

Legal Services Commissioner Confirms Direction of Office

The Office of the Legal Services Commissioner has now been in existence for almost 18 months. During that time we have established the office, hired our complement of staff (10), established a database, handled approximately 4,240 complaints against solicitors and 210 complaints against barristers while fielding 10,600 telephone inquiry calls and conducted 600 face to face interviews with complainants.

As most in the legal profession are now aware, we are the first port of call for all complaints against solicitors, barristers, licensed conveyancers and law clerks in NSW. When we receive complaints against legal practitioners, we firstly decide whether or not they should be declined as not amounting to complaints under the Act or as being frivolous or vexatious. For those complaints that are not declined, we decide whether or not we will deal with them or refer them to the appropriate Council for investigation. In general, we retain the complaints that are either politically sensitive or were lodged against individuals where investigation by the Council might cause a perception of conflict. The other class of complaints that we are likely to retain are those complaints which we believe could be resolved through formal or informal mediation between the parties.

It is also clear from the functions of the Commissioner in Section 131, Part 10 of the *Legal Profession Act* of 1987, that we have, along with the Professional Associations, an educational role. This is particularly the case as we have determined that the mission of the Office is to ultimately reduce the number of complaints received and handled by the Office against legal practitioners in New South Wales.

What many lawyers may not realise is that the model for regulation of the profession that we have adopted in NSW is unique in the world. What we have is a form of co-regulation with my Office working with the two Councils to regulate both branches of the profession. No other jurisdiction I'm aware of in the world has a similar model, although a Legal Services Ombudsman does exist in the UK, albeit with different and more limited powers than ours. Other Australian jurisdictions are presently considering moving to our model of co-regulation.

As this Office has no direct precedent in Australia it was decided that it would be very valuable for me to travel to the UK and the United States in September of this year to explore mechanisms used to set both ethical and practice standards for the profession, as well as the complaint handling procedures to deal with those who fail to meet such standards.

While a full and detailed report is being prepared

concerning what I learned on this trip (incorporating information from many interviews and extractions from volumes of reports and papers I collected), I intend here to give a quick overview of my impressions and findings.

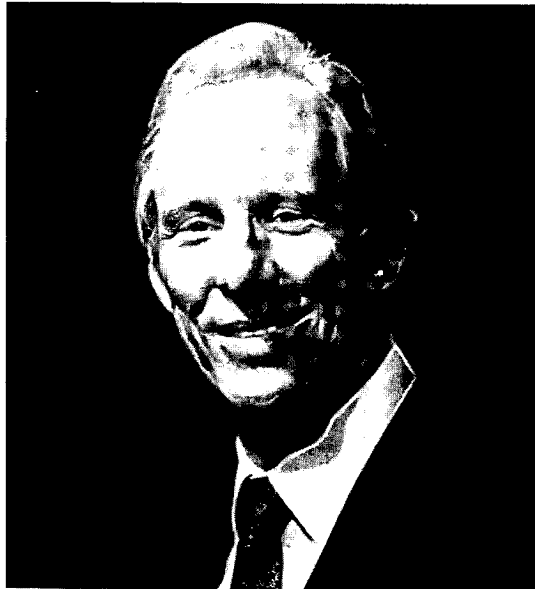
Amidst a flurry of meetings, speeches and seminars, I attended several conferences. One of them was the UIA Annual Conference held at the Grosvenor Hotel in London which was also well attended by members of the NSW Bar Association. Attending this conference were 1200 lawyers from 60 different countries discussing a number of issues under the general theme of "Meeting the Challenge". On the first day of the conference there was a panel discussion on entrance to the profession. This had a number of key speakers

from various Law Societies and Bar Associations. Unfortunately, the main subject covered by virtually every speaker was the fact that there are presently too many lawyers. In itself, this choice of subject matter is not surprising. However, I was very disappointed with the level of discussion about the issue. There did not seem to be any analysis of what should be done, or indeed, what power the legal profession could utilise to impact on the issue at all. Indeed, it seems to me that rather than focussing on the question of "too many lawyers", the more appropriate issue to address is to ensure that lawyers are competent and of high ethical standards, rather than simply a question of numbers.

While in London I met with the executives of the Law Society and Bar Association as well as those involved with the handling of complaints and the setting of ethical standards. I must admit that I came away with a feeling that, notwithstanding some very positive initiatives such as the client care rule which applies to solicitors' practice, the profession in the UK experiences a deeper division between the branches of the profession than here in NSW and is also less focussed on the needs and rights of the consumer of legal services.

Following my week in London, I flew to the United States where I held meetings in New York, Chicago, San Francisco and Los Angeles with the American Bar Association and a number of lawyers involved in the disciplinary area as well as legal academics and many individual practitioners.

Not surprisingly, the system of discipline which applies to the profession in the United States is markedly different from that that exists in the UK or here. In America, due to their strong focus on separation of powers, the disciplinary function in relation to the legal profession exists as a branch of the judiciary. The disciplinary committees are actually



“employed” by the state court system.

The American Bar Association, which is a voluntary organisation, puts out model rules which are in turn adopted by the State Bar Associations and then presented to the judiciary for their adoption.

The codes established and adopted are, like much legislation in the United States, highly detailed and codified. Accordingly, much of the process of complaint handling and discipline is based on what may be referred to as technical arguments over the application of the various codified rules. In this process, the complainant or consumer of legal services has very little, if any, role to play. They simply lodge their complaint and the resultant disciplinary hearing is largely conducted by affidavit.

The major concern that this gives rise to is that the consumer's problem is never addressed, causing a greater degree of consumer dissatisfaction with the legal profession.

This, coupled with the fact that America has just hit the milestone of 1 million practising lawyers (one for every 260 members of the population), and what can only be described as bizarre advertising campaigns by members of the profession, has resulted in an even greater crisis of confidence in the community with the legal profession than exists in Australia.

I returned to Australia with a very strong view that the direction that we have taken in the regulation of the profession is the right direction. While we still have many bugs in the system, and unacceptable delays, particularly in our review function, the underlying philosophy of positively addressing the 95% of complaints that would never result in discipline of a practitioner through mediation and other forms of resolution is far more beneficial to the community and ultimately for the profession. As Commissioner I strongly support the initiative of the Bar Association and the Law Society in focussing not only on the disciplining of aberrant legal practitioners through the complaint handling process but on the resolution of the problem presented by the complainant. It is through mediation and resolution of these problems that the profession will not only gain a greater degree of satisfaction in its clients (and resultant reduction in “lawyer jokes”), but will also gain positive insight into how to better focus the service provided to clients.

While many in the profession have expressed to me their concern about increased government regulation, increased competition caused by an explosion in the number of legal practitioners, and a shrinking financial base, I believe that all is not doom and gloom for the profession.

Unlike what I experienced in the UK and the US, here we are better recognising the importance of consumer satisfaction when providing legal professional services to the community. It is through this approach, and not that of increased barriers to complainants, or defensiveness in the face of government regulation, that will ultimately provide the degree of respect, understanding and satisfaction by the community of the legal profession that the profession deserves.

□ Steve Mark

Justice Kirby elected President of ICJ

The President of the Court of Appeal, Justice Michael Kirby, was elected President of the International Commission of Jurists (ICJ) at the Commission's triennial meeting in Bangalore, India on 27 October 1995.

For the past three years Justice Kirby had served as Chairman of the Executive Committee of the ICJ, the main executive office in the organisation.

The ICJ comprises no more than 45 jurists elected by the present Commissioners to reflect the legal profession around the world.

The Commissioners come from different branches of legal activity and different regions of the world. The activities of the ICJ are focussed on defence of the rule of law, advancement of human rights and protection of the independence of the judiciary and of lawyers.

One of the recently elected ICJ Commissioners is Dato' Param Cumaraswamy (Malaysia) who, in 1994, was appointed UN Special Rapporteur on the Independence of the Judiciary and of Lawyers.

Justice Kirby holds the UN post of Special Representative of the Secretary-General for Human Rights in Cambodia.

Justice Kirby will hold the post of President of the ICJ for three years. His immediate predecessor as President was Dr Joaquín Ruiz-Giménez, the former Ombudsman of Spain who was a defender of human rights in that country during the Franco years.

Justice Kirby told the closing session of the joint meeting of ICJ Commissioners and the 100 representatives of National ICJ Sections and Affiliated Organisations from around the world that he had adopted objectives of modernising the ICJ organisation.

This had involved securing the participation in the Commission of more women as Members, more non-English speaking Commissioners, more representatives from developing countries and more younger lawyers.

The ICJ had, in the past three years, acquired new premises in Geneva and had adopted a much more transparent administrative style than it had followed in the past.

Lawyers in Australia wishing to be associated with the AICJ should contact the Secretary-General of the Australian Section, Mr David Bitel, Sydney (telephone (02) 283 1333; Fax (02) 267 8808). Those interested will then be put in touch with their local branch.

The AICJ has been very active in recent years with regard to concerns relevant to the independence of the judiciary in Australia and with trial and electoral observance and the conduct of human rights missions in the region, including in East Timor, Burma, the Philippines and Japan.

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