



# Senate Select Committee on Superannuation and Financial Services

## Main Inquiry Reference (a)

### Submission No. 234

(Supplementary to Submission No. 190)

**Submittor:** Legal Ombudsman, Tasmania  
Ms Judith Paxton  
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## Legal Ombudsman

5 July 2001

Ms S Morton  
Secretary  
Senate Select Committee on  
Superannuation and Financial Services.  
Parliament House  
CANBERRA ACT 2600

Dear Sue,

Enclosed please find:-

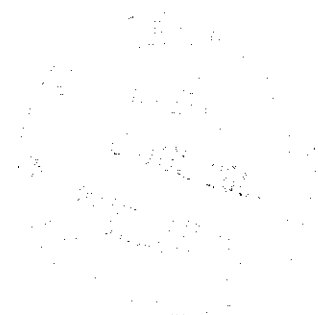
1. a corrected proof of the transcript of evidence of the hearing on 15 June 2001;
2. copies of my Annual Reports for 1995, 1996, 1997 and 1998;
3. a copy of my letter to the Attorney-General dated 6 July 1999 and a copy of his recent letter in which he approves the release of it to the Senate Inquiry.

During the inquiry, I was asked when the first complaints about mortgages came in and undertook to provide this information. The first was received in 1997.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Judith Paxton".

Judith Paxton  
Legal Ombudsman





5 JUL 2001

Ms Judith Paxton  
Legal Ombudsman  
15 Murray Street  
HOBART Tasmania 7001

Dear Ms Paxton

I refer to your approach to my Office on 25 June 2001 concerning the release of your letter dated 6 July 1999 in relation to solicitors' mortgage funds and the handling of complaints by the Law Society.

I am happy to release this correspondence to the Senate Inquiry into Solicitors' Mortgage Funds, and would be pleased if you would advise the Inquiry accordingly.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. Patmore'.

*Peter Patmore*  
*Attorney-General*  
*Minister for Justice and Industrial Relations*



TASMANIA

Legal Ombudsman

~~CONFIDENTIAL~~

6 July 1999

Mr P Patmore MHA  
Attorney-General  
Parliament House  
HOBART TAS. 7000

MINISTER

Dear Mr Patmore,

I am writing to alert you to a few matters that are of particular concern to me and which I think should be brought to your attention now.

**Complaints against McCulloch & McCulloch** - At the end of last year I reported to you on the Law Society's investigations into complaints about the firm of McCulloch & McCulloch. In essence, I said that I was satisfied the Law Society's actions had, generally, been satisfactory. This is no longer the case.

The Society has had the McCulloch matters with its counsel for over six months. Members of the public who had money invested with the McCullochs have still to be advised of what is happening and believe, rightly or wrongly, that the passage of time is allowing the McCullochs to strip themselves of their assets. I appreciate the investigation of the investments is a complicated matter, nevertheless, the time taken to get on with it is troubling both to me and to the many people who contact me.

I have regularly raised with the Law Society my concerns about the length of time this matter is taking. I am assured that things are now moving but, based on past performance, I am not confident that this will be the case.

**Matters awaiting prosecution** - Other than the McCulloch matters, there are still around ten very old complaints awaiting prosecution action but which have not got to the hearing stage.

Further, two cases that were prosecuted before the Disciplinary Tribunal are, after more than a year, still awaiting the Tribunal's decision. I can see no reason for the

delay and have urged the Tribunal concerned to get on with it. I have been assured that a decision will be brought down soon.

**Piggott Wood and Baker investment complaints** - Whilst I appreciate the need to prevent a "run" on investment funds, I have received a number of representations from members of the public that indicate a "run" may already have begun, stimulated by suspicions about the level of secrecy on the part of the Law Society, investors' continued inability to get information from Piggott Wood and Baker and the belief that the press has been hampered in its capacity to report on this matter.

**Handling of complaints** - There has been a marked increase in the number of representations to me about the handling of complaints by the Law Society. This is probably due to resource restraints that have led to time/cost cutting strategies recently adopted by the Law Society.

I am mindful of the Society's present difficulties and so have been relatively restrained in my requests to it. Nevertheless, some overall improvement in the handling of complaints and disciplinary matters will have to be made very soon.

Yours sincerely,



Judith Paxton  
Legal Ombudsman



1996

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PARLIAMENT OF TASMANIA

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# LEGAL OMBUDSMAN

## ANNUAL REPORT

### FOR THE YEAR ENDED 31 DECEMBER 1995

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*Presented to both Houses of Parliament pursuant to section 86 of the Legal Profession Act 1993*

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By Authority: Government Printer, Tasmania

## INTRODUCTION

This is the first annual report of the Tasmanian Legal Ombudsman.

Section 86 of the *Legal Profession Act* 1993 requires the Legal Ombudsman to report to the Attorney-General as soon as practicable after 31 December each year. My appointment commenced on 1 February 1995 and therefore the period covered by this report is only eleven months. However, to bring the reporting system into line with the intent of the Act, it seems appropriate to report at this time.

During the period under review, the Law Society of Tasmania commenced operating under the *Legal Profession Act* 1993 which replaced the *Legal Practitioners Act* 1959, the *Solicitors Remuneration Act* 1883, the *Law Society Act* 1962, and the *Legal Practitioners Act* 1968, as well as other amending Acts.

Part 8 of the *Legal Profession Act* 1993 deals with the handling of complaints against legal practitioners relating to professional misconduct or unprofessional conduct and the discipline of practitioners found guilty of these offences. The position of Legal Ombudsman also was created and defined under this Part of the Act.

The new Act and the creation of the position of Legal Ombudsman has changed the complaints handling procedure and, during the reporting period, the Society has had to adapt to these changes, including enhanced services, and cope with some deficiencies in the transitional arrangements between the old and the new Acts.

This report should be read in the context of the above. It will provide information on the complaints received and handled during the year, describe the present complaints handling process and make recommendations aimed at improving it.

## **ROLE AND FUNCTIONS OF THE LEGAL OMBUDSMAN**

The office of Legal Ombudsman was established under Division 4 of the Legal Profession Act 1993. I was appointed by the Attorney-General as the first Legal Ombudsman for Tasmania from 1 February 1995.

Section 85 of the Legal Profession Act 1993 describe the functions of the Legal Ombudsman. They are to monitor written complaints and applications about legal practitioners made to the Law Society of Tasmania; and "to investigate and examine any complaints made by any person in respect of the manner in which an investigation or hearing of such complaints has been dealt with and to investigate any other matters relating to disciplinary proceedings in relation to legal practitioners as the Attorney-General may direct".

The legal profession in Tasmania is a self regulating body. The creation of the position of Legal Ombudsman was designed to protect the public interest and to bring to the complaints handling process a community perspective. To this end, the Legal Ombudsman may require the Law Society of Tasmania or any member of the Society's Council or Disciplinary Tribunal to furnish such information as may be necessary and may attend any meetings of the Council or Tribunal during deliberations on an investigation or complaint. The Act also allows the Legal Ombudsman to take a matter directly to the Disciplinary Tribunal as, in fact, may anyone else.

## **RESOURCES**

The Office of Legal Ombudsman is a part time position funded from the Solicitors' Guarantee Fund, as are other community benefit activities such as the provision of Legal Aid and the funding of disciplinary prosecutions of lawyers. It was originally estimated that the demands of this office would be approximately 50 hours a year and that a salary of \$5,000 would be appropriate. It soon became apparent that 50 hours nowhere met the demands of my position and, accordingly, after the first six months the resources allocation was reviewed and the salary increased to \$8,000 per annum. Whilst these resources are adequate for the function of monitoring complaints, a recent request under s.85(1)(b) has been received which requires detailed enquiry into the manner in which the Council investigated the matter. If the number of this type of request becomes significant, the resources currently allocated to this Office will be insufficient.

While the Office of the Legal Ombudsman does not have a budget, the Department of Justice has funded administrative costs amounting to approximately \$780.00 for the reporting period and provided sundry items of furniture and equipment.



## OUTLINE OF COMPLAINTS HANDLING PROCESS

The Council of the Law Society is established under the Legal Profession Act 1993 to investigate every complaint. In practise, they are investigated by the Council's Investigations Committee. The following procedure is normally adopted:-

- Letter to the complainant requesting authority to pass the letter of complaint to the lawyer complained of.
- If the practitioner refuses to answer or is tardy in answering *this* matter, it may be referred to the disciplinary proceeding.
- The practitioner's response is sent to the complainant for comment.
- If the complainant does not agree with the explanation given and the Council considers the matter, on the face of it, involves either professional misconduct or unprofessional conduct, prosecution of the practitioner may be considered. As part of this consideration, the Council may seek legal advice on whether the matter relates to professional misconduct or unprofessional conduct.
- The Council may hear and determine a matter if it involves unprofessional conduct or matters of a minor nature. If a matter is more serious or involves professional misconduct, it is referred to the Disciplinary Tribunal or the Supreme Court. The hearing before the Disciplinary Tribunal is similar to the procedure before a court and the practitioner is entitled to be represented. In a hearing before the Council, the Council is not bound to observe the Rules of Evidence but may inform itself in any manner as it thinks fit.
- The Council or Tribunal may impose a range of penalties, however, the Tribunal has the power to impose heavier penalties including fines up to \$20,000 and the withdrawal of a practising certificate.

A copy of each complaint is sent to me as Legal Ombudsman, as are copies of the Minutes of the Investigations Committee meetings. As mentioned earlier, the Law Society must provide such information as I may require at any stage of the complaints handling process. To date, I have received the full co-operation of the Society and, where I have raised concerns, my point of view has always been considered.

As Legal Ombudsman I may take part in deliberations of the Investigations Committee or the Tribunal in relation to complaints but may not vote.

A person dissatisfied with the manner in which his/her complaint has been handled by the Law Society may apply to me to investigate and examine their concerns.

## NATURE AND VOLUME OF COMPLAINTS

During the reporting period the Law Society received 104 letters dealing with 135 issues of complaint. The table below provides an indication of the nature and outcome of the complaints.

NATURE OF COMPLAINT	SUSTAINED	PART SUSTAINED	NOT SUSTAINED	RESOLVED	NOT COMPLETED	TOTALS	%
Wrong Advice	1		3			4	3
Non Release of File		1	2	2		5	4
Withholding Money				1	5	6	4.5
Bad Management of Money	1		2		3	6	4.5
Overcharging		1	5		2	8	6
Acting without Instruction		3	1	1	1	6	4.5
Not Communicating with Client	1			1	2	4	3
Misleading Client or Court			2		2	4	3
Breach of Undertaking	1	1				2	1
Unethical Behaviour	1		6			7	4.5
Failure to provide Itemised Account				1		1	1
Delay	1	4	4	2	6	17	13
Harassment/Rudeness/Bad Conduct toward Client		1	8		3	12	9
Miscellaneous (i)			7	1	4	12	9
Quality of Work/Negligence (ii)			41			41	30
TOTALS (iii)	6	11	81	9	28	135	100
% TOTAL	4.5	8	60	21	6.5		

- Notes: (i) Examples of complaints under this category include referring a case to another solicitor without advising client, losing a will and having work done by unqualified person.  
(ii) Not considered to be within ambit of Law Society's complaint handling process.  
(iii) Many cases involved multiple complaints and so have been recorded more than once.

The 104 letters of complaint related to 86 individual lawyers. This represented approximately 16% of the 529 registered practitioners in the State (registration figure provided by Law Society).

The two grounds upon which the Law Society considers complaints are "professional misconduct" and "unprofessional conduct".

Section 56 of the Act provides:-

“**professional misconduct**” includes conduct on the part of a practitioner which results in -

- (a) a contravention or failure to comply with -
  - (i) any provision of this Act or any regulations, rules or by-laws made under this Act; or
  - (ii) any terms and conditions imposed under this Part; or
- (b) fiduciary default; or
- (c) any serious neglect or undue delay; or
- (d) the charging of excessive fees or costs; or
- (e) consistent or substantial failure to reach reasonable standards of competence and diligence.”

“unprofessional conduct” includes -

- (a) professional conduct that falls short of a standard of conduct that a member of the public is entitled to expect of a practitioner of good repute and competency; and
- (b) conduct of a kind referred to in paragraphs (c), (d) and (e) of the definition of “professional misconduct” but of a lesser degree of seriousness.”

Of the 104 complainants, 80 had their cases finalised in the reporting period. The average time taken from start to finish was about three months. It is important to note, however, that 41 complaints were considered to relate to quality of work or negligence. Generally, in these cases, the Law Society takes the view that, as the client has recourse through the courts, the matter is not one for it. Also, the Law Society usually does not consider that these matters constitute professional misconduct or unprofessional conduct. I shall discuss this later in the report.

In four of the cases finalised, whilst not considering the action complained of was so bad as to be classified as unprofessional conduct, the Society nevertheless admonished two of the practitioners concerned and drew to the attention of two others their failure to perform to an expected standard. These cases involved such issues as delay, withholding files and accounting matters.

The remainder of the finalised complaints were either not considered to have merit, were resolved between the practitioner and complainant as a result of the complaint being lodged, or the complainant did not proceed.

Of those complaints not completed, two were being brought before the Disciplinary Tribunal, two were awaiting advice from the Law Society’s legal advisers on how to proceed, one was awaiting taxation of costs and the rest were awaiting responses from the practitioner or the complainant. Of these, six cases were more than six months old.

At the beginning of my tenure there were eighteen complaints carried over from previous years, the oldest of which was lodged in 1991. Of these, eleven were still outstanding at 31 December 1995 with nine awaiting possible prosecution before the Disciplinary Tribunal. The delay in handling some of these was due, at first, to the fact that the Legal Profession (Disciplinary Tribunal) Rules 1995 were not finalised until the middle of the year and, more lately, to resolving the question whether they should be processed under the old or new Acts.

As an aside, I would make the following general observations:-

- poor record keeping and poor management of case work by some legal firms is a direct cause of distressed and frustrated clients.
- breakdown in communication between legal practitioners and their clients is often the result of the practitioner assuming that the client has a better understanding of the legal process than is the case.

- the names of some solicitors are becoming far too familiar and the nature of the complaints against them far too predictable. During the reporting period, six complaints were lodged against one solicitor alone.
- there appears to be a pattern of general ineptitude on the part of some practitioners.

## **PROSECUTION AND DISCIPLINARY ACTION**

During the year the Law Society completed disciplinary proceedings relating to a complaint lodged in 1991. In simple terms, the complainant was led to believe by the lawyer that, although she was entitled to Legal Aid, she would get better service if she paid the lawyer privately and at a higher rate than he would have received through Legal Aid. She followed his advice. Four years ago she lodged a complaint about this matter with the Law Society. In 1995 the Law Society commenced proceedings in the Supreme Court against the lawyer but consented to dismiss the proceedings on condition he did not practise for three years.

The Law Society published the details and outcome of these disciplinary proceedings in the Law Letter, as is required.

As mentioned above, the Law Society worked on preparing eleven other applications to the Disciplinary Tribunal and I trust these cases will be finalised one way or the other early in 1996.

## **OBSERVATIONS AND RECOMMENDATIONS IN RELATION TO THE COMPLAINTS HANDLING PROCESS**

The Law Society appears keen and genuine in its desire to ensure high professional standards in Tasmania. The members of the Investigations Committee do this work on a voluntary basis and appear to approach the consideration of complaints in an unbiased, often sympathetic, manner. They appear generally willing to be critical of their colleagues and to prosecute them if necessary and the Law Society is starting to use its new powers. The Committee has been receptive of my point of view in relation to the handling of complaints and a good working relationship has developed between us. However, there are, in my view, deficiencies in the complaints handling process. These in no way reflect adversely on the members of the Law Society but relate to the system itself. Below are some of my concerns.

- (a) The present complaints system is not client focussed. The Law Society is interested in the regulation, promotion and representation of the legal profession. As has been pointed out to me on a number of occasions, it is not a consumer protection body. Generally speaking, people lodging complaints about lawyers are not aware of this distinction and are not interested in whether the lawyer is guilty of professional misconduct or unprofessional conduct. They want their problems fixed. It is of no use to them if, at the end of the complaints process, the lawyer is found guilty of unprofessional conduct but their case has still not come to court or their conveyancing has still not been done.

The definitions of professional misconduct and unprofessional conduct have been given in this report. As can be seen, professional misconduct is reasonably clear cut. However, unprofessional conduct, and "professional conduct that falls short of a standard that a member of the public is entitled to expect of a practitioner of good repute and competency", is more difficult to determine. It is in this area that there is the greatest difference between the Law Society and me in relation to the investigation of complaints.

The usual expectation of an ordinary person when hiring a lawyer is that the lawyer will achieve, within a reasonable time and cost, the desired outcome. The consumer expects the advice given to be right, expects to be kept informed and to be treated considerately. Consumers do not expect their files to be lost, their case to be handed to someone else without consultation or, worse, the case to be forgotten altogether when there is a change within a firm of solicitors.

These issues of standard of work are the subject of many complaints but the Law Society does not consider they constitute professional misconduct or unprofessional conduct, and so they do not consider them. Isolated examples of carelessness or inexperience, however detrimental to the client, are similarly dismissed. This is one of the major reasons I consider the present complaints handling system does not have a consumer focus. It has been put to me that the Law Society does not have the resources to handle complaints relating to quality of work. Who, then, does handle such complaints? If the matter is clear cut and involves significant damages, the consumer can probably afford to hire a second lawyer to sue the first. This is all very well if the chances of winning are assured. However, if the damages are relatively small and the client relatively poor, he or she may well not be able to pursue the matter.

However, in regard to poor quality of work a complainant does have access to the Office of Consumer Affairs. In discussions I had with members of that office, they expressed the view that self-regulating industries, like the legal profession in Tasmania, should handle quality of work issues. One reason for this is that the assessment of the work needs to be undertaken by a specialist in that field. The Office of Consumer Affairs is not staffed to allow this activity, even if it was inclined to undertake the responsibility. Staff of the Office of Consumer Affairs further believe that they should not be the first point of call given the existence of the Law Society and the Legal Ombudsman.

- (b) During 1995 there were a number of complaints which were dismissed but which the Investigations Committee considered involved ineptitude, inexperience, carelessness or poor record keeping. None of these deficiencies were considered to amount to unprofessional conduct. The Law Society considers that there needs to be an accumulation of proven complaints of this nature before any disciplinary action is warranted. The question has to be asked - how can there be an accumulation of proven complaints when each is dismissed in the first instance? The present system allows some lawyers to blunder along all their lives at the expense of their clients.

- (c) Whilst the present complaints handling system affords natural justice, it is often lengthy. Should the Committee miss its fortnightly meeting if, for example, there are not enough members available or there is a public holiday, it may be a month before first consideration of a complaint.

If the lawyer against whom a complaint is lodged refuses to respond to the Law Society, as happened a number of times during the year, there is then a further delay whilst the Law Society prosecutes the practitioner for failure to comply. To date, no cases lodged in 1995, involving this process, have been finalised. If the complaint results in a formal hearing, the case may take years. Meanwhile the complainant may be suffering hardship or, as in a recently finalised case, may have died.

If a complaint is made before a legal case is complete, the lawyer involved may refuse to continue to act for the client. The rationale for this is that the client must have faith in the lawyer. If the complaint relates to negligence this approach would be understandable. However, in matters of delay, it is not.

There is an argument that the client suffers no penalty because the case can be picked up by another lawyer at no additional cost but this is not quite true. The second lawyer is entitled to charge for the time spent becoming familiar with the file and the client would have had to pay the first lawyer any monies owing before the file is released. Also, further delay is involved.

- (d) I have received a number of expressions of concern from people afraid of the consequences of lodging a complaint. There is a real concern that they will not be able to find another lawyer to take their case, particularly if it involves suing another lawyer. There is also concern that, in some way, they will be victimised by the legal profession in Tasmania as a whole.
- (e) To me, a disturbing factor is that, on occasions, in determining whether to pursue a matter, the Law Society takes into account the cost to itself. The Society often employs legal practitioners to advise whether there is a case to answer. This incurs the usual client/solicitor expenses which are paid from the Solicitors' Guarantee Fund. If, in its opinion, the matter appears to be relatively minor, there is an inclination on the part of the Society to dismiss the claim as not being worth the cost of proceeding.

## **RECOMMENDATIONS**

The adoption of the following recommendations may overcome the deficiencies outlined above:

### **Recommendation 1**

That the role and functions of the Legal Ombudsman be reviewed with the aim of giving the position initial investigative powers. A similar system to that of the New South Wales Legal Services Commissioner may be appropriate. The Commissioner can either investigate a matter himself or refer it to the Law Society. Referrals would occur when the matter complained about raised ethical issues. Alternatively, that a system be developed to deal with relatively minor matters that would bypass the formal and lengthy procedures established under the Act with a view to giving satisfaction to the client and improved professional standards.

### **Recommendation 2**

That the investigation of complaints relating to quality of work be undertaken by either the Legal Ombudsman or the Law Society and that resources be allocated accordingly.

### **Recommendation 3**

- (a) That there be greater scope for mediation in any new complaints handling process to facilitate a quicker, less painful resolution of complaints, and
- (b) that, in any event, the Council should make greater use of the powers given to it under s.59 of the Act to require parties to attend a conference which may achieve a mutually agreeable outcome. Such conferences should be conducted by suitably qualified practitioners, preferably with mediation accreditation.

## CONCLUSION

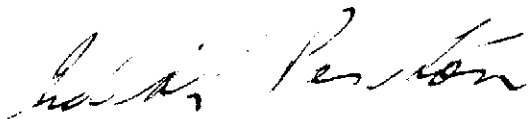
I believe that the Office of Legal Ombudsman has and does serve a useful purpose, albeit a limited one. I think I have been effective in bringing a consumer perspective to the Law Society's deliberations about complaints. Members of the public who came to me during the year indicated they were reassured by the fact that there was someone independent monitoring the complaints handling process. In this regard, it is clearly an advantage that the person holding this office not be a lawyer. I believe this factor outweighs the disadvantages of not having legal training.

It is important to note, however, that I am only able to monitor complaints which have been lodged with the Law Society and accepted by the Law Society. I cannot deal with any matters but these unless requested to do so by the Attorney-General. This, to me, is a significant matter of concern.

As yet I have not sought to promote the Office of Legal Ombudsman to any great degree because:-

- (a) I do not have the investigative powers that the public believes me to have as indicated by the nature of my title, and
- (b) my resources are very limited.

As can be seen from this report, I believe the Office of Legal Ombudsman serves a useful purpose. Nevertheless, I have drawn attention to a number of issues in the complaints handling process which should be examined with the object of improving consumer confidence in the quality of the services provided by the legal profession in Tasmania.



Judith Paxton  
**Legal Ombudsman**

15 February 1996





# **LEGAL OMBUDSMAN**

## **ANNUAL REPORT FOR THE YEAR ENDED 31 DECEMBER 1996**

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Presented to the Attorney-General pursuant to section 86 of the *Legal Profession Act 1993*

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## INTRODUCTION

This is the second Annual Report of the Tasmanian Legal Ombudsman.

In accordance with s.86 of the *Legal Profession Act* 1993, the report covers the functions I have performed during the reporting period 1 January to 31 December 1996 and provides a number of recommendations. In addition, it provides information on the complaints received and handled by the Law Society of Tasmania during the year and examines some of the issues relating to the complaints handling process.

## SUMMARY OF FUNCTIONS PERFORMED

The functions of the Legal Ombudsman are to monitor the handling of written complaints and applications about legal practitioners made to the Law Society of Tasmania, to investigate and examine complaints in respect of the manner in which an investigation or hearing has been dealt with by the Society and to investigate any other matter relating to disciplinary proceedings as the Attorney-General may direct.

I have considered the 100 complaints lodged with the Law Society during the year about Tasmanian legal practitioners, I have attended most of the fortnightly meetings of the Law Society's Investigating Committee and attended two hearings of the Disciplinary Tribunal. In addition, I have monitored the handling of complaints carried over from previous years.

Further, thirty seven people made representations to me either by telephone or in person and many of them did so more than once. Included in this number were two people who requested I formally examine the manner in which the Law Society handled their complaints.

Also during the year I met the Victorian Lay Observer, Ms Jan King, to gain a better appreciation of another legal complaints handling system.

In relation to the complaints handling process, I have given particular time and thought to the question of complaints relating to quality of work and have sought to implement changes in this area.

## RESOURCES

The Office of Legal Ombudsman is a part time position funded from the Solicitors' Guarantee Fund. The annual salary is presently \$8,000. This is not adequate for the role and responsibilities of the position and was a matter I discussed in my 1995 report. I consider that the resources allocated to the Office should be reviewed as a matter of priority.

The Department of Justice has funded additional costs, including telephone, postage and superannuation contributions, amounting to \$1,846.

During the reporting period I was accommodated in the offices of the Tasmanian Ombudsman and I wish to record my thanks to him and his staff. I would also like to record my thanks to Mr Simon Allston, Senior Crown Counsel, Office of the Solicitor-General, for legal opinion provided during the year.

It would be very difficult to undertake the responsibilities of this Office without the co-operation of the staff of the Law Society, in particular that of the Executive Director, Mr A.J. McMahon. I appreciate the assistance I have received.

## NATURE AND VOLUME OF COMPLAINTS

Carried over from previous years were 48 complaints, the oldest of which was from 1992. Of these 11 were still not finalised by the end of 1996, including 9 awaiting completion of disciplinary proceedings.

During the reporting period 100 complaints were received. The table below provides an indication of the nature and outcome of these.

Of the 100 complaints received in the year, 73 were finalised. The average time taken was 2.1 months. Of the 27 not finalised, 19 had been in process for over two months and 11 of these for over 6 months. The two longest running were almost 12 months old.

Of the 73 complaints received and finalised during the year, 20 were wholly or partially sustained. However, the largest category of complaint, quality of work, is one with which the Society presently does not deal. As these were not examined, it is not known whether they had merit.

Other issues that were the subject of most complaint were delay, overcharging, conflict of interest and failure to communicate with the client.

There are 442 registered practitioners employed in private practice in Tasmania. Of these, 82 were the subject of complaints, 13 being the subject of more than one.

Included in complaints received was a request from me that the Law Society examine a number of complaints against one practitioner to determine whether, in light of the accumulation of complaints, he met the "standard of conduct that a member of the public is entitled to expect of a practitioner of good repute and competency."

#### NATURE AND VOLUME OF COMPLAINTS RECEIVED IN 1996

NATURE OF COMPLAINT	SUSTAINED	PART SUSTAINED	NOT SUSTAINED	RESOLVED	WITHDRAWN/NOT PROCEEDED WITH	NOT Completed	TOTALS	% (iv)
Wrong Advice	1						1	.75
Poor representation		1		2			3	2.25
Non Release of Documents		1	1				2	1.5
Bad Management of Money						4	4	3
Overcharging			3	2	3		12	9
Acting without Instruction	1		1		4	1	7	5
Not Communicating					1	6	7	5
Breach of confidentiality	2	1	4				7	5
Misleading Client or Court		1	2			1	4	3
Breach of Undertaking				2		1	3	2.25
Conflict of interest	1	1	4		1	4	11	8
Criminal Behaviour					1	2	3	2.25
Unethical Behaviour			2			2	4	3
Failure to Itemise Account			1			2	3	2.25
Inefficiency/incompetence	1	1		1	1	1	5	3.75
Delay		3	3		4	6	16	12
Harassment/Rudeness		2	3	1	1		7	5
Miscellaneous (i)	1		4	1	5	5	16	12
Quality of Work (ii)			17		1		18	13.25
Poor accounting	1		1				2	1.5
<b>TOTALS (iii)</b>	<b>9</b>	<b>11</b>	<b>46</b>	<b>9</b>	<b>22</b>	<b>38</b>	<b>135</b>	
<b>%TOTAL (iv)</b>	<b>7</b>	<b>8</b>	<b>34</b>	<b>7</b>	<b>16</b>	<b>28</b>		

**Notes:**

- (i) Examples of complaints under miscellaneous include failing to apply for Legal Aid and lodging a caveat without good reason.
- (ii) These were not considered to be within the ambit of the Law Society's complaints handling process.
- (iii) Many cases involved multiple complaints and so have been recorded more than once.
- (iv) Percentages have been rounded.

## PROSECUTION AND DISCIPLINARY ACTION

If, during investigation of a complaint, the Law Society considers that matters raised amount to professional misconduct, it must apply to the Council, the Disciplinary Tribunal or the Supreme Court to hear the matter.

The Law Society had, at the beginning of the year, 11 cases awaiting possible prosecution carried forward from previous years. During 1996, six new cases were added to the list.

The Law Society is operating under the *Legal Profession Act 1993* which came into effect at the end of 1994. Conduct occurring before the Act came into effect could not be dealt with by the new Disciplinary Tribunal so the Law Society sought amendment to the legislation, which was obtained in October 1996. This accounts for much of the delay in the handling of prosecutions. However, delay was also caused by tardiness on the part of some legal practitioners hired by the Law Society to provide advice and to prepare cases for prosecution.

During the year the Law Society completed the prosecution of four practitioners. Briefly, the cases and outcomes were as follows:-

- . The practitioner was found to have approached and spoken to a woman who had applied for a restraining order against his client, without the approval of the woman's solicitor. The practitioner was ordered to pay costs of \$1,100 and formally apologised
- . The practitioner failed, on two occasions, to provide information to the Law Society in relation to complaints. For one he was fined \$1,000 and ordered to pay costs of \$546.00 and on the other was reprimanded and required to pay costs of \$545.00.
- . The practitioner was found to have paid to one spouse, without the authority of the other, money he was holding in trust pending a divorce settlement. He was admonished and ordered to pay costs which were agreed at \$6,000.

The practitioner was found to have taken money for his own costs out of the money he held for his client without rendering an account to the client in accordance with the Rules. In addition, the Disciplinary Tribunal found that the practitioner conducted his defence in such an unsatisfactory manner as to warrant his name being removed from the roll; that is, he is no longer allowed to practice.

Also during the year, a member of the public brought his own complaint before the Disciplinary Tribunal. The complaint related to the handling of mortgages and alleged breaches of agreements. Before the hearing was completed, the matter was settled privately between the parties and the case withdrawn.

## **MEDIATIONS AND COMPULSORY CONFERENCES**

The Legal Profession Act 1993 allows the Law Society to require parties to a complaint to attend a conference to settle matters that can be settled. During the reporting period four such conferences were held. Three were conducted by the President of the Society and one by the Executive Director.

*Case A* concerned the handling of an estate. The lawyer had, in error, undertaken work on a will that was not the last one. As a result of the conference, the parties came to an understanding.

*Case B* concerned a legal firm's clerical system being inadequate to prevent possible conflict of interest situations. The conference resulted in the firm apologising to the complainant and implementing better methods.

*Case C* involved complaint about costs. It was settled at a conference during which the practitioner agreed to refund an amount of money to the satisfaction of the client.

*Case D* concerned disagreement over costs and resulted in a compromise with the practitioner refunding an amount of money that satisfied the client and the client understanding that the accounting process was honest.

## **THE COMPLAINTS HANDLING PROCESS**

### **Quality of work:**

In my 1995 Annual Report, I expressed concern that the complaints handling process lacked client focus because the Law Society did not generally consider complaints relating to poor quality of work on the grounds that such issues did not constitute professional misconduct. I recommended that complaints relating to quality of work be the subject of investigation by either my Office or the Law Society.

It is pleasing to see that the Law Society is now prepared to investigate complaints relating to quality of service and that, wherever possible, such investigations will be undertaken as informally and quickly as possible. I note, however, that the Society believes the Act needs amendment before it is able to do this. Advice provided by the Senior Crown Counsel indicates that the Act already gives the Law Society these powers. I recommend that discussions be held between the Government and the Society to ensure there is no delay in the Society commencing investigation of quality of work/service complaints.

Under the Legal Profession Act 1993, "consistent or substantial failure to reach reasonable standards of competence and diligence" is considered to constitute professional misconduct. However, before any disciplinary action can be taken, there needs to be an accumulation of proven complaints of this nature which, of course, can not easily happen whilst ever the Law Society does not examine quality of work/service complaints.

Now that the Society has agreed to handle complaints relating to quality of service, it should be possible to properly use this part of the Act. This is particularly satisfying as a major aim of the Government, in introducing the Act, was to improve the standards of legal practice and, thereby, increase clients' satisfaction.

### **Timeliness:**

Whilst the average time taken to finalise the investigation of complaints received during the year was 2.1 months, the time taken to complete the investigation of some complaints is still of major concern to me.

The speed with which complaints are handled depends, mainly, on fortnightly meetings of the Investigating Committee, the efficiency of the practitioners employed by the Society to advise it and the willingness of the practitioner complained of to provide a response.

When a complaint is received, subject to permission from the complainant, it is usually referred for a response to the practitioner concerned. Should a practitioner fail to respond, the Society may formally require that he or she respond within a specified period. Failure to respond can result in prosecution before the Disciplinary Tribunal.

In relation to complaints lodged during the reporting year alone, to elicit a response it was necessary to issue six practitioners with a formal request. This is a time consuming and costly procedure and it has come as a surprise to me that any lawyer should need to be threatened with prosecution by the governing body before bothering to respond to a request for information.

In relation to the above, the Law Society is taking what action it can to speed up the process including allowing less "grace" before issuing a formal notice.

### **Informal processes:**

On a number of occasions during the review period, the Law Society found practitioners guilty of behaviour that was very poor but not sufficiently bad as to warrant prosecution for unprofessional conduct. Included were such things as sending rude and/or threatening letters to clients or other professionals, breaching confidentiality by sending to one client notes on another, providing wrong information, being wrong in law and not being sufficiently alert to possible conflict of interest. The practitioners concerned often apologised, through the Society, to the client and made some reparation. There were also occasions, however, when it was considered appropriate for the President of the Society to send an "educative" letter to a practitioner.

Between such misdemeanours and those warranting formal prosecution, is a body of behaviour that calls for something more than apology or educative letters. At present the Act does not provide for informal proceedings, as in some Acts that govern professional bodies.



In, for example, the *Veterinary Surgeons Act 1987* and the *Nurses Act 1995* there is provision for the governing body to hold an informal inquiry into a complaint or an act that may give grounds for a complaint, but which may not be so bad as to warrant a formal inquiry. Under these provisions, the practitioner can be called to account and, if necessary, cautioned or admonished.

Such a system has many advantages. It is relatively quick and inexpensive, educative rather than punitive and often provides satisfaction to a complainant that he or she may not otherwise obtain. Such a system does not preclude a formal inquiry if found necessary.

I strongly recommend that the *Legal Profession Act 1993* be amended to allow the same flexibility in the governance of legal practitioners in Tasmania.

### **Observations on the Role of Legal Ombudsman:**

As already mentioned, during the year only two people formally requested that I look into the manner in which the Law Society handled their complaints. In one case I considered the Society and the practitioner to have acted appropriately. In the other, I considered that, whilst on the evidence before it at the time, the Society had reached a reasonable decision, it should have better communicated with the complainant.

The reason for the small number of requests to me should be examined. Perhaps nearly all complainants were happy with the outcome. Perhaps the role of my Office is not sufficiently well known. Another explanation may be the fact that I can only examine complaints that have been lodged with the Law Society.

Most of the people who made informal representations to me during the year had not lodged a complaint with the Law Society, nor did they go on to lodge one. As my role is to monitor the handling, by the Law Society, of complaints made to it, I can do nothing for people who have, for whatever reason, not made such representation. I believe there are many people who would seek the assistance of the Legal Ombudsman if the Office had investigative powers or if complaints could be referred by it to the Law Society rather than, as is now the case, the complaint having to go through the Law Society's present investigative process first.

Once again, I recommend that the *Legal Profession Act 1993* be amended to give the Legal Ombudsman some investigative powers.

## SUMMARY OF RECOMMENDATIONS

That discussions be held between the Government and the Law Society of Tasmania to ensure there is no delay in the Society commencing investigations of quality of work/service complaints.

That the Office of Legal Ombudsman be given investigative powers.

That the *Legal Profession Act 1993* be amended to allow the Law Society to conduct informal inquiries into complaints or acts that may give grounds for complaint, but which may not be so bad as to warrant formal proceedings.

That the resources allocated to the Office of Legal Ombudsman be reviewed as a matter of priority.

## CONCLUSION

The last year has seen further improvements to the legal complaints handling system as the Law Society has become more familiar with its powers under the new Act and has achieved changes to overcome transitional problems. The Society's agreement to handle complaints relating to quality of service will be another significant step towards realising the spirit of the legislation. I believe that further significant improvements will result from acceptance of the recommendations in this report, which I commend to you.



Judith Paxton  
Legal Ombudsman

10 March, 1997



# Legal Ombudsman

Annual Report  
For the Year Ended 31 December 1997

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Presented to the Attorney-General pursuant to Section 86  
of the *Legal Profession Act 1993*

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## Introduction

In accordance with Section 86 of the *Legal Profession Act 1993*, this report covers the functions I have performed during the reporting period 1 January to 31 December 1997. Additionally, it provides information on the complaints received and handled by the Law Society of Tasmania during the year and examines some of the issues raised.

## Summary of Functions Performed

The functions of the Legal Ombudsman are to monitor the handling of written complaints and applications about legal practitioners made to the Law Society of Tasmania, to investigate and examine complaints about the manner in which an investigation or hearing has been dealt with by the Society, and to investigate any other matter relating to disciplinary proceedings as the Attorney-General may direct.

I have considered the 138 letters of complaint about legal practitioners lodged with the Law Society during the year, I have attended most of the fortnightly meetings of the Law Society's Investigating Committee and attended three hearings of the Disciplinary Tribunal.

In addition to the above, over 80 people made representations to me either by telephone or in person and many did so on more than one occasion. This was more than double the number received in previous years. I also received thirteen formal requests to review the manner in which complaints had been handled by the Law Society. Again, this is a significant increase on previous years.

I have also considered a number of issues arising from the above, such as those relating to quality of work, and made recommendations on them.

From time to time, I have addressed university students, lawyers and representatives of community service groups on the role of my Office.

## Resources

The Office of Legal Ombudsman is a part time position funded from the Solicitors' Guarantee Fund. The annual salary is presently \$8,000. In my Annual Report for 1996, I recommended that the resources allocated

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to the Office be reviewed and, following the tabling of that report in 1997, it was agreed that this would be done.

The Department of Justice has funded additional costs, including telephone, postage and superannuation contributions, amounting to approximately \$2,500.

During 1996 I was accommodated in the offices of the Tasmanian Ombudsman. However, early in 1997 I was accommodated in the Office of Consumer Affairs. I wish to record my thanks to the Acting Director of Consumer Affairs, Mr Roy Ormerod, and his staff for the help they have given me during the year.

As mentioned in my last report, it would be difficult to undertake the responsibilities of Legal Ombudsman without the co-operation of the staff of the Law Society, in particular that of the Executive Director, now Mrs Jan Martin, and I very much appreciate the assistance I have received.

## Nature and Volume of Complaints

During the reporting year the Society received 138 letters of complaint as compared with 100 received during the previous year. They were handled as follows:

- 16 lodged but not proceeded with due mainly to the complainant failing to respond to correspondence from the Law Society, in particular to requests for authority to refer the complaint to the practitioner concerned;
- 42 not sustained;
- 10 sustained or partly sustained;
- 5 resolved to the satisfaction of the complainant;
- 11 considered to relate to negligence about which the complainant could take civil action;
- 2 referred for prosecution of the lawyer concerned;
- 52 not finalised.

Total 138

Although 138 representations were received, they dealt with over 194 separate issues. The table below provides an indication of the nature and outcome of the complaints received.

NATURE OF COMPLAINT	SUSTAINED	PART SUSTAINED	NOT SUSTAINED	RESOLVED	WITHDRAWN/ NOT PROCEEDED WITH	NOT COMPLETED	TOTALS	% (iii)
Wrong Advice	2		1	2	1	1	7	3.5
Poor representation			2		2	2	6	3
Non Release of Documents	1		1		1	1	4	2
Bad Management of Money						10	10	5
Overcharging		1	12	1	4	8	26	13.5
Acting without Instruction	1		4	1		1	7	3.5
Not Communicating with Client	2	1				11	14	7
Breach of confidentiality					1	1	2	1
Misleading Client or Court	1		2				3	1.5
Breach of Undertaking					2	1	3	1.5
Conflict of interest			3		2	1	6	3
Criminal Behaviour			1			5	6	3
Unethical Behaviour			2		3		5	2.5
Failure to Account			2			3	5	2.5
Inefficiency/ incompetence	1						1	0.5
Delay	2	1	10	2	3	11	29	15
Harassment/Rudeness/ Bad Conduct toward Client/threat		1	2	1		3	7	3.5
Other/Miscellaneous (i)	2	1	9		4	5	21	11
Negligence/ Quality of Work (ii)			11				11	5.5
Failure to follow instruction			2			2	4	2
Inaction			6		1	1	8	4
Poor service/work			6		1	2	9	4.5
TOTALS	12	5	76	7	25	69	194	
% TOTAL (iii)	6	2.5	39	3.5	13	36		

Notes:

- (i) Examples of complaints under other/miscellaneous include failure to seek legal aid, failure to provide estimate of costs, failure to release documents.
- (ii) These were not considered to be within the ambit of the Law Society's complaints handling process.
- (iii) Percentages have been rounded.

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As can be seen, issues that were the subject of many complaints were delay, overcharging, failure to communicate with the client and negligence. However, of particular concern to me is the number of complaints relating to the management of money, and I shall comment on this later in my report.

36 complaints were carried over from previous years. Of these, 22 were finalised during the reporting period; 12 being sustained, one partly sustained, five not sustained and four not proceeded with; leaving 14 matters still not completed by the end of 1997.

Of those 14 complaints lodged prior to 1997 and not yet finalised, nine are awaiting prosecution action against the practitioner concerned, consideration of one complaint lodged in 1994 has been deferred pending the outcome of civil action and consideration of another, lodged in 1995, has been deferred pending taxation of costs. There seems to be no adequate reason for the delay in finalising the other three.

In 1997, complaints relating to delay amounted to 15% of the total, a rise of 2% when compared with 1995, when I first commented on such matters. Complaints relating to overcharging in 1997 made up 13.5% compared with 6% in 1995, and failing to communicate with the client increased from 3% in 1995 to 7% in 1997.

On the other hand, between 1995 and 1997 there was a significant drop in complaints relating to quality of work/negligence - 30% compared with 10%, and for complaints relating to poor conduct - 9% to 3.5%.

Complaints on other topics have not shown such variation.

Complaints were made against 113 of the 501 registered practitioners employed in private practice in Tasmania. Of these, complaints against 28 practitioners were found to be justified. In the case of three of these practitioners, more than one complaint was found to be justified. This does not count complaints relating to negligence/quality of work where the complainants were advised they had other avenues of redress.

As noted in previous years, complaints indicate there are a number of practitioners whose standard of work is often below that which is expected of a practitioner of good repute and competency. Also, complaints against such practitioners usually fit a predictable pattern.



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## Prosecution and Disciplinary Action

If, during investigation of a complaint, the Investigating Committee considers that matters raised amount to professional misconduct, it must apply to the Council of the Law Society, the Disciplinary Tribunal or the Supreme Court to hear the matter.

During the year disciplinary action was completed against seven practitioners. Briefly, the cases and outcomes were as follows:-

- The practitioner was found guilty of unprofessional conduct for assaulting a visitor to his office. He was reprimanded by the Disciplinary Tribunal and ordered to pay costs.
- The practitioner was found to have breached an undertaking made to the Law Society, as a result of a complaint made against him by a member of the public in 1995. The undertaking was that he would not act as a trustee in the course of his business as a legal practitioner and that he would relinquish any trustee positions he already held. He was ordered to be struck off the Roll of Legal Practitioners because the judge held that, in addition to failing to honour his undertaking, the proceedings raised cause for substantial concerns about the practitioner's "honesty and competence and his ability to both comprehend and satisfy the high standards required of a legal practitioner."
- The practitioner was struck off the Roll of Legal Practitioners as a result of the criminal offence of stealing from a client.
- The practitioner was found, by the Council of the Law Society, to have lodged a caveat against a property when there was not sufficient interest to support the caveat. The practitioner was reprimanded and ordered to pay costs.
- The practitioner was found guilty, in another jurisdiction, of illegal sexual conduct. He may not practise law anywhere in Australia for a period of two years.
- The practitioner was found guilty, by the Disciplinary Tribunal, of unprofessional conduct because of unwarranted delay in the handling of a client's affairs. He was reprimanded and ordered to pay the Society's costs.

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- The practitioner was prosecuted before the Disciplinary Tribunal for failing to provide information to the Law Society in relation to a complaint. He was fined \$250 and ordered to pay costs. I should note that the practitioner has *still* failed to provide the requested information and is again facing prosecution before the Tribunal for the same offence.

During the year two people, whose complaints were the subject of disciplinary action, said they did not wish to proceed. Although the Law Society may be able to proceed with one case, it was forced to drop the other.

## Mediation and Compulsory Conferences

The *Legal Profession Act 1993* allows the Law Society to require parties to a complaint to attend a conference to settle matters that can be settled. During the reporting period one such conference was arranged and the matter was successfully resolved. The complaint related to costs and the practitioner reduced the bill.

## Complaints Handling

The three issues of most concern to me in the past were the handling of complaints relating to quality of work/service, the lack of client focus and timeliness.

### Quality of Work/Service:

In my Annual Report for 1995 I recommended that complaints concerning quality of work be investigated by the Law Society. As a result, in 1996 the Society indicated a willingness to investigate such complaints but expressed the view that it did not have the power. In my report for that year, I urged that action be taken to ensure there was no more delay in commencing investigations of quality of work/service complaints. In November 1997, I was advised that the Government proposed to amend the Act to put beyond doubt that the Law Society has jurisdiction to deal with quality of work/service issues and that a system involving the use of voluntary mediation conferences and the implementation of certain procedures recommended in the Society's Client Care Guidelines would be trialed.

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### Client Focus:

When introducing the *Legal Profession Bill 1993*, the Government placed considerable emphasis on the need for greater consumer protection. In my first Annual Report following the passing of the Bill, I was critical of the complaints handling system and commented that it lacked client focus as the Law Society was interested in the regulation, promotion and representation of the legal profession and did not see itself as a consumer protection body. I commented that most people who lodged complaints were unaware of this distinction, their primary interest being to get their problems resolved.

I am pleased to report that, recently, the Law Society appears to be giving greater attention to consumer needs. This is evidenced by the publication of Client Care Guidelines, acceptance that it should investigate complaints relating to work/service and the fact that members of the Investigating Committee are taking a more active, personal interest in the resolution of individual complaints.

### Timeliness:

Complaints are considered at fortnightly meetings of the Law Society's Investigating Committee. They are then generally referred to the practitioner complained of for a response. When the practitioner's response is received the Committee may refer it to the complainant for comment or seek advice from its own counsel or, if the matter appears clear cut, make a decision.

The average time taken to finalise complaints received in 1997 was 2¼ months, a little longer than in 1996. The average time taken to finalise complaints carried over from previous years was 15¼ months which, in my view, is far too long.

Complaints involving the prosecution of the practitioner often take a long time. However, delay in completing an investigation is sometimes the result of lack of co-operation on the part of the practitioner.

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Generally, practitioners respond promptly to the Law Society's request for information. However, where a practitioner fails to respond, the Society may issue a notice under the provisions of s.58(6) of the Act requiring him or her to do so. This greatly adds to the time taken to investigate a complaint. In 1997, six such notices were required to be issued.

In some cases, delay in finalising a complaint is the direct result of tardiness on the part of counsel employed by the Law Society to provide advice on whether a matter complained of amounts to professional misconduct and/or prepare a case for prosecution.

As mentioned earlier, two people whose complaints were the subject of disciplinary action said they did not wish to proceed. The complaints were of long standing, one lodged in 1992, and it is likely that the time taken in bringing the matters before the Disciplinary Tribunal was a major factor in the complainants' unwillingness to proceed.

There was also some delay at the Disciplinary Tribunal stage. Much of this was related to the difficulty in convening a suitable, available Tribunal. Tribunal members are drawn from a group of seven highly regarded senior practitioners.

Whilst the average time taken to handle unsustained complaints is not unreasonable, given the need to allow time for comment from both the complainant and the practitioner, I am still concerned at the time taken to handle the others.

The Law Society is endeavouring to overcome these problems by streamlining the work of the Investigating Committee, employing more reliable counsel and by appointing more Tribunal members.

## Applications to my Office

As mentioned previously, I received 13 formal requests to review the manner in which complaints had been handled by the Law Society. Generally, I found the action taken by the Society to have been appropriate. However, there were five cases, two of which are particularly complex, that I considered warranted further investigation and the Society is taking action to provide answers to the questions I have asked.

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Oral representations I received during the year covered a broad range of issues. Of particular significance, however, was the number of people concerned at the possible loss of money they had invested with three practitioners.

In late December 1996, following a complaint to the Law Society, a prominent lawyer was struck off the Roll of Legal Practitioners. The complaint related to accounting. During the reporting period more complaints about him were received, the bulk of which also related to his financial dealings. Many people had invested with him or his firm and were concerned about possible losses. Although the Council of the Law Society arranged for the appointment of a manager for the practice and a Court fund was established, during the first half of 1997 I received a number of representations from investors who said they were not being provided with adequate information on their particular situation. In the latter half of the year, however, investors appear to have been kept better informed.

During the year the Law Society was involved in the investigation of the financial dealings of two other solicitors. I expect these inquiries will be completed by the middle of 1998. In these cases I believe the Society has taken action to keep investors better informed than in the first case I have mentioned.

It is interesting to note that, with very few exceptions, detection of poor or illegal financial dealings by legal practitioners in Tasmania has occurred as a direct result of complaints lodged by members of the public, rather than by audit or other regulatory procedures.

Another regular complaint by people who have contacted me during the year is that the lawyer fails to advise of progress and will not respond to letters or telephone calls. As noted previously, there was also an increase in the number of formal complaints about delay and lack of communication. Most people believe that, having instructed a practitioner, the onus is then on the practitioner to get on with the work and the client should not have to follow the matter up all the time. There seems little that a person can do to obtain a response from an unwilling practitioner, particularly when the client is in a position in which it would be difficult to change solicitors.

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A further frequent complaint is that the case had been passed from one person in a firm to another without the client having been advised. When this occurred on the day of a court hearing, clients were confused and distressed and it was, in their view, too late to do anything about it. People who have raised this issue with me have also complained that the "stand in" got the facts wrong.

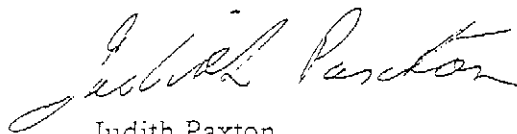
In September 1996, the Law Society issued "Client Care" Guidelines as a means of improving communication with clients. I have often asked those who contact me whether they have been provided with the information suggested in these Guidelines. In general, it appears, they have not.

I agree with the Law Society that, if practitioners followed the Guidelines, the profession would be held in much higher regard.

## Conclusion

Whilst during the reporting period there was an increase in the number of complaints received about members of the legal profession in Tasmania and some particularly notable and worrying malpractices were brought to light, I have noted a greater willingness on the part of the Law Society to improve the manner in which it handles complaints from members of the public and I hope the following year will prove the worth of its initiatives.

This year I have made no formal recommendations in my report as I believe the implementation, in 1998, of a number of recommendations I have made over the last two years, coupled with the Law Society's initiatives, should be given time to be assessed.



Judith Paxton  
Legal Ombudsman

10 April 1998



# Legal Ombudsman

Annual Report  
For the Year Ended 31 December 1998

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Presented to the Attorney-General pursuant to Section 86  
of the *Legal Profession Act 1993*

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## Introduction

In accordance with Section 86 of the *Legal Profession Act 1993*, this report covers the functions I have performed during the reporting period 1 January to 31 December 1998. Additionally, it provides information on the complaints received and handled by the Law Society of Tasmania (the Society) during the year and examines some of the issues raised. This report also contains recommendations in relation to the complaints handling process and in relation to "client care".

## Summary of Functions Performed

The functions of the Legal Ombudsman are to monitor the handling of written complaints and applications about legal practitioners made to the Society, investigate and examine complaints about the manner in which an investigation or hearing has been dealt with by the Society, and investigate any other matter relating to disciplinary proceedings as the Attorney-General may direct.

I have considered the 136 letters of complaint about legal practitioners lodged with the Society during the year, attended most of the fortnightly meetings of the Society's Investigating Committee and attended four hearings of the Disciplinary Tribunal.

In addition to the above I received nearly 300 representations, including 18 formal requests to review the manner in which complaints had been handled by the Society.

Further, in accordance with section 85(c) of the *Legal Profession Act*, at the request of the Attorney-General, I investigated a disciplinary proceeding being undertaken by the Society.

I have also addressed legal practitioners in both Hobart and Launceston, as part of a Risk Management Education Program, to provide information on behaviour likely to generate complaints.

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## Resources

The Office of Legal Ombudsman is a part time position funded from the Solicitors' Guarantee Fund. Towards the end of 1998, as a result of recommendations in my Annual Report for 1996, the resources allocated to my Office were reviewed and it was agreed that the salary for the Office should be increased from \$8,000 a year to \$12,000 a year.

The Department of Justice has funded additional costs, including telephone, postage and superannuation contributions, amounting to approximately \$1,700.

During the year I was again accommodated in the Office of Consumer Affairs and wish to record my thanks to the Director of Consumer Affairs, Mr Roy Ormerod, and his staff for the help they have given me during that time.

I also wish to record my thanks to the Executive Director of the Law Society, Mrs Jan Martin, for her time and assistance. As mentioned in previous reports, it would be difficult to undertake my responsibilities without this co-operation.

## Nature and Volume of Complaints

At the start of 1998, the Law Society had 67 complaints carried over from previous years. They were handled during the year as follows:-

- |              |                                                                                                                 |
|--------------|-----------------------------------------------------------------------------------------------------------------|
| 1 from 1992: | finalised, not sustained;                                                                                       |
| 1 from 1993: | still awaiting prosecution and carried over into 1999;                                                          |
| 3 from 1994: | one finalised, one deferred pending civil action and one still awaiting prosecution and carried over into 1999; |
| 1 from 1995: | settled;                                                                                                        |

- 
- 9 from 1996: one finalised, not sustained and 8, involving disciplinary action, carried forward into 1999;
- 52 from 1997: 47 finalised during the reporting period - 12 sustained, 13 not sustained, 15 not proceeded with, 2 related to negligence with civil action considered to be an option. Thus 10 were carried into 1999, two of which are awaiting prosecution.

During 1998, the Society received 136 letters of complaint, one less than the previous year. They were handled as follows:

- 21 lodged but not proceeded with;
- 42 not sustained;
- 21 sustained/found to have merit;
- 6 considered to relate to negligence about which the complainant could take civil action;
- 46 not finalised.

Total 136

As in previous years, a number of practitioners received complaints from more than one client. However, it should be noted that about 30% of complaints were not sustained/found to have merit and that, of those found to have merit, most were not so bad as to warrant prosecution. Whilst the number of practitioners who have complaints sustained against them is relatively small, this is not to say that within certain practices there are not significant deficiencies which the Society is actively trying to address.

Although 136 representations were received in 1998, they dealt with 197 identifiable separate issues. The table below provides an indication of the nature and outcome of the complaints received.

NATURE OF COMPLAINT	SUSTAINED/ found to have ment	NOT SUSTAINED	RESOLVED	WITEDRAWN /NOT PROCEEDED WITH (iii)	NOT COMPLETED	TOTALS	% (iii)
Wrong Advice	1	1			5	7	3.5
Poor representation		3			3	6	3.0
Non Release of Documents/file	4	1		1	4	10	5.0
Management of Money	1	2		1	3	7	3.5
Overcharging/wrongful charging	1	11		2	9	23	11.5
Acting without or against Instruction	1	1		1		3	1.5
Failing to respond/ communicate with Client	3	9		3	5	20	10.0
Breach of confidentiality		1				1	0.5
Misleading Client or Court					2	2	1.0
Conflict of interest		5			2	7	3.5
Criminal Behaviour	7				1	8	4
Unethical Behaviour	1				2	3	1.5
Lying				1	4	5	2.5
Failure to Account		1		1	1	3	1.5
					2	2	1.0
Defalcation					4	4	2
Inefficiency/ incompetence		1		2	1	4	2.0
Delay	4	6	1	5	10	26	13.0
Harassment/Rudeness/ Bad Conduct toward Client/threat		4			3	7	3.5
Other/Miscellaneous (i)	1	6		2	9	18	9.0
Inaction	1	4	1	3	4	13	6.5
Poor service/work	1	5		3	3	12	6.0
Negligence (iv)		6				6	3.0
TOTALS	26	67	2	25	77	197	
% TOTAL (ii)	13	30.5	1	15.5	39		

Notes:

- (i) Examples of complaints under other/miscellaneous include failure to seek legal aid, passing file from one practitioner to another without informing client, collusion and wrongly placing a caveat.
- (ii) Complaints not proceeded with are those not pursued by the complainant.
- (iii) Percentages have been rounded.
- (iv) Negligence cases not handled by Society.

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As in previous years, the issues that were the subject of many complaints were delay, overcharging and failing to communicate with the client.

In 1998, complaints relating to delay amounted to 13% of the total, the same as in 1995 when I first commented on such matters. Complaints relating to overcharging in 1998 made up 11.5% compared with 6% in 1995, and failing to communicate with the client increased from 3% in 1995 to 7% in 1997 and 10% in 1998.

On the other hand, between 1995 and 1998 there was a significant drop in complaints relating to quality of work/service - 30% compared with 6%, and for complaints relating to poor conduct - 9% to 3.5%.

As can be seen from the table above, 7 complaints relating to criminal behaviour were sustained during the year. All were about the same practitioner who was found to have stolen clients' money. The Society took immediate steps to ensure that the people concerned were recompensed.

Also during the year, the Society concluded that a number of people had suffered as a result of fiduciary default in relation to mortgage practices of a legal firm. These matters are being addressed by the Solicitors' Trust. Three other applications claiming fiduciary default by the same firm were also received but a decision on whether a default had actually occurred had not been made by the end of the reporting period.

During the year, considerable publicity was given to the management of various mortgage funds and to possible illegal activities. However, the actual number of practitioners whose fund management or possible illegal activities came to the attention of the Society was three, much the same as in the last two years.

Whilst 26 of the complaints lodged and finalised in 1998 were sustained/found to have merit, only one was considered serious enough to warrant prosecution for misconduct. Of those received but not finalised in 1998, 9 have been referred for prosecution and there are 6 complaints awaiting a decision on whether or not the matters raised warrant prosecution.

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## Prosecution and Disciplinary Action

If, during investigation of a complaint, the Investigating Committee considers that matters raised amount to professional misconduct, it must apply to the Council of the Law Society, the Disciplinary Tribunal or the Supreme Court to hear the matter.

During the year disciplinary action was completed against five practitioners, one of whom was charged with three separate matters. Briefly, the cases and outcomes were as follows:-

- The practitioner was struck off the Roll of Legal Practitioners as a result of the criminal offence of stealing from a client.
- The practitioner was found guilty, by the Disciplinary Tribunal, of misconduct in that he failed to provide advice on costs to his client, as is required by Rule 13 and that, from time to time, he withdrew money held in trust for his clients without any authority which is in breach of Rule 40. He was reprimanded, fined \$500 and ordered to pay 90% of costs.
- The practitioner was prosecuted before the Disciplinary Tribunal for failing to provide information to the Society in relation to a complaint. He was admonished, fined \$500 and ordered to pay costs.
- A practitioner was found guilty of professional misconduct as he borrowed money from his client without requiring his client to obtain independent legal advice and this omission constituted a conflict of interest. The loan was from the proceeds of a workers' compensation payment. The practitioner was suspended from practising for six months and ordered to pay costs.
- The practitioner was prosecuted for failing to provide information to the Law Society in relation to three separate complaints. The Tribunal heard all three applications together and the practitioner was reprimanded in respect of each complaint and fined a total of \$2,500. He was also required to seek supervision in the management of his files from a senior practitioner nominated by the Society.

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Four more cases are still before the Tribunal. Two, heard at the same time against the same practitioner, have been deferred since early in 1998, at first because further evidence was sought and then because of a matter relating to the membership of the Tribunal. The third case has been determined but the Tribunal has yet to decide on the penalty. The fourth case was scheduled for hearing before Christmas 1998 but, due to holiday arrangements, had to be deferred.

Further, at the time of writing, the Society had an application before the Supreme Court to strike off a practitioner for criminal activities.

At the end of the reporting period, 17 cases, involving 10 practitioners, were awaiting prosecution. One practitioner faces 4 charges of unprofessional conduct and three others face two each.

As I mentioned in my report for 1997, the cause of delay in completing prosecutions is often the direct result of tardiness on the part of counsel employed by the Law Society to provide advice on whether a matter complained of amounts to professional misconduct and/or prepare a case for prosecution. Although some very efficient lawyers are employed to give advice, there are some employed who, for whatever reason, have not provided an efficient service even in the face of numerous urgings. The Society is still trying to remedy this problem.

Once a matter is ready for hearing, further delays often occur in finding a time when members of the Tribunal are available.

Whilst I am critical of the time taken to bring a matter to a hearing before the Disciplinary Tribunal, I have been impressed with the work of the Tribunal once a matter is before it. The Tribunal's dealings are fair, thorough and rigorous.

Since 1995, seven cases of failing to provide information to the Law Society in relation to complaints were brought before the Tribunal. In no case did the practitioner concerned deny the charge although a variety of reasons were given, examples being too heavy a workload, personal problems and an inability to open any letter bearing the letterhead of the Law Society. In each case the practitioner was fined and ordered to pay costs.

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As prosecuting a matter is an extremely time consuming, costly exercise, both for the Society and for the practitioner concerned (both sides employ counsel to represent them), I recommend the Act be amended to allow the Society to impose an automatic, suitably heavy fine on practitioners who fail to respond within a reasonable time to the Society in relation to complaints. If the practitioner wishes to dispute the matter, it could then be referred to the Tribunal.

## **Mediation and Compulsory Conferences**

Although the Act has not been amended to include mediation, in 1997 the Law Society agreed to a system of voluntary mediation in consumer complaints and the then Attorney-General requested the Society keep statistics of mediation conferences held and records of lawyers' attendance so that he could review the situation at the end of 1998. Two such conferences were conducted during the reporting period.

- The first case related to costs. The complainant did not want to pay over \$4,000 to the practitioner because he believed he had been given wrong advice and poor service. The mediation was not a success.
- The second case also related to costs and did not satisfy the complainant who is seeking an "admission of fault". This complaint has not yet been finalised.

In addition to the above, the President, the Executive Director or a member of the Investigating Committee have, from time to time, spoken to the parties to a complaint in an attempt to quickly resolve a matter. This approach often seems to be an effective way of resolving less complex matters that do not involve unprofessional conduct.

## **Complaints Handling**

In the complaints handling process, the issues of most concern to me at the end of this reporting period were timeliness and the handling of complaints relating to quality of work/service and client care. A further issue, and one I have raised in previous years, is the lack of an informal disciplinary process.



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### **Timeliness:**

Complaints are considered at fortnightly meetings of the Society's Investigating Committee. They are then generally referred to the practitioner complained of for a response. With a few notable exceptions, practitioners generally respond promptly to these requests.

When the practitioner's response is received, the Committee may refer it to the complainant for comment or seek advice from its own counsel or, if the matter appears clear cut, make a decision.

The average time taken to finalise complaints received in 1998 was nearly 2 ¾ months, a little longer than for 1997 which, in turn, was a little longer than for 1996. One possible reason for this increase could be the complexity and seriousness of a number of complaints, particularly those relating to defalcations, which require considerable time and energy to handle, leaving less time for the others.

The length of time taken to investigate complaints relating to the handling of clients' money, whilst apparently unavoidable, leads to understandable anxiety and frustration on the part of the clients concerned.

Complaints involving prosecution of a practitioner are still taking a very long time and, as can be seen from figures given previously in this report, the number of cases awaiting prosecution is now considerable and will require much time on the part of the Disciplinary Tribunal. In view of the fact that some of these cases are over four years old, it is important for both the community and the practitioners concerned that they be finalised soon.

The Society has recently established a sub committee whose aim is to improve the complaints handling system including timeliness.

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### Quality of Work/Service:

In my Annual Report for 1995 I recommended that complaints concerning quality of work be investigated by the Society. As a result, in 1996 the Society indicated a willingness to investigate such complaints and, in 1998, amendments to the *Legal Profession Act* were proposed to cover the handling, by the Society, of "consumer disputes", by allowing it to refer such disputes for mediation.

Under the proposed changes, consumer disputes may be referred for mediation but no other action is required. Further, under the proposal, participation in mediation about a consumer dispute is voluntary. This means that, if the matter is not referred for mediation or mediation is rejected by the practitioner, the complaint is, in effect, dismissed even though it might have merit. I believe this is a weakness in the proposed system and, during the year, suggested that the Society be given the option of taking some action, other than mediation in relation to complaints about quality of work/service.

### Client Care:

In 1996 the Society issued Client Care guidelines to "encourage practitioners to improve their communication with clients and to reduce the number of formal complaints by clients to the Law Society...".

These guidelines recommend, amongst other things, that firms should inform clients in writing of the name of the solicitor handling the matter, who in the firm to contact, the basis upon which costs will be charged and an estimate of costs and disbursements. They also recommend clients be informed, at the outset and through the course of a matter, as to the issues, steps and progress and reasons for any unreasonable delay.

Based on the nature and number of complaints received in the two years since the guidelines were issued, it seems their aims have not been met. In particular, the number of formal complaints to the Society has remained the same and those relating to communication have increased to 10%.

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In view of the above, I recommend that Client Care Rules be introduced but that such Rules should still allow enough flexibility to take account of exceptional cases. As well as improving communication between practitioners and their clients, Rules would provide set standards against which a practitioner's performance can be measured.

### **Informal Process:**

At present the Society cannot take such action as to admonish or require a practitioner to undertake a course of education unless a very formal hearing in relation to unprofessional conduct has been undertaken. As in other years, the Society has found complaints that are, on the surface, justified but the action complained of does not warrant prosecution for unprofessional conduct. In such cases some alternative mechanism for encouraging improved performance on the part of the practitioner and which is understood by the complainant would seem to be appropriate.

In my report for 1996, I drew attention to the system adopted for veterinary surgeons and a similar one for nurses which allow the governing body to address such complaints in a relatively informal, inexpensive way. Under these systems the practitioner can be called to account and, if necessary, cautioned, admonished or directed to undertake a course of education. Under both systems there is provision for a formal inquiry if evidence of a more serious misdemeanour is revealed.

Once again, I recommend that the *Legal Profession Act 1993* be amended to incorporate a similar system for legal practitioners.

### **Applications to my Office**

The majority of people who contact me do so by telephone. During the reporting period, I received over 250 calls. It should be noted, however, that some people called more than once.

- About half (110) were from people generally unhappy with some aspect of the legal system but who had not lodged a complaint with the Society. Many were seeking legal advice which I cannot give. Some wanted to know how to lodge a complaint about a legal practitioner.

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- 48 related to complaints that had been lodged with the Society. A subject of particular concern is that a complaint is dismissed because the matter complained of relates to negligence or poor service/work. Some calls related to the time taken to handle complaints in which prosecution action is being taken.
  - 25 were from people concerned about the safety of money invested through solicitors' trust accounts. The management, by legal practitioners, of clients' funds and investments has recently become a disturbing issue and considerable publicity was given to it. Although during the year, the Society acted promptly when it became aware of possible defalcations, many callers either did not understand the process being undertaken by the Society or the Solicitors' Guarantee Fund or had not received regular and promised updates of information on the state/stage of their claims.
  - Issues raised by the remaining 75 included not being able to get information from their lawyer on the progress of their case, poor representation in court, gross delay, overcharging and being charged on the steps of the court under threat of no representation (these include an increasing number relating to being promised action on a "no win no charge" basis and then being charged half way through). I am surprised at how many people alleged they had not been informed of the expected process, outcome and cost of their case. The introduction of Client Care Rules would go a long way towards alleviating this problem.

#### **Formal applications:**

During the reporting period I received 18 formal requests to review the manner in which complaints had been handled by the Law Society. In 11 of the cases I was satisfied the Society had properly investigated the complaint. However, in 7 cases, I asked the Society to examine certain aspects more closely. I am still awaiting a response on 4 of these.

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In relation to the other three, whilst I agreed there was no unethical conduct on the part of the practitioners concerned, I considered the complainants had been poorly treated by the legal profession. As an example, Mr and Mrs S had had their furniture and other goods stolen from a warehouse. In 1992 they went to a law firm to sue the warehouse owner for compensation. Over the next five years their file was passed through six members of the firm, they were not kept properly informed, little was achieved and now the person they were suing has died.

Towards the end of the year I received two representations from people seeking information from the Society under the provisions of section 58(10) of the *Legal Profession Act 1993* which, in respect of complaints relating to fiduciary defaults, requires the Society to provide complainants with details of the investigation and copies of the documents being examined, the first time anyone has attempted to use this part of the Act. As the Law Society had failed to comply with their request, they asked that I pursue the matter.

In one case, as the complainants had lodged a writ against the Society with the Supreme Court, I considered it would not be appropriate for me to take any action. In the other, the Society advised it was still trying to determine if there had been a fiduciary default and, therefore, whether it would have to comply with the request.

## **Summary of Recommendations**

That the *Legal Profession Act 1993* be amended to allow the Law Society to impose an automatic fine on practitioners who fail to respond to it in relation to complaints.

That the *Legal Profession Act 1993* be amended to incorporate an informal complaints handling process for complaints that have merit but do not warrant formal prosecution of the practitioner.

That Client Care Rules be introduced.

That the Law Society have available to it options, other than mediation, to deal with quality of work/service complaints.

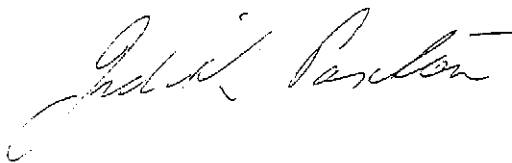
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## Conclusion

The volume and nature of complaints received during the reporting period was much the same as in the last two years. However, the time taken to handle them was slightly longer and the build up of cases awaiting prosecution continues.

Applications to my office have increased, particularly in relation to quality of work/service issues and the safety of investments. They suggest that public perception of the legal profession has worsened as a result of publicity given to a small number of practitioners found guilty of criminal behaviour or to be involved in fiduciary default in relation to mortgage practices.

The Law Society is working to improve its procedures and, through educational programs and disciplinary action, the behaviour of some of its members but much still needs to be done to improve the image of the legal profession in the eyes of the community.



Judith Paxton  
**Legal Ombudsman**

March 1999