct a practitioner to waive a lien. Also, it may be argued that Board No.2 should not be empowered to make compensatory orders because barristers are legally incapable of entering into contractual arrangements with their clients. The requirements of the practitioners consent to exercise of the compensatory jurisdiction is, we think, a sufficient reply to this argument, but, in any event, in our First Report we recommend (again subject to Mr Conachers dissent) that all practitioners should be legally capable of entering into contractual arrangements with clients. Subject to these qualifications, we recommend that Board No.2 be empowered to make the orders listed in paragraph 7.17. In making this recommendation, we acknowledge that many of the orders listed in that paragraph are more likely to be made in relation to people practising in the manner in which solicitors now practise. Nonetheless, there may be instances where it is apt to apply them to a person who is practising in the manner in which barristers now practise. Such a person maybe, for example, a poor organiser of chamber work and be the subject of complaints of delay, or may accept more work than he or she can reasonably cope with. In these events, Board No.2 may see fit to order the practitioner to take advice in relation to the management of his or her practice, or to report from time to time on the practice.

Costs

7.23 We recommend that the Professional Standards Boards should be empowered to order any party (including any person appearing by leave of a Board) to pay such costs of and incidental to an inquiry (including the costs of any prior investigations) as a Board determines. In the case of the Bar Council, the Law Society Council, and the Attorney General, a Board's power to order payment of costs should be limited. In general, the test should be whether, in the light of the material before the Councils or the Attorney General at the relevant time, it was reasonable to have referred the matter in question to a Board.

Appeals

7.24 We recommend that a party to an inquiry (including any person appearing by leave of a Board) who is aggrieved by a finding or order of a Board should have a right of appeal (in the sense of a hearing *de novo*) to the Disciplinary Tribunal. 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. Later in this Report, we recommend the creation of a right of appeal from the Disciplinary Tribunal to the Court of Appeal. We recommend, however, that there should be 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. This recommendation does not accord with the Law Society's view. In effect, the Law Society has proposed that an appeal should lie as of right from Board No. 1 to the Disciplinary Tribunal, and from there to the Supreme Court.⁶

7.25 In relation to an order for compensation, the Society would allow an appeal only as to the merits of the order and not as to the amount of the order.⁷ We do not agree and we recommend that the right of appeal should not be so confined.

7.26 Our thinking in relation to appeals from an order of a Board, and from an order of the Tribunal on appeal from a Board, is influenced by our later recommendation that a Judge of the Supreme Court should be appointed to the Disciplinary Tribunal. If this recommendation is not adopted, we would recommend that there be an appeal from a finding or order of a Board to the Disciplinary Tribunal, and a further appeal, as of right, to the Supreme Court (that is, not necessarily to the Court of Appeal). We would still retain the qualification that the right of appeal of a person with a limited interest in an inquiry should be limited to a finding or order affecting that interest.

Procedural and Miscellaneous Matters

7.27 We recommend:

(a) that a Board should have power to summon witnesses and to examine them on oath, and to require the production of documents;

(b) that a Board should have power to call its own witnesses;

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

(d) that a Board should have a compulsory conciliation jurisdiction in the sense that it might direct a complainant and a practitioner to confer before it, but information obtained in the course of any exercise of this jurisdiction should not be admissible in any other proceedings whatsoever save so far as information obtained in negotiations "without prejudice" is admissible under the general law;

(e) that if a transcript or other official record of the proceedings before a Board is taken or made, it should be made available, upon application and upon payment of a prescribed fee, to anyone who was entitled to be present at, or to appear and be heard in, the proceedings [and to other persons approved by a Board];

(f) that when a Board makes a finding against a practitioner, it should have power, before making an order disposing of the reference, to examine any record of prior findings against the practitioner in respect of his or her professional conduct by:

(i) the Bar Council or the Law Society Council (unless the practitioner objects to this examination);

(ii) a Professional Standards Board;

(iii) the Disciplinary Tribunal;

(iv) a court; or

(v) the Solicitors' Statutory Committee;

(g) that a Board should give written reasons for its findings and orders and, upon application, should make them available to any person who appears, or was entitled to appear, or was given leave to appear, at the inquiry, or who was present, or entitled to be present, during the inquiry;

(h) that the members of a Board should have power to make rules with respect to the Board's practice and procedure.

7.28 We also recommend that if, 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 it may therefore call for the withdrawal of the right to practise of the practitioner concerned, it should transfer the reference to the Disciplinary Tribunal.

7.29 In general, a Board should publish a summary of each reference it deals with. It should be published in a form which identifies neither the complainant nor the practitioner complained of. The purpose of the publication would be to show practitioners and members of the public the type of professional conduct which the Board regards as unsatisfactory and the type of sanctions which it considers appropriate. In some circumstances, a summary may not be necessary. If, for example, the evidence falls short of proving the conduct alleged, little

purpose may be served in publishing a summary. Also, some cases may not be capable of being anonymised. And, in some instances the facts in dispute may not be worth reporting.

FOOTNOTES

1. Law Society of New South Wales, Submission No.272 (“Submission on Discussion Paper No.2, Complaints and Discipline”), p.45 (paragraph 6(c)). We refer to this Submission as “the Law Society’s Submission”.
2. The Law Society’s Submission, p.39 (paragraph 4(c)).
3. The Law Society’s Submission, p.43 (paragraphs 5(b)(v) and (vii)).
4. The Law Society’s Submission, pp.42-44 (paragraphs 5(b)(v), (vii), (viii) and (ix)).
5. Law Society Journal (NSW), vol.19, No.9 (October, 1981), p.670.35.
6. The Law Society’s Submission, p.41 (paragraph 4(j)).
7. The Law Society’s Submission, p.41 (paragraph 4(j)).

8. The Disciplinary Tribunal

I. Introduction

8.1 In this chapter, we make some general comments about the Disciplinary Tribunal we have recommended, and then we turn to our more detailed recommendations concerning the Tribunal.

8.2 We suggested in the Discussion Paper that one Disciplinary Tribunal should be created for all legal practitioners. We envisaged that the Tribunal would deal with breaches of professional standards which may call for the withdrawal of a practitioner's right to practise, whether permanently or temporarily, or, in our present terminology, with conduct showing unfitness to practise. We said, in effect, that just as the Supreme Court now has jurisdiction over all practitioners, the Tribunal should have a concurrent jurisdiction over all practitioners.

8.3 The complaints, discipline and professional standards system proposed by the Law Society includes a Professional Misconduct Tribunal. Broadly speaking, in its application to practitioners subject to governance by the Society, the powers and functions of the Tribunal the Society proposes are substantially the same as those of the Tribunal we recommend. It is clear, however, that the Society intended that the Tribunal it proposes would only have jurisdiction over practitioners subject to its governance, not over all practitioners.¹

8.4 In its submission on the Discussion Paper, the Bar Association said:

“Both the English and the Victorian system provide for a Disciplinary Tribunal for the hearing and determination of more serious complaints against barristers. Such a Tribunal has the power of suspension and disbarment, which the Professional Conduct Committee in England and the Ethics Committee of the Victorian Bar do not possess. The Association is of the view that such a Tribunal is redundant, especially having regard to the obviously small number of complaints against barristers which would warrant its attention, and particularly where under the present system, matters so serious as to involve possible disbarment or suspension from practice are referred to the Supreme Court under the well recognised procedure referred to in the Association's earlier submissions. The Association can see no warrant whatever for any alteration of this procedure.”²

8.5 In short, the Law Society favours the idea of a Disciplinary Tribunal for practitioners subject to its governance but the Bar Association opposes the same idea for practitioners subject to its governance.

8.6 When speaking of “the obviously small number of complaints against barristers which would warrant [a Disciplinary Tribunal's] attention”, the Bar Association is making a prediction which may or may not prove to be right. The number of practitioners subject to its governance is greater than ever before and the contents of paragraph 2.5 indicate that the Association's complaints work in recent years is not insignificant.

8.7 In Scotland, the Hughes Commission said that the proposals they had made in relation to “Complaints and Discipline: Solicitors” were in their view clearly applicable to advocates (the Scottish equivalent of our barristers). They felt bound, however, to recommend different procedures for complaints against advocates. One reason for adopting this different approach was that over the period 1972-1979 an average of only five complaints were received by the governing body of advocates each year. In the event, the Hughes Commission said that rather than recommend for advocates a standing Disciplinary Tribunal of the kind they had

recommended for solicitors, they would recommend that provision be made for convening an *ad hoc* Disciplinary Tribunal.³

8.8 We recommend that a variation of the Hughes Commission approach be adopted in relation to the Bar Association in this State. In short, we do not recommend that a separate Disciplinary Tribunal be created for practitioners subject to governance by the Bar Association. Considerations of cost are sufficient in themselves to tell against a recommendation of this kind. On the other hand, we recommend that one Disciplinary Tribunal should be created for all practitioners and that it should be so constituted that it must sit in one form when inquiring into the conduct of a practitioner subject to governance by the Bar Council and in another form when inquiring into the conduct of a practitioner subject to governance by the Law Society Council.

8.9 Details of this recommendation are given later in this Chapter but, for present purposes, we make one general comment.

8.10 Nothing in any of the recommendations in this Report is intended to change the original jurisdiction of the Supreme Court with respect to barristers and solicitors. At present, the Law Society Council refers many questions of professional misconduct to the Solicitors' Statutory Committee, but sometimes it bypasses the Committee and commences proceedings against the practitioner in the Supreme Court. On both the Society's proposals and our recommendations, the Council could continue to do the same. One difference would be that the Disciplinary Tribunal would have taken the place of the Solicitors' Statutory Committee. In the case of the Bar Association, we propose that the Bar Council could do much the same. It could refer questions touching the conduct of a practitioner subject to its governance to the Tribunal or it could commence proceedings against the practitioner in the Supreme Court. The Association's submission seems to indicate that its present view would be that it would not use the Tribunal.⁴ Whether this view, if it is the Association's view, will remain unchanged is a matter for conjecture. Later in this Chapter we recommend that the Attorney General should also be empowered to make references to the Tribunal. Hence, under our recommendations, proceedings may also come before the Tribunal on institution by the professional councils or by the Attorney General, on removal from a Board, or on appeal from a Board. One of us, Mr Conacher, sees value in the principles of the present arrangement for the Solicitors' Statutory Committee and is of opinion that, in order to give effect to that principle in relation to the scheme recommended, any proceedings before the Tribunal should be removed into the Supreme Court on application by the professional council concerned.

II. Composition

8.11 We recommend:

- (a) that there should be a Chairman of the Tribunal, and that the Chairman should be the Chief Justice;
- (b) that there should be practitioner members of the Tribunal who are subject to governance by the Law Society and practitioner members who are subject to governance by the Bar Association, 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;
- (c) 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;

(d) that no member of the Tribunal should be, at the same time, a member of the Bar Council, the Law Society Council, or the Public Council on Legal Services;

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

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

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

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

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

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

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

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

(g) that, subject to sub-paragraphs (e) and (f), 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 subparagraphs (c) and (d) accordingly. We comment on three of these recommendations.

Judges as Members

8.12 Although we suggested in the Discussion Paper that two judges should be members of the Disciplinary Tribunal, no direct comment on the suggestion was made by the Law Society or the Bar Association. In confining membership of its proposed Tribunal to solicitors and lay people, the Society has, however, impliedly disagreed with our suggestion. On the other hand, in speaking of the Barristers' Disciplinary Tribunal in Victoria, the Bar Association confined its comments to the method of appointing that Tribunal's lay members. It did not refer to the fact that a judge, or retired judge, of the Supreme Court of Victoria must be the Chairman of the Tribunal.

8.13 There are advantages and disadvantages in having judges as members of the Tribunal. Included in the advantages is the public esteem in which the judiciary is held. The presence of judges on the Tribunal would do much to enhance public confidence in the Tribunal. Another advantage is that judges are expert in the expression of judgments and the Tribunal's judgments will be of great importance in setting standards for the legal profession. This will be especially so where the Tribunal hears appeals from the Professional Standards Boards. The concept of "unsatisfactory conduct" will need to be developed by the Boards and the Tribunal and there is much to be said for securing a judicial contribution to this development. On the other hand, it is questionable how far judges of the Supreme Court can properly be called upon to undertake duties outside their duties as members of the Court and to share adjudication with members of the Tribunal who are not judges of the Court. Further, it can be argued that many judges know little of the non-contentious work of solicitors and, when

coupled with the presence of a public member on the Tribunal, this lack of knowledge would place an unduly heavy burden on the practitioner member. Also, it can be argued that non-judicial members of the Tribunal may defer excessively to the opinions of the judicial member, and that the balance of the Tribunal would thereby be impaired.

8.14 We have considered arguments of this kind at length but, on balance, we have concluded that provision should be made for a Supreme Court judge to be a member of the Tribunal. We have in mind that the Chairman of the Tribunal, 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 case which does not call for the presence of a Judge.

The Appointment of Public Members

8.15 In paragraph 7.14 we gave our reasons for our recommendation that the public members of the Professional Standards Boards should be appointed by the Attorney General. The same reasons prompt us to recommend that the Attorney General should appoint the public members of the Tribunal. This recommendation accords with the submission of the Law Society⁵ but not with that of the Bar Association.⁶ In speaking of the possibility that a Disciplinary Tribunal might be created, the Association said:

“... the power to appoint the panel of lay persons from which the lay member of the Tribunal is to be drawn should be vested in the Chief Justice in order to avoid any suggestion of political influence.”⁷

On the approach we have adopted, the Chief Justice is given the power to appoint practitioner members of the Tribunal, not public members. We think that the respective powers we have recommended for the Chief Justice and the Attorney General, read with the recommendations in paragraph 8.11(g), constitute a fair balance between the professions interest and the public interest.

Different Tribunals for Different Inquiries

8.16 We refer here to the recommendations made in subparagraph (g) of paragraph 8.11 to the effect that the Chairman of the Tribunal, the Chief Justice, should nominate the persons who are to comprise the Tribunal for particular inquiries. Our purpose in making this recommendation is to provide the means for the Chairman to constitute the Tribunal according to the likely need of an inquiry. Inquiries will vary in their complexity. In some instances, there will be indications that few issues are substantially in dispute, or that the issues involve only simple questions of fact. In other instances, there will be indications that there are complex issues of fact. In still other instances, there will be indications that there are difficult issues of law. We believe that the Chairman of the Tribunal should be empowered to decide who are most appropriate lawyers to sit on a particular inquiry. The public members of the Tribunal will bring different skills to the work of the Tribunal, and the Chairman should be empowered to choose the public member whom he believes to be best suited for a particular inquiry.

Terms and Conditions of Appointment

8.17 We said in paragraph 7.15 that the terms and conditions of appointment to the Professional Standards Boards are matters that may be left to the people who are responsible for making the appointments, and we added some general comments. We hold the same views in relation to the appointment of the non-judicial members of the Tribunal.

III. References to the Tribunal By Whom are References Made?

8.18 For reasons similar to those given in paragraphs 7.7 and 7.9 the majority of us recommend that only the Bar Council, the Law Society Council, and the Attorney General be empowered to make references to the Tribunal, and to intervene, as of right, in proceedings before the Tribunal. This recommendation does not preclude anyone, whether a dissatisfied client or complainant, or judge or other public official, or the Lay Review Tribunal or a Lay observer, from recommending to the Councils or the Attorney General, or both, that a reference be made to the Tribunal. Mr Disney is of the same view but for somewhat different reasons. As indicated in paragraph 7.8, he (unlike the majority of us) considers that members of the public should have the right to make references to the Professional Standards Boards. He does not consider, however, that they should have such a right in relation to the Tribunal, the proceedings of which, as we recommend below, should be held in public and be more formal than those of the Boards. If his earlier suggestion were adopted, members of the public could refer a matter to the Board and then if the Board considered that the matter was so serious as to merit reference to the Tribunal, it could make such a reference. All of us have recommended that the Board should have power to refer serious matters to the Tribunal.

The Form of the Reference

8.19 We recommend that it should be a condition of any reference to the Tribunal that the reference itself be expressed with the particularity of a criminal charge. The consequences for a practitioner of a reference to the Tribunal are potentially no less serious than those of many criminal charges. We think it right that a reference should be formulated in much the same way as a criminal indictment and that rules no less favourable to the practitioner than those of the criminal law with respect to particulars, and further particulars, should apply to the reference.

Open or Closed Hearings

8.20 The Law Society proposes that its suggested Professional Misconduct Tribunal should have “the same discretionary powers as the Supreme Court to close its proceedings or suppress publication thereof, but otherwise the proceedings of that Tribunal would be open to the public”.⁸ We agree with the policy stated by the Law Society and, subject to one exception, we recommend that the business of the Disciplinary Tribunal should be conducted in the absence of the public only where the presence of the public will, in the words of section 80(b) of the Supreme Court Act, 1970 “defeat the ends of justice”. The exception to which we refer is that we recommend that when the Tribunal is hearing an appeal from a Professional Standards Board it should observe the rules which apply to the Boards. This means that the appellate business of the Tribunal will be conducted in the absence of the public unless the presence of the public will aid the ends of justice.

Appearances Before the Tribunal

8.21 Again, we draw a distinction between the ordinary work of the Tribunal and its appellate work. In the case of its ordinary work, the majority of us would limit the right to appear to the Bar Council, the Law Society Council, the Attorney General, and the practitioner concerned, and, where a person is a claimant for compensation, the same three of us would allow that person to appear on the question of compensation only if the Tribunal gives leave to appear. Mr Disney, however, considers that the Tribunal should have the power to allow other persons to appear (as the majority of us recommended in relation to the Professional Standards Board). In the case of the appellate work of the Tribunal, we all recommend that the Tribunal should observe the rules which apply to the Professional Standards Boards, namely, rules of the kind recommended in paragraph 7.15.

8.22 In the case of the ordinary work of the Tribunal, the majority of us seek to confine the right to appear because of the analogy we see between that work and a criminal trial. The victim of, say, an assault is not given the right to appear on the trial of the alleged assailant on a prosecution by the Crown.

Orders

8.23 We recommend that the Tribunal should be empowered to make orders in respect of both unsatisfactory conduct and conduct showing unfitness to practise. The recommended provision concerning unsatisfactory conduct is simple. It is:

“Where it appears to the Tribunal that a practitioner is guilty of unsatisfactory conduct, the Tribunal may exercise the powers of a Board with respect to the practitioner.”

The recommended provisions concerning conduct showing unfitness to practise are less simple. They are:

“(1) Where a barrister and solicitor holds a practising certificate issued by the Bar Council and it appears to the Tribunal that, by reason of his conduct, he is unfit to hold the certificate, the Tribunal may, on application by the Attorney General or the Bar Council

(a) order that his name be struck off the roll of barristers and solicitors;

(b) order that the practising certificate be cancelled;

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

(d) make such order or other provision with respect to him as the Supreme Court might formerly have made with respect to a barrister or a solicitor except that any fine ordered to be paid shall not exceed \$25,000.

(2) Where a barrister and solicitor holds a practising certificate issued by the Council of the Law Society, and it appears to the Tribunal that, by reason of his conduct, he is unfit to hold the certificate, the Tribunal may, on application by the Attorney General or the Council of the Law Society

(a) order that his name be struck off the roll of barristers and solicitors;

(b) order that the practising certificate be cancelled;

(c) order that a practising certificate be not issued to him by the Council of the Law Society during such time or until the happening of such event as may be specified in the order, or without leave of the Tribunal; and

(d) make such order or other provision with respect to him as the Supreme Court might formerly have made with respect to a solicitor or a barrister except that any fine ordered to be paid shall not exceed \$25,000.

(3) Where a barrister and solicitor holds a practising certificate without restriction, and it appears to the Tribunal that, by reason of his conduct, he is unfit to hold the practising certificate, the Tribunal may, on application by the Attorney General or the Council of the Law Society [or the Bar Council], order that the practising certificate be restricted to the effect that he shall not practise on his own account or in partnership during such time or until the happening of such event as may be specified in the order or without leave of the Tribunal.”⁹

8.24 Subsections (1) and (2) of the provision quoted in the preceding paragraph speak of unfitness to hold practising certificates issued by the Bar Council and the Law Society Council. The subsections are not intended to suggest that the standards expected of a holder of a certificate issued by the Bar Council are higher than those expected of the holder of a certificate issued by the Law Society Council, or the reverse. As indicated in paragraph 5.16,

our approach to the drafting of these provisions is much influenced by the fact that many orders of the Tribunal will affect practising certificates. Hence, the provisions focus on practising certificates.

8.25 Subsection (3) of the same provision is based on our assumption that practitioners subject to governance by the Bar Council may, in time, be permitted to practise as employees or in partnership. If it were not for this assumption, the application of the provision would have been limited to practising certificates issued by the Law Society Council.

8.26 The provisions quoted in paragraph 8.23 will need ancillary provisions. We recommend that where a practising certificate issued by the Bar Council is cancelled, the Law Society Council should be able to issue a practising certificate to the practitioner concerned, but should not be under any duty to do so. Likewise, we recommend that where a practising certificate issued by the Law Society Council is cancelled, the Bar Council should be able to issue a practising certificate to the practitioner concerned, but should not be under any duty to do so. We expect that these ancillary provisions will seldom be used. Where a practitioner is found by the Tribunal to be unfit to hold a practising certificate issued by, say, the Bar Council, it is unlikely that he or she will be considered fit to hold a practising certificate issued by the Law Society Council. There may, however, be occasions when this general rule will not apply. If, for example, a person subject to governance by the Bar Council were found to be so incompetent as an advocate that he or she is unfit to hold a practising certificate issued by that council, the Law Society Council might be prepared to issue a practising certificate on condition that the practitioner concerned did not undertake any advocacy.

8.27 We also recommend that where a Board's compensatory jurisdiction is conditional upon the consent of a practitioner and the release of a claimant's ordinary civil rights to compensation, the Tribunal's compensatory jurisdiction should be subject to the same conditions.

8.28 The amount of \$25,000 mentioned in sub-paragraph (c) of subsections (1) and (2) of the provision quoted in paragraph 8.23 is the amount suggested by the Law Society in its submission to us in relation to its proposed Professional Misconduct Tribunal.¹⁰

Costs

8.29 We recommend that the Tribunal's powers in relation to costs be the same as those of the Professional Standards Boards.¹¹

Appeals

8.30 We have recommended earlier in this Report 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. We recommend here that 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 re-hearing de novo.

Procedural and Miscellaneous Matters

8.31 We recommend that the practice and procedure for proceedings in the Tribunal should be modelled on those of the ordinary courts, and that the members of the Tribunal should be empowered to make rules for the practice and procedure for proceedings in the Tribunal. Also we recommend that 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. This last-mentioned recommendation is subject to an exception in the case of the appellate work of the Tribunal. In respect of that work, the Tribunal should observe the rules which apply to the Professional Standards Board and therefore should not be bound by the rules of evidence. Evidence received by a Board might, on appeal to the Tribunal, be admitted by consent.

8.32 The Law Society's submission speaks of proceedings before its suggested Professional Misconduct Tribunal as being "formal and in accordance with the rules of evidence". As indicated, we agree with the Society's general view and we think that our present recommendations give effect to it.

IV. Renewal and Cancellation of Practising Certificates

8.33 We recommend in our First Report, on the regulation and structure of the legal profession, that all practitioners should be required to hold a current practising certificate.¹² This requirement has long applied to solicitors, and Part IX of the Legal Practitioners Act, 1898, contains comprehensive provisions relating to solicitors' practising certificates. Section 71 of the Act, for example, lists six grounds on which the Council of the Law Society may refuse to issue a certificate or to cancel a 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 "infirmary, injury or illness (whether mental or physical)".

8.34 We see no reason why the grounds specified in sections 71 and 71A of the Act should not continue to be used in relation to practising certificates. We question, however, whether the Bar Council and the Law Society Council are the appropriate authorities to exercise exclusively powers of the kind conferred by these sections. The refusal to renew a certificate, or the cancellation of a certificate, constitutes, in effect, a denial of a qualified person's right to practise. We have said already that the power to withdraw a practitioner's right to practise, whether permanently or temporarily, should be confined to the Disciplinary Tribunal and to the Supreme Court.

8.35 We recommend that the Tribunal be empowered to make the orders mentioned in paragraph 8.23 on the grounds now specified in sections 71 and 71A of the Act. There are limited instances, however, where the Bar Council and the Law Society Council will need like powers. An applicant for, or the holder of, a certificate may fail to carry out some prescribed ministerial act. He or she may fail, for example, to complete an application form, to pay a prescribed fee, or to reply to correspondence from the Bar Council or the Law Society Council. In other instances, the Law Society Council may have good grounds for suspecting that a practitioner's trust account is not in order, and may need to take urgent action. In all these circumstances, we would allow a governing body to cancel the certificate of a practitioner subject to its governance, or to refuse to renew the certificate, but only for a period of up to twenty-one days, and we recommend accordingly. Also we recommend that an appeal against a cancellation or refusal by either Council should lie to the Tribunal and not to the Supreme Court, that an appeal should not have the effect of permitting a practitioner to practise pending its determination, but that the Tribunal might grant that permission, and that, upon application by a governing body, the Tribunal should be empowered to extend the period of an order made by the governing body. Appeals of the kind we are now considering may often need to be disposed of quickly and, for this reason, we recommend that in these instances the Tribunal might consist of one member only, a Supreme Court judge. We also recommend that there should be a further appeal to the Court of Appeal, but only with the leave of that Court.

V. Funding of the Tribunal

8.36 The main work of the Tribunal will, we anticipate, be similar to that of the Solicitors' Statutory Committee and we recommend that, for the first three years of its operation, the Tribunal should be funded in the way that the Solicitors' Statutory Committee is now funded

(that is, from the Solicitors' Fidelity Fund), and that, at the expiration of this period, the question of the funding of the Tribunal should be reconsidered. The need for reconsideration may arise, if, for example, a significant part of the Tribunal's work is concerned with practitioners subject to governance by the Bar Council. In this event, it may be necessary for the Bar Council to contribute to the funding of the Tribunal on some appropriate basis.

FOOTNOTES

1. Law Society of New South Wales, Submission No.272 ("Submission on Discussion Paper No.2, Complaints and Discipline"), p.34 (paragraph 2(b) and (c)). We refer to this Submission as "the Law Society's Submission".
2. New South Wales Bar Association, Submission No.267 ("Submission on Discussion Paper No.2, Complaints, Discipline and Professional Standards"), paragraph 6.7. We refer to this Submission as "the Bar Association's Submission".
3. Cmnd. 7846, paragraphs 18.45 and 18.46.
4. The Bar Association's Submission, paragraph 6.7.
5. The Law Society's Submission, p.40 (paragraph 4(d)).
6. The Bar Association's Submission, paragraph 6.8.
7. The Bar Association's Submission, paragraph 6.8.
8. The Law Society's Submission, p.40 (paragraph 4(f)).
9. In this context, we adopt s.21 of the Interpretation Act, 1897, and use words importing the masculine gender as including females.
10. The Law Society's Submission, p.40 (paragraph 4(f)).
11. See paragraph 7.23.
12. Chapter 4.

9. Incidental Matters

I. Introduction

9.1 In this Chapter, we are concerned with some incidental aspects of the complaints, professional standards, and discipline system we have recommended in earlier chapters. We consider them under the following headings:

- (i) Inquiries involving practitioners subject to different governing bodies.
- (ii) The effect of a practitioner changing his or her governing body.
- (iii) The effect of civil or criminal proceedings on inquiries.
- (iv) Inquiries into multiple complaints against a practitioner.
- (v) Applications for restoration to the Roll of practitioners.
- (vi) Legal aid.
- (vii) Advertising the system.
- (viii) The cost of the system.

II. Inquiries Involving Practitioners Subject to Different Governing Bodies

9.2 It may sometimes happen that a complaint will involve a practitioner who is subject to governance by the Law Society Council and another practitioner who is subject to governance by the Bar Council. We believe that in these cases much time and effort would be saved if the Law Society and the Bar Association were to make joint arrangements to investigate the complaint. If the investigation showed that the conduct of the practitioners called for a reference to a Professional Standards Board or to the Disciplinary Tribunal, we believe that an *ad hoc* Board or Tribunal should be convened so that the reference could be treated as a single proceeding. The Law Society Council and the Bar Council could then jointly instruct someone to appear for them. The Hughes Commission in Scotland recommended to this effect and we agree generally with the recommendation.¹ Adapted to this State, the recommendation is that where a complaint involves a practitioner who is subject to governance by the Council of the Law Society and another practitioner who is subject to governance by the Bar Council, the Councils should be empowered to make joint arrangements to investigate it and, if considered desirable, to request the Chief Justice to convene an *ad hoc* Professional Standards Board or Disciplinary Tribunal to inquire into the conduct of the practitioners. In turn, the Chief Justice should be empowered to convene a Board or Tribunal comprising, in each instance, a Supreme Court Judge, a practitioner subject to governance by the Council of the Law Society, a practitioner subject to governance by the Bar Council, and two public members.

III. The Effect of a Practitioner Changing His or Her Governing Body

9.3 We think it necessary to ensure that a practitioner cannot avoid investigation of his or her conduct, or references to a Board or the Tribunal, or proceedings in the Supreme Court, by transferring to the governance of another governing body, by surrendering his or her practising certificate, or by seeking removal from the Roll of practitioners. We recommend therefore that if, at anytime, a practitioner is governed by a particular governing body, the conduct of the practitioner while subject to that governance remains within the jurisdiction of that body notwithstanding that at the time of any reference or proceedings relating to the conduct the practitioner is no longer subject to that governance. But where

the practitioner has obtained a practising certificate from the other governing body, that other body should also be able to proceed against him or her.

IV. The Effect of Civil or Criminal Proceedings on Inquiries

9.4 We believe that, 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 Tribunal. We believe further that a practitioner seeking a stay of disciplinary proceedings should have the onus of showing that the stay should be granted and we recommend accordingly. In short, the proceedings should be commenced and then the Board or the Tribunal should decide whether or not there should be a stay.

9.5 Much can be said for and against the views we have just expressed. We agree with the view of an *ad hoc* Committee on Grievance Procedures of the Association of the Bar of the City of New York (the Silverman Committee). In 1976, it said:

“When a complaint involves issues that are also the subject of a pending suit, the practice of the Grievance Committee had been to do nothing whatsoever while litigation, civil or criminal, was pending and until all appeals were disposed of. In fact, the file is usually closed and ordinarily not reopened unless the complainant, or some other source, brings it to the attention of the staff again after litigation is determined.

The argument in favour of deferring disciplinary proceedings when a judicial proceeding is pending is that the two tribunals might reach different results on the same facts. There is the further concern that the respondent attorney might be unfairly prejudiced in the pending litigation by an unfavorable disposition in the disciplinary proceeding. On the other hand, the consequence of deferral is excessive delay, loss of public confidence in the disciplinary system, and the risk to the misconduct.

We think the public interest, and public confidence in the administration of justice, suffer more when discipline is long deferred than they would from two tribunals reaching dissimilar results. The two tribunals are asking different questions and may be concerned with issues that are not identical: the issue in a disciplinary hearing is not only whether some actionable misconduct occurred, but whether any such misconduct should restrict the attorney’s privilege to practice law. That one of the two proceedings might prejudice the other is a danger, but such prejudice is not inevitable, or in every case serious. A decision to defer disciplinary action can be made in a particular case if substantial prejudice seems likely.”²

V. Inquiries into Multiple Complaints Against a Practitioner

9.6 We spoke in paragraphs 6.19 and 6.20 of the need to investigate the practice of a practitioner against whom a number of complaints are made in a short time. We return to the subject of multiple complaints because of a comment made by the Law Society in its submission to us. The comment was:

“The use of records of prior proved complaints or findings relating to the solicitor would only be admissible by either Tribunal before the question of guilt is determined where multiplicity of offences was part of the offence alleged against the solicitor.”³

We believe that a governing body should be able, in one reference, to refer to the Board or to the Tribunal, a number of instances of conduct which may constitute, either separately or together, unsatisfactory conduct or conduct showing unfitness to practise. If, for example, ten complaints of delay are made against a practitioner, it may appear on inquiry that, viewed separately, not one of them justifies the making of an order against the practitioner but, viewed collectively, they do justify the making of an order. On the other hand, five complaints of delay may have been made against a practitioner and, after inquiry, adverse findings may have been made and appropriate measures taken against the practitioner. If then another five complaints of delay are made against the same practitioner, the ten complaints might be the subject of one reference to a Board or to the Tribunal. We presume that

this is what the Society meant when making the comment to which we refer. If this is so, we agree with the Society.

VI. Applications for Restoration to the Roll of Practitioners

9.7 At present, once a practitioner's name is removed from the Roll of practitioners on which it was entered, restoration to the Roll can be effected only in pursuance of an order of the Supreme Court. We make no recommendation for change. In saying this we mean that restoration to the Roll of barristers and solicitors should be effected only in pursuance of an order of the Supreme Court.

VII. Legal Aid

9.8 Our terms of reference specifically exclude from our consideration the provisions of the Acts relating to legal aid which were in force at the time the terms of reference were framed. Hence we make no recommendations in relation to those provisions, or to the provisions of later Acts relating to the same subject. We do, however, recommend to the appropriate authorities that consideration be given to making a practitioner whose conduct is subject to inquiry by a Professional Standards Board or the Disciplinary Tribunal eligible for legal aid. The costs of an inquiry, especially one by the Tribunal, will be high, and yet the consequences may be so important to the practitioner concerned that he or she will have little option but to incur them. If, for example, a practitioner is eligible for legal aid in civil or criminal proceedings arising out of his or her professional conduct, we believe that he or she should have a like eligibility in disciplinary proceedings arising out of the same conduct. Whether or not a claimant for compensation, or any other person given leave to appear before a Professional Standards Board, should also be eligible for legal aid is another question, a question which will need to be decided in accordance with the policies of the persons who administer legal aid.

VIII. Advertising the System

9.9 The Hughes Commission in Scotland recommended that a leaflet should be produced describing briefly the procedures for lodging complaints against solicitors and advocates and that this leaflet should be readily available to the public.⁴ As noted already, the Benson Commission in England said:

“In order to help those who wish to make a complaint, the Law Society has published a pamphlet explaining how it handles complaints and the procedure which should be followed. A copy is sent to anyone who writes to the Law Society saying he wishes to make a complaint about a solicitor. This is to be commended, but the pamphlet has not always been updated as promptly as it should have been. This detracts from its usefulness and we suggest that the Law Society should arrange for regular revisions in future.”⁵

9.10 We recommend that the Council of the Law Society and the Bar Council should each prepare a leaflet which explains in simple terms the operation of their respective complaints, discipline and professional standards scheme. The majority of us, who recommend the constitution of the Public Council on Legal Services, recommend also that this leaflet should be prepared in consultation with that Council.

9.11 We further recommend that every complainant to the Council of the Law Society or the Bar Council should be given a copy of the leaflet, and that ways and means of making it readily available to the public generally should be investigated.

9.12 In England, the Benson Commission also said:

“We think that it would be advisable for the Law Society to make an analysis in future showing the nature of the complaints received and the action taken and to publish the results annually to its members. It would be helpful to solicitors to know the main areas of complaint so that, in appropriate cases, they can themselves take corrective action. An analysis of this nature would also be helpful to the Law Society in planning its educational and training programmes, in preparing notes for the guidance of solicitors and in laying down Professional Standards.”⁶

9.13 We recommend that complaints statistics should be prepared and published by the Bar Council and the Law Society Council in their annual reports. The statistics to be kept and the form of their publication could be the subject of consultation with the Public Council on Legal Services.

IX. The Cost of the System

The Law Society

9.14 The Law Society had W D Scott & Co Pty Limited, Management Consultants, assess the cost of establishing and operating the complaints, discipline and professional standards system it proposed. The report of the consultants, dated October, 1980, is attached to the Society's submission to us. In short, establishment costs are assessed at \$40,100 and annual recurring costs at \$1,266,700.⁷ It seems that these costs are seen by the Society as being reasonable.

9.15 The report of the consultants does not compare the assessed annual recurring costs of the system proposed by the Society with the actual annual recurring costs of the system operated by the Society at the time of the report. Hence we are not able to say what part of the assessed costs of \$1,266,700 represents additional costs. We suggest, however, that the additional annual costs are to the order of \$300,000. We arrive at this figure by examining the five components of annual recurring costs which the consultants examined. In our terms, these were:

- (i) Lay Members of the Complaints Committee.
- (ii) The Professional Standards Board.
- (iii) The Disciplinary Tribunal.
- (iv) The Lay Review Tribunal.
- (v) The Professional Conduct Division.

Items (i) and (ii) represent new initiatives and their cost is clearly additional to those of the then existing system. For present purposes, item (iv) is not a new initiative and its cost is not an additional cost to the proposed system. Items (iii) and (v) are also not new initiatives (the Disciplinary Tribunal is essentially a substitute for the Solicitors' Statutory Committee) but the proposed system will make new demands and these will lead to additional costs. According to the consultants, the additional costs, at the time of their report, were to the order of the following:

Item (i) - 6,000

Item (ii) - 140,900

Item (iii) (based on estimates of additional sitting days plus time to prepare judgments) - 6,800

Item (v) (based on the need to employ 11 additional officers) - 156,700

Total - 310,400

Item (iii) does not make any allowance for the cost of the work of the Tribunal in dealing with any references from the Bar Council.

9.16 The scheme that we recommend for practitioners subject to governance by the Law Society Council is not significantly different from that proposed by the Society itself. In this circumstance, it seems to us that, subject to two qualifications, the establishment and annual recurring costs of our recommended system would be substantially the same as those of the Society's proposed system.

9.17 The first qualification to which we refer is that the Consultants' estimate of costs is based on the Law Society's view that three Complaints Committees will be needed to deal with the expected volume

of complaints, that one lay person will be appointed to each Complaints Committee, and that each lay person will be paid a retainer of \$2,000 a year.⁸ Our recommendation is that there should be one Complaints Committee and that three lay people should be appointed to it. If there is a need for more than one Complaints Committee, we would recommend that at least one-third of the members of each Committee should be lay people.

9.18 The second qualification to which we refer is that the Consultants' estimate of costs is based on the Society's view, expressed in our terms, that the Professional Standards Board for practitioners subject to governance by the Council of the Society will meet in the premises of the Society.⁹ Although we have not made any recommendation to this effect, we believe that the Board should not only be independent of the Society but also that it should be seen to be independent. Any appearance of independence will, we believe, be lost if the Board meets in the premises of the Society. We acknowledge that the cost of alternative premises may be high but we strongly recommend that alternatives be investigated.

9.19 At present, and subject to one qualification, the cost to the Society of its complaints system is recouped from the Solicitors' Fidelity Fund. The qualification to which we refer is that the Society bears all the costs of the Lay Review Tribunal and, to the extent that the Society's Community Assistance Department can be said to be part of its complaints system, it also bears all the costs of that Department.

9.20 The question to be considered is how should the system we recommend be financed. We see good reasons why practitioners should bear part of the costs and we see good reasons why government money, or the Statutory Interest Account should also bear part of the costs. Any decision as to the apportionment of the costs must be, however, a difficult decision. Many considerations need to be taken into account. For example, to what extent would the system we recommend be concerned with misconduct relating to trust accounts and to what extent would it be concerned with unsatisfactory conducted Our guess, and it can be no more than a guess, is that misconduct relating to trust accounts would account for at least three-quarters of the system's work. On that basis, it could be argued that government ought to permit a like part of the costs of the system to be borne by the Statutory Interest Account, and that practising certificate fees should bear the remaining part. There is also a case for the cost of lay participation at all levels of the system being borne by government money, or the Statutory Interest Account. We are not in a position to make firm recommendations with respect to these matters. They will need to be resolved by Government in consultation with the Law Society Council and others.

The Bar Association

9.21 In paragraph 3.37, we spoke of some of the practical consequences for the Bar Association of the implementation of our recommendations relating to the Bar Council's investigatory functions. We referred then to increases in the complaints work, and in the work of administration, of the Council. Clearly, these increases would lead to increases in the costs of administration.

9.22 The costs of establishing, and operating, a Professional Standards Board for practitioners subject to governance by the Bar Council would depend in large measure on the presently unpredictable workload of the Board. In paragraph 7.5, we expressed the view that the annual retainer and the sitting fees for all members of the Board might be paid from government money or the Statutory Interest Account. On this approach, the main costs to the Association of the Board would be those incurred in the Bar Council's appearances before it and in providing premises for it. Again, we strongly recommend that the Board should not meet in the Association's own premises.

9.23 In paragraph 8.35, we made a recommendation to the effect that the Bar Association should not make any contribution to the funding of the Disciplinary Tribunal for the first three years of the Tribunal's operations.

9.24 In short, the cost to the Bar Association of our recommended scheme cannot be determined with any precision. There would certainly be increased costs with respect to investigations of unsatisfactory conduct, the work of the Lay Observer, the work of the Professional Standards Board and, perhaps,

after three years, the work of the Disciplinary Tribunal. The extent of the increase would depend largely on the use made by the Bar Council of the Board and the Tribunal. By virtue of the smaller number of practitioners subject to its governance, the Association's costs cannot be compared with those of the Law Society.

9.25 As in the case of the Law Society, we see good reasons why practitioners subject to the governance of the Bar Council should bear part of the Association's costs. On the other we see good reasons why government money should also bear part of the costs. If a self-governing body is to be made more accountable to the public, the public should pay at least part of the cost of the new accountability. There is also a case for the Statutory Interest Account to be used for part of these purposes. Much of the money in solicitors' trust accounts, from which the Statutory Interest Account is derived, is there because of the work of barristers and solicitors. And, to the extent that it is justifiable to use the Statutory Interest Account for the purpose of improving the competence of solicitors, it is justifiable to use it for the purpose of improving the competence of barristers. The public is the main beneficiary of practitioners' improved competence, whether the practitioners are governed by the Law Society Council or the Bar Council. But again, we are not in a position to make firm recommendations with respect to these matters. They too will need to be resolved by Government in consultation with the Bar Council and others.

X. Conclusion

9.26 We said in the Discussion Paper that more details of our then suggested complaints, discipline and professional standards system would be given in a Part II of the Paper, together with overseas comparative material. We added that that Part would also consider some matters not considered in Part 1. In the events which happened, we did not publish Part II. A major reason for non-publication was the early indication given to us by the Law Society that its proposed scheme would incorporate many of the details about which we had intended to write. One consequence of this omission is that if representations concerning the few parts of this Report which traverse ground not traversed in the Discussion Paper are made to the Attorney General, the Attorney may see fit to refer them to us for consideration.

FOOTNOTES

1. Cmnd. 7846, paragraph 18.48.
2. Page 32.
3. Law Society of New South Wales, Submission No.272 ("Submission on Discussion Paper No.2, Complaints and Discipline"), p.41 (paragraph 4(i)). We refer to this Submission as "the Law Society's Submission".
4. Cmnd. 7846, paragraph 18.49.
5. Cmnd. 7648, paragraph 25.13.
6. Cmnd. 7648, paragraph 25.19.
7. The Law Society's Submission, pp.46-48, paragraph 8.
8. The Law Society's Submission, p.54.
9. The Law Society's Submission, p.58.

10. Codes of Professional Conduct

I. Introduction

10.1 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 we conclude this Report by making some general comments on Codes of Professional Conduct.

II. The North American Experience

10.2 The current Code of Professional Responsibility for members of the American Bar Association became effective on 1st January, 1970. Critics of the Code often concentrate on the extent to which it is, in their view, unclear, ambiguous, or silent. Indeed, the American Bar Association's Commission on Evaluation of Professional Standards (the Kutak Commission) is now working on a new set of Model Rules of Professional Conduct. Notwithstanding these facts, we quote at some length from the Preliminary Statement to the 1970 Code. We do so because the Statement helps to explain some of our later comments.

"... the American Bar Association has promulgated this Code of Professional Responsibility, consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action...."

10.3 A Code of Professional Conduct was adopted by the Council of the Canadian Bar Association in 1974. A prior code of ethics had been adopted in 1920. In the current code, the field of professional conduct and ethics is divided into seventeen chapters, each of which contains a short statement of a rule or principle followed by commentary and notes. The commentary and notes to each rule contain a

discussion of the ethical considerations involved, explanations, examples and other material designed to assist in the interpretation and understanding of the rule itself. The preface to the Code acknowledges that “inevitably the practical application of the code’s complex provisions to the diverse situations confronted by an active profession in a changing society will reveal gaps, ambiguities and apparent inconsistencies”.

10.4 Despite the limitations of the American and Canadian Codes, it seems to us that many lawyers in these countries see the Codes as essential guides to their professional responsibilities. In Canada, Chapter 11 of the Code (“Competence and Quality of Service”) has been the focus of much of the recent debate in that country on the quality of legal service. How to lift the quality so that it accords with the standard prescribed by the Code is part of that debate.

III. The Benson Commission

10.5 In England, the Benson Commission spoke, not of a Code of Professional Conduct, but of written Professional Standards. We are in substantial agreement with that Commission’s general views on this subject and we quote them at some length:

“22.57 The law and the work of lawyers become more complex. The profession has grown rapidly in the last ten years. Public expectations become higher. It therefore becomes more difficult to maintain a uniformly high quality of service by traditional methods alone. We consider that both the public and the profession would find it helpful to have an authoritative indication of what good practice requires.

22.58 In these circumstances, we consider that the use of written Professional Standards within the legal profession is now desirable in the public interest. We therefore recommend that the Law Society and the Senate [of the inns of Court] should each establish committees for the purpose of devising Professional Standards to be approved for publication by the governing bodies. Each committee should include members of the other branch.

22.59 The committees’ first task will be to identify the topics upon which Standards are required,.... The Standards would then have to be drafted and the drafts made public for consideration by the profession and a wide range of other interested parties including organisations representing the users of legal services. When comments have been received and assimilated, final drafts can be presented to the governing bodies for approval and publication. The task of devising Standards is long and difficult but the process of defining what is best practice is, in itself, valuable. The revision and updating of Standards at regular intervals is also a salutary process.

22.60 Standards should not be over ambitious or unnecessary and should be applied with common sense. For example, a written Standard,... might call on a solicitor to give a client certain information at the first interview. If instructions are received in an emergency requiring immediate action, the required information should be given not at the outset, but at the first convenient opportunity thereafter. Subject to the need to interpret Standards reasonably, we consider that a serious or repeated failure to comply with them should be treated as a breach of professional discipline. This should be without prejudice to the rule that inefficiency (whether or not comprising proven breaches of Standards) may itself invoke disciplinary procedures.”

IV. New South Wales

The Bar Association

10.6 In its submission to us in August, 1979, the Bar Association said:

“The tried and tested ‘standards’ of professional conduct presently applicable to barristers are well and clearly set out in the General Rules of the Association (a new and expanded form of which is about to be adopted) and in the judicial decisions relating to disciplinary matters which have accumulated over the years and which have grown out of experience and judicial wisdom. No necessity has been shown, let alone any reason, good or otherwise, why those standards are suddenly to be considered so lacking in substance as to require a ‘Director of Professional Standards’ or a ‘Professional Standards Board’ to reset or replace them with new and different standards.”¹

10.7 We do not say that the standards of professional conduct presently applicable to barristers should cease to be applicable to them. We do say, however, that some conduct which, for disciplinary purposes, is not now subject to any standard should be subjected to a standard. Our present concerns are how best to set this standard and to make it known to practitioners and the public.

10.8 The Foreword to the 1980 edition of the Bar Rules notes that no “list of rules can be exhaustive”. It adds:

“It would be over-ambitious to set out in a concise publication a set of Rules so detailed as to meet each of the many problems arising from day to day in the course of a barristers practice. But it is possible and convenient to lay down, in respect of common problems and situations, Rules which a member of the Bar may know what observance is required of him. These Rules seek to do that. ...

No formulation of the Rules could hope to encompass every ethical problem which may rise in the future. The President or other senior members of the Bar Council are always available to give advice in a case not covered by a particular Rule.”

10.9 We think it fair to say that the Bar Rules do not purport to be a Code of Professional Conduct in the sense in which that expression is understood by lawyers in the United States of America and Canada.

The Law Society

10.10 At present, solicitors do not have anything in the nature of a written Code of Professional Conduct. They have *The New South Wales Solicitor’s Manual* which, in the words of the Manual is “A Collation of the Law and Practice relating to the profession of the Solicitor in New South Wales”. Amongst other things, the Manual contains a selection of rulings of the Council of the Law Society on a variety of matters, ethical and otherwise. These rulings, many of them many years old, are not binding on succeeding Councils but they may be treated by these Councils as persuasive precedents.

10.11 In its report for the year ended 30th June, 1981, the Executive Committee of the Law Society’s Council indicated that it was in the process of formulating a policy in relation to a Code of Professional Conduct for solicitors.²

V. Recommendations

10.12 We recommend that the preparation of a Code of Professional Conduct for the legal profession of this State should be undertaken. Ideally, this work would be undertaken by the Councils jointly. We recognise, however, that one Council may have an interest in some parts of the Code greater than that of the other Council, and that the Council with the greater interest would wish to carry special responsibilities in relation to those parts. There could be no objection to this but we would hope that both Councils would take responsibility for the final product.

10.13 The task of preparing a comprehensive code is truly monumental and calls for careful work by many people over a long time. The present time is, we believe, a most appropriate time to begin the task. If the recommendations made in this Report are implemented, there will be a heightened interest in

the subject of professional standards. Practitioners will demand guidance on what is, or is not, “unsatisfactory conduct”, and a Code could give guidance of this kind.

10.14 The form of any code is, of course, a matter largely for its framers. Nonetheless, we suggest that it might consist of, first, rules and, secondly, advisory guidelines. Breaches of some rules could be deemed to be unsatisfactory conduct and breaches of other rules could be deemed to be conduct showing unfitness to practise. Rules having these consequences should be given effect to either by act or Regulation. If breaches of some rules did not necessarily constitute either unsatisfactory or conduct showing unfitness to practise those rules would not need to be in statutory form. The three of us who recommend the constitution of the Public Council on Legal Services suggest that the Code should be developed in consultation with, amongst others, that Council.

FOOTNOTES

1. New South Wales Bar Association, Submission No.267 (“Submission on Discussion Paper No.2, Complaints, Discipline and Professional Standards”), paragraph.4.6.
2. Law Society Journal (October, 1981), vol.19, No.9, p.670.24.

Appendix - Terms of Reference

“To enquire into and review the law and practice relating to the legal profession and to consider whether any and, if so, what changes are desirable in

- (a) the structure, organisation and regulation of that profession;
- (b) the functions, rights, privileges and obligations of all legal practitioners; and
- (c) the provisions of the Legal Practitioners’ Act, 1898, and the Rules and Regulations made thereunder and other relevant legislation and instruments,

with particular reference to but not confined to the following matters

- (d) the division of the legal profession into two branches;
- (e) the rights of audience of legal practitioners;
- (f) the existence or otherwise of monopolies or restrictive practices within the profession;
- (g) the right of senior counsel to appear without junior counsel;
- (h) the fixing and maintenance of ethical standards;
- (i) the making, investigation and adjudication of complaints concerning the professional competence or conduct of legal practitioners and the effectiveness of the investigation and adjudication of such complaints by professional organisations;
- (j) the making, investigation and adjudication of complaints concerning charges made for work done by legal practitioners;
- (k) the fixing and recovery of charges for work done by legal practitioners, including the charging by junior counsel of two-thirds of his seniors fee and the fixing of barristers’ fees in advance for work to be done;
- (l) the liability of legal practitioners for professional negligence and compulsory insurance in respect thereof;
- (m) partnerships and the incorporation of legal practices;
- (n) advertising;
- (o) confidentiality;
- (p) the certification of legal practitioners as specialists in particular fields;
- (q) performance of conveyancing and other legal work other than by legal practitioners;
- (r) fidelity guarantees and rules relating to the administration of guarantee funds;
- (s) the Statutory Interest Account;
- (t) the supervision by independent third parties of trust accounts of legal practitioners;

(u) the necessity for participation by legal practitioners in courses of continuing legal education;

but not including an examination of the provisions of the Legal Assistance Act, 1943, the Public Defenders Act, 1969, the Legal Practitioners (Legal Aid) Act, 1970; the role of the Law Foundation; or legal education prior to admission.”

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