

Bar Association of Queensland 2008 Annual Conference

COMPLAINTS ABOUT LAWYERS: REGULATION, REPRESENTATION AND RESTORATIVE JUSTICE

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Thank you for inviting me to talk at your annual conference once again. This makes three years in a row. I take that as a compliment and a vote of confidence that I won't bore you by repetition. I will try to avoid that by talking about some bigger picture issues that I see arising out of the way we regulate professional standards in the legal profession but at the same time grounding what I have to say in matters that are closer to home and probably of more immediate interest to you.

I will start however by reciting some basic facts about the complaints the Commission has dealt with over the first three and a half years since our inception – the period 1 July 2004 through 31 December 2007.

Some basic statistical data about complaints against Queensland barristers

The basic facts are these:

- there were 6379 solicitors with practising certificates as at 1 July 2006 and 853 barristers and the relativities haven't changed much over the years - so about 1 in 10 of Queensland's legal practitioners are barristers and about 9 in 10 are solicitors;
- we received 4232 formal written complaints over the period 1 July 2004 through 31 December 2007, an average of just over 1200 a year or about 1 complaint for every 6 Queensland legal practitioners.ⁱ Those complaints included 208

complaints against barristers, about 1 in 20 of the total number of complaints, and 3795 against solicitors, about 9 in 10. On our experience to date, then, barristers are about half as likely as solicitors per head of population in the profession to find themselves subject to complaint;

- we summarily dismissed 1041 or almost 1 in 4 of the 4232 complaints for one reason or another, mostly for want of jurisdiction;
- we commenced investigations into the 2307 complaints we assessed to allege either unsatisfactory professional conduct or professional misconduct on the part of the respondent practitioners, and we initiated a further 398 investigation matters or ‘own motion’ investigations – so we commenced 2705 investigations in all;
- of those 2705 investigations, 125 or about 1 in 20 concern conduct or alleged conduct on the part of barristers and 2444 or about 9 in 10 concern conduct or alleged conduct on the part of solicitors - on an annualised basis, about 1 for every 25 barristers and 1 for every 10 solicitors.

Of course some practitioners within each respondent group are more likely than others to find themselves subject to investigation. That is determined among other things by the areas of law in which they practice, their gender and their age. I note for example that half of all the investigations concerning solicitors arise from the practice of family law (1 in 5), conveyances (1 in 5) and personal injuries law (1 in 10). I note also and perhaps more surprisingly that women solicitors are three times less likely than men solicitors to find themselves subject to investigation and that solicitors whatever their gender become increasingly more likely to find themselves subject to investigation as they get older.

I am cautious about drawing premature conclusions from the much smaller number of investigations about barristers but it appears (and this is hardly

surprising) that barristers who accept direct briefs are more likely to find themselves subject to investigation than barristers who do not.

And of course some practitioners, barristers and solicitors alike, find themselves subject to investigation more than once. We have concluded 98 of the 125 investigations we commenced in relation to barristers, for example, and those 98 investigations involved only 78 respondent barristers – 62 of whom were investigated once; 13 twice; 2 three times and 1 four times. Similarly, we have concluded 2206 of the 2444 investigations we commenced in relation to solicitors, and those 2206 investigations involved only 1113 respondent solicitors – 723 of whom were investigated once; 231 twice; 97 three times and 62 four or more times.

- The numbers get ‘better’ again in the sense that only relatively few of the investigations we have seen through to conclusion have resulted in disciplinary proceedings.

We concluded 53 of the 98 investigations we concluded in relation to barristers, for example, just more than half of them, on the basis that there was no reasonable likelihood a disciplinary body would find the respondent barristers guilty of unsatisfactory professional conduct or professional misconduct. We concluded a further 17, about 1 in 6, on the basis that, while there might have been a reasonable likelihood of an adverse finding, nonetheless no public interest would be served by initiating disciplinary proceedings. We concluded only 9 or 1 in 10 of them by deciding to initiate disciplinary proceedings.

Those 9 prosecutions involve 9 respondent barristers, 3 of whom have so far faced the Legal Practice Tribunal which found each of them guilty of professional misconduct - 1 was struck off and the other 2 were reprimanded and fined, 1 of them \$5,000 and the other \$20,000. We have filed a further 4 discipline applications with the Tribunal that have yet to be heard and are currently preparing discipline applications in relation to the remaining 2. Those 6 matters should all be heard this calendar year.

We concluded 1194 of the 2206 investigations we concluded in relation to solicitors on ‘no reasonable likelihood’ grounds, once again just more than half of them, and 504 or almost a quarter of them on ‘no public interest’ grounds – this might seem to be an unusually high number and I will come back to this matter shortly. We concluded only 103 or about 1 in 20 of them by deciding to initiate disciplinary proceedings in one or the other of the disciplinary bodies and 78 of those discipline applications have now been decided - and all but 2 of the respondent solicitors were found guilty of either unsatisfactory professional conduct or professional misconduct or both.ⁱⁱ

The upshot of all of that, if the trends thus far persist into the future, is that barristers are only half as likely as solicitors per head of population to find themselves subject to complaint and to investigation but, if they do, twice as likely to find themselves answering to a disciplinary body and, like solicitors, very likely in that eventuality to find themselves subject to an adverse finding.

There is one other statistic I would like to share with you and that allows me also with only a minor detour to segue to the first of the bigger picture matters I want to raise.

The reforms to the regulation of the legal profession that came about when the *Legal Profession Act 2004* commenced on 1 July that year 2004 fundamentally changed the system for dealing with complaints, not least by creating the Legal Services Commission as an independent statutory body to receive and deal with complaints and to decide what action to take on a complaint, if any.

The Commission’s independence of the profession is crucial to the integrity of the new regime. You’ll recall that the Law Society when it had the responsibility under the previous regime was savaged in the media for the way it was seen to deal with complaints and - this is how the problem was portrayed - that the public could have no confidence in a system which, by requiring consumers to take their complaints about solicitors to the solicitors’ union, saw ‘Caesar judging Caesar’. That might or might not have been a fair way to characterise it but there was a problem and a real one even so -

systems for dealing with complaints have to be and be seen to be disinterested and impartial and the system as it then was failed to meet that test.

The new system charges the Commission with receiving and deciding what action to take on complaints but it allows the Commission to refer complaints to the professional bodies for investigation and in those circumstances requires the professional bodies to report back and to recommend how the complaints should be resolved.

The system is co-regulatory both in spirit and actuality. The Commission has an arrangement with the Law Society whereby we refer there about half the complaints about solicitors that require investigation and with the Bar Association whereby we refer almost all complaints about barristers.

Notably - the numbers move around a little, but this is the consistent trend - we find ourselves disagreeing with the decision urged upon us by the Law Society in about 1 in 10 of the matters we refer there and with the Bar Association in about 1 in 10 matters also. We mostly agree, in other words, and as it happens our disagreements when we have them are mainly in relation to matters in which reasonable minds are likely to disagree in any event - and indeed often already have in the Society's or Association's committee that considered the matter. There have been a few, but only a few disagreements of a more substantial kind.

It would be wrong to make too much of that ⁱⁱⁱ but the high level of agreement does nothing to detract from the fact that the Commission's independence of the profession is crucial to the integrity of the system for dealing with complaints, and that the process must be and be seen to be disinterested and impartial.

**An issue arising from some recent and well known, real and imagined complaints:
the inevitable tension between representative and regulatory functions**

I can't help but remark in this context how very differently the Bar Association and the Law Society responded to the recent and very public criticism of their members Stephen Keim SC and Peter Russo respectively. The Commissioner of the Australian Federal

Police, Mick Keelty, was highly critical of their conduct in the course of their defence of their client, Dr Mohamed Haneef, and his criticisms were repeated by the then Prime Minister and Commonwealth Attorney-General. They variously described Mr Keim's and Mr Russo's conduct as 'inappropriate', 'unprofessional', 'improper' and 'highly unethical'.

The sequence of events - this is all a matter of public record - was as follows:

- Dr Haneef was arrested on 2 July 2007 in relation to his alleged connection to terrorist incidents in the UK and held in police custody. He was interviewed at length twice, on 3 July and again on 13 and 14 July. His arrest and detention was widely reported in the media. The media coverage included leaked information detailing aspects of the supposed case against him that was attributed to 'sources' on the prosecution side and that proved subsequently to be misleading and in some key respects simply untrue;
- Dr Haneef was charged on 14 July. He applied for bail very soon thereafter and was granted bail on 16 July. The Minister for Immigration announced almost immediately however that he had decided to exercise his discretionary power under the Migration Act to cancel Dr Haneef's visa on character grounds – so he was taken into custody once again and transferred to an immigration detention centre in Sydney;
- Mr Keim leaked the first record of interview to Hedley Thomas, a journalist with *The Australian*, on 17 July, in its entirety and without any editorialising - as he put it to inspire public debate about the accuracy or otherwise of the supposed evidence against his client that had been leaked by unidentified sources on the other side – and *The Australian* published it the following day, on 18 July;
- Mr Keelty and the Attorney-General criticised the conduct of journalist's unidentified informant in public interviews during the course of the day, in the terms that I have described and, later that same day, Mr Keim outed himself;

- the next day, 19 July, the then President of the Bar Association, Hugh Fraser QC, issued a brief media statement in response to the criticisms of Mr Keim. He said that Mr Keim was a highly respected and ethical member of the Bar and that he was entitled to a presumption of innocence, but that it wasn't appropriate to comment further because of the possibility that Mr Keim's conduct might become subject to formal complaint;
- the Bar Association promptly found itself subject to strident and public criticism from some of its members for its 'abjectly inadequate' and 'craven abdication' of its responsibility to come out in support of a member who had come under attack - 'if all it takes to cower the Association is... the possibility of an unidentified complaint to an unnamed authority then we have failed as an independent Bar';
- Mr Fraser issued a second media statement several days later, on 24 July. He said among other things that no-one had suggested that Mr Keim had acted other than honestly and with the best of intentions, but that 'any suggestion of possibly unethical conduct by a barrister is serious [and] must be dealt with thoroughly and impartially, in the public interest';

Mr Fraser went on to describe the statutory schema for dealing with complaints and added that 'it would be wrong... to pre-empt the Commissioner's decision [to refer such a complaint to the Association] or to disqualify the Association from making any investigation required by the Commissioner.' He said that he would not for that reason express any conclusion about Mr Keim's conduct but he repeated that Mr Keim was a respected member of the Bar who 'remained entitled to be regarded as innocent';

- four days later, on 28 July, having reviewed the evidence, the Commonwealth Director of Public Prosecutions dropped all charges against Dr Haneef;
- in the interim, on 20 July, a local solicitor complained to the Commission about Mr Keim's conduct. We referred the complaint to the Bar Association in August, but only after seeking and obtaining the Association's assurance that none of its

members who had already expressed a concluded view on the matter would have any part in the investigation. The complaint became a matter of public record on 17 September - I hasten to add not as a result of any leak on the part of anyone at the Commission from the Commission's end – and, notwithstanding all the prior speculation, Mr Keelty complained only on 8 August. We referred his complaint to the Association also;

- Mr Russo leaked the second record of interview on 22 August, according to media reports on the instructions of his client 'to try to balance the slander of his name by innuendo and selective leaking of information'. The Australian Federal Police issued a media release that same day saying that 'the continuing attempts by Dr Haneef's defence team to use the media to run their case is both unprofessional and inappropriate' and that it had notified the Commission of its concerns. Not surprisingly in all the circumstances, the media release was widely interpreted to mean that Mr Keelty had made a second complaint, this time about Mr Russo, although on closer reading that it not what it says;
- the Law Society interpreted it that way, too, and its President, Megan Mahon, unambiguously expressed the Society's views about the matter in a letter she wrote to me on 27 August - which, ironically enough, I learned about only when I read about it in the newspapers the following day. Ms Mahon's letter said among other things that Mr Russo had 'breached none of the conduct rules that govern the professional conduct of Queensland solicitors' and that he had 'acted at all times in this matter in a dignified and highly professional way and has earned the respect and commendation of his colleagues and the Queensland Law Society.'

Ms Mahon told me in subsequent correspondence that she felt 'very strongly' that 'it is a fundamental and important role for the QLS to defend our members against plainly unwarranted criticism. We would be failing abysmally in our duty and responsibility to our members if we did not adopt this course.' She also told me, in a conversation I'm sure she won't mind me repeating, that her members

had responded very positively to her coming publicly to Mr Russo's defence, and that she'd received numerous unsolicited expressions of support;

- the Bar Association finalised its report and recommendations to the Commission in relation to the complaints against Mr Keim in late December, although we didn't receive it until mid-January, and we (my delegate, as it happens, not me) dismissed both complaints and advised the parties accordingly on 1 February 2008. Given the public interest in the matter, and with Mr Keim's consent, we published our reasons and related materials on our website that same day, including the Bar Association's report and recommendations. I note for the record that we have never received a complaint about Mr Russo's conduct in this matter from the Australian Federal Police or anyone else.

I don't propose to say anything about the merits of either the complaints or the decision to dismiss them, but I do want to reflect on the very different ways the Bar Association and the Law Society responded to the speculation in the media that Mr Keilty had made a complaint or might make a complaint to the Commission about the conduct of their members, Mr Keim and Mr Russo.

There is an obvious and inherent tension between a professional body's membership services role in representing its members subject to complaint on the one hand and its regulatory role in impartially investigating complaints against its members on the other. I don't think anyone would dispute, for example, that a professional body can't properly expect to publicly or even privately represent a member subject to complaint and at the same time or some later time to investigate the complaint - or for that matter any related complaint - and to be and be seen to be disinterested and impartial.

The fact is that the Law Society knowingly precluded itself by defending Mr Russo in the way that it did from having any role in investigating a complaint about his conduct in defending Dr Haneef - and in this sense exercised my discretion for me, had in fact a complaint been forthcoming. The Bar Association on the other hand deliberately and knowingly opted to keep both its and my options open in relation to the complaints about Mr Keim.

I am not saying that the Society was wrong to do what it did and the Association was right, or vice versa - that is entirely a matter for the memberships. I am drawing attention, however, to the fact that there's a choice to be made and a choice that has consequences, and potentially in this instance consequences that go beyond any particular complaint.

One has to ask, it seems to me, to inform the exercise of the choice, just how often a professional body can defend or be seen to be defending its members subject to complaint before excluding itself from investigating not just those particular complaints but *any* complaints about its members.

In fact the question is broader than that – it becomes a question ultimately of just how proactive a professional body can be or be seen in advocating for its members generally, even in matters that have little if anything to do with complaints - and it strikes me as obvious that the more a professional body is seen to be an advocate for its members the less it will be seen to be disinterested and impartial in dealing with complaints about its members, fairly so or otherwise.

The challenge for the Society and the Association is to get the balance right or, alternatively, to make the existential decision and to decide which of these two not easily reconciled roles is most fundamental to its purposes. The balance is easily tipped. The co-regulatory system for dealing with complaints can survive an occasional display of partisanship with its integrity intact, but no more than that.

A corresponding structural tension at the national level

The recent reforms have largely resolved the inherent tension in Queensland between professional bodies' representative and regulatory roles and similar structural reforms to the regulation of the profession have been implemented right across the country. Queensland wasn't the first state to transfer responsibility for dealing with complaints from the professional bodies to an independent statutory body – the Queensland commission was born in to the world of regulation on the very same day our counterpart

in New South Wales celebrated its tenth birthday, and there were like (but differently named) bodies in existence in Victoria and Western Australia also. Nor was Queensland the last: we now have or soon will have counterpart bodies in every Australian state and territory under their local *Legal Profession Acts* when the national model laws have been fully rolled out.

Some states have chosen also to transfer other regulatory functions from the professional bodies to newly created statutory bodies – how many and which functions varies from state to state – and so the structural arrangements for the regulation of the profession have changed significantly over recent years.

There has been no corresponding structural reform at the national level. Of course there is no regulation to be done at the national level – that’s a purely state responsibility – but that’s where all the action is and has been for a decade or more now designing the reforms to the regulation of the profession through the development of national model laws and legal profession rules. Those laws have been developed by the professional bodies through their peak body, the Law Council of Australia, in consultation with the Standing Committee of Commonwealth, State and Territory Attorneys-General.

The Law Council like its constituent bodies will look after the interests of its members – it promotes itself as ‘representing 50,000 lawyers across the country’, and so it should – and so the consultative framework echoes at the national level the inevitable tensions between the professional bodies’ representative and regulatory roles that have been resolved at state and territory level by the creation of independent statutory bodies to receive and deal with complaints and for various other purposes. They (we) have no effective seat at the table.^{iv}

That’s understandable – we have arrived on the scene in numbers only recently – but now needs to change. The reform process has a way to go yet. There is a real push on from the large law firms in particular to better and more fully ‘harmonise’ the regulation of the profession across state and territory borders, and it will be all the poorer for it if the consultative mechanisms going forward exclude the experience and perspective the statutory bodies can bring to the discussion.

I don't have time to develop the argument, but I'm sure of this: the national model laws project has failed to deliver the desired 'harmonisation' of regulation of the profession across the country, not least of the multiplicity of complaints and disciplinary regimes. We may now have a 'core uniform' national definition of the meaning of the two key terms *unsatisfactory professional conduct* and *professional misconduct*, but those terms are interpreted and applied very differently from state to state because no two regulators have the same powers in relation to complaints.

I'm doubtful there will ever be full harmonisation within a federal framework but we can do a lot better, and that will require more effective and inclusive consultation. There is a forum that brings the professional bodies and the statutory regulators together and that provides a mechanism - the Conference of Regulatory Officers (CORO). CORO has had some success, and has recently succeeded for example in 'harmonising' the hitherto multiplicity of compulsory professional development schemes across the country, and it has potential to play a significant role in future deliberations. It has limited capacity however as things stand and would have to be better structured and resourced to play the role.

The issue is an important one I think and needs to be squarely on the agenda.

An issue arising from complaints about lawyers more generally: the need for the Commission to have summary powers in relation to complaints

The *Legal Profession Act 2004* reformed the system for dealing with complaints about lawyers not only by transferring responsibility from their professional bodies to an independent Commission but by redefining the benchmark standards against which their conduct and hence complaints are assessed. The system casts its gaze now well beyond conduct that can be sheeted home to practitioners personally and that other and reputable practitioners consider to be 'disgraceful' or 'dishonourable' or otherwise unethical. It extends now to include conduct that falls short of the standards of competence and diligence not only that lawyers are entitled to expect of their

professional colleagues but that members of the public are entitled to expect of a reasonably competent lawyer.

It's hard to overstate the importance of the re-conceptualisation. We get a lot of complaints – I've already recited the statistics – but only very few of them allege unethical conduct of kinds that would warrant a traditional disciplinary response. The vast majority describe conduct of much more prosaic kinds, many of them conduct of a kind that in the context of an employment relationship would be seen as a performance management rather than a disciplinary issue. They are no less important for that – 'garden variety' complaints about honest mistakes and 'stuff ups' and errors of judgement and poor standards of service and the like are at least as damaging to the reputation of the profession by reason of their weight of numbers alone as the very much less frequent but more serious complaints that allege some ethical wrongdoing.

The reforms have been a long time coming and it's as well to remind ourselves that they have their origins in the reports of inquiry after inquiry not only in this country but the UK and North America that described the shortcomings of the traditional approach and called for change. The recurring theme throughout all these reports was that the systems for dealing with complaints that have been administered traditionally by the professional bodies were too narrowly focused on ethical misconduct and failed to respond effectively to a much larger number of relatively minor but yet legitimate consumer grievances.

The New South Wales Law Reform Commission reported to that effect as long ago as 1979.^v The American Bar Association (the ABA) reported to similar effect in 1992^{vi} and so too the white paper tabled in the British parliament in 2005 setting out the government's reform agenda on the heels of the Clementi review of the arrangements for the regulation of the legal profession there. Notably the white paper has the title *The Future of Legal Services: Putting Consumers First*.^{vii}

The ABA study reported among other things that 'the overwhelming majority' of complaints about lawyers allege 'minor incompetence, minor neglect or other minor misconduct' or that lawyers 'behaved in ways that are unfair to the client and

unprofessional’, and that ‘many of them state legitimate grounds for client dissatisfaction.’ It also found that ‘the public is left with no practical remedy’ because ‘the system for regulating the profession is narrowly focused on violations of professional ethics’ and ‘does nothing to correct the lawyer’s behaviour or to compensate the clients.’

Interestingly in our context the ABA report goes on to argue that ‘cases of minor misconduct seldom justify the resources needed to conduct formal disciplinary proceedings’ and that ‘in most cases... the respondent’s conduct does not justify imposing a disciplinary sanction.’ It says instead that ‘what most of these cases call for is a remedy for the client and a way to improve the lawyers’ skills’, and that they ‘should be removed from the disciplinary system and handled administratively.’

Similarly, the *Putting Consumers First* report found that there had been significant improvements since problems with the handling of complaints in England and Wales first came to light in the 1980’s but, despite the improvements, ‘too many consumers are finding that they are not receiving a good or a fair deal’ and that ‘change is needed to meet their reasonable demands.’

It proposed reforms which would establish a single, independent regulator to receive and assess all complaints about lawyers and, consistent with the reforms proposed by the ABA more than a decade earlier, a system in which complaints about poor standards of service are dealt with separately from complaints which allege unethical or other serious misconduct – it envisages the regulator referring those complaints to the professional bodies for disciplinary action as appropriate but dealing in-house with complaints about poor standards of service.

Those reforms have since been implemented. The newly created independent regulator, the Office of Legal Complaints (the OLC), mediates complaints about poor standards of service but also, and ‘separate to any disciplinary action’, has significant powers ‘in all the circumstances of a complaint’ to require evidence and to make and enforce decisions that give consumers appropriate redress. They include powers ‘to require the provider to make an apology to a complainant; ...to re-do the work or otherwise remedy

the faults in the service provided to the complainant; ...to waive some or all of the fee; ...to take other steps in relation to the complainant as the OLC considers just; and to order a payment for poor service, loss or distress, such an award to be enforceable as a debt' – notably, to an upper limit of £20,000.^{viii}

It's interesting to review the recent reforms in Australia and in Queensland against this backdrop. Not surprisingly, given the findings of inquiry after inquiry, the national model laws and our own *Legal Profession Act 2007* (the Act) embed the system for dealing with complaints firmly within a consumer protection context. The Act describes its purposes, for example, as being not only to 'provide for the discipline of the legal profession' and to 'promote and enforce the professional standards, competence and honesty of the legal profession' but also and specifically to 'provide a means of redress for complaints about lawyers.'

Notably, however, rather than designing a system that deals with complaints about poor standards of service and other minor 'misconduct' administratively and separately from complaints about unethical and other more serious misconduct, as the ABA and the *Putting Consumers First* reports recommended, we in Australia have opted instead to design a system that deals with them by extending its reach downwards, as it were. I'm not entirely sure that was the smart way to go – hopefully someone will one day compare the impacts of the recent reforms in England and Wales with the impacts of the reforms we have implemented here - but in any event it works, and arguably works well (notwithstanding the differences in how it works across state and territory borders).

Let me take you through how our local system works. The Act gives us only two ways to deal with a complaint, putting aside for these purposes the complaints we summarily dismiss. We can deal with it either as a consumer dispute - that is to say, a complaint that involves no issue of unsatisfactory professional conduct or professional misconduct - or as a conduct complaint. Conduct complaints are complaints that involve an issue of unsatisfactory professional conduct or professional misconduct which, if substantiated, might warrant a disciplinary response.

One option within this framework is to treat complaints which allege poor standards of service and other minor ‘misconduct’ not as conduct complaints but as consumer disputes, and in that way to divert them from the disciplinary process in the way that the ABA and the *Putting Consumers First* reports envisage. But, clearly, that’s not what the Act envisages. That’s because, it defines consumer disputes to exclude complaints that allege unsatisfactory professional conduct at the same time as defining unsatisfactory professional conduct to include ‘conduct 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’ – and, while it’s not exactly clear in operational terms just what those words mean, or just how far down they reach, they seem clearly intended on any ordinary reading of the words to include poor standards of service and other minor misconduct that causes consumers to be legitimately aggrieved and to be entitled to some appropriate redress, even if only an apology.

Secondly, and here’s the rub, the Act gives us no obligations and no powers in relation to consumer disputes other than the power ‘to suggest to the parties that they enter into a process of mediation’ – and hence no obligation and no power to deal with legitimate grievances or to ensure that complainants get the appropriate redress unless the respondent practitioner agrees.

It follows then, given that one of the Act’s most fundamental purposes is to provide complainants with a means of redress, that it envisages us dealing with complaints about poor standards of service and other minor misconduct not as consumer disputes but as conduct complaints - and so to see to it that they’re investigated, either in-house by the staff of the Commission or by referral to the professional bodies.

So far so good, but the Act gives us only two options after an investigation is completed. We can either dismiss the complaint (that is to say, take no further action on the complaint) or to initiate and prosecute formal disciplinary proceedings.

Obviously it’s appropriate to initiate disciplinary proceedings in relation to unethical and other serious misconduct, subject of course to the usual evidentiary tests, and also

in relation to less serious misconduct including unsatisfactory professional conduct of kinds that warrant being named publicly as such, to send a message to the practitioner or to the profession or both, and to protect the public at large.

There comes a point however where it begins to go over the top to initiate formal disciplinary proceedings and yet at the same time quite inappropriate to turn a blind eye. Let me give you some examples of the kinds of conduct I have in mind, all of them real:

- acting for the buyer in a conveyance but forgetting for five months despite reminders to send the client a copy of the contract and settlement details - preventing the client from applying for a first home owner's grant;
- acting for the buyer in a conveyance, and failing to send on the results of a search that revealed a building defect before the contract became unconditional – leaving the buyer to pay the cost of the repairs;
- acting for a vendor in a conveyance, and inadvertently depositing the settlement proceeds into the client's Australian account in Australian dollars rather than, as instructed in writing, into a British account in pounds sterling – given fluctuations in the exchange rates, costing the client several thousand dollars;
- acting for the executors of a deceased estate and holding the estate money in the law practice trust account pending resolution of the estate's taxation liabilities rather than, as instructed, investing the money in an interest bearing account – costing the estate the interest;
- acting in an estate matter, and wrongfully exercising a lien by refusing to hand over a copy of the will to the executor;
- acting for the wife [Clare, say] in a property settlement following divorce and, when the matter settled, after Clare expressed some anxiety about doing so herself, volunteering to go to the ex-husband's home to collect some of her personal belongings – and getting into a heated argument with him and saying

‘you are a grotesquely ugly man. I can’t believe Clare was with someone as ugly as you’;

- acting for the distraught wife in a family law matter and causing her great distress by saying to her, to put her at her ease, apparently, that her best revenge would be to live well and that she should shave her legs, wear high heels, and get a new wardrobe and hairdo, all of which would also help her in court - and refusing to apologise because, so we’re told, no offence was intended, and anyway it was good advice;
- taking instructions from the husband in a family law matter to obtain orders to enable his children to live with him 6 days a fortnight, not 4 days a fortnight as per his informal arrangement with his estranged wife and, after running up \$17,000 in legal fees arguing the toss, being informed by the client after he received the sealed consent orders they eventually entered into on his behalf to settle the matter said that the children would live with him not 6 days a fortnight but 4 days a fortnight, just as per the previous informal arrangement – and, having admitted making a mistake, declining to remedy the mistake unless the client put further funds into his trust account and, when that was refused, terminating the retainer on the basis that the client had lost confidence in him.

Of course those examples all involve solicitors, and most of them in relation to family law and conveyances. Those two areas of law between them make up about 40% of all the complaints we receive. Here are two examples involving barristers, both of them raising issues of competence and diligence:

- bringing a judicial review application that was doomed to fail and found as such by the Court following an application by the other parties, and finding himself subject to an indemnity costs order amounting to \$40,000;
- failing to explain the law of self defence, failing to take detailed instructions, and proceeding to run a defence that was doomed to fail, all in his first criminal trial - with the result that his client was found guilty and put at risk of going to prison.

The matter was successfully appealed on the grounds of incompetence of counsel and a new trial was ordered, but the Crown subsequently dropped all charges - and meanwhile the defendant had run up \$30,000 in legal fees for the appeal and in preparation for the abandoned trial.

I'd be surprised if more than a few if any of you believe that conduct of these kinds should ordinarily be subject to formal disciplinary proceedings – assuming of course that we're dealing with 'first offenders' so to speak and not recidivists. We have to bear in mind in this context that disciplinary proceedings are adversarial in all but name. They are inevitably protracted. They put the Commission as prosecutor and the respondent practitioners to significant expense of time and money, especially respondents who exercise their entitlement to be legally represented, and they put respondents through a public humiliation – none of which should be disproportionate to the gravity of the alleged wrong-doing. Moreover disciplinary proceedings in circumstances like these offer complainants little if anything by way of redress and respondent practitioners little if anything by way of making them better lawyers.

Equally I would be surprised if more than a few if any of you would be comfortable turning a blind eye to conduct of these kinds, or would deny that the complainants have a legitimate grievance and are entitled to some appropriate redress. So what then do we do within a legislative framework that at face value gives us the stark choice after investigation only to dismiss complaints or initiate disciplinary proceedings?

The Act gives us two grounds on which to dismiss a complaint. One is that there is no reasonable likelihood a disciplinary body will make a finding of unsatisfactory professional conduct or professional misconduct – but we don't want to go there because that would be to deal with the complaints as consumer disputes, in effect, and we would be relinquishing any powers we otherwise might have to ensure the complainants some redress.

The other is that there is no public interest in initiating disciplinary proceedings - and this gives us our opportunity. That's because it is hard to see how it could possibly be in the public interest to prosecute practitioners for conduct of these kinds provided only

they apologise to the complainant or re-do the work or waive some or all of their fee or fix their office systems or undertake some training or mentoring and the like - that is to say, done what they reasonably can to make good their mistake or to prevent or reduce the risk of it happening again, or of course both.

So, when the facts aren't in dispute and appear to give complainants legitimate grounds to feel aggrieved, we invite respondent practitioners to make any submissions they might care to make to seek to persuade us that no public interest would be served by initiating disciplinary proceedings because they have resolved the problem as best they can or fixed whatever it was that went wrong so it doesn't happen again. If we're persuaded, that's the end of it: complaint dismissed. If not, our options remain open, and we will look again at whether to commence disciplinary proceedings.

This explains the figure I gave you earlier – the more than 500 investigations we have concluded on public interest grounds since our inception three and a half years ago. I note, to drive the point home, that we concluded 121 investigations on public interest grounds over the period July through December last year but only 19 by deciding to initiate disciplinary proceedings. That means, had we not taken this approach, that there would have been a seven-fold increase in the number of matters we put before the disciplinary bodies, at a huge cost to everyone concerned - or that we would have turned a blind eye to 121 matters that needed to be put right.

I believe our approach is consistent with our powers under the Act and certainly its spirit but it would be preferable if it had a firmer statutory mandate – and I doubt that the legislators envisaged the power to dismiss complaints on public interest grounds being used in this way. It could be argued on this basis that our approach is little more than a contrivance or 'back door' way to get for the Commission some de facto disciplinary powers when the Act on its face gives those powers specifically and solely to the disciplinary bodies.

Further, while it may well be entirely appropriate to invite a respondent to consider making amends to a disgruntled client and only then to decide what disciplinary action to take, if any, it's nonetheless a thin line between that and bargaining with the legal

process by putting the respondent under duress to do the right thing by a client in exchange for not proceeding with a prosecution – and the niceties we have to observe to avoid crossing the line mean that we're less than fully able to ensure that respondents provide complainants with the form of redress that's most appropriate to their particular circumstances. We have to make do with the respondent's best offer.

I think for these reasons that the Act should be amended to give the Commission explicit summary powers, subject of course to review.^{ix} Those powers might include the power to require respondents to apologise to complainants; to reduce or waive their fees; to re-do the work they were engaged to do in the first place; to correct a mistake and to meet the costs they necessarily incur in so doing; to do or refrain from doing something in connection with their practice or to be mentored by an appropriately qualified person or to undertake some further training and the like; to make payments to compensate complainants for poor service, loss or distress; to impose conditions on practising certificates; or to take such other steps that the Commissioner believes in all the circumstances of a complaint to be fair and reasonable including issuing private cautions or reprimands.

I note that the Commission's counterpart bodies in England and Wales and every other Australian state and territory are able to exercise summary powers of these kinds in relation to minor complaints, albeit powers that are variously expressed from jurisdiction to jurisdiction and quite different in scope. In my opinion, given the purposes the Act sets out to achieve, the argument for this Commission having similar such powers in relation to minor complaints is compelling.

Another issue arising from complaints: the need to be able to require practitioners who are not themselves parties to a complaint to cooperate with investigations

The Act gives the Commission powers, and it gives the professional bodies powers when the Commission refers complaints there for investigation, to require complainants and lawyers subject to complaint to cooperate by answering questions and producing documents and the like, subject of course to their duties of confidentiality and unless it might tend to incriminate them. The Act gives us no such powers in relation to lawyers

who are not parties to complaints but who may nonetheless be able to assist us with our inquiries.

It's not a common problem but we've been frustrated on a number of occasions now in conducting investigations of serious suspected misconduct because lawyers we had good reason to believe could help us with our inquiries have chosen not to. That strikes me as unacceptable in the absence of some very good reason,^x and the Act should be amended in my view so that a lawyer's failure to cooperate without justifiable excuse is capable of constituting unsatisfactory professional conduct or professional misconduct.

I am at a loss to understand how amendments to this effect could be resisted. It would be hypocritical in the extreme for members of a profession that holds itself out to be highly ethical to argue they should be under no obligation to cooperate with properly constituted investigations into suspected misconduct by their peers – an obligation which falls well short of an obligation to pro-actively report suspected professional misconduct as is the case in England and Wales, for example, and as the Act already requires in relation to suspected irregularities in the handling of trust money. I see no reason why trust account irregularities, serious though they are, should be singled out as more worthy of investigation in the interests of protecting the public and the reputation of the profession than dishonest and seriously unethical conduct of other kinds.

I am reminded in this context of what Gary Crooke QC had to say at your 2006 conference. He argued that 'a truly ethical environment at the Bar is one where unacceptable conduct will not be tolerated and the unworthy will be spurned.' He urged you to think 'very squarely... before you decide to do nothing about it' and it's hard but to agree with him.

Endnotes:

ⁱ There is no dishonour in being subject to complaint. Complaints are just that – complaints - and they might or might not have any foundation in fact, and indeed they often don't. That said, practitioners who find themselves subject to complaint are well advised to ask themselves whether they could have done anything to prevent it, or to prevent it from escalating into a formal written complaint to the Commission, and so use the fact of the complaint to drive improvements to their business. We analyse every complaint on completion and are firmly of the view, whatever their merits, that somewhere between 70 and 80% of

all complaints could have been avoided – for the most part, if the respondent practitioners had communicated more effectively with their clients about such basic questions as ‘what are my options?’, ‘what are my chances?’, ‘how much will it cost?’, ‘how long will it take?’ and ‘what is the process?’

ii That means that the Commission has prosecuted 81 practitioners since its inception on 1 July 2004 and, while not every charge against every practitioner was proved, only 2 of those 81 practitioners have had all the charges against them dismissed. I am very conscious however that we should not parade this statistic as a measure of our success, or at least not in any simple way unsupported by other evidence. The statistic by itself is equally consistent with failure – it might mean no more than that the Commission has been too timid to take on the ‘hard cases’. I don’t think that’s true, by the way, but the case should be properly argued.

iii It would be easy to make too much of the fact that the Commission mostly agrees with the professional bodies about what action should be taken on a complaint, if any. The number of complaints against barristers and hence the number of investigations we refer to the Bar Association is too small to draw any solid conclusions, especially after only a couple of years’ experience, but my impression, where we have differed, is that the Commission has tended to take a somewhat ‘tougher’ line than the Association. There are many more complaints against solicitors but we should still be cautious about drawing conclusions. We can’t be sure, for example, that the investigations we refer to the Law Society are a representative sample. I do think it is fair to say, however, that the high level of agreement is explained in part at least by the Commission having succeeded in bringing about a culture shift by persuading the Society to take a more consumer-oriented approach to some, especially more minor matters than it might have taken in the past.

iv I do however want to put on the record that Queensland’s Attorneys-General and departmental officers have always sought the Commission’s views about any proposed reforms to our local *Legal Profession Act* and welcomed our input including the unsolicited suggestions we have made from time to time. My comments refer solely to the discussions and debate at the national level.

v Legal Profession Discussion Paper No 2, *Complaints, Discipline and Professional Standards*, 1979

vi *Lawyer Regulation for New Century* - Report of the Commission on Evaluation of Disciplinary Enforcement, American Bar Association Center for Professional Responsibility, February 1992

vii *The Future of Legal Services: Putting Consumers First*, Department for Constitutional Affairs, October 2005

viii see <http://www.legalcomplaints.org.uk/how-we-handle-complaints/about-poor-service.page>

ix The Legal Practice Tribunal would be the appropriate body to conduct any reviews, in my opinion.

x Those good reasons will include duties of confidentiality owed to clients, obviously. They should also include the duty of confidentiality that practitioners who have been appointed by their professional bodies as Senior Counsellor owe to practitioners who come to them in that capacity for ethical advice. There may be other ‘good reasons’ also.