



TASMANIA

# **Legal Ombudsman**

## **Annual Report For the Year Ended 31 December 2006**

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 2006. 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 for change to the legislation in relation to the regulation of the legal profession in Tasmania.

## **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.

During 2006, I considered 129 letters of complaint about legal practitioners lodged with the Society. I or Mr Ian Stewart, who Acted as Legal Ombudsman during part of the year, attended most of the fortnightly meetings of the Society's Investigations Committee, seven meetings of the Council of the Law Society, five of the six disciplinary hearings and one mediation.

My office also received over 200 calls or visits from members of the public and I considered 24 formal requests that I investigate the manner in which complaints were being, or had been, investigated by the Law Society.

## **Resources**

The Office of Legal Ombudsman is a part time position funded from the Solicitors' Guarantee Fund at an annual salary, in the reporting period, of \$14,621.

The Department of Justice provided additional funds to cover such things as accommodation and superannuation.

During the year I was again accommodated in the Office of Consumer Affairs and, as in previous years, was given support by the staff of that Office, for which I am very grateful.

This year I took two months leave of absence during which Mr Ian Stewart was Acting Legal Ombudsman. I thank him for his willing and efficient administration and competence in undertaking the responsibilities of the position.

## **Nature and Volume of Complaints**

At the start of 2006, the Law Society had 113 complaints carried over from years 1997 to 2004. They were handled during the year as follows:

1 from 1997	Awaiting action in the Courts and carried forward into 2007.
3 from 1998	These, relating to mishandled mortgages, are still awaiting action in the Courts and have been carried forward into 2007.
30 from 1999	All 30, relating to mortgage matters, were closed during the year, following advice from Counsel for the Society that allegations of unprofessional conduct or professional misconduct could not be proved.
1 from 2000	This matter is still awaiting prosecution before the Disciplinary Tribunal and has been carried forward into 2007.
6 from 2001	All six, relating to the handling of mortgages, have been carried forward into 2007.
9 from 2002	One was dismissed; two, relating to mortgage matters, were closed following advice that a prosecution would not be successful; one was successfully prosecuted before the Disciplinary Tribunal; one was unsuccessfully prosecuted before the Supreme Court, three are still under investigation and one is awaiting prosecution before the Council of the Law Society. Thus, four have been carried forward into 2007.
3 from 2003	One was successfully prosecuted before the Tribunal, one, relating to mortgage matters, was closed following advice that a prosecution would not be successful and one is still awaiting prosecution action. Thus one has been carried forward into 2007.

16 from 2004	One was dismissed, one was partially sustained, 11 are awaiting prosecution action (ten of these are against one practitioner) and three are still under investigation. Thus, 14 have been carried forward into 2007.
44 from 2005	23 were dismissed, three were closed, one was withdrawn, two were resolved and two were sustained/found to have merit, leaving 13 carried forward into 2007.
43	Total number of complaints carried forward into 2007 from years 1997 to 2005.

During 2006, the Society received 129 letters of complaint, covering some 187 matters, which were handled as follows:

51	not sustained or dismissed as lacking in substance, frivolous or vexatious.
5	closed because there was insufficient evidence on which to base a successful prosecution.
2	sustained/found to have merit.
2	resolved.
2	withdrawn
6	considered to relate to negligence or costs about which the complainant could take other action.
61	still under investigation.

**Total 129**

The nature and outcome of the complaints received are detailed in the following table. As many letters of complaint covered more than one issue, the number of complaints in the table are considerably higher than the number of letters received.

***Nature and Outcome of Complaints Received in 2006***

NATURE OF COMPLAINT	SUSTAINED/ Found To Have Merit	NOT SUSTAINED	CLOSED	RESOLVED/ Withdrawn/ not proceeded with	NOT COMPLETED	REFERRED (iii)	TOTALS	% (iv)
Breach of Rules of Practice/Court orders/other Acts	1	2		1	1		5	3
Threat	1	1		1	3		6	3
Wrong placement of caveat					1		1	0.5
Wrong/poor advice		2			4		6	3
Poor representation		3			3		6	3
Non release of documents/files/money		6			1		7	4
Management of money		1	1		2		4	2
Overcharging/wrongful charging		6	3	1	10	2	22	12
Acting without instructions/failing to follow instructions		4			6		10	5
Failing to respond/communicate with client	1	9	1	2	8		21	11
Breach of confidentiality		3			5		8	4
Misleading client, Court or Society		1			4		5	3
Conflict of interest		4			6		10	5
Unethical behaviour (i)		1			4		5	3
Lying		3			3		6	3
Failure to account		2			1		3	2
Theft/fraud/dishonesty		1			3		4	2
Breach of undertaking		1			6		7	4
Inefficiency/incompetence		1					1	0.5
Delay/inaction	1	6	1	2	6		16	9
Harassment/rudeness/bad conduct toward client/intimidation		5			3		8	4
Other (ii)		6	1	1	5		13	7
Poor service/work		4			4		8	4
Negligence/taxing				2		3	5	3
<b>TOTALS</b>	<b>4</b>	<b>72</b>	<b>7</b>	<b>10</b>	<b>89</b>	<b>5</b>	<b>187</b>	
% TOTAL (iv)	2	38	4	5	48	3		

## Notes:

- (i) Examples of unethical behaviour are borrowing from a client, inappropriately approaching a witness.
- (ii) Examples of complaints under 'Other' are failing to apply for Legal Aid, passing client's file to another practitioner without permission, failing to attend Court.
- (iii) Complainants advised to get bill taxed or seek other remedies.
- (iv) Percentages have been rounded.

In descending order; overcharging, failure to respond/communicate and delay/inaction stand out as the most frequent subjects of complaint. This is similar to previous years.

Of completed complaints, four percent were sustained/found to have merit and 77% were dismissed. This is a high level of complaints dismissed compared to previous years.

By the end of the reporting period, 48% were not completed, up on the two previous years.

Under the *Legal Profession Act 1993*, a complaint is defined as a complaint relating to professional misconduct or unprofessional conduct of a practitioner. If a complaint does not reveal sufficient poor conduct to be likely to result in a successful prosecution for unprofessional conduct or professional misconduct, it is dismissed or closed.

The above figures reflect this approach but do not mean that all the complaints that were dismissed/closed were unwarranted. A great proportion of them related to quality of work and could be classed as consumer disputes. In other States these are handled by the regulatory body.

The figures above indicate a need for consumer disputes to be given some attention, not dismissed as lacking in substance. This is an issue I shall come to later in this report.

As in previous years, the Society, through a letter or call from the President, has expressed to some practitioners that his/her conduct is not approved of. I have detailed those complaints handled in this manner during 2006 later in this report.

### ***Timeliness***

The average time taken to complete investigations of complaints lodged in 2006 was 67 days, similar to the 2005 average.

## **Formal Prosecution and Disciplinary Action**

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

**“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.”

During the year one practitioner was prosecuted in the Supreme Court, two practitioners before the Disciplinary Tribunal and two before the Council of the Law Society. In addition, one prosecution before the Disciplinary Tribunal, commenced in 2005, was finalized in 2006. Briefly, the cases and outcomes are as follows:

- Practitioner A was prosecuted before the Supreme Court for allegedly misleading the Industrial Commission following the termination of his employment with a legal firm. The complaint was lodged in 2002. The Law Society alleged that some answers given by the Practitioner, as a sworn witness, were false. However, whilst Justice Underwood found the answers given were untrue, he considered that there was no motivation for the practitioner to deliberately give false answers and that it is easy to be mistaken about times and dates when trying to recall events that happened two years previously. He concluded that the Society’s case was not made and the matter was dismissed. The Society was required to pay the costs of the practitioner as well as its own and I expect the total costs to be many thousands of dollars.
- In 2001, Practitioner B was retained by Mr L to act for him in a matrimonial property settlement. The matter was listed for a Case Assessment Conference. However, the practitioner did not attend the conference nor did he arrange for anyone else to do so. Although the Practitioner did arrive some 33 minutes late for the conference, he left before directions or costs orders were made. As a result of the Practitioner’s failure to appear at the conference, Mr L was ordered to pay his wife’s costs and to file Forms 3A by a certain date.

The practitioner did not advise his client of these orders or how they came about.

In addition the practitioner delayed in other matters, failed to respond to Mr L's requests for information and failed to advise his client of his rights, powers and entitlements.

Following a complaint lodged with the Society in 2002, the practitioner was prosecuted before the Disciplinary Tribunal.

The Tribunal found the practitioner had breached Rule 10 of the Rules of Practice in that he did not do his best to complete his client's business in a competent manner and within a reasonable time. He was found guilty of unprofessional conduct, fined \$1,500 and ordered to pay the Society's costs of \$10,000 for investigating and prosecuting the matter.

- In 2001, Practitioner C was retained to act in relation to Mrs P's rights under the *Testator's Family Maintenance Act 1912* (TFM). Mrs P was illiterate and in receipt of a disability pension. For these reasons, the practitioner offered to act for her on a no win, no fee basis and his offer was accepted. The practitioner later required Mrs P to sign a periodic payment form to pay for the services of counsel.

Some months later, in 2002, Mrs P died. Consequently, the TFM claim was discontinued with no order as to costs. However, in March 2003, the practitioner rendered an account for \$9,785 to the estate of Mrs P for his fees for the TFM claim, the executor's action and the administrator's application.

Following the sale of Mrs P's house, the practitioner deducted from the proceeds, fees of Counsel and the amount of \$9,785 as above.

In 2003 a complaint was lodged with the Society and the practitioner was prosecuted before the Disciplinary Tribunal on the grounds that:

- (a) he had no entitlement under the retainer to require Mrs P to sign a periodic payment form;
- (b) he had rendered an account to the estate of Mrs P when he had no entitlement to do so; and
- (c) he had no entitlement to deduct costs from the proceeds of the sale of Mrs P's house.

Whilst the matter was heard in October 2005, it was not until July 2006 that the Tribunal handed down its decision. In relation to the above, by a majority decision, the Tribunal found the practitioner guilty of

professional misconduct. The dissenting member considered the conduct only amounted to unprofessional conduct.

The practitioner was ordered to repay the fees he had incorrectly charged, amounting to \$10,949. He was also fined \$8,000.

During the hearing, the Tribunal formed the view that the practitioner had not been frank with the Society in responding to the complaint. For this he was found guilty of unprofessional conduct and fined a further \$1,000 bringing the total fines to \$9,000.

The Tribunal also ordered that he pay the Society's costs amounting to \$28,834.

- A complaint, lodged with the Society in 2002, resulted in Practitioner D being prosecuted before the Disciplinary Tribunal for inordinate delay in the prosecution of a personal injuries claim on behalf of Ms J arising from a motor vehicle accident. He was also prosecuted for failing to properly advise Ms J, failing to respond to her frequent requests for information and wrongfully closing her claim.

The Tribunal found the practitioner guilty of unprofessional conduct, fined him \$3,000 and ordered that he pay costs amounting to about \$4,650. However, nearly a year later, the Tribunal has not yet provided the full reasons for its decision. Both the Law Society and I have raised this delay with the Tribunal but without success.

- Practitioner E was prosecuted before the Council of the Law Society following a complaint lodged in 2005. The complainant alleged that, in his correspondence and a telephone call to her, the practitioner threatened that, unless she underwent a termination of her pregnancy, she could face criminal charges for alleged breaches of the Victorian Crimes Act. The client of the practitioner was allegedly the father of the child she was carrying.

The Council found the practitioner guilty of unprofessional conduct. He was reprimanded, fined \$1,500 and ordered to pay the Society's costs of some \$4,000.

- Practitioner F was prosecuted before the Council of the Law Society for a number of failings in relation to trust accounts. These included failing to make a required deposit into a statutory deposit account; failing, on four occasions, to properly record details of clients on whose behalf he held money in trust; ten separate instances of failing to properly record receipts; 17 instances of withdrawing money from his trust account for a client when there was not sufficient credit for the client in the account;

permitting cheques to be signed by a person who was not a principal of the firm and failing to ensure his cash book was balanced.

He was found guilty of unprofessional conduct, reprimanded, fined \$2,000 and ordered to pay the Society's costs of some \$10,000.

In this case, the Society undertook the investigation and prosecution on its own motion rather than as a result of a complaint.

### **Alternate Dispute Resolution**

When it is deemed more appropriate to mediate a matter rather than to undertake a prosecution, the Society may try to resolve disputes through this means. During 2006, the Society undertook one mediation.

In this case Practitioner G visited another legal firm to inspect some documents. He brought his client with him. The practitioner he came to see, Ms N, told him she could not allow the client to see the documents but she would provide copies for the client to inspect. Practitioner G became very demanding, knocked her with his brief case and grabbed her arm. When asked to apologize, Mr G said she should apologize to him. The Society considered that the conduct of Mr G an older, larger and more experienced practitioner than Ms N, was not acceptable. The matter was resolved during a mediation conducted by a senior member of the Council of the Law Society.

### **Informal Disciplinary Action**

In addition to taking formal action, the Law Society is able to take less formal action against practitioners for conduct that is unacceptable but not so bad as to warrant a formal prosecution. This practice has my full support.

During the reporting period, the following informal actions were taken:

- In a case lodged in 2006, a complainant felt he should not have been charged because he believed Practitioner H had said that if he won his case the other side would have to pay. After investigation, the Society dismissed the complaint. However, the practitioner's attention was drawn to the necessity to ensure compliance with section 143(A) of the Legal Profession Act 1993 and the Rules of Practice 1994 relating to information that is required to be given to a client.
- This case, also lodged in 2006, was similar to the above. The Society resolved to dismiss the complaint on the basis that there was insufficient evidence to substantiate an allegation of unprofessional conduct against Practitioner I. However, the Practitioner was sent a letter of

admonishment by the President of the Society for her failure to comply with aspects of Part 11A of the Legal Profession Act 1993.

- In a case lodged in 2005, Practitioner J was found to have been rude to a client and, following a letter from the President of the Law Society, she sent a letter of apology to the client.
- In 2005, during a telephone conference between the parties, Practitioner K, a male, was heard to say about the female representative of the other side, to those in his office, being the female employee, the female Legal Aid conference mediator and his female client, words to the effect, “This is why we should never have female lawyers”, and further words to the effect that female lawyers were inferior to male lawyers. This matter was resolved when Practitioner K agreed to make a written apology and give a sum of money to a charity.

### ***Timeliness of Disciplinary Actions***

Cases prosecuted in 2006 before the Supreme Court and the Tribunal have taken about four years to reach finalization except in the case of Practitioner D detailed above, which will exceed five years to complete.

In my view such inordinate delay is not acceptable and I hope the changes proposed under the Legal Profession Bill 2007 will speed up the prosecution process.

In relation to the prosecutions before the Council of the Law Society and the informal disciplinary processes, I believe the time frames are generally satisfactory.

### **Applications to My Office**

The majority of people who contact me do so by telephone. During the reporting period my Office received over 215 calls or visits from members of the public, a significant increase over previous years.

The following are the major topics of concern to the callers:

- The procedure for lodging a complaint,
- The time taken for a complaint to be investigated by the Law Society,
- Doubts that an investigation by the Law Society will be fair and the belief that lawyers look after their own,

- Having to pay a lawyer's bill before the completion of an investigation of a complaint about costs,
- Complaints about the conduct of magistrates,
- Perceived unfair treatment by Legal Aid,
- Where to go for help when a matter is outside the scope of the Law Society or my Office. This is often because the complaints relate to quality of work/service issues, i.e. consumer complaints.

### *Formal Applications*

During the reporting period I received 24 formal applications to investigate the manner in which complaints about legal practitioners had been or were being handled by the Society, the same number as the year before.

Briefly:

- One was from a person who felt she was being required to apologise to a member of a legal firm, for having written to the Law Society about him, before any further work would be done on her matter. She was also worried about the costs of hiring a new lawyer. The matter was resolved after I spoke to the head of the firm concerned.
- One asked me, on a number of occasions, to help get the Law Society to reopen his complaints and make a solicitor take action over a very old matter. Whilst sympathizing with the person concerned, there was nothing I or the Society could do to help him. It is pleasing to note that the Society had done a great deal in the past to try to assist him.
- One was from a woman and her daughter who complained that their file was being held by their lawyer when they had paid the bill. They also complained that he had been abusive towards them. After speaking to the lawyer, he agreed to release the file on the payment of \$100.
- One, whose complaints relating to service and costs were dismissed, sought a review. However, as her complaints were consumer complaints rather than issues of unprofessional conduct, there was nothing I could do. This is because, unlike in other States, consumer disputes are not required to be considered by the Law Society, the present regulatory authority.
- One, whose complaint related to negligence, sought a review. However, negligence is also an issue that the Society does not have to investigate because it is considered the client can sue the practitioner for damages. Whilst this is true, there are many people who cannot afford to take

action in the Courts, especially when the amount of their loss may well be less than the cost of legal proceedings.

*In the past I have recommended that Tasmania adopt a system, similar to that in Victoria, that allows negligence claims against practitioners to be investigated by the regulatory body, with the power to award damages up to a set amount. I again make that recommendation.*

- Two were from people who had lodged complaints with the Society and were dissatisfied with the outcome. From my enquiries, I was satisfied the Society had properly investigated their complaints.
- One believed the Society had not properly considered all aspects of his complaint that his lawyer had, without consulting him, changed his plea to guilty. I asked the Society to reconsider the complaint, which it did. However, the Society argued that, taking all the evidence into account, there was no prospect of a finding by a Tribunal that the practitioner was guilty of either unprofessional conduct or professional misconduct.
- One, whose complaints I have considered on a number of occasions in the past, will not believe the Society has properly investigated them even though I have assured him I am satisfied his complaints have been properly considered and that the practitioner concerned has done all that he is required to do.
- Six applications related to the length of time the Society was taking to complete its investigations. I raised my concerns with the Society and one case has now been finalized. However, the others, the oldest of which dates back to 2001, are still under investigation.
- Three people had not yet lodged complaints with the Society so I could not help them and six people raised matters outside my jurisdiction.

## **Consumer Complaints**

As mentioned throughout this report, the Law Society is not required to investigate complaints that do not relate to unprofessional conduct or professional misconduct. The definition of such complaints are provided on pages 7 and 8.

A great majority of people who lodge complaints against legal practitioners are not concerned with prosecutions. Their complaints relate to lack of service, poor work, delay, lost files, inability to speak with their lawyer. In other words, consumer complaints, as opposed to conduct issues that would warrant prosecution. These people want their problems fixed.

This year the regulation of the legal profession in Tasmania is proposed to be removed from the Law Society and be undertaken by a Board. This is likely to be done under the Legal Profession Bill 2007. The Bill is based on the Model Laws which were agreed in meetings of Attorneys-General.

In the Model Laws, a consumer dispute is defined as a dispute between a person and an Australian legal practitioner about conduct to the extent that the dispute does not involve an issue of unsatisfactory professional conduct or professional misconduct. Examples of such complaints could be inefficiency/incompetence (including giving wrong advice), delay (but not to the extent to warrant prosecution), loss of files, failing to communicate, passing files from one practitioner to another without consulting the client.

The Model Laws propose that consumer disputes be handled by the regulatory body, in Tasmania's case, by the proposed Board. However, under the Draft Legal Profession Bill 2007, the handling of such disputes is noticeably absent.

Roughly two thirds of the complaints against legal practitioners in Tasmania over the last ten years could be categorized as consumer disputes. This is in line with complaints received in New South Wales, Victoria, Queensland, South Australia and Western Australia.

I believe the handling of consumer disputes should be included as an important part of **any** regulatory authority's responsibilities for the following reasons:

- The stated purposes of the Bill are to:
  - (a) provide for the protection of clients of law practices;
  - (b) facilitate the regulation of legal practices on a national basis across State and Territory borders;
  - (c) provide a nationally consistent scheme for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of legal services and the public generally;
  - (d) promote and enforce the professional standards, competence and honesty of the profession; and
  - (e) provide a means of redress for complaints about the legal profession.
- A clear objective of this Bill is to provide a means of redress for complaints about the legal profession. "Redress" means to remedy, to rectify, to put right. This is what is sought when a client lodges a

consumer complaint. If such complaints are not to be handled by the Board, this objective of the Bill cannot be met.

- Another clear objective of this Bill is to achieve national consistency. If consumer disputes are not handled by the Board, Tasmania will be the only State not to have consumer disputes handled by the regulatory authority.
- The investigation of some consumer complaints reveal conduct issues.
- It has been said that a significant guide as to which legal practitioners and firms should be audited is the receipt of two complaints against them, whether classified as consumer or conduct complaints.
- A number of consumer disputes against a practitioner may well indicate a practitioner whose “performance falls short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner”, i.e. the definition of unsatisfactory professional conduct. If the Board did not handle such consumer disputes, it would be hampered in its ability to protect the public from such practitioners.
- With practitioners able to practice across jurisdictions, it is important to be able to share information about the performance of legal practitioners and, if the regulatory authority in Tasmania does not consider consumer complaints along with other States, there will be inconsistency in assessment and in reporting.
- If the Board is not to handle consumer disputes it may be that another agency, such as the Office of Consumer Affairs, could take on this role. However this would mean considerable double handling and duplication of resources. For example, to determine whether a complaint was a consumer dispute rather than a conduct matter, it would still have to be considered by the Board in the first instance. It would then have to be forwarded to the second agency which would have to be staffed by an appropriately trained officer/officers to deal with it. This would mean double work in communicating with the complainant, record keeping, investigation, reporting, etc. It would also be the cause of considerable confusion in the minds of complainants.

If consumers of legal services are to have nowhere to go in relation to consumer disputes, I believe the Tasmanian public will be ill served, particularly compared to those in other States.

In light of all of the above, ***I most strongly recommend that consumer disputes be handled by any regulator authority as an important part of its role.***

## **Summary of Recommendations**

- Tasmania adopt a system, similar to that in Victoria, that allows negligence claims against practitioners to be investigated by the regulatory body, with the power to award damages up to a set amount.
- Consumer disputes be handled by the regulatory body as an important part of its role.

Judith Paxton  
**Legal Ombudsman**

**March 2007**