



TASMANIA

**Legal Ombudsman**

**Annual Report  
For the Year Ended 31 December 2007**

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

## Table of Contents

<b><i>Introduction</i></b> .....	<b>3</b>
<b><i>Summary of Functions Performed</i></b> .....	<b>3</b>
<b><i>Resources</i></b> .....	<b>3</b>
<b><i>Nature and Volume of Complaints</i></b> .....	<b>4</b>
Nature and Outcome of Complaints Received in 2007 .....	6
Timeliness .....	7
<b><i>Formal Prosecution and Disciplinary Action</i></b> .....	<b>7</b>
Prosecutions in the Supreme Court.....	8
Prosecutions Before the Disciplinary Tribunal.....	10
Timeliness of Disciplinary Hearings .....	11
<b><i>Alternate Dispute Resolution</i></b> .....	<b>11</b>
<b><i>Informal Disciplinary Action</i></b> .....	<b>12</b>
<b><i>Applications to My Office</i></b> .....	<b>12</b>
Formal Applications.....	13
<b><i>Consumer Complaints</i></b> .....	<b>14</b>
<b><i>Conclusion</i></b> .....	<b>16</b>

## **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 2007. Additionally, it provides information on the complaints received and handled by the Law Society of Tasmania (the Society).

## **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 2007, I considered 102 letters of complaint about legal practitioners lodged with the Society. I attended 18 meetings of the Society's Investigations Committee, six meetings of the Council of the Law Society and four directions hearings of the Disciplinary Tribunal.

My office also received over 270 calls or visits from members of the public and I considered 22 formal requests that I investigate the manner in which complaints were being, or had been, investigated by the Law Society.

In addition, I gave much time and effort to trying to improve the new Legal Profession Bill.

## **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 \$16,329.

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.

## Nature and Volume of Complaints

At the start of 2007, the Law Society had 104 complaints carried over from years 1997 to 2006. They were handled during the year as follows:

- |              |   |
|--------------|---|
| 1 from 1997  | This matter, relating to mortgages, was finalized when the practitioner was struck off the Roll during the year.  |
| 3 from 1998  | These, relating to mishandled mortgages, were finalized when the practitioner was struck off the Roll during the year.  |
| 1 from 2000  | This matter is still awaiting prosecution before the Disciplinary Tribunal and has been carried forward into 2008.  |
| 6 from 2001  | Five, relating to the handling of mortgages, were closed and the other, also relating to mortgages, was carried forward into 2008 for prosecution action.   |
| 4 from 2002  | One was finalized following a decision of the Disciplinary Tribunal, one was dismissed and two are awaiting disciplinary action. Thus two have been carried forward into 2008.  |
| 1 from 2003  | This is still awaiting disciplinary action and has been carried forward into 2008.  |
| 14 from 2004 | One was dismissed, 10 were sustained when the Court found the practitioner guilty of unprofessional conduct, one is still awaiting the practitioner to abide by an agreement made during mediation and two are awaiting prosecution. Thus, three have been carried forward into 2008. |
| 13 from 2005 | One was resolved, one was closed, nine were dismissed, one was sustained when the Court found the practitioner guilty of misconduct and one is still awaiting a hearing before the Disciplinary Tribunal. Thus, one has been  |

carried forward into 2008.

61 from 2006	38 were dismissed/closed, one was withdrawn, four were sustained following prosecution, three are awaiting prosecution and 15 are still under investigation. Thus, 18 have been carried forward into 2008.
27	Total number of complaints carried forward into 2008 from years 2000 to 2006.

During 2007, the Society received 102 letters of complaint, covering some 148 issues, which were handled as follows:

51	not sustained or dismissed as lacking in substance, frivolous or vexatious.
4	closed because there was insufficient evidence on which to base a successful prosecution.
1	resolved.
2	withdrawn.
1	Referred for taxation of the bill.
43	still under investigation or awaiting prosecution.

**Total 102**

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 higher than the number of letters received.

***Nature and Outcome of Complaints Received in 2007***

NATURE OF COMPLAINT	SUSTAINED/ Found To Have Merit	NOT SUSTAINED	CLOSED	RESOLVED/ Withdrawn/ not proceeded with	NOT COMPLETED	REFERRED (iii)	TOTALS	% (iv)
Threat		2					2	1.5
Unethical behaviour					1			0.5
Wrong/poor advice		2			1		3	2
Poor representation in Court		4			1		5	3.5
Non release of documents/files/money		2	1		2		5	3.5
Management of money		2			1		3	2
Overcharging/wrongful charging		11	1	1	5		18	12
Acting without instructions/failing to follow instructions		9			2		11	7.5
Failing to respond/communicate with client		5	1	1	6		13	9
Breach of confidentiality		1					1	0.5
Misleading client, Court or Society		3					3	2
Conflict of interest		6	1		3		10	7
Lying/making false statement		1			2		3	2
Failure to account		2	2				4	2.5
Theft/fraud/dishonesty					2		2	1.5
Breach of undertaking		2			1		3	2
Inefficiency/incompetence		2			2		4	2.5
Delay/inaction		9			11		20	13.5
Harassment/rudeness/bad conduct toward client/intimidation		5			3		8	5.5
Dropping client		1			1		2	1.5
Other (i)		6			10		16	11
Poor service/work		6			2		8	5.5
Negligence/taxing					1		3	2
<b>TOTALS</b>		82	6	2	57	1	148	
% TOTAL (iv)		55.5	4	1.5	38.5	0.5		

## Notes:

- (I) Examples of “unethical behaviour” are failing to pay for expert’s advice, dropping client without proper cause.
- (ii) Examples of complaints under ‘Other’ are failing to attend Court, passing file to another practitioner without client’s permission.
- (iii) Complainants advised to get bill taxed or seek other remedies.
- (iv) Percentages have been rounded.

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 number of complaints in this category related to quality of work/service and could be classed as consumer disputes. In other States these are handled by the regulatory body, but not in Tasmania.

### ***Timeliness***

The average time taken to complete investigations of complaints lodged in 2007 was 68 days, similar to the last two years.

The 43 complaints carried forward from 2006 and finalized in 2007 took an average of 295 days.

## **Formal Prosecution and Disciplinary Action**

If, during investigation of a complaint, the Law Society 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.”

### *Prosecutions in the Supreme Court*

During the year the Law Society prosecuted two practitioners in the Supreme Court.

Briefly the cases and outcomes were as follows:

- Practitioner A had acted for a number of different parties in relation to sales and purchases of real estate. She was the subject of numerous complaints which led the Law Society to prosecute her.

The judge found that, over a period of some six months when the practitioner was undertaking conveyancing work, she did not do her best to complete her clients' business in a competent manner and within a reasonable time; she did not inform clients of significant developments in their matters and she breached accounting rules. Further, the judge considered that the management of conveyancing transactions demonstrated that the practitioner did not understand the importance of time constraints in conveyancing transactions, that she was either unaware of the Rules or disregarded them, and that she had little, or no, understanding of the level of disclosure and honesty required in dealings with clients. She made promises (advertisement for fixed fee conveyancing and advice in a letter that she would provide a settlement statement prior to settlement) which she ignored more than once, and when taken to task by clients about these matters, she became abusive.

The judge also found the practitioner to have misled clients about the status of their matters, presumably in an effort to stop them complaining.

Nevertheless, the judge found that there was no suggestion of criminal conduct. The Court was told that the practitioner had never before been the subject of disciplinary proceedings and the extent of what might be described as prior wrongdoing extended to two complaints from clients to the Law Society of Queensland both of which were resolved informally.

The practitioner was found guilty of unprofessional conduct and, if she wished to resume any form of conveyancing practice she was required, before doing so, to undergo some form of training in conveyancing practice and procedure, and in the maintenance of proper books of account for a legal practice, and to demonstrate, to the Law Society, her competence in both areas; and thereafter be permitted to resume such practice, but restricted to practice only as an employed practitioner for a period of two years.

Some months after the above hearing, the Law Society drew the Court's attention to the fact that Practitioner A had allowed the Court to believe that she had not been the subject of disciplinary proceedings when, in fact, she had been found guilty of unprofessional conduct by the Law Society of the Northern Territory. She had been formally admonished. The judge concluded that Practitioner A's conduct in misleading the Court over this matter amounted to professional misconduct and ordered that her name be removed from the Roll of legal practitioners.

- Practitioner B was found guilty of misappropriating a total of \$12,385 from three of his clients. An illustration of his misappropriation was his handling of \$9,350 retained for the payment of stamp duty on behalf of one of his clients. He paid that amount into his firm account when the account was in debit by some \$322.00. He then withdrew cash amounts from the account by about 40 separate ATM cash withdrawals.

In addition to the above, the practitioner was found guilty of professional misconduct because he borrowed \$8,000 from a client. He failed to advise his client to seek independent legal advice before lending the money, provided no security for the loan and, by the time of the hearing, still owed more than \$4,250.

Other than the fact that he had not repaid the money, he should not have borrowed from his client in the first place. By doing so he

put himself into a conflict of interest situation where it would be hard to put the interests of his client before his own.

During the same hearing, Practitioner B was also found guilty of professional misconduct for having lied to another legal practitioner on at least three occasions. He told the other lawyer that he had had sought advice from a barrister when he had not. He also said he was still awaiting the opinion when this was untrue. He also lied when he said he had briefed another Senior Counsel and when he produced an imaginary account of a conversation on the matter in question.

He was also found guilty of unprofessional conduct for being unresponsive and evasive with a client.

As a result of his having been found guilty of misconduct, the practitioner was struck off the Roll of legal practitioners.

### ***Prosecutions Before the Disciplinary Tribunal***

The Disciplinary Tribunal comprises three of seven senior legal practitioners from around the State, selected by Tasmania's judges.

In 2007 five applications for hearing were lodged with the Disciplinary Tribunal. However, although there were four "directions" hearings no case was actually heard. All five were lodged with the Tribunal between January and the end of June 2007 but have had to be carried forward into 2008. It is of great concern to me that they could not be heard in 2007.

In the case of two of these applications, in respect of the same practitioner, Counsel who was engaged to defend him, became ill and died. A delay in these matters was completely understandable.

However, in relation to the others, there was a delay of nearly two months whilst the judges considered and appointed new Tribunal members. Had the Law Society submitted its recommendations well before the expiry of the term of the then Tribunal members, this delay may have been avoided.

Further delays occurred because of the difficulty in finding dates when Tribunal members were available and, as the new members were not appointed until 30 November, a further delay occurred because of the holiday season.

### ***Timeliness of Disciplinary Hearings***

In relation to the cases prosecuted in 2007 before the Supreme Court, those involving Practitioner A were the result of complaints lodged in 2005. To me, this is too long a time.

Those relating to Practitioner B were as the result of complaints lodged in 2006 and appear to me to have been handled in a timely manner.

However, I am greatly concerned about those cases being carried forward from as far back as 2000. They are awaiting completion, by the Law Society, of its investigations and preparation of applications to the Disciplinary Tribunal or, perhaps, to the Supreme Court.

As a general statement, I believe the time from lodgment of a complaint to a disciplinary hearing is far too long. Further, whilst there have been significant delays once a matter has been lodged with the Disciplinary Tribunal, I believe that, in most cases, the greatest time has been taken in the investigation process leading to the prosecution.

The new Legal Profession Act provides for nine people appointed to be members of the Tribunal instead, as now, of seven. This may well assist in the quicker formation of Tribunals to hear applications and I hope the proposed Board and its staff will be able to dedicate more time to the investigation stages.

### **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 2007, one complaint was resolved through the use of a compulsory conference under s59 of the *Legal Profession Act 1993*.

The complaint concerning a real estate transaction and the application of a caveat on the subject property by the practitioner, was complex and had been long-running.

The Council of the Society formed a view that the complaint, or part of the complaint was amendable to resolution by convening a compulsory conference between the parties which was facilitated by a barrister engaged by the Society.

As a result of the conciliation conference, the matters of contention between the parties were resolved. However, by the end of the reporting period, the practitioner had failed to fulfill her side of the agreement.

## **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. However, during the reporting period no such actions were undertaken although, as a result of a complaint having been lodged about costs, the firm in question did reduce the bill.

## **Applications to My Office**

The majority of people who contact me do so by telephone. They may, however, make an appointment to speak with me in person. During the reporting period my Office received over 275 calls or visits from members of the public, a significant increase over previous years.

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

- How to lodge a complaint about a legal practitioner;
- General unhappiness about the standard of work/service provided by a practitioner;
- Delay and inaction on the part of a practitioner;
- Inability to make contact with their legal practitioner particularly in the face of an imminent Court hearing or settlement date;
- Delay in receiving a response from the Law Society to a complaint;
- Costs, including the issue of value for money.

In addition to calls from members of the public, I received calls from two legal practitioners concerned at the manner in which complaints against them were being handled by the Law Society.

### *Formal Applications*

During the reporting period I received 22 formal applications to investigate the manner in which complaints about legal practitioners had been, or were being, handled by the Law Society. This is similar to the number received during 2006.

Briefly:

- One thought his lawyer was not progressing his matter due to some sort of conspiracy. I found that the Law Society had investigated the matter thoroughly and I tried to help the complainant understand the investigation process.
- One related to a practitioner using an incorrect name on an affidavit in a family law matter. Whilst I did not like what was done, I could see no grounds for a prosecution of the practitioner.
- One asked me to review a matter that was before the Supreme Court. However, I refused on the grounds that she had gone to a higher authority than me.
- One person considered the practitioner had lied to the Law Society when responding to his complaint. I found the Society's investigations had been thorough and that the client was unable to prove his claims.
- One person was justifiably unhappy with the length of time the Law Society was taking to investigate his complaint. I agreed that the matter was taking an inordinately long time and expressed my concerns to the Society. In due course the matter was resolved.
- One wanted me to require the Law Society to reopen an old complaint in light of a Supreme Court decision that a law firm was in default in relation to 35 mortgage matters. Whilst I sympathized with the client, I was satisfied that no purpose would be served in trying to reopen the matter after some six years and in light of the fact that the public had been protected from any further similar defaults.
- One believed he had been ill served by a practitioner who took some time to advise that he could no longer act due to a conflict of interest, and by two other practitioners who had, the client believed, deliberately altered some dates on an affidavit. I found

no basis on which the Law Society could have done more than it did.

- One complainant believed the Law Society should have looked more closely at two matters of complaint about the handling of a family law matter. I have written to the Society asking for these matters to be re-examined.
- One person, whose complaints were very old, asked that I investigate why he was being asked, by the Law Society, to provide information he had already provided. I considered the Law Society had misunderstood the issues of complaint and asked that his real concerns now be investigated as speedily as possible.
- One person, whose complaint had been dismissed, proved to me that he, rather than the practitioner had been telling the truth. I am pleased to note that the firm concerned has now taken appropriate action to assist him and that the Law Society is investigating a number of complaints against the practitioner in question.
- In relation to five other applications, I found the Society had properly undertaken investigations before dismissing the complaints.
- Seven people wrote asking for a formal investigation of matters outside my jurisdiction.

## **Consumer Complaints**

The Law Society is not required to investigate complaints that do not relate to unprofessional conduct or professional misconduct (see definitions at pages 8 and 9).

As I have mentioned in nearly all of my Annual Reports, a great majority of people who lodge complaints against legal practitioners are not concerned with prosecutions. They just want their problems fixed. Their complaints relate to lack of service, poor work, delay, lost files, inability to speak with their lawyer. In other words, consumer complaints.

The following are some examples of consumer complaints:

- The practitioner, Mr A, did not appear at Court as he said he would. The client, Ms W, asked for an adjournment and briefed someone else who charged for becoming familiar with the matter. Ms W felt Mr A should have had to pay this cost.

- Mr M acted for Mr F in the purchase of property but would not provide the title or information on its registration.
- Mr L consulted Mr J over an assault matter but could not get from Mr J information on what happened at various hearings of the Court nor would Mr J send Mr L's file to his new solicitors even though his bill had been paid.
- Mr B advised Mr W that he had a good case. Mr W was asked to provide \$10,000 before Mr B would proceed. He did this. After some time, during which Mr W constantly but unsuccessfully sought information on the progress of his matter, Mr B advised he had no case.
- Mr H made mistakes in relation to land titles so that, instead of Mr J's brother and mother getting a block each they were put down as owners in common. The law firm later put a mortgage on the wrong block.
- Mr G was supposed to do the conveyancing on a block of land. He told Mr B that all was well. However, on settlement day Mr B found that there was an easement on the land so he could not build. Mr G suggested he build a smaller home. B lost his temper. G would not hand over the file, was incompetent and caused B to lose money.
- Mr T failed to submit an application to the Industrial Commission on behalf of Ms K as he should have done. Ms K was advised by the Law Society that she may wish to seek advice in relation to negligence. However, she did not have the money to employ a lawyer to do this.
- Ms S retained Mr T to apply for a restraint order. However, 10 minutes before the hearing Mr T rang to say he had forgotten it and that Ms S would have to appear on her own without documents. He then billed her for this.

During 2007, the Legal Profession Act 2007 was passed. Under this Act, a Board is to be established to regulate the legal profession in Tasmania. However, as with the current Act, the new regulatory body will not be required to investigate consumer complaints.

It has been put to me that it would not be fair for legal practitioners to have consumer complaints subject to scrutiny by a regulatory authority when, for example, other professions do not. However, in other States,

such as New South Wales, the handling of consumer complaints against legal practitioners makes up a major portion of the work of the Office of the Legal Services Commissioner.

Despite significant representations to the Government to amend the Bill to deal with consumer issues, the Government proceeded with legislation that fails to deal with this gap.

There is, of course, no reason why a person dissatisfied with the standard of work/service they have received from a legal practitioner in Tasmania cannot approach the Office of Consumer Affairs. The Office of Consumer Affairs has expertise in resolving disputes between consumers and traders and a range of legislation through which to enforce appropriate consumer outcomes.

## **Conclusion**

In nearly all my Annual Reports since 1995, I have recommended that the regulation of the Legal Profession in Tasmania be removed from the Law Society and made the responsibility of an independent body.

As long ago as 2003, such change appeared to be imminent. However, it was not until July 2007 that a new Bill was introduced and, under this Bill, the regulation of the legal profession is one of co-regulation with a Board undertaking some regulatory functions and the Law Society retaining others. The Office of Legal Ombudsman will not exist under this new regulatory model.

I believe the new system, whilst deficient in some areas, will be significantly better than the present one and it is my earnest hope that, after so long a time, it will begin within the next few months.

Having said that, as this is my last Annual Report as Legal Ombudsman, I wish to address some mistaken beliefs and to give credit and thanks where they are due.

There is a widely held belief that the Law Society is an “old boys club” that looks after its own. Whilst I cannot comment on the selection of members of the Council of the Law Society, after many years of observing its approach to complaints and disciplinary matters, I make the following observations:

In relation to the prosecution of legal practitioners, I have never seen favouritism or corruption. I have occasionally observed regret that a

Practitioner, who was believed to be professional, in fact deserved to be prosecuted. However, I have not seen the Society shy away from undertaking the prosecution, even sometimes of members of its Council. In general, I consider that the Society has prosecuted practitioners with appropriate vigour.

It has been said that the Society hounds certain practitioners who are outside its clique and that it prosecutes them unfairly. I believe this criticism is unfounded. The practitioners in question have been the subject of numerous complaints and the Society would have been derelict in its duty not to do all it could to protect the public from them.

It has been put to me that I have been “out to get” the Law Society. This is not the case. Over the years, I have been critical of certain of its practices and have held diametrically opposed views on many issues. Nevertheless, it has been my observation that the members of the Council and, in particular, the members of the Investigations Committee, have been, with a very few exceptions, people of integrity, committed to upholding high standards within the profession.

Members of the Investigations Committee have met most fortnights, after work, sometimes for over three hours, on a voluntary basis, to consider complaints from members of the public. In addition, some regularly take more complex matters home to provide carefully written advice, again free of charge.

Collectively, members of the Investigations Committees have had a depth of knowledge across all aspects of the law which is impressive and which has been of particular benefit when considering the range of complaints that have come before them. This is something that the new system may lack and be the poorer for.

Finally, it would have been very difficult to undertake my responsibilities as Legal Ombudsman without the co-operation of the members of the Law Society and, in particular, without the co-operation of its staff. I particularly appreciate the willing assistance given to me by the Executive Director, Mr Martyn Hagan and the Office Manager Mrs Vicki Cowles.

Judith Paxton  
**Legal Ombudsman**

