

COAG National Legal Profession Reform Project
National Legal Services Ombudsman

Overview of the proposed framework

Under the proposed regulatory framework, the office of the National Legal Services Ombudsman would be created to administer and oversee a national complaints-handling scheme.

Consumers of legal services throughout Australia would have a single, easily accessible avenue for making complaints about legal practitioners. If substantiated, complaints could result in findings of unsatisfactory professional conduct or professional misconduct against a legal practitioner. In addition, the Ombudsman would have powers to deal with complaints of a more 'consumer' nature, being complaints about the provision of legal services. The Ombudsman could make a determination in relation to these complaints if reasonably satisfied that the conduct the subject of the complaint was not fair and reasonable in all the circumstances.

Under the proposed framework, legal practitioners would benefit from the prompt resolution of complaints against them, including those arising from misunderstandings and miscommunication.

The Ombudsman would have a range of functions in relation to complaints against legal practitioners and law practices, including:

- receiving complaints;
- investigating complaints;
- making determinations in relation to complaints of a consumer nature, and certain cases of unsatisfactory professional conduct, and making appropriate orders;
- prosecuting matters involving unsatisfactory professional conduct or professional misconduct in the appropriate disciplinary tribunal;
- conducting internal reviews of certain decisions;
- being involved in reviews by the disciplinary tribunal, and appeals to the Supreme Court in relation to disciplinary matters; and
- providing education to the public and legal profession about ethical issues, producing educational information about the complaints process and advising members of the public about the complaints process.

1. LLFG comments on the proposed framework

1.1 *The LLFG supports the establishment of a national complaints handling body - the office of the National Legal Services Ombudsman (**Ombudsman**) - and a single entry point for receipt of complaints about legal practitioners.*

1.2 *LLFG also agrees that the Ombudsman should set national requirements for complaints handling.*

1.3 *The LLFG agrees that in the short term, the delegation of the complaints handling function to State and Territory bodies is a pragmatic and potentially cost effective way to implement a national framework in view of the existing state based complaints handling infrastructure. The LLFG believes that all complaints should be received by the Ombudsman and then, if appropriate, delegated down to the relevant state or territory body responsible for handling the complaint. It is accepted that, initially when the system is established, delegation might be on*

state based lines. However, there should be a plan to revisit this to look at how consistency and cost efficiency are best achieved. Where a complaint potentially relates to more than one jurisdiction, only one should be charged with handling the complaint.

- 1.4 Detail is required as to how existing State and Territory resources would be collectively utilised to deliver a uniform and simplified national complaints handling process. For example, the LLFG considers that to provide for an effective national complaints handling system, there must be a uniform structure and process for dealing with complaints at the local level with an Ombudsman having control over the implementation of the framework and ensuring consistency of decision making.*
- 1.5 The LLFG considers that there are benefits for the profession and consumers if the model continues to evolve over time to provide a more efficient and streamlined system and to avoid the duplication of resources which can add to the cost and complexity of the framework. The LLFG believes that as part of this evolution of a national model, more work needs to be done to establish the best way in which consumer complaints should be resolved with a view to ensuring simplicity and efficiency of processes.*
- 1.6 The LLFG does not agree that the powers of the Ombudsman in respect of consumer complaints and disciplinary matters should be expanded to allow for the making of binding orders against a legal practice or practitioner. The LLFG submits that these additional powers will confuse the mediating and investigative roles of the Ombudsman with the role of the relevant Tribunal exercising judicial functions.*

Introduction

The Taskforce proposes a new national uniform framework for dealing with complaints against legal practitioners and law practices. The framework would strengthen the role and powers of complaint handling bodies to ensure the more efficient, cost effective and timely resolution of complaints. It would also address concerns about a lack of consistency across State and Territory jurisdictions in relation to complaints handling, outcomes, and appropriate redress for consumers of legal services.

Under the proposed framework, an office of the National Legal Services Ombudsman ('Ombudsman') would be established to oversee the national scheme. In practice, the Ombudsman would handle relatively few complaints itself at first instance (for example, only where a complaint is particularly sensitive or may lead to a legal precedent). In most cases, the Ombudsman would delegate its complaint handling functions to State and Territory bodies, which would investigate and resolve complaints, and prosecute disciplinary matters, on its behalf. These bodies would continue to be separate State and Territory entities, but would operate under the name and auspices of the Ombudsman (eg, as State or Territory offices). Legal services consumers could automatically access the Ombudsman via a single telephone number, which could divert them to the relevant State or Territory body.

The benefits of having an Ombudsman at the national level would be to ensure consistency over time in complaints handling. The National Ombudsman would monitor the conduct of its delegates in exercising powers under the National Law, and could review any decisions made by those delegates on its own motion or, in relation to consumer complaints, under a framework providing for internal review. The National Ombudsman should also have the power to develop tools to help support practitioners to uphold high ethical standards and good business practices.

The Taskforce proposes a more simplified complaints handling scheme, which would streamline the process for considering and determining complaints to ensure their more speedy resolution. In particular, the Ombudsman and its delegates would have more streamlined powers to investigate and resolve complaints, and broader powers to make binding determinations and orders where certain complaints have been substantiated.

The National Legal Services Ombudsman

Under the Taskforce's proposed regulatory framework, the Ombudsman would be created to administer and oversee a national complaints-handling scheme.

Objectives of the provisions

The objectives of the complaints handling provisions are as follows:

- to provide a national scheme for the discipline of the legal profession, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;
- to promote and enforce the professional standards, competence and honesty of the legal profession; and
- to provide a means of redress for complaints about lawyers.

The Ombudsman's role

At a high level, the Ombudsman's role would be to:

- promote, monitor and enforce high standards of conduct in the delivery of legal services through its complaints-handling and educational functions;

- protect consumers of legal services including by providing appropriate means of redress for complaints; and
- promote public confidence in the delivery of legal services and the administration of justice.

More particularly, the Ombudsman would have a range of functions in relation to complaints against legal practitioners and law practices, including:

- receiving all complaints, and initiating complaints on its own motion;
- dismissing complaints in certain circumstances;
- investigating complaints;
- making determinations in relation to complaints of a consumer nature, and certain cases of unsatisfactory professional conduct, and making appropriate orders;
- prosecuting matters involving unsatisfactory professional conduct or professional misconduct in the appropriate disciplinary tribunal;
- conducting internal reviews of certain decisions;
- involvement in reviews by the disciplinary tribunal, and appeals to the Supreme Court in relation to disciplinary matters; and
- providing education to the public and legal profession about ethical issues, producing educational information about the complaints process and assisting members of the public to make complaints.

The Taskforce notes that certain other powers could also be vested in the National Ombudsman to facilitate the investigation and resolution of complaints, such as trust account investigations.

2. LLFG comments

- 2.1 *The Ombudsman should not have power to make determinations of unsatisfactory professional conduct. Determinations of unsatisfactory professional conduct or professional misconduct should be made by a disciplinary tribunal only and not by the Ombudsman.*
- 2.2 *The LLFG does not support giving the Ombudsman (and/or its delegates) power to make binding determinations and orders in relation to consumer complaints or broader powers in relation to disciplinary matters than those currently available under the Model Law and the Legal Profession Acts.*
- 2.3 *This is consistent with the model of an Ombudsman exercising a mediating and investigative role as between the profession and consumers of legal services. It should not be able to act as a judge.*
- 2.4 *The LLFG submits that to the extent, the Ombudsman is unable to mediate a resolution of a complaint as between a consumer and legal practitioner, the consumer continues to have recourse to the ordinary tribunals and courts to pursue remedies against the legal practitioner as a matter of contract and law.*
- 2.5 *The Supreme Courts in the respective state and territories still continue to have inherent jurisdiction in respect of the control and discipline of the legal profession.*

Possible delegates

The National Law would provide that the Ombudsman may delegate its complaint handling functions and powers to certain bodies nominated by States and Territories as suitable to have power delegated to them. These bodies could be specified in a Schedule to the National Law to provide certainty and stability for the legal profession and the community. If, for any

reason, a jurisdiction wishes to change the body nominated for its jurisdiction (eg, if there is a restructure), the Schedule could be amended by agreement of a majority of SCAG Ministers, and the Ombudsman. Alternatively, less formal procedures could be considered which do not require the approval of SCAG Ministers. The Taskforce would be interested in the views of the Consultative Group and stakeholders on this matter.

3. LLFG comments

3.1 The uniform structure for dealing with complaints at the local level should be prescribed in the National Law and should not be changed except by national agreement.

At this stage, the Taskforce proposes that most of the existing State and Territory complaints handling bodies be nominated as the Ombudsman's delegates. As noted above, these could be known as the Ombudsman's State and Territory offices. These bodies may include, for example:

- Office of the Legal Services Commissioner (NSW);
- Legal Services Commissioner (Victoria);
- Legal Services Commission (Queensland);
- Legal Profession Complaints Committee (Western Australia);
- Legal Practitioners Conduct Board (South Australia); and
- Legal Profession Board (Tasmania).

The Taskforce proposes that one body only should be nominated as the Ombudsman's delegate in each jurisdiction and, where possible, this should be an independent body. In certain small jurisdictions (ie, the ACT and the Northern Territory), an independent body does not exist and it may not be cost effective to establish a new one. Other options for those jurisdictions include the possibility of nominating an independent body from another jurisdiction to deal with complaints in these jurisdictions, creating a new independent body to deal with complaints handling, or nominating a professional association as the delegate. The Taskforce will seek the views of the smaller jurisdictions on options that may be appropriate for them.

4. LLFG comments

4.1 It is important that only experienced legal practitioners handle complaints. We agree that initially there should be one delegate in each jurisdiction wherever possible. There should be a plan for examining whether a more cost effective and efficient model of handling complaints can be achieved over time.

Assistance from professional associations

In several jurisdictions professional associations currently handle complaints against legal practitioners – either in the absence of an independent body (eg, in the ACT and Northern Territory) or in addition to an independent body.

There are various options regarding the role of professional associations under the new framework. In jurisdictions that have independent complaint handling bodies, these bodies would operate under delegation from the national body. However, State or Territory bodies could have a discretion to refer certain complaints or investigations to professional

associations where they consider it appropriate to do so. This could involve the referral of complaints on a case by case basis, or in relation to a particular category of complaint. . The Taskforce proposes that the professional associations would be given the power to make recommendations only to the State or Territory delegate. The State or Territory delegate would then make any determination in relation to the complaint, or decision to institute proceedings in the disciplinary tribunal. It is also possible that the State or Territory body could authorise a professional association to prosecute a disciplinary proceeding on its behalf.

The Taskforce would be interested in the views of the Consultative Group and stakeholders in relation to these options.

5. LLFG comments

5.1 *There is merit in involving professional associations at least initially in the complaints process but the nature and extent of their role must be consistent in all jurisdictions and it must be cost effective.*

The complaint handling framework

In practice, the vast majority of services and transactions involving legal practitioners are handled well. However, for public policy reasons, where consumer disputes or allegations of unsatisfactory professional conduct or professional misconduct occur, there is a collective interest in ensuring they are adequately addressed.

Legal services consumers and other practitioners may complain about a range of matters in relation to legal practitioners. According to the NSW Legal Services Commissioner, the large majority of complaints generally refer to practitioners acting in a way that consumers believe is unethical, and about 80% of complaints also refer to communication problems or billing practices.¹ The vast majority of complaints do not give rise to professional conduct investigations. Generally, most disciplinary proceedings arise from client complaints. However, other bodies also have responsibility for raising these matters, including the courts and—in some circumstances—other legal practitioners. In some cases, a legal practitioner must disclose matters about him or herself (such as conviction for serious or tax offences).²

The Model Bill framework

The Model Bill provides a framework for dealing with complaints about lawyers. The States and Territories have adopted these provisions to varying extents when implementing the Model Bill provisions (see Attachment).

Generally, the Taskforce considers that the Model Bill provisions provide a good starting point for further reform of the complaints handling system. However, the Taskforce has identified the following issues to be addressed.

First, the Model Bill is very prescriptive in relation to complaints handling and, in particular, in relation to procedural matters. Consistent with the Taskforce's approach to the new principles-based legislation generally, it intends to take a simpler approach to these matters.

¹ S Mark, 'Ethics and Risk Management—How to Reduce Complaints', *Paper given to Ethics for Lawyers, Centre for Continuing Legal Education, Faculty of Law, UNSW* on 18 August 2009.

² G Dal Pont, *Lawyers' Professional Responsibility* (2006) 3rd ed, 532.

This would involve including the general architecture of the complaints framework in the legislation, the minimum requirements to ensure procedural fairness, and an outline of the penalties that may be imposed. Where required, more detail would be provided in the National Rules and/or complaint handling guidelines.

6. LLFG comments

6.1 *The LLFG does not disagree with the proposal to include the 'general architecture of the complaints framework' in the legislation subject to there being sufficient clarity in the National Rules with respect to the process for dealing with complaints and conducting investigations. For example, it is imperative that the rules contain appropriate provisions in relation to the rules of evidence, procedural fairness and legal professional privilege. The rules should also permit sufficient flexibility in procedures to allow for time periods to be extended or reduced in appropriate circumstances.*

Second, the Model Bill does not provide an adequate framework for dealing with complaints of a 'consumer' nature. Currently, if a complaint does not involve issues of unsatisfactory professional conduct or professional misconduct, the complaint handler may seek to resolve the complaint by mediation. However, if this is not successful, and the complaint does not raise disciplinary issues, generally there are no other remedies available. As a result, many consumers do not obtain what they consider to be an adequate resolution of their complaint.

In practice, complaints about lawyers may relate to a range of matters, from poor communication and servicing of clients, to serious allegations of unethical or improper professional conduct. It is not always clear at the outset whether a complaint is classified as a purely consumer matter or a purely disciplinary matter. For this reason, the Taskforce does not consider it appropriate to distinguish between different types of complaints at the time they are made. However, the Taskforce considers that the Ombudsman should be given powers to make binding determinations in relation to consumer complaints, and to impose a range of orders that are appropriate to such conduct.

7. LLFG comments

7.1 *The LLFG does not support the extension of powers of an Ombudsman to make binding determinations in relation to consumer complaints. See the previous comments under 2.*

Third, the Model Bill only provides for complaints against legal practitioners, rather than law practices. In some cases, it may be more appropriate for the complaint to be made against the law practice itself. For example, in situations where more than one legal practitioner does legal work on a single matter it can be difficult or inappropriate to lodge a complaint against an individual practitioner. Alternatively, where alleged misconduct indicates systemic improper practice, it may not be possible or appropriate to complain about any one single practitioner.³ In Victoria, complaints can be made against a law practice in relation to a 'civil dispute'.⁴ The Taskforce also understands that legislation

³ See, generally, the discussion in NSW Law Reform Commission, *Complaints Against Lawyers: An Interim Report* (2001).

⁴ Generally, this is defined as a costs dispute in relation to legal costs not exceeding \$25,000 in respect of any one matter, a claim that a person has suffered pecuniary loss as a result of an act or omission by a law practice or legal practitioner in the provision of legal services (other

permitting complaints against law firms has been enacted in several overseas jurisdictions, including the United Kingdom. Accordingly, the new framework will provide for complaints of this nature. To have any real meaning, this regime must be accompanied by a power to issue determinations involving law practices. This could include, for example, an order to redo work.

8. LLFG comments

8.1 We agree that a consumer complaint should be able to be made against a legal practitioner or law practice subject to the general comments made in 1.

Finally, the Model Bill provides that complaint-handling bodies may make complaints about lawyers on their own motion, but does not deal specifically with investigations into systemic matters that may indicate conduct capable of resulting in a complaint of a consumer or disciplinary nature. The Taskforce considers that the Ombudsman should have such a role under the new framework.

9. LLFG comments

9.1 We submit that own motion investigations must be subject to a threshold requirement eg, the complaint handler must have reasonably formed the view that there are systemic issues in connection with a complaint that requires investigation.

9.2 We note there is potential for overlap between the role of the National Legal Services Board and its powers of regulation and investigation, and the proposed investigative powers of the Ombudsman under the new framework. The LLFG submits that there should be clarity around their respective roles to avoid duplication of resources and inefficiencies.

The proposed framework

Complaints handlers should have a broad array of powers and a wide discretion to deal with complaints at they see fit. Any exercise of a discretion must be fair and complaints that involve issues of professional misconduct must be investigated. They also need more scope to deal with complaints about matters that do not raise disciplinary issues. This includes matters such as poor business practices, poor communication, small mistakes or a lack of courtesy. As the Queensland Legal Services Commissioner has commented '[c]omplaints of these kinds invariably justify some appropriate remedial action if substantiated but rarely a formal disciplinary response'.⁵

Generally, all complaints should be made to the Ombudsman. In practice, complaints would be made to the State or Territory delegate of the national body, which would then be required to report certain categories of complaint to the national body. These categories would be outlined in guidelines, and would cover the type of complaints the national body may wish to 'call in' to handle on its own (eg, complaints that may be particularly sensitive or may lead to a legal precedent). Such reporting could be effected through a national complaints database or other arrangements.

than one for which a claim can be made against the Fidelity Fund), or any other genuine dispute between a person and a law practice or legal practitioner arising out of, or in relation to, the provision of legal services.

⁵ J Briton, *A Response to the Paper for Consultative Group of 16 September 2009* (unpublished).

Unless the national body decides to deal with the complaint itself, the State or Territory delegate would deal with the complaint under a standing delegation from the national body. Accordingly, where this paper refers to the Ombudsman, it includes a reference to the State or Territory body acting under such delegation.

The Taskforce proposes a simple and efficient process for dealing with complaints of a 'consumer' nature (as opposed to a 'conduct nature'). Generally, this means complaints about legal practitioners or law practices that relate to provision of legal services, including complaints about legal costs up to \$100,000.

10. LLFG comments

- 10.1 *The LLFG submits that all complaints should be received at a single national collection point and then delegated as appropriate.*
- 10.2 *We agree that there should be clarity around the definitions of different types of complaints, eg a complaint of 'a consumer nature' should be defined. The Victorian definition of a civil complaint is recommended as it restricts complainants to recipients of the legal services, and in the case of a costs dispute, to the person who is charged with the costs or who is liable to pay the costs.*
- 10.3 *We note in Victoria a civil complaint includes a costs dispute in relation to legal costs not exceeding \$25,000 in respect of any one matter. It also includes a claim for pecuniary loss. The jurisdictional limit in relation to a small claims proceeding under the new national Consumer Credit Code is \$40,000. An amount within that range may be considered appropriate for all types of civil complaints. The jurisdictional limit should apply to the total legal costs of a matter.*

The Taskforce considers that the Model Bill's definitions of 'unsatisfactory professional conduct'⁶ and 'professional misconduct'⁷ generally are appropriate, and does not propose to alter them. The Model Bill also provides an outline of the matters that are capable of constituting unsatisfactory professional conduct or professional misconduct, and notes that these are intended to be the minimum standard adopted. The Taskforce proposes that the existing list be adopted, but notes that further matters may be identified for inclusion in the list. The Taskforce would be interested in the views of the Consultative Group and stakeholders on this matter.

⁶ Under the Model Bill, 'unsatisfactory professional conduct' includes conduct of an Australian legal practitioner occurring 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.

⁷ Under the Model Bill, 'professional misconduct' includes: (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

11. LLFG comments

11.1 We agree no changes are required to the definitions of unsatisfactory professional conduct and professional misconduct. This is on the basis that the common law standard under which liability only attaches to those implicated in the conduct continues to be applied.

The Taskforce proposes the following legislative provisions in relation to complaints, and would be interested in the views of the Consultative Group and stakeholders in relation to this framework.

Complaints

- A complaint may be made against a legal practitioner or a law practice.
- Complaints will be made to the State or Territory delegate of the Ombudsman in the jurisdiction to which the complaint relates.
- The State or Territory delegate must advise the national body of certain categories of complaints, in which case the national body would have a discretion to 'call in' the complaint. The national body would outline these categories in practice guidelines.

12. LLFG comments

12.1 We agree consumer complaints relating to costs or loss should be able to be made against a legal practitioner or law practice. Disciplinary complaints should only be able to be made against a legal practitioner.

12.2 Also see the previous comments under 10.1.

Own motion investigations

- The Ombudsman should have the power to instigate a complaint and/or investigate a matter on its own motion, either in relation to a particular legal practitioner or law practice, or in relation to systemic matters that may indicate conduct capable of resulting in a complaint of a consumer or disciplinary nature.

13. LLFG comments

13.1 See previous comments under 9.1.

Consideration of complaint

- The Ombudsman may make preliminary inquiries to determine how to proceed with the complaint.
- In doing so, the Ombudsman should have a discretion to request further information from any relevant person in relation to a complaint, including the complainant and the legal practitioner or law practice involved.
- If a response is not received within the specified timeframe, the Ombudsman may take the steps it considers reasonable in the circumstances, including: investigating the complaint; proceeding to resolve the complaint; or dismissing the complaint.
- The Ombudsman should have a discretion to dismiss a complaint at any time on the basis that it is vexatious, misconceived, frivolous, or lacking in substance; that is made out of time; or on public interest grounds.

- If the Ombudsman considers it necessary in the public interest to immediately suspend a practising certificate based on of the seriousness of the alleged conduct, it may request the National Legal Services Board to do so. Any such suspension should be subject to appeal to the Supreme Court.

14. LLFG comments

14.1 *The LLFG submits that the Ombudsman should be granted the same range of powers a complaints handler has available to it under the Model Law and the Legal Profession Acts in relation to consideration and dismissal of complaints. These are broader than in the summary above. In addition the Ombudsman should have power to dismiss a complaint where the conduct complained of was immaterial or inconsequential and should be able to dismiss it if they consider it requires no further investigation.*

Investigation of complaints

- The Ombudsman should have the power to conduct an investigation into the complaint.
- The Ombudsman should be able to engage the services of any person for the purpose of obtaining expert assistance in order to exercise any of the Ombudsman’s functions.
- In an investigation, the Ombudsman:
 - must give an opportunity to make submissions on the conduct the subject of the investigation to the legal practitioner or law practice whose conduct is the subject of the complaint, and the complainant. If a response is not received within the specified timeframe (which, for example, may be 21 days unless the matter is urgent and a shorter timeframe is considered appropriate), the Ombudsman may determine the matter in the absence of that information and this will not constitute a breach of natural justice; and
 - may provide an opportunity to make submissions to any other relevant person.
- For the purposes of an investigation, the Ombudsman may require a complainant, legal practitioner or law practice to do anything reasonable to assist in the consideration or resolution of the complaint. In relation to a legal practitioner or law practice, this would include giving the Ombudsman a statement of information; producing to the Ombudsman any document or other thing; and giving the Ombudsman a copy of any document. Any such requests should be subject to appropriate exemptions, for example in relation to client legal privilege.
- For the purposes of an investigation, the Ombudsman may enter premises at any time with the consent of the occupier, or under the authority of a search warrant. The Model Bill provisions regarding search warrants and powers of investigators while on premises should be adopted, in a streamlined form.
- In relation to costs disputes, the Ombudsman should have the power to arrange for a costs assessment of the bill that is the subject of a complaint.

15. LLFG comments

15.1 *See comments under 6.1.*

15.2 *The LLFG submits that the Rules should provide sufficient flexibility to allow the Ombudsman to extend or reduce time periods in the circumstances.*

15.3 *The third bullet point refers to the making of submissions. Under the Model Law, when a practitioner is notified of a complaint, they must also be informed of their right to make a submission unless the complaint is to be dismissed. The LLFG submits a practitioner should have the opportunity to make a submission prior to the commencement of an investigation.*

The third bullet point should therefore be deleted.

Resolution of complaints

The Ombudsman should have broad powers to resolve a complaint, including one or more of the following methods: negotiation, mediation, making a binding determination (and imposing an appropriate order), or instituting disciplinary proceedings in the relevant disciplinary tribunal.

The Ombudsman would have a range of alternative dispute resolution options available for dealing with a consumer complaint, including informal negotiation with and between the parties, or more formal mediation. Generally, these methods would be expected to resolve most consumer complaints. If either party does not engage in mediation in good faith, or the mediation does not resolve the dispute, the Ombudsman should have the power to: dismiss the complaint; further investigate the complaint; or proceed to a determination of the complaint.

The Ombudsman should be required to take the submissions made by each party (within the specified timeframe) into consideration when making a binding determination.

16. LLFG comments

16.1 See previous comments under 2.

Consumer complaints

The Ombudsman should have the power to make binding determinations where reasonably satisfied that the conduct the subject of the complaint was not fair and reasonable in all the circumstances. As a general rule, the Taskforce would expect that consumer complaints could be resolved within three months of the complaint being made. Where that period is exceeded, the Ombudsman should be required to explain to the complainant the reasons for the delay.

The Ombudsman should be required to forward its proposed determination to the relevant parties, noting that they have a specified period to make submission on it (which, for example, may be 21 days unless the matter is urgent and a shorter timeframe is considered appropriate). If neither party objects within this period, the determination may be made. If either party makes submissions within this period, the Ombudsman must take them into account when making a determination.

The Taskforce proposes that the Ombudsman have the power to make the following range of orders in relation to complaints of a consumer nature:

- issue a caution;
- require an apology;
- require the legal practitioner or law practice to redo the work that is the subject of the complaint at no cost, or to waive or reduce its fees for the work;
- require the legal practitioner to undertake training, education, be supervised or undertake counselling (or require a law practice to make arrangements for these matters with respect to legal practitioners within it);

- make a compensation order (up to a specified amount).

17. LLFG comments

- 17.1 *The LLFG does not agree to the extension of powers to the Ombudsman in relation to consumer complaints as listed above. As mentioned in 1.6, this confuses the mediating and investigative powers of the Ombudsman with the role of the relevant Tribunal exercising judicial functions. In addition, there is sufficient redress for consumer complaints under the existing regime.*
- 17.2 *The LLFG submits that the Ombudsman should have the same range of powers as the Legal Services Commissioner or other appropriate authority has available to it in relation to a complaint of a consumer nature under the Model Law. It is noted that the Victorian Legal Services Commissioner can make an ex gratia payment to a complainant as compensation for pecuniary loss suffered as the result of the conduct of a law practice or practitioner. However, the LLFG submits the Ombudsman should have no power to make a compensation order against the law practice for the reasons discussed in paragraph 1.*
- 17.3 *The Victorian Legal Services Commissioner's powers in relation to a disciplinary complaint are considered to be appropriate.*

The Taskforce does not propose more expanded powers in relation to these complaints (eg, a reprimand, suspension of a certificate or a fine) on the basis that conduct for which such orders would be appropriate is likely to be of a 'disciplinary' nature, involving issues of unsatisfactory professional conduct or professional misconduct.

Disciplinary matters

For complaints of a disciplinary nature, the Ombudsman should be required to determine whether there is a reasonable likelihood that the relevant disciplinary tribunal would find a legal practitioner guilty of unsatisfactory professional conduct or professional misconduct. At this stage, the Taskforce does not propose to extend these definitions to include law practices, however certain complaints against a law practice may result in disciplinary proceedings against particular legal practitioners within it.

The Taskforce proposes that the Ombudsman should also have the power to make a determination that a legal practitioner has engaged in unsatisfactory professional conduct. In this case, the Ombudsman could make any of the same kinds of orders as are available for a consumer complaint. In addition, it could reprimand the legal practitioner or order that a specified condition be imposed on his or her practising certificate or issue a fine. However, where the Ombudsman considers that more serious orders are warranted, it may institute proceedings in the relevant State or Territory disciplinary tribunal alleging unsatisfactory professional conduct.

Therefore, under the proposed framework, all matters involving professional misconduct must be instituted in the disciplinary tribunal. By contrast, the Ombudsman would deal with most matters involving unsatisfactory professional conduct—unless it considers it more appropriate to institute proceedings in the disciplinary tribunal due to the expanded range of orders available to it.

If the disciplinary tribunal finds the legal practitioner guilty of unsatisfactory professional misconduct or professional misconduct it would impose an appropriate penalty. As per the Model Bill, the disciplinary tribunal should be able to make any such orders 'as it thinks fit'. These would include the orders set out above, and any of the following:

- a reprimand;
- a fine (up to a specified amount);
- a compensation order (up to a specified amount);
- an order recommending the person's name be removed from the roll;
- an order recommending the suspension or cancellation of a practising certificate or exclusion of a person from eligibility for a certificate for a certain period;
- an order recommending that conditions be placed on the person's practising certificate;
- an order to undertake further legal education;
- an order to work under supervision for a specified period;
- an order to do or refrain from doing something in connection with the practice of law;
- an order that the practitioner's practice be managed or subject to periodic inspection;
- an order to seek advice in relation to the management of the practice from a specified person;
- an order not to apply for a practising certificate for a specified period;
- an order that a legal practitioner undergo a mental health assessment;
- an order in relation to costs.

18. LLFG comments

18.1 See previous comments under 2.

18.2 Provisions in relation to orders requiring implementation in another jurisdiction need to be added.

The Taskforce proposes to adopt the Model Bill provisions in relation to costs for matters heard in the disciplinary tribunal. Under these provisions, costs would be ordered against a legal practitioner who has been found guilty of a disciplinary matter (including the costs of the Ombudsman and the complainant) unless there are exceptional circumstances. The tribunal would have a discretion to order costs against a legal practitioner who has been found not guilty if satisfied that: the legal practitioner's failure to cooperate with the Ombudsman was the sole or principal reason for the proceedings being instituted in the tribunal; or there is some other reason for making the order in the particular circumstances. Alternatively, the tribunal could order costs against the Ombudsman if satisfied that the legal practitioner is not guilty and special circumstances warrant the making of the orders.

In relation to disciplinary tribunal proceedings, the Taskforce generally proposes a simplified form of the Model Bill provisions. Orders made by the Ombudsman and the relevant disciplinary tribunal should be enforceable. For example, a compensation order or a fine should be enforceable as if it were an order of a court. At the same time, if a legal practitioner fails to comply with an order made by the Ombudsman or the relevant disciplinary tribunal, this should be conduct capable of being unsatisfactory professional conduct or professional misconduct. Finally, the inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of lawyers would not be affected.

Procedural fairness

The Taskforce notes the importance of affording procedural fairness in relation to complaints, but proposes a more streamlined framework than is provided under the Model Bill.

The Ombudsman should be required to give a legal practitioner or law practice a copy of the original complaint (subject to limited exceptions, such as where this would prejudice the investigation of the complaint, place the complainant at risk, prejudice court proceedings, or the complaint has been dismissed). If this is not possible, a summary document should be provided.

The Taskforce considers that this information could be provided at the following points in the complaints process:

- the Ombudsman should have a discretion to provide this information at the time the complaint is received;
- the Ombudsman should be required to provide this information if it chooses to investigate the complaint; and
- if the Ombudsman considers it appropriate to proceed to a proposed determination without an investigation (which would occur only in exceptional circumstances), it should be required to provide the information with the proposed determination.

Where the complaint or a proposed determination is forwarded to the legal practitioner or law practice, it should also advise that they have a right to make submissions on them within a specified period (which, for example, may be 21 days unless the matter is urgent and a shorter timeframe is considered appropriate). If a response is not received within that timeframe, the Ombudsman may determine the matter in its absence and this will not constitute a breach of natural justice (unless there are exceptional circumstances).

The Ombudsman also should be required to give the complainant and the legal practitioner or law practice written notice of its decisions to dismiss a complaint, to make a binding determination of a consumer complaint, or to refer a matter to the disciplinary tribunal; and written reasons for these decisions.

Finally, as in the Model Bill, the Ombudsman should have a duty to deal with complaints as efficiently and expeditiously as is practicable.

The Taskforce notes that the *Legal Profession Act 2004* (Vic) contains provisions dealing with procedural fairness and the duties of the Commissioner to provide an opportunity to be heard or make a submission prior to dismissing a complaint or otherwise determining how to deal with a complaint. These provisions should be considered when drafting the provisions for the proposed framework.

19. LLFG comments

19.1 See the previous comment under 6.1 and 15.2.

Avenues of review or appeal

The Taskforce proposes the following forms of review and appeal:

- Decisions of the Ombudsman (or its delegate) in relation to consumer complaints would be subject to internal review by the national body;

- Decisions of the Ombudsman (or its delegate) that a person has engaged in unsatisfactory professional conduct, and any orders made as a result of this finding, are subject to review by the disciplinary tribunal; and
- Decisions of the disciplinary tribunal that a person has engaged in unsatisfactory professional conduct or professional misconduct may be appealed to the Supreme Court.

20. LLFG comments

20.1 See previous comments under 1.5 and 2.2 in relation to the first and second bullet points.

Generally, decisions of the State or Territory delegate on consumer complaints would be subject to internal review by the national body, and this power cannot be delegated. This would allow the national body to maintain minimum standards and consistency in complaint handling and decision-making across all jurisdictions, and would ensure the accountability of State and Territory delegates to the national body. It would be consistent with current practice in some jurisdictions in which the decisions of professional associations can be reviewed by the independent complaints body. It would also give legal practitioners some comfort that the new framework will afford sufficient safeguards to ensure that proper decisions are made when making binding determinations and imposing orders on them.

Accordingly, the Taskforce proposes that a complainant or legal practitioner/law practice should be able to request a review of a decision to dismiss a complaint, or to make a binding determination and/or impose an order in relation to a consumer complaint. The request must be made within a specified timeframe, and the review should be conducted expeditiously. The national body would conduct a review of the handling of the complaint to determine whether it was conducted appropriately (including in accordance with any applicable National Rules) and the decision was based on reasonable grounds. Generally, it would be able to conduct a review 'on the papers', unless it considers it appropriate to request additional information or conduct an investigation. The national body should have the power to confirm the original decision, make a new decision, or refer the matter back to the original decision-maker.

If a legal practitioner were to seek a review of an order made against him or her, there would be a risk that the reviewer could make a more onerous order in the place of the original decision. For a consumer, an internal review may overturn the decision of the delegate and remove the remedy afforded to them.

Under the new framework, the relevant disciplinary tribunal in each State and Territory would continue to make original decisions in relation to matters involving professional misconduct, and some matters involving unsatisfactory professional conduct. In addition, it would review decisions by the Ombudsman in relation to: a determination that a practitioner has engaged in unsatisfactory professional conduct, and any order made as a result of that determination; or a decision to omit information originally included in a complaint from the information outlined in an application to the tribunal.

In addition, a disciplinary tribunal decision in relation to a disciplinary matter would be subject to a limited avenue of appeal to the relevant Supreme Court.

Information management

The National Law should clearly authorise appropriate information sharing between the national body and the various State and Territory bodies acting as its delegates – as well as between the various delegates – to ensure a consistent approach to dealing with complaints, and that complaints that cross jurisdictions may be appropriately addressed. In addition, the National Law should permit the disclosure of information to other relevant agencies, courts and tribunals where appropriate.

The Ombudsman and National Legal Services Board will also have complementary roles in ensuring high standards in the provision of legal services (and conduct of the profession), and monitoring compliance with the National Law and national rules. Accordingly, the National Law should provide appropriate information sharing provisions between these two bodies.

21. LLFG comments

21.1 *We agree the National Law should include provisions in relation to information sharing.*

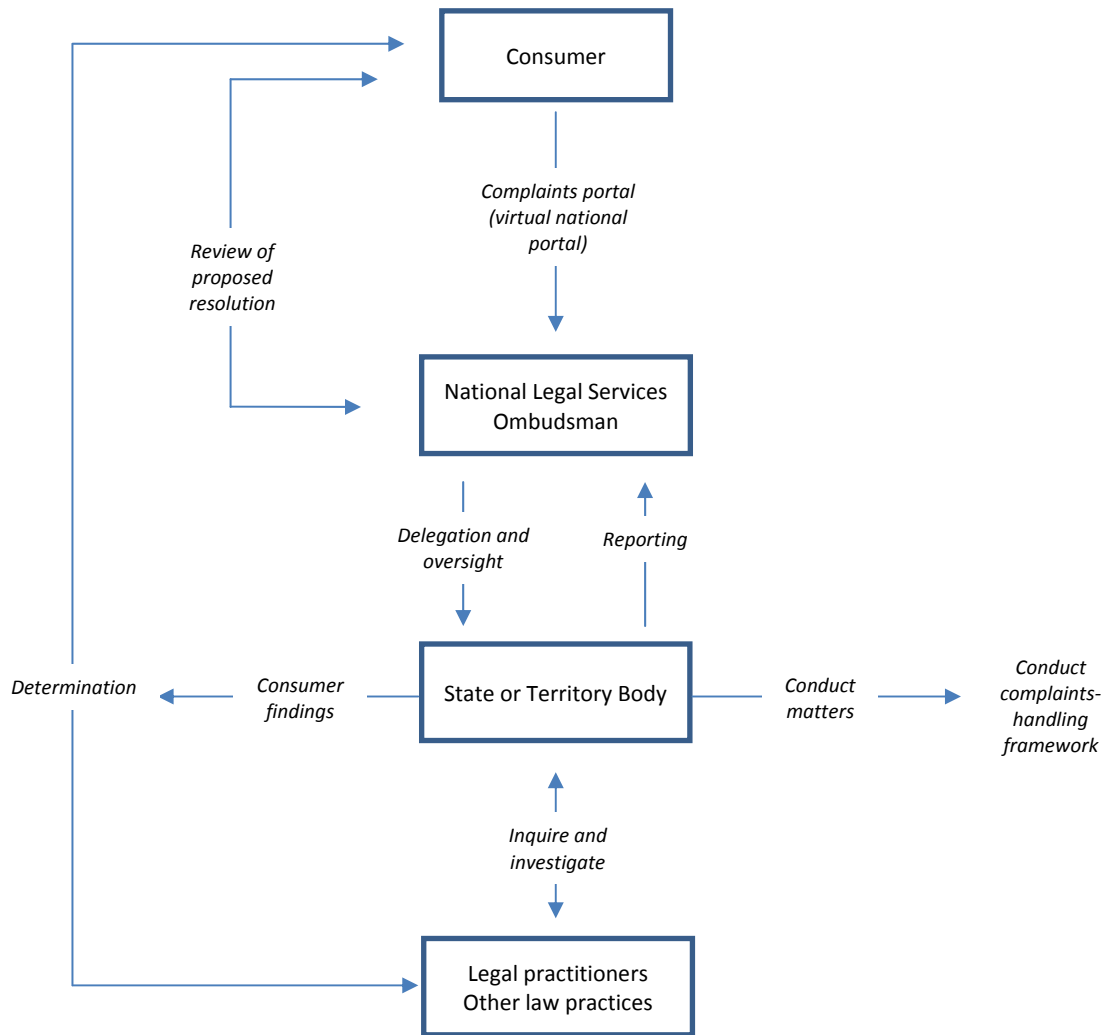
21.2 *We also submit that the 'other relevant agencies' to whom information may be disclosed will need to be specified.*

Other functions and powers

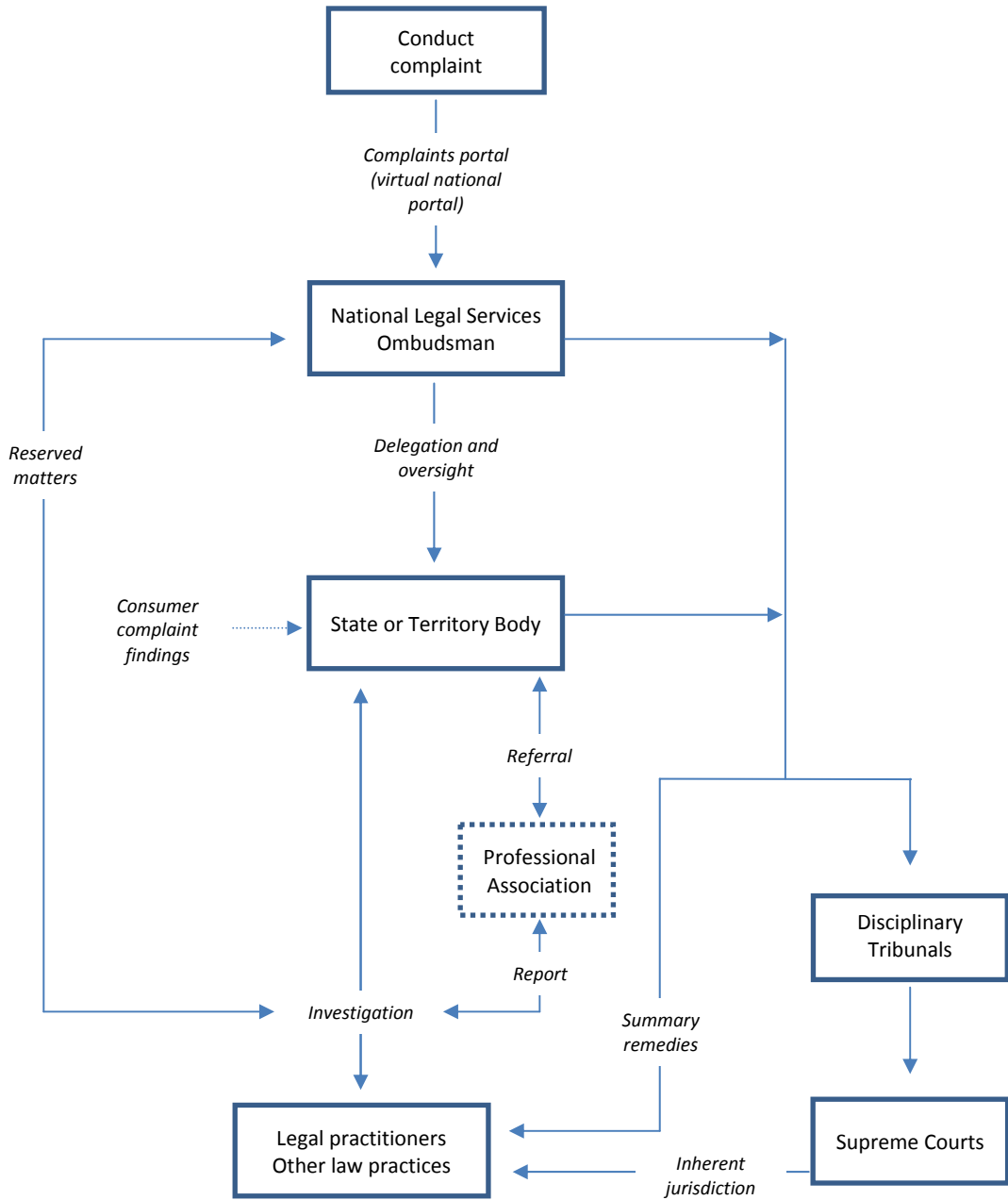
In addition to dealing with complaints, the Ombudsman should also have the following functions and powers:

- report suspected offences to the relevant authorities (including the police);
- refer matters of capacity in relation to legal practitioners to the National Legal Services Board;
- provide reports and make recommendations to the Board regarding any matter relating to the complaint handling framework;
- collect information and data on complaints, including systemic issues; and
- provide an annual report to the Board in accordance with the National Law.

NATIONAL LEGAL PROFESSION REFORM TASKFORCE
CONSUMER COMPLAINTS-HANDLING FRAMEWORK



NATIONAL LEGAL PROFESSION REFORM TASKFORCE
 CONDUCT COMPLAINTS-HANDLING FRAMEWORK



Disciplinary provisions in each jurisdiction

Australian Capital Territory

In the ACT, complaints about solicitors are made to the Law Society of the ACT, and its Complaints Committee conducts preliminary inquiries. Unsatisfactory professional conduct and professional misconduct matters are referred to the Disciplinary Tribunal or, in more serious cases, the Supreme Court. The Law Society may suggest mediation, to which both parties must consent. The Council of the Law Society may make various orders. Complaints against barristers are made to the ACT Bar Association. It appoints professional Conduct Investigation Committees on an ad hoc basis to investigate complaints. Unsatisfactory professional conduct and professional misconduct matters are heard before a Disciplinary Tribunal.

For both solicitors and barristers, serious conduct matters and costs reviews may be referred directly to the ACT Supreme Court, which has inherent jurisdiction over all lawyers. The Court also hears appeals and can review the decisions of the professional associations.

New South Wales⁸

In NSW, complaints about solicitors and barristers are made to the Office of the Legal Services Commissioner. The Commissioner may investigate a complaint, refer a complaint to mediation, or refer it to the appropriate professional association for investigation.

Where the complaint involves a 'consumer dispute' (ie, a complaint that does not involve an issue of unsatisfactory professional conduct or professional misconduct), it is usually referred to mediation. A client may refer a costs dispute to the Commissioner or a professional association for mediation if the amount is less than the prescribed amount (ie, \$10,000) and no application has been made for a costs assessment.

Where a complaint involves a reasonable likelihood of unsatisfactory professional conduct or professional misconduct, it is referred to the Administrative Decisions Tribunal for a hearing. The Tribunal has disciplinary powers and can make various orders. In some circumstances, where there is a reasonable likelihood that the lawyer will be found guilty of unsatisfactory professional conduct only, the Ombudsman may deal with it.

If a professional association decides to dismiss a complaint, reprimand a lawyer, or omit certain matters from the allegation that will be heard by the Tribunal, the complainant may apply to the Commissioner for a review of the decision. The Commissioner may also review a professional association's decision on his or her own initiative.

If the Tribunal finds the lawyer guilty of unsatisfactory professional conduct or professional misconduct, it may make various orders. A Tribunal decision may be appealed to the Supreme Court (unless the decision was made on an interlocutory basis, with consent, or as to costs, in which case the leave of the Court is required). In addition, the Supreme Court has inherent jurisdiction over all lawyers in NSW.

⁸ See, generally, Office of the Legal Services Commissioner website, (www.lawlink.nsw.gov.au/olsc).

Queensland⁹

Under the *Legal Profession Act 2007* (Qld) the Legal Services Commission deals with complaints about lawyers and law firms. The Commissioner can also initiate an investigation on his or her own motion in relation to possible unsatisfactory professional conduct or professional misconduct.

Generally, the Legal Services Commission assesses a complaint as either a consumer dispute or a conduct complaint. The Commission mediates or otherwise tries to resolve consumer disputes or refers them to a professional association for mediation or resolution; and investigates conduct complaints or refers them to a professional association. It initiates disciplinary proceedings against practitioners if there is a 'reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct' and 'it is in the public interest to do so'. The Commissioner prosecutes these matters before the Legal Practice Committee or, for more serious matters, the Legal Practice Tribunal.

The Legal Practice Committee decides if a practitioner is guilty of unsatisfactory professional conduct, or whether an employee of a law practice is guilty of misconduct. If so, it can make various orders. Parties who are dissatisfied with a decision of the Committee can appeal to the Legal Practice Tribunal. If the Tribunal decides a practitioner is guilty of unsatisfactory professional conduct or professional misconduct, it also can make various orders. Parties who are dissatisfied with a decision of the Tribunal can appeal to the Court of Appeal.

Victoria¹⁰

Under the *Legal Profession Act 2004* (Vic), the Legal Services Commissioner deals with complaints about legal practitioners (and, in some cases, law practices). Civil complaints are civil disputes about legal costs up to \$25,000, financial loss disputes where a client claims to have suffered the loss as the result of an act or omission of a lawyer, and any other genuine dispute. Disciplinary complaints are complaints about the conduct of a lawyer that, if established, would amount to unsatisfactory professional conduct or professional misconduct. Mixed complaints are complaints involving both types of complaint.

A civil dispute is generally dealt with in two stages. First, the Commissioner attempts to resolve the dispute between the parties by alternative dispute resolution. This may include referring the dispute for mediation or, in the case of a dispute about the legal costs, making an arrangement for an assessment of the legal costs. If this does not resolve the dispute, a party to the complaint may apply to VCAT for a determination. The Tribunal may make orders for compensation or the payment of costs, amongst other things.

In relation to disciplinary disputes, the Commissioner investigates the complaint or refers the investigation to a prescribed investigatory body. If the Commissioner is satisfied that there is a reasonable likelihood that the Tribunal would find the practitioner guilty of professional misconduct, the Commissioner must apply to the VCAT for an order. If the Commissioner is satisfied that there is a reasonable likelihood that the tribunal would find the practitioner guilty of unsatisfactory professional conduct, the Commissioner may make an application to VCAT or take other action, such as cautioning or reprimanding the lawyer (with the lawyer's consent), or requiring compensation. Where the Tribunal finds the practitioner guilty of professional misconduct or unsatisfactory professional conduct, it may impose various penalties.

⁹ See, generally, Legal Services Commission website, (www.lsc.qld.gov.au).

¹⁰ See, generally, Legal Services Commissioner website, (www.lsc.vic.gov.au).

Western Australia¹¹

Under the *Legal Profession Act 2008* (WA), the Legal Profession Complaints Committee is responsible for dealing with complaints about solicitors and barristers. The Law Complaints Officer is a statutory office that assists the Complaints Committee.

The Committee has the power to investigate cases and, where appropriate, its staff may try to mediate. Where this does not resolve the matter, it will be referred to the Committee. The Committee must dismiss the complaint if it is satisfied that there is no reasonable likelihood that the practitioner would be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct; or it is in the public interest to do so.

If the Committee considers that the practitioner may be guilty of unsatisfactory professional conduct or professional misconduct, the Committee can commence formal disciplinary proceedings in the State Administrative Tribunal. If an allegation is proved, the Tribunal can make a number of orders. Alternatively, the Committee can exercise its own disciplinary powers in certain cases in relation to unsatisfactory professional conduct.

South Australia¹²

Complaints about lawyers can be made to the Legal Practitioners Conduct Board, which is an independent body established under the *Legal Practitioners Act 1981* (SA). The Board has disciplinary powers for minor misconduct and in more serious cases it can institute proceedings in the Legal Practitioners Disciplinary Tribunal or, in the most serious cases, in the Supreme Court. If the Board considers that the lawyer has been guilty of unsatisfactory conduct it may make various orders. There is a right of appeal to the Supreme Court from Tribunal decisions.

Tasmania¹³

Under the *Legal Profession Act 2007* (Tas), complaints are made to the Legal Profession Board, which is an independent body. The Board is responsible for investigating complaints, and may engage in mediation, intervention to achieve a resolution without a formal complaint, or a hearing (which could involve discipline of the lawyer or referral of the matter to the Disciplinary Tribunal or the Supreme Court). If the Board considers that the alleged conduct may amount to professional misconduct, it must refer the matter to the Disciplinary Tribunal or the Supreme Court.

Northern Territory¹⁴

The Law Society of the Northern Territory deals with complaints about lawyers. Under the *Legal Profession Act 2006* (NT), the Law Society assesses and/or investigates complaints. It may suggest or require mediation for consumer complaints, and may refer serious disciplinary matters to the Legal Practitioners' Disciplinary Tribunal. The Disciplinary Tribunal can make various orders upon a finding of professional misconduct or unsatisfactory professional conduct. The Statutory Supervisor must monitor investigations by the Law Society, and may require it to report on the progress of investigations.

¹¹ See, generally, Legal Profession Complaints Committee website (www.lpbwa.org.au).

¹² See, generally, Legal Practitioners Conduct Board website (www.legalcomplaints.com.au).

¹³ See, generally, Legal Profession Board website (www.lpbt.com.au).

¹⁴ See, generally, Northern Territory Law Society website (www.lawsocietynt.asn.au).