

# REGULATING LEGAL PROFESSIONAL CONDUCT AND ETHICS

## THE NEED FOR TRANSPARENCY

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The Law Society of New South Wales in 1992 stated the argument for self-regulation in the following terms:

*“The legal profession is one of those professions, designated 'consultant professions', that are distinguished by a tradition of honourable service and are of particular value to the community. Professional self-regulation is logical and efficient. The legal profession in New South Wales has demonstrated throughout its history that it is capable of setting, and enforcing compliance with, high standards of professional practice. The courts have constantly relied upon the professional practitioner of good repute and competency as the best arbiter of proper professional conduct. An informed understanding of a professional discipline is required to assess the standards of that discipline.... The independence of the legal profession from the influence or control of the executive arm of government is essential not only to its effective self-regulation but also to the very maintenance of the rule of law. One of the reasons for the perceived unpopularity of lawyers is their need from time to time to defend persons' rights under the law and to uphold the law. If the executive should wish to take action to circumvent the law, or diminishes individual rights, the lawyers who may stand between the executive government and the achievement of its objectives should not be subject to the control of a government instrumentality.”<sup>2</sup>*

These are of course the main reasons argued over the years by professional organisations for maintaining the control and regulation of lawyers by lawyers. The Law Council of Australia in its *Blueprint for the Structure of the Legal Profession* issued in July 1994 acknowledged that self-regulation carried with it certain responsibilities: *“The self-regulation of the legal profession is subject to an external and transparent process of accountability to ensure that the rules of professional bodies are not inconsistent with national competition policy principles; the protection of consumers of legal services through comprehensive education and training of the legal profession and the development of a uniform standard of client care; proper information is available for consumers of legal services as to quality and cost of legal services.”<sup>3</sup>*

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1 Barrister -at-Law, Mediator and Arbitrator; formerly a Judge of the High Court of Fiji

2 Submission: Scrutiny of the Legal Profession; Complaints Against Lawyers, Law Society of New South Wales, 31 July 1992

3 *Blueprint for the Structure of the Legal Profession*, July 1994

In late 1991 the New South Wales Government gave to the Law Reform Commission NSW a reference with respect to “*the necessity for implementing alternative mechanisms to those presently existing to deal with complaints about the delivery of legal services to the public*”.<sup>4</sup> At that time the professional bodies – the Law Society of NSW and the NSW Bar Association fulfilled the regulatory functions with respect to lawyers in New South Wales, with those functions being in part, at least, delegated to a committee of those bodies: a system not dissimilar to that which I understand operates in Fiji.

The Law Reform Commission observed that “*Owing to the largely part-time, voluntary nature of the existing system, the processing of complaints takes too long (especially in the case of the Bar), investigations are often quite inadequate (especially in the case of the Law Society), and complainants feel left out of the process, leading to the dismissal of the vast number of complaints - and promoting the common idea that the legal profession is simply “looking after its own”. In particular, there is still a profound gap between what angers clients (and others) sufficiently to go to the trouble of complaining, and what lawyers and their professional associations see as important enough to merit serious attention, disciplinary action or compensation.*”<sup>5</sup>

In 2000 when dealing with an appeal by a NSW solicitor Mr. Justice Kirby of the High Court of Australia said: “*This appeal concerns professional misconduct alleged against two legal practitioners in New South Wales. One of the legal practitioners, Mr Ross Barwick (the appellant), is accused of having first acted in a way that amounted to professional misconduct as long ago as early 1990. His conduct originally came to the notice of the Law Society of New South Wales (the first respondent) in August 1992 as a result of a routine audit of Mr Barwick's trust account.*

“*Jurisdiction over the professional conduct and competence of legal practitioners exists for the fundamental purpose of protecting the public. In such circumstances the serious delays in disposing of the allegations against Mr Barwick (and the other legal practitioner involved) must occasion grave concern. The interests of the public, of complainants and of the legal practitioners themselves require that such matters be dealt with lawfully and fairly but also with more efficiency and expedition than has been the case here. The handling of the allegations involving Mr Barwick has been complicated by the supervening discovery of further and later acts which are alleged to constitute additional instances of professional misconduct; the intervening changes in the*

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4 NSW Law Reform Commission Report 70 (1993) – Scrutiny of the Legal Profession : Complaints against Lawyers (“LRC Report 70”)

5 LRC Report 70

*applicable legislation and of the institutions responsible for deciding such matters; and the delays attendant on this litigation. But the proceedings do not represent an exemplary model of their kind. Unhappily, the recent experience of this Court suggests that such delays may represent the norm, not an exception.*"<sup>6</sup>

From my observations of Fiji both the Law Reform Commission and Mr. Justice Kirby could have been speaking about the situation that exists here.

When I last inquired I was told that there were almost 200 outstanding unresolved complaints against lawyers in this country, where there are less than 400 lawyers unlike New South Wales where there are in excess of 20,000 solicitors with current practicing certificates and approximately 2000 barristers with current practicing certificates. Unlike Fiji in NSW Professional Indemnity Insurance is compulsory for both branches of the profession and without a current policy of insurance it is not possible to renew one's practising certificate. Similarly, continuing legal education of a minimum of 10 hours per annum must be completed to enable renewal of one's practicing certificate.

Most lawyers in Fiji spend most of their professional time doing the work of a solicitor and a very small part of their time practising as a barrister. This perhaps exacerbates the risk of complaints and negligent behaviour. Conveyancing transactions (including mortgages) and probate applications are rich areas for complaints by clients. It is the legal work of solicitors, and not barristers, that requires the operation of trust accounts.

Instances have occurred where the High Court and the Fiji Court of Appeal have referred matters to the Fiji Law Society for investigation but unfortunately the same culture of delay appears to have prevailed to these complaints as to those that have arisen from members of the public.

There will always be complaints that have no merit but unless there is a timely process for resolving all complaints it is not possible to dispose of these appropriately. This can only lead to additional frivolous and vexatious complaints. The situation becomes compounded.

When professional bodies, even with the best intent, hold the role of disciplinarian there is always the suspicion within the community at large that they will protect their own. On some occasions it appears the community's suspicion may have been justified.

It is said that a proper system of complaint handling must recognise that there are multiple aims to be met: (1) there is a consumer dimension, with the consequent need to redress the complaints of dissatisfied users of legal services, but it is also necessary (2) to ensure the diligence and competence of individual practitioners, as well as (3) to set and maintain high standards of

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<sup>6</sup> Barwick v NSW Law Society HCA [2000] 2

ethics and practice for the legal profession generally. One of the central criticisms of the system that existed in New South Wales was that the system was geared almost entirely to the second aim, failed to achieve even this adequately, and insufficiently addressed the other two aims.<sup>7</sup>

Another central criticism of the system that existed in New South Wales was that it lacked the appearance of independence, and thus did not enjoy public confidence.<sup>8</sup> Surely these criticisms sound familiar with those that are heard in Fiji today. This however is New South Wales in 1993, some 15 years ago.

The Law Reform Commission considered the “Best Practice” principles for handling complaints against lawyers and concluded that such principles are:

- independence and impartiality;
- recognition of the multiple aims of a professional disciplinary system;
- accessibility;
- efficiency and effectiveness;
- procedural fairness;
- openness and accountability;
- external scrutiny and review;
- contribution to the general enhancement of professional standards; and
- proper funding and resources.

The most important feature of a disciplinary system - whether professional or otherwise - is its independence and impartiality. Persons with a legitimate grievance must feel that their complaint will be dealt with in a fair and unbiased manner. The worry with a system which is operated entirely by the professional association itself is that it gives rise, as the American Bar Association (ABA) has stated, to “*the familiar criticism that the fox is guarding the henhouse*”, which is likely to be made even where the system may *in fact* be “*fair to both respondents and complainants*”.<sup>9</sup>

The complaints handling system must be widely accessible to potential complainants. This involves effective access to information, assistance, officials and institutions relevant to the process, with minimal disincentives imposed by time, cost or complexity.

Having regard to the multiple aims of a complaints handling system, a simple and comprehensive range of efficient and effective processes, services and techniques must be available to address the legitimate needs of complainants, legal practitioners and the society. This will involve: the prompt and thorough investigation of all disciplinary matters; consensual dispute resolution of appropriate complaints; a flexible range of sanctions and remedies; the availability of

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education, counselling and assistance for lawyers to prevent or minimise poor practice; continuous monitoring of the system; and coordination among the various agencies with responsibility for regulating the conduct of lawyers.<sup>10</sup>

Both complainants and legal practitioners should be entitled to be treated with fairness and justice in the investigation, hearing and determination of complaints.

Public confidence in the complaints handling system requires that the system be fair, open and accountable. Subject to the need for confidentiality in certain circumstances, as many elements of the system as possible should be open to the public and on the record, and reasons for decisions must be provided. Non-lawyers must meaningfully participate at all levels of the process to ensure that different experiences and perspectives are represented, and to assure complainants that the system is not operated solely by and for lawyers.

The complaints handling system must be subject to external scrutiny at all levels to ensure its accountability and effectiveness. The existence of one or more agencies with “*watchdog*” or oversight responsibilities provides an important means of guarding against bias, arbitrariness, arrogance, complacency and other problems which destroy public confidence. Among other things, the system should afford a complainant the opportunity for a meaningful external review of a decision to dismiss a complaint and other adverse decisions.

The work and experience of the complaints handling system must feed back into the legal profession to contribute to the enhancement of professional standards, such as through changes in legal education, legal practice, or rules of ethics and professional responsibility.

It is essential that adequate resources (financial, human and technical) are provided to permit the operation of a comprehensive system of regulation, with the features enumerated above. The sources of funding should recognise the interests of both the legal profession and the general public in the maintenance of high standards in the provision of legal services.<sup>11</sup>

The Law Reform Commission, taking account of these principles, endeavoured to design a new system which was much more consumer-oriented and which actually dealt seriously and effectively with most complaints and disputes. Among other things, this required educating the public about the nature of legal services and their rights and remedies under the disciplinary system, and educating the legal profession about the standards of practice and common courtesy to which clients should be entitled.

The centrepiece of the proposed reforms was the establishment of an independent, statutory, office

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of Legal Services Ombudsman (LSO), around which the rest of the proposed new system was designed. The LSO was to be responsible for providing advice and assistance to all potential complainants, receiving all formal complaints, and monitoring all subsequent stages of the system. In addition, the LSO would have the power to investigate complaints *directly* (where the complaint involved a member of one of the professional Councils or someone else associated with the complaints handling system, or where the LSO believed the public interest so required) and to take over from the Law Society or Bar Association the investigation of any complaint (at his discretion).

The other key features of the recommended new system included:

- ensuring both the perception and the reality of the **independence** of the complaints handling system from the legal profession through the establishment of the office of the LSO, as well as changes to the method of appointing lawyer and non-lawyer participants in the disciplinary system;
- strengthening the mechanisms for ensuring the **accountability** of the legal professional associations and the other institutions involved in the complaints handling system, through a more robust, non-lawyer dominated, Legal Services Conduct Review Panel;
- much **better access** to the system for potential complainants, in terms of information, language, physical access and so on;
- a more simple, **streamlined structure**, with the central intake of *all* complaints (including disputes about fees and costs), a central source of advice and assistance, and a single Legal Services Tribunal to conduct hearings with greater and more flexible powers to sanction lawyers and to make compensatory orders in favour of complainants;
- redress of the current imbalance of rights and safeguards between complainants and lawyers, with the creation of a statutory **Complainants' Charter of Rights**;
- a clearer distinction between consumer-type disputes and disciplinary matters, with a much greater **emphasis on consensual dispute resolution, arbitration and compensation** in the former cases;
- increased **attention to education and prevention** measures, such as compulsory training in legal ethics and professional responsibility for law students, feedback to the legal profession from the disciplinary system, and

the emphasis on “Client Care” principles and practices in solicitors’ offices.<sup>12</sup>

There was at this time no Administrative Appeals Tribunal in NSW and accordingly when the legislation was ultimately introduced adopting generally the recommendations of the Law Reform Commission there was established the Legal Services Tribunal which consisted of two barristers or two solicitors (depending on whether the person complained of was a solicitor or a barrister) and two lay persons appointed by the Attorney General. The legislation also changed the proposal of a Legal Services Ombudsman to a Legal Services Commissioner as the person to whom all complaints are made and who is charged with the investigation of those complaints albeit that he may refer them to the relevant professional body for investigation.<sup>13</sup> There was no judicial member of the Tribunal at this time, a situation that later changed.

The Legal Profession Act 2004 (NSW) provides for the appointment of a Legal Services Commissioner by the Governor on the recommendation of the Attorney General<sup>14</sup> and goes on to prescribe the functions of the commissioner as being:

- to receive complaints about unsatisfactory professional conduct or professional misconduct of Australian lawyers or Australian-registered foreign lawyers,
- to assist and advise complainants and potential complainants in making and pursuing complaints (including assisting complainants to clarify their complaints and to put their complaints in writing),
- to initiate a complaint against an Australian lawyer or an Australian-registered foreign lawyer,
- to investigate, or take over the investigation of, a complaint if the Commissioner considers it appropriate,
- to monitor investigations and give directions and assistance to the Councils in connection with the investigation of complaints,
- to review the decisions of the Councils to dismiss complaints or to reprimand Australian lawyers or Australian-registered foreign lawyers in connection with complaints,
- to take over investigations or to institute proceedings in the Tribunal against Australian lawyers or Australian-registered foreign lawyers following a review by the Commissioner,
- to conduct regular surveys of, and report on, the views and levels of satisfaction of complainants and respondent Australian lawyers with the complainants handling and

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13 Legal Profession Reform Act 1993 (NSW)

14 Legal Profession Act 2004 s.686

disciplinary system,

- to monitor the refusal to issue, cancellation and suspension of practising certificates,
- to exercise functions conferred on the Commissioner with respect to the suspension of practising certificates,
- to review the provisions and operations of the complaint and disciplinary provisions to ensure that the provisions are meeting the aims and objects of the legislation,
- to monitor generally the exercise of regulatory functions of the Councils (other than the imposition of conditions on practising certificates),
- to review legal profession rules,
- to assist the Councils to promote community education about the regulation and discipline of the legal profession,
- to assist the Councils in the enhancement of professional ethics and standards, for example, through liaison with legal educators or directly through research, publications or educational seminars.<sup>15</sup>

As can be seen the complaints and discipline provisions of the Legal Profession Act 2004 (NSW) do not exclude the Law Society or the Bar Council from a very important and dominant role in the process. The provisions do however put in place a transparent process that is overseen by the Legal Services Commissioner.

Members of the profession are also protected by the role of the professional body and the creation of the Legal Services Division of the Administrative Decisions Tribunal to which the relevant Council or the Legal Services Commissioner can refer complaints. The Tribunal is comprised of a judicial member, a professional member and a lay member.

The introduction of such a system to Fiji is essential in the light of the Fiji Law Society's failure to deal with a very significant number of complaints in a timely and transparent manner. The introduction of lay persons onto disciplinary committees of the Fiji Law Society in itself may well lead to greater efficiency and a motivation to deal with complaints in a timely manner. The stories are endless of the problems that have been associated with the process to date. For example, disciplinary committee members from the West have travelled to Suva on a Saturday for a meeting of a disciplinary committee only to find that access cannot be gained to the Law Society office and the journey is wasted. This cannot encourage support and participation from busy practitioners.

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<sup>15</sup> Legal Profession Act 2004 (NSW) s.688

The creation of a Legal Services Commissioner to oversee the operation of the complaints and disciplinary process with powers such as exist in NSW to remove complaints from the Law Society and to refer complaints to a Tribunal is, from my observations over the last five years, perhaps the only way the Fiji Law Society can be focused on the disciplinary role given to it by legislation. Whilst there is no administrative review tribunal in Fiji a Legal Services Tribunal could be established with a judge of the High Court as the judicial member on an ad hoc basis.

The cost of such a process would not be great and would be greatly outweighed by having a legal profession in Fiji that is properly entitled to the status of a profession. The maintenance of the rule of law and the development of the economy is dependant on there being a disciplined professional and ethical legal profession. The fact that the Fiji Law Society is able to raise \$50,000.00 to celebrate its 50<sup>th</sup> anniversary and at the same time it is unable to raise funds to deal with outstanding complaints and disciplinary matters, clearly shows that a process that is accountable to the community is required in the interests of Fiji. It is surely a clear case of *res ipsa loquitur*.