

Legal profession under scrutiny in New South Wales

In November 1991, the then NSW Attorney-General, the Hon Peter Collins QC MP, asked the New South Wales Law Reform Commission to look at the need for an alternative means of dealing with complaints about the delivery of legal services to the public. *Astrid Eggins*, from the NSWLRC, reports.

The reference had a dual focus. The first part dealt with solicitors and barristers operating in private practice. The second concerned government lawyers. For reasons of policy as well as pragmatism, the Commission decided to examine these two parts of the reference separately. In May 1992, the Commission published Discussion Paper 26 and in February 1993, it released Report 70. These two papers dealt with only the first term of reference. The Commission plans to release a discussion paper on the second term by the end of the year.

As part of its research program, the Commission examined not only the current complaints system for lawyers operating in New South Wales but also looked at complaints systems operating in other jurisdictions including all the other Australian States and Territories as well as the disciplinary systems operating in England, Wales and in a number of American States. We summarised this comparative research in Discussion Paper 26.

The Commission received a number of submissions, both in response to its initial publicising of the reference and then more detailed submissions in response to the three options for reform in

Discussion Paper 26. With the exception of the Law Society and the Bar Association, which favoured only slight modification of the current system, those who made a submission to the Commission expressed dissatisfaction with the current system for handling complaints in NSW and called for greater independence. Some submissions suggested setting up a legal services ombudsman, others favoured the idea of an independent complaints commission.

One of our first tasks was to find out the level of public awareness of the current complaints system. So we organised a public opinion survey through the Roy Morgan Research Group. The questionnaire sought to discover how much people knew about the current complaints system and what they felt might be an appropriate alternative. As well as the survey we undertook our own review of the complaint files that the Law Society and Bar Association held. The Commission's Report number 70 includes details of the survey questions, the responses and the results of the Commission's review.

When the Commission attempted to identify the criteria for judging a complaints

handling system it was disappointed to find that, to date, only operational issues relating to complaints handling systems had been studied and that there had been little consideration of the broader philosophical issues.

Based on the submissions the Commission received and its own research and analysis of complaints handling systems, the Commission has produced a set of 'best practice principles' which are applicable to all professional complaints handling systems, not just those dealing with lawyers. The Commission proceeded to measure the existing systems operated by the Law Society and the Bar Association against these 'best practice principles'. In outline form, the 'best practice principles' were as follows

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

A detailed discussion of these principles can be found in Report 70.

After extensive investigation, the Commission concluded that the existing system of handling complaints does not adequately serve the needs of complainants, the practising profession or the community at large.

Owing to the largely voluntary, part-time nature of the existing system, it is the Commission's view that the processing of complaints takes far too long (especially in the case of the Law Society). Complainants often feel left out of the process. The vast majority of complaints are dismissed, promoting the view that the legal profession is 'looking after its own'.

The Commission identified a wide divergence between what clients perceive as unsatisfactory behaviour on the part of their lawyer (delay, negligence, rudeness, poor communications and overcharging) and what lawyers and their professional associations see as sufficient to merit genuine attention and action.

The Commission concluded that a proper system of complaints handling must attempt to meet multiple objectives. It must ensure

- a mechanism for redressing the complaints of dissatisfied users of legal services
- the diligence and competence of individual practitioners
- the maintenance of high standards of ethics and practice for the legal profession generally.

One of the Commission's central criticisms of the operation of the existing system is that it is geared almost entirely to the second aim without adequately

achieving it, and insufficiently addresses the first and third objectives.

The Commission found that the current complaints system lacked the appearance of independence and thus did not enjoy public confidence. At the same time, the system must be accountable to the public. Accordingly, the Commission has endeavoured to design (using the 'best practice principles' as a guide) a new system which is much more consumer-oriented and which will deal seriously and effectively with most complaints and disputes. Among other things, this will require educating the public about the nature of legal services and their rights and remedies under the disciplinary system and educating the legal profession about the standards of practice and common courtesy to which clients should be able to feel entitled.

The centrepiece of the Commission's proposals for reform is the creation of the office of the Legal Services Ombudsman (LSO). The LSO would provide advice and assistance to all complainants, receive all formal complaints (not necessarily in writing) and monitor each complaint as it progressed through the complaints system. The Law Society and the Bar Association would still have the responsibility for investigating each complaint and determining the appropriate disciplinary action. The LSO would, however, have the responsibility to monitor the professional associations' efforts at investigation, their progress and their decisions.

The Commission also proposed that the LSO would have the power to investigate complaints directly if the need arose and to

take over from the Law Society or the Bar Association the investigation of any complaint.

The Commission made 77 recommendations in all. The other key features of the recommended system include:

- much better access to the system for potential complainants, in terms of information, language, physical access
- a simpler, streamlined structure, with the central intake of all complaints (including disputes about fees and costs) and a single Legal Services Tribunal
- redress of the current imbalance of rights and safeguards between complainants and lawyers, with the creation of a statutory Complainant's Charter of Rights
- a clearer distinction between consumer-type disputes and disciplinary matters with much greater emphasis on consensual dispute resolution, arbitration and compensation in the former cases
- increased attention to education and prevention measures such as compulsory training in ethics and professional responsibility for law students
- strengthening the mechanisms for ensuring the external accountability of the system through a more robust, non-lawyer dominated panel empowered to review all adverse decisions
- funding these reforms through a modest levy on lawyers' practising certificates which will permit the release of the existing sources of funding (*ie* the Statutory Interest Account) for the purposes of legal aid.

In late May 1993, the Government released a policy statement which adopted most of

the Commission's recommendations. In particular the Government endorsed the Commission's central recommendation for the creation of an independent ombudsman with broad powers to oversee the operation of the complaints system. To avoid confusion with the current Ombudsman, the Government felt the title Legal Services Commissioner was more appropriate.

The Government has chosen not to adopt the Commission's recommendations in two important respects. Firstly, although the Government intends that the vast majority of complaints will be made to the Commissioner, the professional associations are to retain the power to receive complaints. The Government has stated that, in the case of a lawyer lodging a complaint, that person may

prefer to deal directly with the professional association. Secondly, the Government has stated its intention to abolish the Conduct Review Panel on the grounds that review of complaints will now effectively be the responsibility of the Commissioner. The Government will be releasing an exposure bill for public comment this month.

Copies of the Commission's Report No 70 can be purchased from the NSWLRC at a cost of \$20.