

**THE SYSTEM FOR DEALING WITH COMPLAINTS:  
THE COMMISSION'S APPROACH<sup>i</sup>**

**John Briton**

**Legal Services Commissioner**

Thank you for giving me the opportunity to talk with you. As you are no doubt aware, the Legal Services Commission was created as part of a comprehensive package of reforms to the regulation of the legal profession in Queensland brought about by the Legal Profession Act 2004 (the Act). Most if not all the Act came into effect almost two years ago now, on 1 July 2004, including Chapter 3 which establishes the system for dealing with complaints and disciplinary matters.

That system established under the Act significantly reformed the previous system for dealing with complaints about and disciplining solicitors and law practice employees. I will describe some of those reforms shortly but of course one of them is that the system no longer applies only to solicitors and law practice employees but for the first time extends to include barristers.

It is important that we set the reforms in context, and not only the reforms to the complaints and disciplinary regime but the Act's other reforms also. The fact is that the Act embeds the regulation of the legal profession firmly within a consumer protection context. This is entirely consistent with reforms and proposed reforms to the regulation of the legal profession elsewhere including most recently in the United Kingdom.

I note for example that the Secretary of State for Constitutional Affairs and Lord Chancellor presented a report to the British Parliament in October last year that sets out the government's response to Sir David Clementi's recent review of the regulation of the legal profession there. The Lord Chancellor says among other things in his foreword to the report that 'consumers need, and deserve, legal services that are efficient, effective and economic. They want to have choice, and they want to have confidence in

a transparent and accountable industry. Legal services are crucial to people's ability to access justice. They must therefore be regulated in such a way as to meet the needs of the public – individuals, families, and businesses.'

The Lord Chancellor goes on to say 'the professional competence of lawyers is not in doubt... but despite this, too many consumers are finding that they are not receiving a good or a fair deal... The case for reform is clear, and reform is overdue... The proposed regulatory framework sets the framework within which firms can deliver consumer focussed legal services... Our vision is of a legal services market where excellence continues to be delivered; and a market that is responsive, flexible, and puts the consumer first.'

Notably, to underscore the point, the report goes under the name 'The Future of Legal Services: Putting Consumers First'.<sup>ii</sup>

In any event, returning to home, the *Legal Profession Act 2004* Act says one of its main purposes is 'to provide for the protection of consumers of legal services and the public more generally.'<sup>iii</sup>

It goes on to describe the main purposes of Chapter 3 as follows:

- to provide for the discipline of the legal profession;
- to promote and enforce the professional standards, competence and honesty of the legal profession; and
- to provide a means of redress for complaints by consumers.<sup>iv</sup>

### **The system established under the Act for dealing with complaints**

I have attached a flow chart at Appendix 1 that describes the system established under the Act for dealing with complaints. In summary, however, the Act establishes the Commission as the sole body authorised to receive complaints about solicitors, barristers and law practice employees in Queensland. It doesn't however confine the Commission to responding to complaints, but gives the Commissioner power, if the

Commissioner believes it to be appropriate, simply to start an investigation into the conduct of a solicitor, barrister or law practice employee. These are called 'investigation matters'.<sup>v</sup>

The Act gives the Commission power to deal with complaints or investigation matters itself or alternatively to refer them to the professional bodies to be dealt with there. In the latter case, however – whenever the Commission refers complaints or investigation matters to the professional bodies for investigation – the investigation remains subject to the Commission's direction and control and the professional bodies are obliged to report their recommendations to the Commission for decision.<sup>vi</sup> It gives the Commission and the Commission alone the power to decide whether the evidence after investigation is sufficient to warrant a disciplinary response and, if so, the power to initiate and prosecute disciplinary proceedings.

These are significant powers. My intention today is to describe the thought processes the Commission brings to bear in exercising these powers and applying them to the realities that confront us.

One of those realities, incidentally, is that the Commission received 1485 complaints during the year to 30 June 2005 - the first year since the Act came into effect on 1 July 2004 - and 60 or 1 in 25 of those complaints were complaints about barristers. Notably there were (in round figures) about 6600 legal practitioners in the jurisdiction over that same time about 600 or 1 in 11 of whom were barristers. Barristers in other words were significantly under-represented in the Commission's complaints statistics, over its first year at least.

I wouldn't read too much into that, frankly, other than that solicitors are more vulnerable to complaints than barristers simply because they are more likely than barristers to deal directly with consumers and hence prospective complainants. Certainly barristers who accept direct briefs appear to be over-represented in the complaints against barristers, at least on the basis of the small numbers of complaints we have received thus far. In any event, the under-representation in the complaints statistics of barristers as a whole suggests that the Commission is less likely to

encounter barristers who happen to be subject to complaint than barristers who happen to be representing solicitors subject to complaint – and I have that in mind as I talk to you.

### **Some preliminary observations**

It might be useful if I'm trying to describe how the Commission thinks about its role to start with some preliminary observations.

The first of them is that one of the basic legal principles that applies to our work is, as the Court of Appeal put it only in December, that 'the object of disciplinary action against legal practitioners is not to exact retribution: it is to protect the public and the reputation of the profession.'<sup>vii</sup> We believe that, and we believe the best way to protect the public and the reputation of the profession is to improve standards of conduct within the profession so as to avoid complaints and the need for disciplinary action in the first place. We will try always to be looking for any leverage our powers under the Act give us to improve standards of conduct within the profession and we don't believe making examples of errant practitioners is the only or the best way to achieve that goal.

The second observation is that many practitioners – and I suspect this is true of barristers in particular - conceive the system for dealing with complaints primarily if not exclusively in terms of upholding high ethical standards within the profession. Indeed some practitioners and again I suspect this is true of barristers in particular seem to associate professional discipline solely with strike-off and suspension and to regard misconduct undeserving of a penalty of that order as trifling and hardly worth the effort of prosecution.

The purpose of the exercise as they see it is to 'get rid of the bad apples' in their midst – the small number of practitioners who wilfully or recklessly flout the ethical rules and accepted standards of professional conduct and practice. I use the phrase 'bad apples' advisedly. I have heard it used and have even been stopped in the street and asked in precisely these terms just what progress we're making. I have been asked in a similar

vein about how many and whose 'scalps' I've collected, or should have, over the time I've had available to me as Commissioner.

I don't want to understate the importance of getting rid of the bad apples - that is an essential ingredient of any effective regulatory regime - but it seems to me that the system for dealing with complaints has to be conceived much more broadly than that. That is because, firstly, very few complaints describe breaches of high ethical standards of a kind that might warrant practitioners being struck off or suspended.

I note for example that the Law Society received just over 1600 complaints in 2002-03 and slightly more again in 2003-04 but that the profession shed itself of only 27 bad apples over those same two years, 15 of them struck off and 12 suspended. That is fewer than 1 bad apple for every 100 complaints and I do not believe that low ratio reflects a want of trying by investigators and prosecutors. It seems to me that the professional bodies have always had a vested interest in ensuring that practitioners who bring the profession into disrepute in these ways get their just desserts, and it seems to me they have always pursued them vigorously, the rhetoric about Caesar judging Caesar notwithstanding.

The fact is that most complaints describe much less serious conduct than would justify the practitioners being struck off or suspended. Most complaints describe conduct of much more prosaic kinds than that, and very often conduct of a kind that in the context of an employment relationship would be seen in a performance management rather than a disciplinary context.

Some complaints are completely without substance, of course, and others whatever their merits can't be proved, but most complaints, even most substantiated complaints, describe everyday mistakes and errors of judgment and poor standards of service rather than misconduct as that term is more commonly understood. They are the sorts of complaints that might best be dealt with by requiring the practitioner to apologize to the complainant or to re-do the work or to waive some or all of their fee or to fix their office systems or to undertake some further training and the like.

The bad apples are in a small minority, even among practitioners subject to legitimate complaint, and if that's what we are looking out for as regulators then we're likely to overlook more minor infractions and move on the next big issue. The risk if we do that is that underlying problems are left unresolved and complainants are left nursing their sense of grievance. This is one reason why consumers find themselves not getting a good or a fair deal, as the Lord Chancellor put it in the White Paper I referred to earlier, and it seems to me to be where the Caesar judging Caesar rhetoric gets its traction. It is the primary reason as I see it why the complaints and disciplinary regimes that have been administered by self-regulating professional bodies have fallen into disrepute - in the United States,<sup>viii</sup> in the United Kingdom<sup>ix</sup> and, as we know from local experience, in Queensland.

We will inevitably focus our attention on the bad apples, if that's how we frame the problem, but we need to frame the problem more broadly. We need to focus attention also on the many more practitioners who are not bad apples and whose conduct is less serious and may even be inadvertent but yet is unsatisfactory in any ordinary sense of the word and gives consumers less than a good or a fair deal.

We will add value by establishing a complaints-handling culture that listens more actively to what complaints are telling us and that recognises that everyday mistakes and errors of judgment and poor standards of service are at least as damaging to the reputation of the profession as the occasional bad apple.

The question for me then is this: how, short of exacting retribution on the one hand or averting its gaze on the other, can the Commission best use its powers at the less serious end of the misconduct spectrum to protect the public and the reputation of the profession?

### **The Commission's powers and the two key concepts**

The Commission's first judgment call, once we decide a complaint meets a number of threshold criteria, is to decide if the complaint alleges conduct on the part of the practitioner that amounts to either unsatisfactory professional conduct or professional

misconduct. If we say yes, then the Act obliges us and gives us significant powers to investigate the complaint.<sup>x</sup> If we say no, hence that the complaint describes what the Act calls a consumer dispute,<sup>xi</sup> then our powers are limited to suggesting to the parties that they enter into mediation.<sup>xii</sup>

The Act obliges us to make a similar judgment call after we've completed an investigation. It gives us the option to dismiss a complaint after investigation if we say *either* there is no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct *or* that it's in the public interest to dismiss the complaint.<sup>xiii</sup>

So how do we decide? The Act doesn't define either term exhaustively but says only that:

- *unsatisfactory professional conduct* includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner<sup>xiv</sup>; and
- *professional misconduct* includes unsatisfactory professional conduct... if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence and conduct... whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that a person is not a fit and proper person to engage in legal practice.<sup>xv</sup>

The question in relation to professional misconduct is the easier of the two. There is plenty of case law, for a start, and in any event professional misconduct generally if not always announces itself by virtue of its gravity.

The question in relation to unsatisfactory professional conduct is more problematic. There is little or no case law to help settle the issue.<sup>xvi</sup> We are left having to ask ourselves a fundamental question: just how unsatisfactory does a practitioner's conduct

in connection with the practice of law have to be to amount to unsatisfactory professional conduct?

The answer is by no means clear but what does seem to be clear is that it no longer has to be as unsatisfactory as it used to have to be. We think there is a strong argument that the concept of unsatisfactory professional conduct applies to a broader range of conduct than the concept of unprofessional conduct that underpinned the previous system for dealing with complaints.

The concept of unprofessional conduct was found at common law to mean 'conduct that may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession of good repute and competency.'<sup>xvii</sup>

Notably, however:

- the definition in the Act of unsatisfactory professional conduct refers not to the standard '*members of the profession of good repute and competency*' are entitled to expect of their fellow practitioners but to the standard '*a member of the public is entitled to expect*';
- not only that, but the Act's definition of unsatisfactory professional conduct omits the words '*falls short of the standard to a substantial degree*';
- the Act gives the Commission no summary reprimand or other like powers – powers of a kind the Law Society had under the previous system for dealing with complaints. It follows that the Act contemplates the Commission bringing discipline applications for unsatisfactory professional conduct of kinds which would not previously have become subject to discipline applications but would have been dealt with administratively; and
- while it enables the disciplinary bodies to make orders of a kind that are typically associated with discipline and punishment – orders to strike off or to

suspend or to fine or to publicly reprimand a practitioner – the Act also enables them to make orders that are more in the nature of and which in any other context might be regarded as performance improvement plans more so than punishment per se.<sup>xviii</sup> They include orders that a practitioner 'do or refrain from doing something' in connection with his or her legal practice or engage in practice only 'in a stated way' or 'subject to stated conditions' or that he or she 'seeks advice' from someone nominated by their professional body.

So we think the concept of unsatisfactory professional conduct has a wider application than the (now superseded) concept of unprofessional conduct. There is now an additional and potentially tougher benchmark. Unsatisfactory professional conduct includes conduct that falls short not only of the standard 'members of the profession of good repute and competency' are entitled to expect of their fellow practitioners but of the standard 'a member of the public is entitled to expect.'

It seems to us accordingly that the term applies to a range of conduct that most people, practitioners included, would regard as unsatisfactory in any ordinary sense of the word but which would not previously have been regarded as 'unprofessional'. We think it extends well beyond unethical conduct as that term would commonly be understood and, depending on the circumstances, that it can include the sorts of everyday mistakes and errors of judgment and poor standards of service that give consumers less than a good or a fair deal.

This is no bad thing, certainly from a consumer point of view. Nor (possible appearances aside) is it necessarily punitive from a practitioner point of view, in either intent or effect – far from it. Rather, it creates an opportunity if only we grasp it to improve standards of legal service delivery in the interests of consumers and practitioners alike, and in the most practical of ways and proactively. That is because it is hard to see how it could be in the public interest to prosecute practitioners for alleged unsatisfactory professional conduct of these kinds provided they can show they've done what they reasonably can to put things right or taken steps to prevent similar mistakes in future.

I might add that in my view the Act similarly broadens the application of the concept of professional misconduct. That concept has hitherto been understood to apply to conduct that 'would be reasonably regarded as disgraceful or dishonourable by [a practitioner's] professional brethren of good repute and competency.'<sup>xix</sup> Now of course it applies also to conduct that represents a 'substantial or consistent' failure to reach the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

As I see it, a practitioner's conduct stands to fall short of expectation measured against this new benchmark despite the fact that other practitioners might not regard it as in any way disgraceful or dishonourable. The new standard doesn't seem to me to imply any wilful or reckless flouting of ethical rules or moral delinquency – just a substantial or consistent failure to reach or maintain the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent legal practitioner.

It seems to us, cutting a long story short and borrowing the Lord Chancellor's words, that consumers have been put first at the very core of the new complaints and disciplinary regime – in the construction of the two key concepts of unsatisfactory professional conduct and professional misconduct.

### **Some practical examples**

Consider the following true story. It is typical of the many stories we hear in complaints every day and has been changed only to disguise the practitioner's and the complainant's identities.

- Ms Brown, a sole practitioner, accepted Mr Smith's retainer to act in a family law dispute about the custody of Mr Smith's son. Ms Brown asked Mr Smith to pay several thousand dollars into her trust account by way of retainer but commenced drafting proceedings prior to payment. Mr Smith duly paid over the money and some time afterwards arrived at Ms Brown's office without an appointment. Ms Brown had a series of appointments with other clients and was unable to see him. Mr Smith left some papers which Ms Brown asked her secretary to put on the file.

Ms Brown went home that afternoon with the intention of reading the documents the following morning but became sick overnight and didn't return to the office for several days, and only after appearing in the Family Court that morning in relation to another matter. She promptly read Mr Smith's file to discover that the documents he had left the best part of a week earlier included an application for residence by his estranged wife that was returnable in the Court that very morning.

- Mr Smith was aggrieved by Ms Brown's failure to appear, ended the retainer and engaged another solicitor. He believed, in all likelihood falsely, that her failure to appear had cost him any chance of obtaining a residence order in his favour. Ms Brown refunded the money he had paid into her trust account but even so Mr Smith lodged a complaint with the Commission.
  
- The Commission referred the complaint to the Law Society for investigation and the Society put it to Ms Brown for her response. She responded defensively – she pleaded her illness, the high cost of and in any event the high impossibility of engaging a locum and, more generally, the travails of suburban sole practice. The Society returned the file to the Commission with the recommendation that we dismiss Mr Smith's complaint on the ground that there was no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct.

The question of course is whether in all the circumstances Ms Brown's conduct in failing to appear 'falls short of the standard of competence and diligence a member of the public' – in this case Mr Smith – 'is entitled to expect of a reasonably competent Australian legal practitioner'. The Law Society said no but we weren't so sure.

Notably I put his scenario (and 15 other like scenarios) to each of the 154 solicitors who attended a series of CPD Ethics workshops at various locations across the state late last year and to 157 final year law students at the University of Queensland. I asked them exactly the question I have just asked. Interestingly, 57% of the students but only 43% of the practitioners answered that question in the negative – and the others all said 'yes'.

Or consider this story – it, too, is typical of the stories we hear in complaints every day:

- Mr Black, a self-employed business man who required a driver's license for business purposes but who had accrued excessive demerit points, faced having his licence cancelled. He consulted a sole practitioner, Mr White, and paid \$600.00 into his trust account by way of retainer to lodge an appeal in the Magistrate's Court on his behalf and subsequently to represent him when the appeal was heard. He had 28 days to lodge the appeal.
- Mr Black became increasingly concerned that Mr White hadn't got back to him with the relevant documents for his signature and finally rang his office in some frustration 27 days later, both during the morning and several times again during the day. Mr White wasn't available to take his calls. Mr Black left messages and called again the following morning, the final day the documents could be lodged with the Court.
- Mr White returned Mr Black's call at 3 o'clock that afternoon and asked him to meet him at the Magistrate's Court to sign the requisite documents. Mr Black had to cancel appointments and to travel to the city as a matter of urgency. The documents were duly signed and lodged but Mr Black remained disgruntled, terminated his retainer with Mr White and complained to the Commission.

The question once again is whether in all the circumstances Mr White's conduct fell short of the standard of competence and diligence a member of the public – in this case Mr Black – is entitled to expect of a reasonably competent Australian legal practitioner.

I put this question also to the solicitors who attended the CPD workshops and to the students at UQ. I can tell you that 76% of the students and 64% of the practitioners answered in the affirmative.

So how did we deal with these complaints?

It seemed to us in relation to the first of them that the issue was not so much what Ms Brown failed to do when (and because) she was sick. The problem in our view was what

arguably she had failed to do when she was well – to put systems in place to prevent such incidents. This is what we did:

- We rang Ms Brown to discuss the matter further. She became distressed at the prospect we might initiate disciplinary proceedings but the complaint-handler had the presence of mind to suggest she consider exercising her entitlement as a member of the Law Society subject to complaint to three free hours of legal advice. Subsequently we asked her in writing to make submissions to us as to why we shouldn't regard her conduct in failing to appear to be unsatisfactory professional conduct.
- Ms Brown duly exercised her entitlement to legal advice and her solicitor in due course made representations on her behalf to the effect that the conduct in question fell short of the requisite threshold and that in all the circumstances it would be inappropriate to file a discipline application. We said that was an open question, in our view, but in any event that we could see no public interest in going down that track if only she could persuade us she had learned from the experience and that it wouldn't happen again.
- Ms Brown subsequently wrote to us. She apologised to Mr Smith for her failure to attend at Court and described what she'd done to ensure it wouldn't happen again. It included arranging for a senior practitioner to review her systems and committing to implement any recommendations, arranging for her secretary to undertake training provided by the Law Society and entering into a reciprocal arrangement with a fellow local sole practitioner 'whereby if either practitioner is away the other practitioner will monitor and look after the other's office for a period of one hour per day whilst they are away.'
- The Commission promptly dismissed Mr Smith's complaint on the ground that there was now no public interest in taking it any further. Ms Brown had effectively pre-empted in a 'self-help' way any orders of a 'performance improvement' kind that might have been open to a disciplinary body had we filed and succeeded in a discipline application.

We responded similarly to the second complaint. It seemed to us in all the circumstances that Mr Black was reasonably entitled to expect Mr White to prepare his appeal documents in a timely fashion and not to have to cancel appointments to make a last minute dash to the city to ensure they were lodged on time. This is what we did:

- We wrote to Mr White in these terms and invited him to make submissions as to how the public interest would be served were we to dismiss the complaint.
- Mr White rang us the very next day and admitted his conduct of the matter was unsatisfactory. He said he intended to contact Mr Black forthwith and to apologise personally and in writing. He also offered to refund the entirety of his fee and any additional sum Mr Black might wish by way of compensation for his inconvenience. We said this was a matter for himself. He explained that his office systems at the time were chaotic but had since been reorganised under a new office manager. We told him that his conduct might well amount to unsatisfactory professional conduct but we could see no public interest being served by initiating disciplinary proceedings provided only that he did what he'd told us he intended to do.
- Shortly afterwards Mr Black rang the Commission to say that Mr White had contacted him and apologised and that they had agreed Mr White would repay his fees plus GST. Mr White subsequently wrote to us to confirm that he had done what he said he would and we promptly dismissed Mr Black's complaint on the ground there was now no public interest in taking it any further. Again, he had effectively pre-empted in a self-help way any orders of a performance improvement kind that might have been open to the Legal Practice Committee had we filed and succeeded in a discipline application.

They were both good outcomes, in our view, and we propose to use the same methodology in other like cases in future, certainly when the facts aren't in dispute and appear to give complainants legitimate grounds to feel aggrieved. We propose to keep our options open. We will invite practitioners in these circumstances to make – and of

course we will listen to – any submissions they might care to make to us about the definitional issue, given their particular circumstances.

More fundamentally, however, we will invite them to deal with the issues of substance. We will invite them to make submissions that seek to persuade us that no public interest would be served by initiating disciplinary proceedings because, whatever the definitional issue, they have resolved the problem as best they can or fixed whatever it was that went wrong so it doesn't happen again.

The strategy has wide application. We often hear from consumers that a practitioner has sent them a bill that far exceeds the practitioner's original estimate of their costs, for example, but at no stage told them of the likely increase. Consumers are reasonably entitled to expect they will be told if their costs are blowing out, in our opinion, even if the bill at the end of the day fairly reflects the work the practitioner undertook on their behalf. They are entitled to expect their lawyers to talk with them before running up bills on their behalf no less than they're entitled to expect other service providers to talk with them in the same or similar circumstances – be they their dentist or motor mechanic or anyone else. We would welcome submissions from practitioners in these circumstances that demonstrate how they have improved their business systems so as to ensure they keep their clients informed in future about any significant increases in their estimated costs.

Numerous other examples come readily to mind including, for example, complaints that describe undue delays by practitioners in attending to matters on their clients' behalves which might or might not have been beyond their control but which in any event they failed to communicate to their clients.

The strategy we adopted in these cases seems to us to be a useful and important way to respond to the Act's apparently broader definition than previously of the sorts of conduct that can properly be subject to investigation and potentially to disciplinary proceedings. It gives us leverage we wouldn't otherwise have to improve standards in response to common complaints of a kind that have previously gone largely unheeded – complaints about conduct that in the context of an employment relationship, for

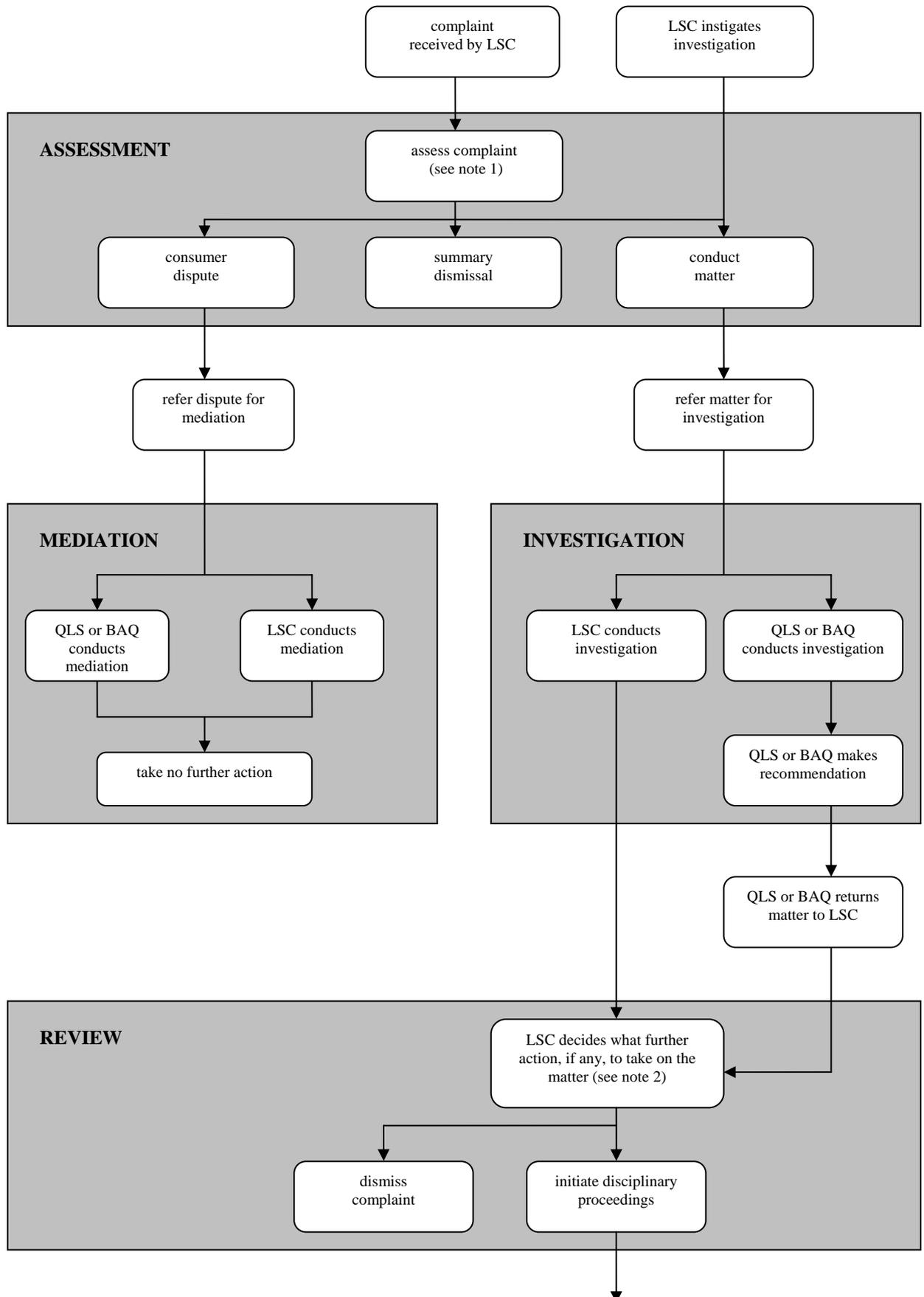
example, would warrant a performance management rather than a disciplinary response. It gives us both a stick and a carrot to put before practitioners subject to these kinds of complaints to encourage them to take constructive remedial action appropriate to their circumstances.

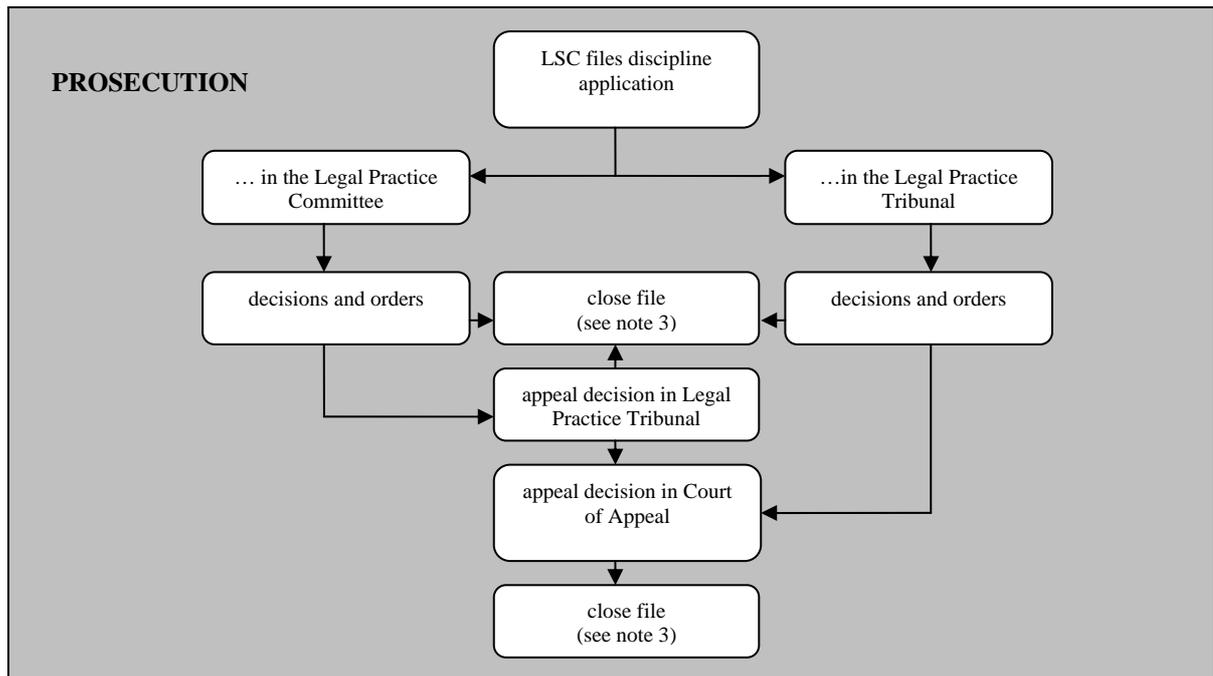
No doubt some practitioners will equate making a submission that describes how they have addressed whatever it might have been that went wrong as a self-incriminating admission of some kind and shrink from it in favour of a not guilty plea, as it were. That is unhelpful.

Indeed it would be a good thing, at least in respect of unsatisfactory professional conduct if not of more egregious misconduct, to rid the disciplinary regime altogether of any of the language and imagery that tend to portray unsatisfactory professional conduct as somehow akin to crime. I refer to the language and imagery of 'charging' practitioners with disciplinary 'offences' and 'prosecuting' them in the expectation they will be found 'guilty' and be 'punished' accordingly.

The main game is not one of prosecuting and punishing practitioners for minor infractions but promoting and protecting the rights of legal consumers by improving standards of legal service delivery.

**Appendix 1: the system established under the Act for dealing with complaints**





1 The Commission is the sole body authorised under the *Legal Profession Act 2004* to receive complaints about the conduct of legal practitioners and law practice employees. We assess complaints against a series of criteria set out in the Act. The assessment leads to one of 3 possible outcomes:

- the complaint is classified as a *conduct matter* if the conduct complained of would, if established, fall short of the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent Australian legal practitioner or would justify a finding that the practitioner is not a fit and proper person to engage in legal practice;
- the complaint is assessed as a *consumer dispute* if the conduct complained of does not meet those criteria but is nonetheless conduct to which the act applies;
- the complaint is *summarily dismissed* if the conduct complained of is not conduct to which the Act applies (see sections 248-259 of the Act).

The Act gives us the option to try to mediate consumer disputes or to refer them to the Law Society or Bar Association for mediation. It requires us to investigate conduct matters or alternatively to refer them to the Law Society or Bar Association for investigation - in which case the investigation remains subject to the Commission's direction and control. The Society and the Association are obliged after the investigation to report their recommendations to the Commission.

2 The Commission is the sole body authorised to decide what action, if any, to take on a conduct matter after investigation. The Act requires us to assess whether the evidence establishes a reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct and whether it is in the public interest to initiate disciplinary proceedings. We initiate disciplinary proceedings if the answer to both questions is 'yes' – in the Legal Practice Tribunal in relation to more serious matters or in the Legal Practice Committee in relation to less serious matters. We dismiss complaints if the answer to either question is 'no'.

3 The Commission is obliged to keep a discipline register of all disciplinary action taken under the Act (see section 296 of the Act).

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**Endnotes:**

- <sup>i</sup> This is an abbreviated and slightly modified version of the Trilby Misso Free Public Lecture I gave at the QUT on 26 October 2005. That lecture was itself an expanded version of a speech I gave to the Central Queensland Law Association Conference in Yeppoon on 26 August 2005
- <sup>ii</sup> *The Future of Legal Services: Putting Consumers First*, Department for Constitutional Affairs, October 2005
- <sup>iii</sup> *Legal Profession Act 2004*, section 3
- <sup>iv</sup> section 243
- <sup>v</sup> section 265(1)(c)
- <sup>vi</sup> section 268
- <sup>vii</sup> *Legal Services Commission v Baker* [2005] QCA 482
- <sup>viii</sup> in addition to *The Future of Legal Services: Putting Consumers First*, see *Lawyer Regulation for A New Century*, the Report of the Commission on Evaluation of Disciplinary Enforcement, American Bar Association Center for Professional Responsibility, February 1992
- <sup>ix</sup> see *The Future of Legal Services: Putting Consumers First*, above
- <sup>x</sup> sections 266, 269 and 540-578
- <sup>xi</sup> sections 262-263
- <sup>xii</sup> section 259(1)(b)
- <sup>xiii</sup> sections 273-274
- <sup>xiv</sup> section 244
- <sup>xv</sup> section 245
- <sup>xvi</sup> Linda Haller, *Imperfect Practice under the Legal Profession Act 2004*, (2004) 23 *The University of Queensland Law Journal*, at p.418
- <sup>xvii</sup> *Re R, a practitioner of the Supreme Court* [1927] SASR 58,61
- <sup>xviii</sup> section 282, especially sub-sections (d)-(g)
- <sup>xix</sup> Lopes LJ in *Allison v General Council of Medical Education and Registration* (1894) QBD 750 at 768. See also *re Hodgekiss* [1962] SR (NSW) 340 and *Kennedy v The Council of the Incorporated law Society of New South Wales* 1940 13 ALJ 563