

# QUT FACULTY OF LAW TRILBY MISSO FREE PUBLIC LECTURE SERIES

26 OCTOBER 2005

**John Briton**

**Legal Services Commissioner**

## **THE LEGAL SERVICES COMMISSION – ONE YEAR ON<sup>i</sup>**

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 of the Act came into effect just over a year ago now, on 1 July 2004. This talk gives me a good opportunity now that I have a year's experience under my belt to reflect on the Commission's role and the progress we've made since our arrival on the scene.

Let me say at the outset that the most fundamental way things have changed is that the Act embeds the regulation of the legal profession firmly within a consumer protection context. The Act says one of its main purposes is 'to provide for the protection of consumers of legal services and the public more generally'.<sup>ii</sup> It says the purposes of the system for dealing with complaints – this is where the Commission come in – are '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>iii</sup>

I want to describe how I see those purposes being achieved. It might be useful, however, to begin by reminding ourselves what drove the reforms in the first place.

### **Recent history**

They were driven by two quite separate considerations. One was that the federal and state and territory governments had come to an agreement to modernise and 'harmonise' the regulation of the profession across the various states and territories so as to facilitate cross-border practice and the development of a national profession. That consensus

resulted in April 2004 in national model laws to serve as a template for reforms at the state and territory level. The model laws provide among other things for multidisciplinary and incorporated legal practices but more relevantly in this context introduce for the first time uniform national standards in relation to rights of admission, rights of practice, professional conduct rules, and arrangements for dealing with complaints and discipline.

Perhaps not surprisingly in our federal system, the model laws contain both mandatory and optional provisions and even some of the mandatory provisions allow local variation by permitting forms of words to differ from state to state provided the content remains substantively the same. Some of the mandatory provisions however are sufficiently ‘core’ to require even the exact same words and they include the provisions that go to the very heart of and that underpin the complaints and disciplinary regime. These are the provisions that introduce and define the concepts of ‘unsatisfactory professional conduct’ and ‘professional misconduct’ and so set the minimum standards expected of Australian legal practitioners in their dealings with their clients, their colleagues, the courts and members of the public more generally. I will canvass those concepts at some length later in the talk.

The reforms were also driven by strictly local circumstances that as it happens resulted in Queensland becoming the first state to enact legislation based on the national model laws. The previous legislative arrangements in Queensland for dealing with complaints about lawyers had come under intense and very public and adverse scrutiny in 2002 and 2003 and were seen as flawed, in the public eye certainly but among many practitioners also. Those arrangements required complainants to take their complaints to the professional bodies – the Law Society in relation to complaints about solicitors and law practice employees and, though it had no statutory powers, the Bar Association in relation to complaints about barristers. The problem in the public view was that the process was insufficiently independent of the profession to give the community confidence that complaints about members of the profession would be dealt with thoroughly and impartially – in particular at the time the well-publicised complaints about the alleged conduct of Michael Baker of Baker Johnson Lawyers. You will recall that the media characterised the process as ‘Caesar judging Caesar’. The publicity gave the impression not only that the profession ‘looked after its own’ as it were but that

malpractice extended well beyond the concerns that had been expressed about Mr Baker's alleged conduct and was rife.

Not surprisingly in these circumstances the government took the opportunity the national model laws gave it to establish a new system in Queensland for dealing with complaints – thus the creation of an independent Legal Services Commission to bring a greater transparency and accountability to the process. These are significant reforms. It is hard in a democracy subject to the rule of law to overstate the importance of citizens having confidence that members of the legal profession conduct themselves properly and that there are mechanisms in place to deal with practitioners whose conduct has been called into question.

### **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 gives the Commission power to deal with complaints itself or alternatively to refer them to the professional bodies for mediation and/or investigation. In the latter case – whenever the Commission refers complaints to the professional bodies for investigation – the Act obliges those bodies to report their recommendations to the Commission for decision. It gives the Commission and the Commission alone the power to decide whether complaints should be dismissed or alternatively 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 view is that the Commission ought try to use them to do something more than simply what the professional bodies always did, but doing it better if indeed we can, or being seen to be doing it better, however important and useful that might be. I think the Commission can add value beyond that, and I want to explain how.

It seems to me that the professional bodies in the past conceived and many practitioners even today still conceive the system for dealing with complaints primarily if not exclusively in terms of upholding high ethical standards within the profession. The purpose of the exercise on such a view is to ‘get rid of the bad apples’ amongst the profession – the small number of practitioners who willfully 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 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 – fewer than 1 bad apple for every 100 complaints. I do not believe that low ratio reflects a want of trying. 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.

In any event, there is little if any evidence that getting rid of the bad apples deters other potential bad apples, much less has any significant impact by way of improving the overall standards of legal practice and service delivery to consumers. It certainly doesn’t seem to have had any marked deterrent effect. The number of practitioners who have been struck off or suspended has been growing over recent years, not shrinking, and there are more than a few recidivists among the practitioners who have been disciplined short of being struck off or suspended.

The fact is that most complaints describe conduct of more prosaic kinds than would justify the practitioners being struck off or suspended or even fined, and very often conduct of a kind that in the context of an employment relationship would be seen as a

performance management rather than a disciplinary issue. 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 honest mistakes and errors of judgment and poor standards of service rather than misconduct as that term is commonly understood, much less a failure to uphold high ethical standards.

The bad apples are in a small minority, even among the practitioners subject to legitimate complaints, and if that is all we are looking out for as regulators then we're likely to overlook more minor infractions and move on the next big issue, sparing a thought perhaps for the practitioners subject to complaint that 'there but for the grace of God go I'. What happens only too easily in these circumstances is that the underlying problems are left unresolved and complainants left nursing their sense of grievance. This seems to have happened more often in the past than perhaps it ought to have, and this is where the Caesar judging Caesar rhetoric gets its traction.

I want to be very clear what I'm saying. I am not saying that the Law Society or the people who administered the previous arrangements on its behalf were careless in any way or insufficiently motivated by the public interest much less lacking integrity. In fact I've been privileged on a number of occasions now to attend meetings of the Society's Professional Standards Committee. I've come away on each occasion full of admiration for their considered judgment and for the many hours of work they've done and continue to do on behalf of the profession and indeed on behalf of the public – all of it free of charge and with very little acknowledgment.

What I am talking about is the power of ideas. 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 our attention not only on the bad apples but also on the many more practitioners who are not 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 legitimate cause for grievance.

This is where the Commission can add value, by conceiving the system for dealing with complaints in terms of upholding high ethical standards certainly, but more broadly in terms of promoting and protecting the rights of consumers and in that sense of

improving standards of everyday practice more generally. 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.

That means, since complaints inevitably come to attention only after the event, not confining ourselves to looking backwards to judge their merits but also, if they appear to have merit, to looking forward to what might be done in the future. We will best protect consumers and practitioners alike by encouraging practitioners subject to complaint to explore ways and means to reduce the risk to other consumers of similar poor standards of service down the track.

In fact we will best protect consumers and practitioners alike by lifting our gaze beyond the individual dealings between practitioners and their clients that come to us as complaints and turning our attention also to how we might lead the way by getting in first, *before* things turn sour. In my view we should be subjecting our complaints data to careful analysis, both by ourselves and in partnership with others, and be undertaking and supporting other research relevant to the work of the Commission. We should be identifying the practitioners and consumers who are most at risk and crafting targeted and evidence-based educational and other preventative strategies calculated to reduce cause for consumer dissatisfaction and complaint.

So: that's how the Commission understands its role – to promote and protect the rights of consumers of legal services. It's worth adding, because that sort of talk makes some practitioners anxious, that this does not mean we see ourselves as consumer advocates or partisan. We don't. Consumers are entitled to a fair go and a fair go means just that – a *fair* go, and by definition that means fair from a practitioner's perspective also.

### **A brief digression**

That leads me to a brief digression, but a digression that goes to the very heart of the complaints-based disciplinary regime. Lawyers sometimes express frustration when I explain the Act's consumer protection purposes. Sometimes they tell me heart-felt

stories about their vulnerability to misconceived or even malicious complaints and the time and emotional energy it costs them to respond. They want to know what the Commission does in these circumstances to protect *them*.

There are various things we do, and for that matter that practitioners themselves can do to discourage misconceived complaints. Those strategies aside, however, the answer is simple: we do not investigate complaints that are patently unfounded and we dismiss complaints that are shown after investigation not to be proved to the requisite standard. In fact we dismissed almost 6 in 10 of the 758 complaints we finalised in the year to 30 June that alleged misconduct of one kind or another for just this reason – that the evidence after investigation failed to establish a reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct. The evidence in some of these matters not only failed to prove the complaints to the requisite standard but proved them to be false.

The Commission needs to understand the frustrations of practitioners in these circumstances. Practitioners for their part need to understand that as a rule we simply don't know that complaints can't be substantiated until after the evidence is in. The long and the short of it is that the time and energy practitioners put in to putting us in the position to dismiss complaints is the price they pay for the accountability of their profession.

Complainants might sometimes or even often get it wrong but they also get it right and the profession owes them a great debt of gratitude when they do. I can't help but say in this context that lawyers often tell me stories about the apparently scandalous conduct of other lawyers – and in the case of Michael Baker, for example, stories going back many years, even decades. I have no idea whether those stories are true. It's as well to remind ourselves, however, as those of you who follow these things will know, that Mr Baker was finally brought to account in the Legal Practice Tribunal a matter of weeks ago now not through any complaints by lawyers but complaints by consumers. They were not wealthy people or sophisticated in the ways of the law but ordinary folk who believed them selves to have been wronged and who had the courage of their convictions.

## **Our performance**

I have described how the Commission understands its role. The question, then, is whether we've lived up to expectation. That's a good question, and indeed the Act requires me to develop performance criteria for dealing with complaints and to report against those criteria in the annual report.

I don't want to go into too much detail here - I will leave that for the annual report which I have to give to the Attorney-General by next Monday and which she has to table within fourteen days thereafter - but clearly the Commission faced two major challenges on its inception. One of them was dealing with the large number of complaints we inherited from the old regime and the other was to develop appropriate policies and processes and systems: we had a legislative framework to work with when we started but otherwise a blank page.

Obviously our priority in the circumstances was to set ourselves realistic and achievable goals. Equally however we wanted to set goals which if we achieved them would lay the foundations to enable us if not immediately at least in the short to medium term to promote and protect the rights of legal consumers in the ways I've described - and to achieve the sort of performance we aspire to as a mature organisation a year or two down the track. I think we've done that.

## **Dealing with complaints**

I mentioned earlier that the Law Society received more than 1600 complaints in each of the two years to 30 June 2004, a total of more than 3200 complaints. What I didn't say was that it finalised significantly fewer complaints than it received - 2647 to be exact, a negative clearance ratio of almost 20%. It comes as no surprise then that the Commission inherited a large number of complaints on its inception on 1 July 2004 - 938 in all. They included 784 complaints that were made to the Law Society but not finally dealt with by 30 June 2004 and 107 complaints that were made to the Legal Ombudsman but not finally dealt with when that office ceased to exist on 31 May 2004. A disproportionate number of those complaints had been in the system for some time,



some of them for two years and more. They also included 47 complaints that were made directly to the Commission in June 2004 in anticipation of the Act commencing.

Our goal in these circumstances was to reverse the trend of recent years to a growing backlog of complaints and to at least hold our own - that is to say, to finalise complaints at the same rate or better than the rate at which new complaints arrive. We set out at the same time to finalise all 107 complaints we inherited from the Legal Ombudsman. We achieved those goals but for 3 of the complaints to the Ombudsman.

Our goal for the year ahead is to fully resolve the backlog of pre-Act complaints and at the same time to finalise post-Act complaints at the same rate or better than the rate at which they arrive. We are on track to achieve that goal. Then, finally, we will be in a position to do what the Act envisages – and what complainants are entitled to expect us to do: to deal with complaints efficiently and expeditiously, against appropriate timeliness criteria.

It's important to get the numbers under control but that's only part of the story. I think we've laid the foundations too in the way we approach complaints and in particular the way we approach the large number of complaints I spoke about earlier – the very many complaints that describe honest mistakes, errors of judgement, poor quality of service and the like.

The best way to explain what I mean is to go to the very fundamentals – to the concepts of unsatisfactory professional conduct and professional misconduct that underpin the whole structure and determine how complaints are dealt with. 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 it does, then the Act obliges us and gives us significant powers to investigate the complaint.<sup>iv</sup> If we say it doesn't, hence that the complaint describes what the Act calls a consumer dispute,<sup>v</sup> then we have the option either to suggest to the parties that they enter into mediation or even to take no further action at all.<sup>vi</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>vii</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>viii</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>ix</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 announces itself by and large because 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>x</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 to require investigation and potentially a discipline application. There is a strong argument that the concept of unsatisfactory professional conduct applies to a broader range of unsatisfactory conduct than the

concept of unprofessional conduct that underpinned the previous system for dealing with complaints.

The concept of *unprofessional conduct* is defined in the 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>xi</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 in the Legal Practice Committee 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 Committee to make orders of a kind that are typically associated with discipline and punishment – orders that impose fines and publicly reprimand practitioners – the Act also enables the Committee to make orders that are more in the nature of and which in any other context would be regarded as performance improvement plans rather than punishment per se.<sup>xii</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.

Furthermore the Act does not define unsatisfactory professional conduct exhaustively but says only that it ‘*includes*’ conduct that falls short of the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent practitioner. The question arises, then, as to just what else it might include.

So we think the concept of unsatisfactory professional conduct has a wider application than the (now superseded) concept of unprofessional conduct – hence that a practitioner’s conduct no longer has to be as unsatisfactory as it used to have to be to warrant investigation and potentially a discipline application.<sup>xiii</sup> We think 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 honest mistakes and errors of judgment and poor standards of service that give rise to legitimate consumer grievance.

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 possibly 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 or reduce the risk they’ll conduct themselves similarly in future.

Consider the following true story. It 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 was 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. It seemed to us that the issue was not so much what Ms Brown failed to do when (and because) she was sick but what arguably she had failed to do when she was well – to have put systems in place to prevent such incidents. This is what the Commission 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 the Legal Practice Committee had we filed and succeeded in a discipline application.

That was a good outcome, 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' behalfs which might or might not have been beyond their control but which in any event they failed to communicate to their clients.

Consider another true story, once again changed only to disguise the practitioner's and the complainant's identities:

- 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 Commission referred the complaint to the Law Society which put it to Mr White for his response. He replied to the effect that the appeal was lodged in time and that Mr Black hadn't suffered any great inconvenience. The Society returned the complaint to the Commission with the recommendation that there was a reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct but that we should dismiss the complaint nonetheless on the basis there was no public interest in taking it any further.
- The Commission disagreed. 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. 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.

The strategy we adopted in respect of Mr Smith's complaint about Ms Brown and Mr Black's complaint about Mr White 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 – 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.

I think the strategy I’ve described has enabled the Commission to make some real progress in that regard.

### **Policies, processes and systems**

The second major challenge the Commission faced on its inception was that it had a legislative framework to work with but was otherwise a blank page. There was an urgent need to develop policies and procedures and precedent letters and the like to enable us to deal with complaints efficiently and effectively and consistently. There was an urgent need also to develop at least basic office systems to enable us to track the large numbers of documents that were clearly going to cross the counter every day, in both directions, and of course a computerised case management system.

The decision was taken just before I started as Commissioner to connect to and adapt the case management system already being used by the Law Society. It was seen to be the most cost-effective option but to have other advantages also, not least that it already stored complaints data going back 11 years and lent itself readily to further enhancement. The system and the infrastructure that supports it was adapted to reflect the new arrangements established under the Act for dealing with complaints and was up and running by 1 July. It enabled the Commission to record, store and retrieve data on electronic complaint files and to generate lists of complaint files but gave us only limited access to its full functionality and limited capacity to generate even the most basic management or performance reports. It required substantial further enhancement.

I took a deliberate decision to make haste slowly – to buy time while living with the system's inadequacies to better understand exactly what we wanted the system to deliver before committing ourselves to further and costly enhancements. We took the same approach and for the same reasons to developing complaints-handling policies and procedures – to get the basics in place to enable us to do our job but to avoid committing too much time and energy before we fully understood our requirements.

We set ourselves the goal of specifying the enhancements we required of the case management system to enable us to access its full functionality and to interrogate the complaints database to generate appropriate management and performance reports and to adapt it to those specifications by 1 July 2005. We have all but achieved that goal.

We set ourselves the goals too of quickly developing basic policies and procedures to enable us to deal appropriately with complaints and of developing comprehensive systems for storing and retrieving precedent documents and the like and fully articulating, documenting and publishing relevant policies and procedures by 30 June 2006. We are on track to achieve those goals also.

It is important to get systems in place to support our complaints-handling core business but again that's only part of the story. We have said we should be trying to learn whatever lessons the complaints-handling experience can teach us about standards of practice and how they might be improved. It's important therefore that the case management system and our other systems support us in achieving that goal in particular by enabling us to analyse the complaints-data with a view to finding ways to reduce cause for consumer dissatisfaction and complaint.

We are well positioned to do just this, although it has to be said as much through good luck as good management. One unintended but happy consequence of the decision to connect the Commission to the case management system that was already being used by the Law Society is that we find ourselves connected to a database that includes a rich array of other regulatory data. We have the opportunity therefore to cross-reference the complaints data with data about the practitioners subject to complaint including their age, gender, how long they have been admitted, what type of practicing certificates they have, whereabouts in Queensland they work and in what size firms.

We have included some cross-referenced data of this kind in the annual report. It's the sort of information that with further analysis should help identify the practitioners who are most at risk of complaint and help craft carefully targeted and evidence-based educational and other preventative strategies.

One interesting but perhaps unsurprising fact is that about a quarter of all Queensland solicitors work in single practitioner firms but they attracted just over half of all the complaints we received that alleged misconduct of one kind or another. On the other hand, about a third of all Queensland solicitors work in firms with six or more partners but they attracted less than a tenth of all the complaints we received that alleged misconduct.

I suspect those figures tell us little more than that clients of bigger firms are less likely to complain, or at least less likely to complain to regulatory authorities like the Commission than clients of smaller or single practitioner firms. I simply don't know, but I doubt they tell us that solicitors who work in the bigger firms have higher ethical standards than solicitors who work in smaller firms. I can't help but note, for example, without comment, that the former President of the New South Wales Bar Association Brett Walker SC was quoted in last Friday's Financial Review as attacking commercial lawyers - he was clearly referring to the bigger firms - for being 'too close to their clients and unconcerned for the administration of justice.' He was quoted as saying that in many cases commercial lawyers were really just 'part of a client's entourage' and should quit the profession and join the ranks of merchant bankers and management consultants.

In fact the Financial Review has been describing over recent months a trend in which partners are leaving big national firms to work with smaller boutique firms. It quoted several such partners on 6 May this year as follows: 'big-firm culture is extremely competitive... We have seen practices where people had more concern about achieving a certain billings target than concern about whether a particular bill for a client was reasonable or not. We have seen practices where people who really didn't have expertise in a given field work on matters in that field because they presumably thought

that by doing so they would realize their budget'. They are describing people on an ethical slippery slope, clearly.

Be that as it may, the data we have about the practitioners who have been subject to complaint to the Commission over the past year invites some interesting questions. Why is it, for example, that women lawyers are less than half as likely as their male counterparts to be subject to complaint? Why is it that lawyers aged in their 30s are only half as likely as lawyers aged in their 40s to be subject to complaint? Why is it that lawyers who work in law offices in some parts of Queensland are only half as likely as lawyers who work in law offices elsewhere in Queensland to be subject to complaint? We don't know the answers – and we should be cautious about jumping to conclusions – but they are good questions.

### **Some comments in conclusion**

I have argued that the Commission will best promote and protect the rights of legal consumers by complementing our core business of dealing with complaints by undertaking, brokering, partnering and supporting research calculated to find ways to reduce cause for consumer dissatisfaction and complaint. We set ourselves a goal last year accordingly: to secure agreement that the Commission should develop such a capacity; to secure the funds through the budget process to employ a policy and research officer during 2005–06 and beyond; and to have recruited to that position by 1 July 2005. The Attorney-General granted our wish and we now have a policy and research officer on board and are beginning to network with academics and others to carve out a role for ourselves. It would be wrong to pre-empt the sorts of research and research partnerships we might embark upon but it might be useful even so to reflect on some possibilities.

Clearly we ought to be harnessing whatever we can learn from dealing with complaints and folding that knowledge back in through continuing legal education and compulsory professional development programs and the like. That can't be the end of it however. I am struck, for example, reading the disciplinary reports, by the fact with few exceptions that the lawyers who have been struck off or suspended or otherwise disciplined over the past ten years found themselves in that position not because they breached some

esoteric standards they learned during their undergraduate or subsequent professional training in legal ethics but values they learned, or should have learned at the bosom – the ordinary and everyday standards of fairness and decency that apply equally to all of us in a civilized society, and indeed something of a lowest common denominator even at that.

The same is true of the thirty or so discipline applications currently in train and indeed what makes one particular discipline application we are likely to file with the legal Practice Tribunal over coming weeks all the notable is precisely that it does raise ethical issues of a kind that might be debated in a class room or text book.

I am struck, too, by the fact that the disciplinary framework that applies to lawyers and for that matter most talk about legal ethics makes misconduct an almost exclusively personal responsibility of individual lawyers. It's as if lawyers work in a social and cultural vacuum. This is stark contrast to the laws that regulate some other aspects of our conduct in a civilized society and that are intended to raise the bar. The law in this and every other state and federally in relation to discrimination and sexual harassment, for example, makes employers vicariously liable for the proven misconduct of their employees and agents and even imposes a reverse onus of proof – they will be held jointly liable unless they can prove they took all reasonable steps to prevent their employees and agents from conducting themselves in that and like ways. Why shouldn't law firms be similarly accountable for the unacceptable conduct of their employees, especially if it can be proven that the conduct can be wholly or partly explained by the corporate culture including, for example, a firm's unreasonable expectations of its employees' performance?

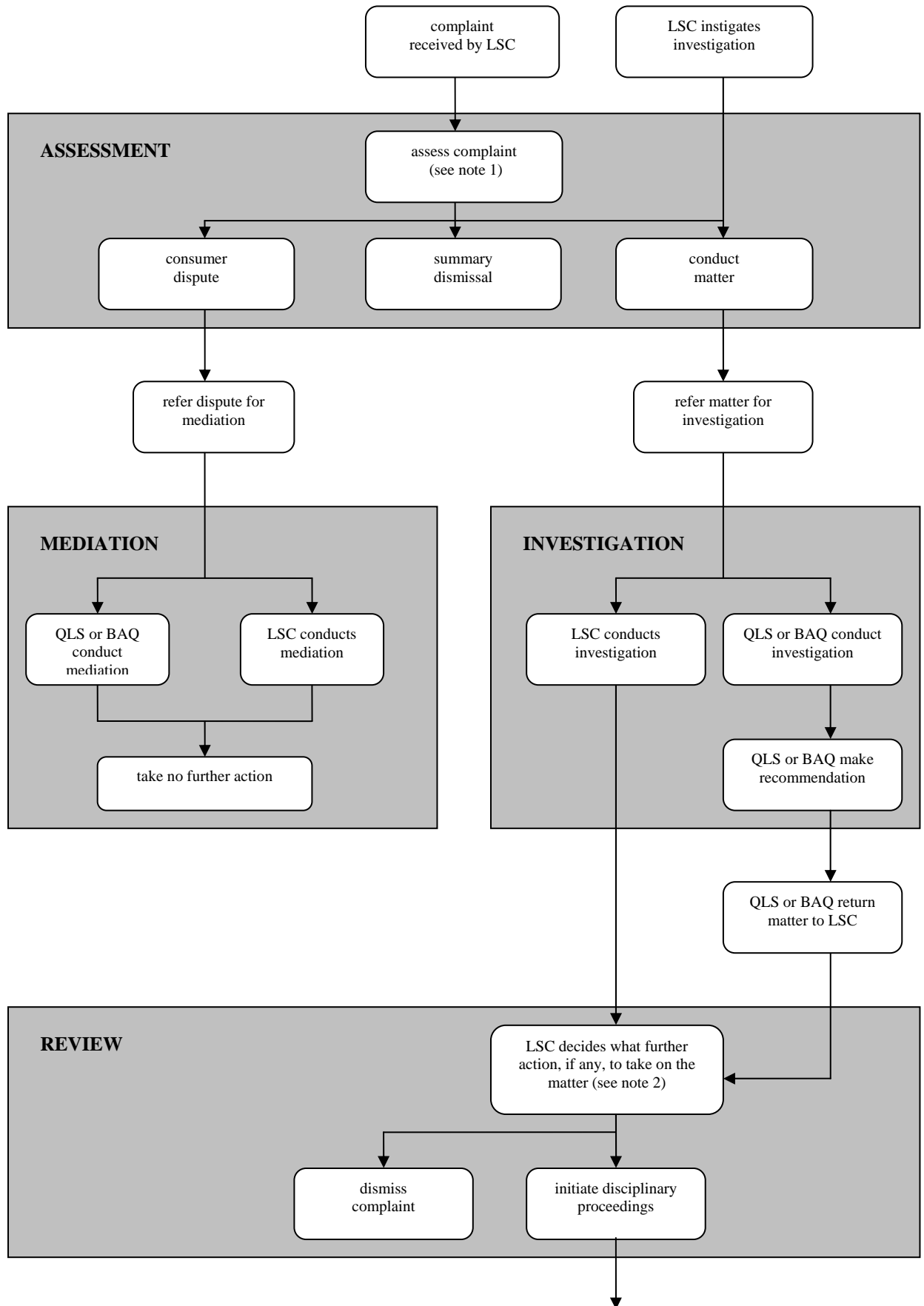
It's a good question in my opinion and apparently not entirely naïve. I understand that the complaints and disciplinary regimes in New York and New Jersey both contain vicarious liability provisions for just these reasons. In fact I stumbled across an article in the Harvard Law Review recently which argues that vicarious liability provisions don't go far enough. The author refers to the fact that the team based nature of large law firm work masks individual responsibility for any particular instances of wrong-doing. The author argues that vicarious liability arrangements put an unfair burden on partners in

these circumstances by letting associates off the hook and recommends a collective responsibility regime instead.<sup>xiv</sup>

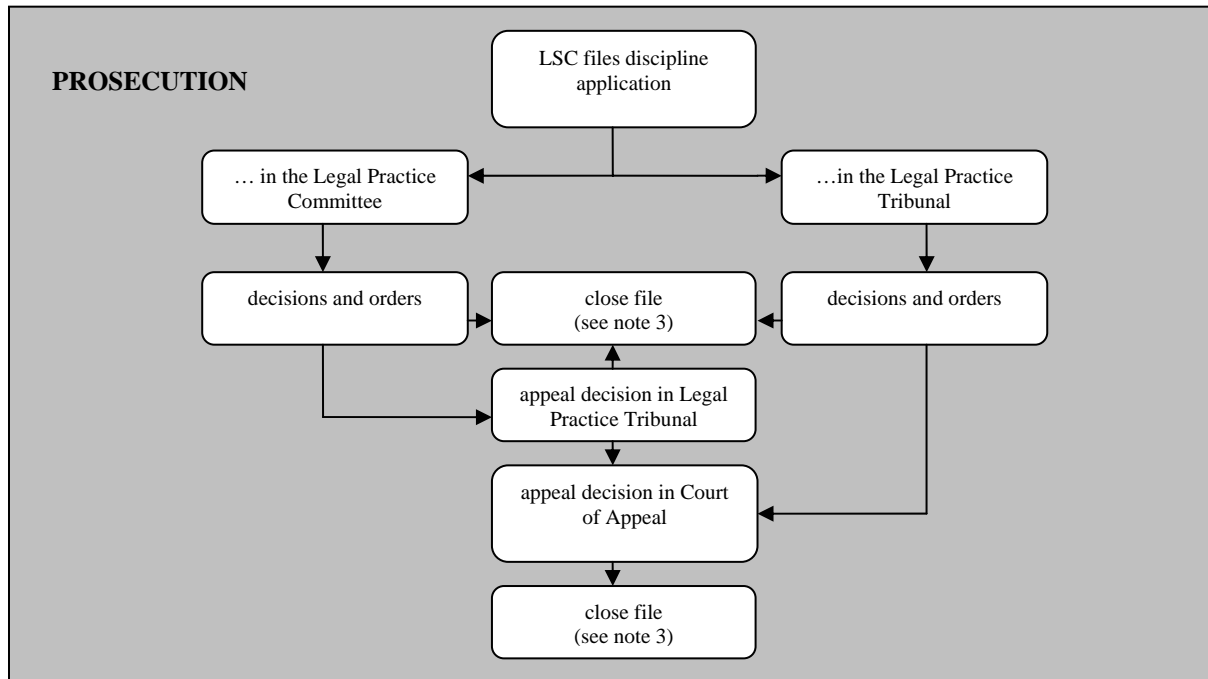
I might add that the imminent proclamation over the next six months or so of those sections of the Act that allow legal practices to incorporate will introduce something akin to vicarious liability, at least in respect of practices which choose that business structure. Those sections of the Act provide that incorporated legal practices must have at least one legal practitioner director. They make legal practitioner directors accountable for implementing ‘appropriate management systems’ which ensure the practice provides legal services to the professional standards that are expected of legal practitioners more generally. They also require legal practitioner directors to take ‘all reasonable action’ to prevent breaches of the standards, ‘if it ought reasonably to be apparent’ that the way the practice provides legal services will result in breaches, and to take ‘appropriate remedial action’ if a breach occurs. A failure by a legal practitioner director to comply with their obligations in these respects ‘is capable of constituting unsatisfactory professional conduct or professional misconduct’, and so for that matter is any unsatisfactory professional conduct or professional misconduct by a legal practitioner employee of the practice or conduct by a non-lawyer director ‘that adversely affects the provision of legal services by the practice.’<sup>xv</sup>

It might be useful and important in any event to study legal workplaces to find out, for example, what business management and performance appraisal systems, supervision practices and more generally workplace cultures in small, medium sized and large legal firms go to support lawyers in conducting themselves ethically and mitigate the risk they will conduct themselves badly. No doubt there will be many other such projects, too, and the Commission looks forward to partnering the professional bodies, the university law schools and other legal service stakeholders in efforts to do some ethical capacity-building within the profession.

**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 and 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).

---

**Endnotes:**

<sup>i</sup> This is an expanded version of a speech given to the Central Queensland Law Association Conference in Yeppoon on 26 August 2005

<sup>ii</sup> *Legal Profession Act 2004*, section 3

<sup>iii</sup> section 243

<sup>iv</sup> sections 266, 269 and 540-578

<sup>v</sup> sections 262-263

<sup>vi</sup> section 259(1)(b)

<sup>vii</sup> sections 273-274

<sup>viii</sup> section 244

<sup>ix</sup> section 245

<sup>x</sup> Linda Haller, *Imperfect Practice under the legal Profession Act 2004*, (2004) 23 The University of Queensland Law Journal, at p.418

<sup>xi</sup> *Re R, a practitioner of the Supreme Court* [1927] SASR 58,61

<sup>xii</sup> section 282, especially sub-sections (d)-(g)

<sup>xiii</sup> see also Haller (above) at pages 417-421 and Ysaiah Ross, *Ethics in Law: Lawyer's Responsibility and Accountability in Australia*, 3<sup>rd</sup> edition, Butterworths, 2001 at pages 155-160

<sup>xiv</sup> 118 Harvard Law Review 2336, May 2005

<sup>xv</sup> sections 92-93