

# THE LEGAL SERVICES COMMISSION – AN OVERVIEW <sup>1</sup>

**John Briton, Legal Services Commissioner**

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Thank you for giving me the opportunity to meet you, and to talk to you about the Legal Services Commission and its role.

## *Firstly, some recent history...*

As you are no doubt aware, the Commission was created as part of the package of reforms to the regulation of the legal profession in Queensland brought about by the *Legal Profession Act 2004* (the Act). Most and certainly all the relevant sections of the Act came into effect on 1 July this year.

The reforms were driven by two quite separate developments. The first consists in moves at a national level over recent years to modernise and ‘harmonise’ the regulation of the profession across the states and territories. The intention of that exercise is to facilitate the development of a national profession and in particular to better accommodate cross-border practice. The process culminated in April this year in the publication of national model laws as a template for reforms at the state and territory level. The model laws introduce for the first time national uniform standards in relation to admission, rights of practice, professional conduct rules, complaints and discipline and the like. They also make provision for incorporated legal practices and multi-disciplinary practices. The Act follows the national model laws as envisaged and adds to them by including revised arrangements in relation to interest on solicitor’s trust accounts, the Fidelity Fund and the status of the Queensland Law Society (the QLS).

The second and quite separate development is no doubt well known to you—the fact that the previous arrangements in Queensland for dealing with complaints about

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<sup>1</sup> This is a longer and referenced version of speeches to the Cairns, Townsville, Rockhampton, Sunshine Coast, Gold Coast and Toowoomba District Law Associations over the period September through November 2004.

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lawyers came under intense and very public scrutiny several years ago and were discredited. Those arrangements, you will recall, required complainants to take their complaints to the professional bodies—the QLS in relation to complaints about solicitors and law practice employees and the Bar Association of Queensland (the BAQ) in relation to barristers. The problem—cutting a long story short—was that the process was insufficiently independent of the profession to give complainants cause for confidence their complaints would be dealt with thoroughly and impartially. You will recall the media characterised the process as ‘Caesar judging Caesar’. The result: the creation of the Commission as an independent statutory body to receive and deal with complaints about solicitors, barristers and law practice employees and to bring a new transparency and accountability to the exercise.

Interestingly, while the QLS now has only a secondary role in relation to complaints and discipline—in ways I will explain shortly—and in that sense that the profession is less self-regulatory now than before, the BAQ has more powers now than previously by virtue of having the same secondary role in relation to complaints against barristers. That is because there was no statutory schema previously for dealing with complaints about barristers. The BAQ, unlike the QLS, had no statutory powers to investigate barristers who found themselves subject to complaint and to prosecute them in the face of apparent misconduct. It only had powers over its members, and then only by virtue of its articles of association. Membership was voluntary and so barristers could, and sometimes did, remove themselves from its reach simply by resigning their membership.

In any event, coming back to the present, there is now an independent Commission and it has significant statutory powers. I will not be shy as Commissioner about exercising independent judgement but I feel no need to demonstrate my independence by public displays of one kind or another or by distancing myself from the profession and practitioners. In fact my wish is that the Commission has a positive relationship with practitioners and their professional bodies. That is because, while it’s an exaggeration to say the new regime will only work if we get on together and have a good professional relationship, it’s unlikely to work effectively if we don’t, let alone to work at its best.

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I might add in this context that I am very grateful for the goodwill with which the Commission has been received, and with which I have been received personally, not least by the President, councillors and senior staff of the QLS. The Society has had a fair going over in the media in recent years and there might well have been some bruised egos about the place but that hasn't been my experience. It might have been different had the personalities been different, but we've simply got on with the job without needless distractions of that kind. I'm grateful for that.

### *Our strategic approach...*

Perhaps the best way to explain the Commission's role as we understand it is to take you through the main elements of our strategic plan. We describe our mission as follows:

- *to promote and protect the rights of legal consumers in their dealings with legal practitioners and law practice employees in Queensland.*

We see ourselves, in other words, as essentially a consumer protection agency and we see our disciplinary function as secondary to and driven by the need to protect legal consumers. You will note that we have avoided any reference in our mission to our role in improving or ensuring high standards in the profession. That is because we are only one of many bodies which have that role, including the QLS and the BAQ, the admissions and disciplinary bodies, the university law schools and others, and it would be silly to try to mark that as a point of difference.

We pursue our mission through four primary strategies, by:

- *establishing and delivering effective and efficient processes for resolving consumer complaints about the conduct of legal practitioners and law practice employees;*

- *investigating legal practitioners and law practice employees in the absence of complaint when there is reason to suspect misconduct;*
- *prosecuting legal practitioners and law practice employees when it is in the public interest and there is a reasonable likelihood a disciplinary body will find them guilty of professional misconduct or unsatisfactory professional conduct; and*
- *collaborating with the professional bodies, law schools and other legal services stakeholders to reduce cause for consumer complaints about the conduct of legal practitioners and law practice employees.*

### ***Our role in relation to complaints and ‘investigation matters’...***

I will deal with the first strategy first. Crucially—this is fundamental to and underpins the new complaints and disciplinary regime—the Act establishes the Commission as the sole body both to receive<sup>2</sup> and, if they allege misconduct, to finalise<sup>3</sup> complaints. All complaints about solicitors, barristers and law practice employees must now begin and end their lives at the Commission. We are also the sole prosecuting authority when the evidence after investigation suggests disciplinary action is appropriate.<sup>4</sup>

I’ll come back to the strategies in relation to complaints and discipline in a moment, but, before I do, let me elaborate briefly on the second strategy. It is important you understand that the Commission does not require a complaint but can initiate an investigation into the conduct of a legal practitioner or law practice employee of its own initiative—the Act calls investigations of this kind ‘*investigation matters*.’<sup>5</sup> Similarly, we are under no obligation to cease an investigation which was prompted by a complaint if the complainant withdraws his or her complaint.<sup>6</sup> That is important because statutory complaints agencies are often, and in my opinion rightly criticised

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<sup>2</sup> *Legal Profession Act 2004*, s.256.

<sup>3</sup> ss.273-274

<sup>4</sup> s.273 (and s.276)

<sup>5</sup> ss.265 and 266

<sup>6</sup> s.260(3)

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for being unduly reactive by being entirely reliant on complaints to trigger or continue investigations. We intend to be as proactive as we reasonably can be in an effort to protect legal consumers from sharp practice.

We intend to be proactive also, as we're flagging in our fourth strategy, by seeking wherever we can to fold back into the profession what we can learn from the complaint-driven or other investigations we have undertaken and from complaints more generally. That is important too because complaints agencies are also often and rightly criticised for 'band-aiding'. We hope to do better than that where we can by driving and otherwise cooperating with efforts to educate practitioners and consumers alike and to achieve systemic reforms in areas of practice which we know from experience to be problematic.

That brings me back to our first strategy—our strategy in relation to resolving consumer complaints. Part of the role, obviously, is to get out and about and to inform lawyers and legal consumers about the new regime. My talking to you today is part of that exercise. It is relatively easy to get to lawyers—lawyers have meetings, like today's, and trade magazines and the like—but it is not so easy to get to legal consumers and we will need to work out effective ways to do that. In the meantime we have done the obvious things including by developing a website which sets out our roles and powers and functions in plain English. I commend that website to you and in fact there is little I will say today that is not already described there.

Obviously, we also have a role in fielding enquiries about the complaints process. We have a number of people at the office who do just that—who inform people about the arrangements for making complaints and, if needs be, help them make their complaints.<sup>7</sup>

Complaints must be in writing, must identify the complainant and if possible the practitioner or employee subject to complaint, and must describe the alleged conduct the subject of the complaint.<sup>8</sup> Notably, complainants are not limited to complaining

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<sup>7</sup> s.309

<sup>8</sup> s.256, especially 256(3)

about the conduct of their own legal practitioners<sup>9</sup> and they can, and not infrequently they do complain about the conduct of someone else’s legal practitioner—the practitioner(s) who acted for their former partner in a family law dispute, for example. Complaints of this kind are sometimes misconceived but some of them raise serious issues that clearly warrant investigation.

Our first task, when we accept a complaint, is to decide whether it is what we call a conduct complaint or a consumer dispute. Conduct complaints are complaints that allege unsatisfactory professional conduct or professional misconduct as those terms are defined (or, in relation to law practice employees, complaints that allege misconduct). Consumer disputes on the other hand make no such allegation but describe grievances nonetheless about the respondent practitioners’ (or employees’) conduct. Consumer disputes typically describe grievances about costs, liens, delays, failures to communicate or poor communication and the like.

The Act defines unsatisfactory professional conduct as:

- *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.*<sup>10</sup>

There are a number of key words in that definition, not least the words ‘*conduct in the practice of law*’. With the limited exceptions I’ll mention in a moment, we can’t deal with complaints about the conduct of people who, while they are lawyers, were acting at the relevant time in a private or some other capacity—as migration agents, say, or as financial advisers, office bearers of bodies corporate, members of parliament and the like.

I draw your attention also to the words ‘*standards of competence and diligence that a member of the public is entitled to expect...*’ The words ‘*a member of the public*’ are new. They do not appear in the common law or previous statutory definitions of

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<sup>9</sup> ss.255 and 256

<sup>10</sup> s.244. Consumer disputes are defined at s.262

unsatisfactory professional conduct and to that extent change, and presumably raise the standard.

The definition of professional misconduct is as follows, either:

- *unsatisfactory professional conduct... if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, or (and this is where a practitioner’s conduct in his or her private capacity can come under scrutiny);*
- *conduct... whether happening in connection with the practice of law or otherwise... that would, if established, justify a finding that a practitioner is not a fit and proper person to engage in legal practice.*<sup>11</sup>

Some personal conduct is sufficiently serious, in other words, to warrant disciplinary action, including of course the ultimate sanction of being struck off. The Act gives some specific examples including conduct which leads to a conviction for a serious offence, a tax offence or an offence involving dishonesty.<sup>12</sup>

We distinguish conduct complaints from consumer disputes because we are obliged to initiate an investigation when a complaint alleges unsatisfactory professional conduct or professional misconduct<sup>13</sup> but we have no such obligation in respect of consumer disputes. Indeed we don’t have to deal with them at all—we can simply summarily dismiss them.<sup>14</sup> We may, however, and as a matter of practice we always do attempt mediation, either ourselves or by referral to the QLS or BAQ.<sup>15</sup>

I might add, to put all this in context, that we have received about 130–140 new complaints a month since our inception in July, slightly more than half of which are consumer disputes and slightly less than half of which are conduct complaints.

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<sup>11</sup> s.245

<sup>12</sup> s.246

<sup>13</sup> ss.265-266

<sup>14</sup> s.259(1)(b)(ii)

<sup>15</sup> s.263

### *A digression...*

Let me digress for a moment, before I describe the process of investigation, to describe some common types of complaint that we probably won't, or don't and can't accept. We do not and we cannot accept complaints about the decisions of courts or tribunals, for example, or complaints about the conduct of judges (although we can of course accept complaints about the conduct of judges in their previous capacities as practitioners). We are not a court of review. Clearly, people who are dissatisfied about the decisions of courts or tribunals should seek legal advice about their rights of appeal, their prospects of success and their likely costs.

Secondly, we do not accept complaints that are '*vexatious, misconceived, frivolous or lacking in substance*'.<sup>16</sup> Nor do we accept complaints which have been dealt with previously and were '*dismissed or dealt with... and disclose no reason to reconsider the matter*'.<sup>17</sup> Nor, fourthly, do we ordinarily accept complaints about conduct that happened more than three years before we receive them, although we will if they allege professional misconduct and it is '*just and fair*' to deal with them '*having regard to the extent of, and reasons for the delay*'.<sup>18</sup>

Nor, fifthly, do we as a rule accept and deal with complaints in relation to cost disputes—or not as conduct complaints, at any rate, certainly in the absence of any evidence of gross overcharging. The regime in relation to costs disputes remains unchanged, at least for the time being, and should be well known to you—clients who believe they have been overcharged are entitled to ask for (and to receive) an itemised bill of costs and, if they remain dissatisfied, to file it with the Solicitor's Complaint Tribunal (the SCT) and apply to have it assessed by a costs assessor. The SCT will then decide whether they were overcharged and what they should pay.

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<sup>16</sup> s.259(1)(c)

<sup>17</sup> s.259(1)(d)

<sup>18</sup> s.258

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Importantly, however, we have the power and the duty, if the process before the SCT reveals evidence of gross overcharging, to commence an investigation with a view to initiating disciplinary proceedings. Indeed we have power to engage a cost assessor ourselves, when we suspect gross overcharging, *‘to report on the reasonableness... of a bill of costs.’*<sup>19</sup>

Nor as a rule do we accept and deal with complaints which allege negligence. We can’t usurp the role of the courts, obviously, by purporting to decide whether practitioners have been negligent, and nor is a disciplinary tribunal an appropriate forum in effect to litigate matters of this nature or complexity. We may well accept complaints which allege negligence, however, if the negligence is obvious on its face (so doesn’t need decision) or has been admitted or proven in court. Clearly conduct which has been agreed or established to be negligent will sometimes amount also to *‘conduct which falls short of the standards of competence and diligence a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.’*

We get a lot of complaints like these and that is one good reason why the QLS should (and I think does) feel liberated by no longer being responsible for receiving and deciding complaints. It’s the Commission’s role under the new arrangements to tell people who have complaints of these kinds that we can’t deal with their complaints—and, if they are alleging negligence, for example, to suggest they go off to another lawyer to get advice about their prospects of seeking a remedy through litigation. This is bad news for most such complainants and news that prompted many a complainant in the past to smell a rat—the rat of Caesar judging Caesar unduly sympathetically, to their detriment as consumers. Now it is our job to bear the bad tidings.

### ***The process of investigation...***

We are obliged, once we’ve assessed a complaint to be a conduct complaint—that is to be alleging some unsatisfactory professional conduct or professional misconduct—to

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<sup>19</sup> s.269(1)(b)

commence an investigation. We can either undertake the investigation ourselves, in-house, or refer it to the QLS or BAQ as the case may be to investigate on our behalf.<sup>20</sup> The investigations we refer to the QLS and BAQ remain subject to the Commission's direction and control<sup>21</sup> and, crucially, neither the QLS nor BAQ have power to decide how they should be finalised, only to report their findings and recommendations to the Commission. It is our job and our job alone to decide how to finalise a conduct complaint.<sup>22</sup>

The Commission - and the QLS and BAQ when they are undertaking investigations on our behalf - have substantial powers of investigation. We can require legal practitioners subject to investigation to give us within a stated reasonable time a full explanation of the matter subject to investigation, in writing or personally, or to appear before us at a stated reasonable time and place, or to produce within a stated reasonable time '*any document in the practitioner's custody, possession or control that the practitioner is entitled at law to produce.*'<sup>23</sup> We will make it a habit to ask, and to ask nicely, but in all likelihood only once. We are likely, if we get no or only an inadequate response, to force the issue by exercising our power to issue a formal direction. Practitioners should be aware that failure to comply within 14 days with a formal direction of this kind is prime facie evidence of professional misconduct.<sup>24</sup>

We - that is the Commission and the QLS and BAQ when they're undertaking investigations on our behalf—also have powers to enter places, either with the occupiers' consent or by warrant,<sup>25</sup> to conduct searches and to inspect or take extracts from documents<sup>26</sup> and, if needs be, to '*seize*' documents or other evidence.<sup>27</sup> You should be aware, too, that practitioners are obliged to give us '*reasonable help*'<sup>28</sup>

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<sup>20</sup> s.265(2)

<sup>21</sup> s.265(3)-(5)

<sup>22</sup> s.268

<sup>23</sup> s.269

<sup>24</sup> s.269(4)

<sup>25</sup> ss.549-555

<sup>26</sup> s.556

<sup>27</sup> s.558

<sup>28</sup> s.557

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during the course of an investigation and that it's an offence to '*obstruct an investigator in the exercise of a power [without] a reasonable excuse.*'<sup>29</sup>

We have two options, having completed an investigation ourselves or having reviewed the findings and recommendations of investigations undertaken by the QLS and BAQ on our behalf. The first is to dismiss the complaint.<sup>30</sup> The word 'dismiss' carries some unfortunate connotations, especially from the complainant's point of view, and especially when the evidence after investigation falls short of exonerating the respondent practitioners but simply entitles them to the benefit of the doubt. We prefer in these circumstances simply to say we will 'take no further action'.

Our second option, if we believe there is a '*reasonable likelihood*' a disciplinary body will find the practitioner guilty of unsatisfactory professional conduct or professional misconduct, and if we believe it's in the public interest, is to file a discipline application.<sup>31</sup> The Commission as noted already is the sole prosecuting authority.<sup>32</sup>

### ***Our role in relation to discipline...***

Interestingly the Commission has no summary reprimand powers, unlike our counterparts in New South Wales or Victoria and unlike the QLS under the previous statutory regime here. Our only option, if we believe there is a reasonable likelihood a disciplinary body will find a practitioner (or employee) guilty and it's in the public interest, is to file a discipline application in one of two newly established disciplinary bodies, the Legal Practice Tribunal (the LPT) and the Legal Practice Committee (the LPC).

The LPT is chaired by the Chief Justice and comprises a judge of the Supreme Court helped by a practitioner member—a solicitor or barrister as the case may be—and a lay member.<sup>33</sup> It hears disciplinary applications in relation both to alleged

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<sup>29</sup> s.571

<sup>30</sup> s.274

<sup>31</sup> s.274

<sup>32</sup> s.273, and see s.276 also.

<sup>33</sup> ss.429,437 and 444

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unsatisfactory professional conduct and professional misconduct and has substantial powers including powers to strike off or suspend practitioners from practice, to allow them to practice only subject to certain conditions, to order them to pay fines of up to \$100,000, to award compensation of up to \$7,500, and to reprimand.<sup>34</sup> Notably, the LPT must in all but exceptional circumstances order legal practitioners it finds guilty to pay costs, including the complainant's costs and the Commission's costs in bringing the application.<sup>35</sup>

Parties who are dissatisfied with a decision of the LPT can appeal the decision to the Court of Appeal, as can the Attorney-General. Appeals are not confined to errors of law but are by way of rehearing the evidence including any fresh evidence the court regards as material.<sup>36</sup>

We will file less serious disciplinary applications—applications in relation to alleged unsatisfactory professional conduct—with the LPC. The LPC is also the body that deals with discipline applications against law practice employees for alleged misconduct.<sup>37</sup> It comprises seven people—a chairperson, two solicitors, two barristers, and two lay people,<sup>38</sup> and has a general advisory role in relation to professional rules.<sup>39</sup> In its disciplinary guise however, it comprises only three of its members—the chairperson (or deputy chairperson), a practitioner member (a solicitor or barrister as the case may be) and a lay member.<sup>40</sup> It has powers to reprimand practitioners it finds guilty, to order them to pay fines of up to \$10,000, to order them to pay compensation up to \$7,500 and to order them to do or refrain from doing something in connection with their practice or that their practice be managed in a stated way for a stated period or be subject to inspection from time to time, etc.<sup>41</sup> It has powers to order law practices not to employ, for up to five years, law practice employees it finds guilty of misconduct, or to employ them only subject to stated conditions.<sup>42</sup>

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<sup>34</sup> s.280

<sup>35</sup> s.286

<sup>36</sup> s.292

<sup>37</sup> s.282(1)

<sup>38</sup> s.452

<sup>39</sup> s.221

<sup>40</sup> s.469

<sup>41</sup> s.282

<sup>42</sup> s.282(4)

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Like the LPT, the LPC must in all but exceptional circumstances order legal practitioners it finds guilty to pay costs, including the complainant's costs and the Commission's costs.<sup>43</sup> Parties who are dissatisfied with a decision of the LPC can appeal the decision to the LPT.<sup>44</sup>

The Commissioner is obliged to keep a discipline register of disciplinary action taken pursuant to the Act, including the name of the practitioner, their firm, and details of the disciplinary action,<sup>45</sup> and to maintain that register on the Commission's website. The Act defines 'disciplinary action' in a limited way to include disciplinary action in relation to professional misconduct only, and not unsatisfactory professional misconduct.<sup>46</sup> We have decided, however, to go beyond the mandatory requirements of the Act and, unless the LPT or LPC makes orders prohibiting their publication, to also include the names and relevant details of any legal practitioners or law practice employees who are found guilty of unsatisfactory professional misconduct or (in the case of employees), misconduct. That is because the information is public in any event, since hearings before both the LPT and LPC *'must be open to the public'* unless they direct a hearing, or part of it, to be closed.<sup>47</sup> The discipline register will include for every entry a link to the disciplinary body's full reasons for decision, and to the full reasons for any decisions on appeal.

We have also decided to include disciplinary action taken before the commencement of the Act including all the disciplinary action taken by, and the reasons for decision of the (now superseded) SCT since its inception in 1997. We have included decisions of the courts over that same period in relation to barristers. I commend the Commission's website to you—again—and on this occasion the discipline register in particular. It contains some user-friendly search facilities and my expectation is that you will find it to be a useful resource in researching disciplinary matters.

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<sup>43</sup> s.286

<sup>44</sup> s.293

<sup>45</sup> s.296

<sup>46</sup> s.295

<sup>47</sup> s.474

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### *Conclusion...*

That is something of a Cook's tour of the Commission's roles and functions. Let me make two other points by way of conclusion. The first of them is that the Act obliges me to develop performance criteria for handling complaints<sup>48</sup> and, since I'm also obliged to deal with complaints '*as efficiently and expeditiously as is practicable*',<sup>49</sup> one of those performance criteria will be something along the lines 'finalise X percent (the vast majority) of complaints within X (say six or nine) months of receipt.'

I mention this because we will have difficulty doing well against measures of this kind for some little while yet. The reality is that the Commission inherited over 1000 complaints on its inception on 1 July and there is a considerable backlog accordingly. A disproportionate number of those complaints have been in the system for some time, some of them for two years and more. We will need to work our way through those complaints before we can achieve the timeliness of performance the Act envisages. I hope and expect we will have overcome these difficulties by the end of financial year 2005/06.

Finally let me give you some advice should you find yourself subject to complaint. Please do not put your head in the sand or let it get the better of you. Remember this, that we are not accusing you of any wrongdoing if we ask you for an explanation or to produce various documents but merely telling you what someone else has told us and getting your side of the story. We are simply trying to put ourselves in a position to decide whether the complaint has merit or otherwise. We ask you to respond as fully and as frankly and as quickly as you reasonably can. Contact us if that's a problem for some reason so that we can discuss how best to proceed. We are not unreasonable people.

Please do not go into indignant or defensive mode, or take black letter points of law. Deal with the substance, and deal with it on its merits. Please do not respond in anger

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<sup>48</sup> s.310

<sup>49</sup> s.253

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or with an excess of adversarial zeal—that will not help you. The fact is, as the Solicitors’ Complaints Tribunal pointed out in a decision in 2003:

- *when faced with such a request or inquiry from their professional body [you could replace these words now with the words ‘from the Commission’], a solicitor is in much the same position as when dealing with the Court. A solicitor has a duty to be truthful even to his own detriment, and not just a duty to be truthful but a positive duty to be full and frank and for his answers to be candid as well as truthful.*<sup>50</sup>

The Court of Appeal agreed. It made the point in that same matter on appeal that:

- *the respondent was generally uncooperative... and apparently took an unduly combative approach before the Tribunal. Neither the investigation nor the hearing is criminal in nature: it is a process directed towards protection of the public. Recognising that, a practitioner is duty bound to cooperate reasonably in the process... The Tribunal was right to have regard to that aspect [the respondent’s lack of cooperation and unduly combative approach] for it bore on [his] lack of proper appreciation of the public interest which should have informed his professionalism.*<sup>51</sup>

Let me leave you with that thought and invite you to ask me any questions. Thank you for listening.

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<sup>50</sup> The Tribunal made these comments in the course of deciding the matter of Whitman. Its reasons for decision can be found in full on the discipline register on the Commission’s website.

<sup>51</sup> QCA03-483: the Court’s reasons for decision can be found on the discipline register also.