RECONCILING REGULATORY APPROACHES AND CONSUMER EXPECTATIONS

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ABSTRACT

This paper will examine how complaints are handled by the Legal Services Commissioner under the *Legal Profession Act 2004* (Vic). Complaint handling procedures have traditionally focused on the most serious ethical violations rather than complainants' most common concerns. By increasing the use of alternative dispute resolution mechanisms, the Commissioner is able to deal more efficiently and effectively with a wider range of conduct issues. However, it is argued that an increase in the Commissioner's summary powers is required in order sufficiently to bridge the gap in the regulatory framework.

I INTRODUCTION

Since December 2005 The Legal Services Commissioner ('LSC') has been the single gateway for complaints about legal practitioners in Victoria.[1] The establishment of a regulatory 'one-stop shop' was a response to criticisms that the complaint-handling system was costly, complex and insufficiently consumer-oriented.[2] Since the early 1980s Australian legislatures and regulators have placed an increased emphasis on protecting consumers of legal services.[3] Although the primary focus in Victoria has been on reducing cost and complexity,[4] recent changes to complaint handling under the current Commissioner, Michael McGarvie,[5] have been aimed at providing complainants with more efficient and satisfactory outcomes. This has involved an increase in the use of alternative dispute resolution mechanisms in relation to minor conduct matters.

This essay will argue that, despite these developments, a disjunction remains between the current regulatory approach and consumer expectations of complaint handling systems. An examination of how complaints are classified under the *Legal Profession Act 2004* (Vic) ('*LPA*') and recent complaints data reveals that disciplinary

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1 The Legal Services Commissioner ('LSC') was established on 12 December 2005 under the *Legal Profession Act 2004* (Vic) ('*LPA*').

2 Peter Sallmann and Richard Wright, 'Regulation of the Victorian Legal Profession: Report of the Review of the Legal Practice Act 1996' (Report, Department of Justice, Victoria, 2001), 19-20. The establishment of a single entry point for all complaints replaced the system under the *Legal Practice Act 1996* (Vic) (repealed) ('*1996 Act*') whereby both the Victorian Lawyers Recognised Professional Associations (the Victorian Lawyers RPA Ltd for solicitors and the Victorian Bar Inc. for barristers) and the Legal Ombudsman could receive and investigate allegations of improper conduct, but the latter could not deal with consumer disputes: s 142(1).

3 Linda Haller, 'Professional discipline for incompetent lawyers? Developments in the UK and Australia' (2010) 17(1) *International Journal of the Legal Profession* 83, 84.

4 Ibid 93.

5 Michael McGarvie was appointed by the Attorney-General on 22 December 2009 after acting as Commissioner for two months. Before that he was Chief Executive Officer of the Supreme Court of Victoria for a period of three years. Prior to that, he was a solicitor in a private law firm for almost 24 years.

action is focused on the most serious ethical violations while complainants who report some of the most common allegations often do not have their concerns addressed. It is recommended that the LSC's summary powers be increased in order to enable them to deal with a wider range of conduct matters more efficiently and effectively, in line with their statutory objectives.[6] This approach is consistent with the purposes of the complaint-handling system which are to protect consumers, promote professional standards and provide redress.[7]

II CLASSIFYING COMPLAINTS

A *Civil and Disciplinary Complaints*

Under the *LPA* a complaint may involve a 'civil complaint,' a 'disciplinary complaint' or both.[8] A civil complaint includes a dispute relating to legal costs not exceeding $25,000 or a claim that a person has suffered pecuniary loss.[9] A disciplinary complaint relates to conduct that, if established, would amount to 'unsatisfactory professional conduct' ('UPC') or 'professional misconduct' ('PM').[10] These are objective standards determined by the *LPA* and decisions of the courts and the Victorian Civil and Administrative Tribunal ('the Tribunal'). The definitions of UPC and PM will be examined in greater detail later on. As it is often explained to complainants, civil complaints are a limited range of disputes mainly about monetary issues and disciplinary complaints are about a practitioner's conduct.

When a written complaint is received by the LSC it is classified under the *LPA* as a civil complaint, a disciplinary complaint or a mixed complaint, which involves both civil and disciplinary issues. This is a significant preliminary step in the complaint-handling process as the classification will determine which procedures will be adopted by the LSC for dealing with and/or disposing of the complaint.[11] In particular the LSC is only required to investigate disciplinary complaints[12] and it is only following such an investigation that an application may be made to the Tribunal in relation to the allegations made.[13] In other words, if, during the course of an investigation, it is established that there is sufficient evidence to make it reasonably likely that the Tribunal would find the practitioner guilty of UPC, the LSC may apply to the Tribunal for an order under Division 4[14] in respect of the practitioner.[15] If the LSC is satisfied

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6 The objectives of the LSC include ensuring that complaints against Australian legal practitioners and disputes between law practices or practitioners and clients are dealt with in a timely and effective manner: *Legal Profession Act 2004* (Vic) s 6.3.2(a).

7 Ibid s 4.1.1.

8 Ibid s 4.2.1(2).

9 Ibid s 4.2.2(2).

10 Ibid s 4.2.3(1).

11 *Byrne v Marles and Another* (2008) 19 VR 612, 625 ('*Byrne*').

12 *Legal Profession Act 2004* (Vic) s 4.4.7. In *Byrne* the court commented that this section is open to being construed as meaning that the Commissioner is required to investigate each complaint which the Commissioner has reason to believe is a disciplinary complaint: ibid.

13 *Legal Profession Act 2004* (Vic) s 4.4.13.

14 An order under Division 4 includes an order recommending to the Supreme Court that the practitioner's name be removed from the roll, an order that the practitioner's practicing certificate be suspended or cancelled, or an order that the practitioner pay a fine, undertake further legal education or do or refrain from doing something in connection with the practice of law: see ibid pt 4.4 div 4.

15 Ibid s 4.4.13(3)(a). Alternatively, with the practitioner's consent, the LSC may reprimand or caution the practitioner or take no further action if satisfied that the practitioner is generally

that there is a reasonable likelihood that the Tribunal would find the practitioner guilty of PM, it is required to make such an application.[16]

B *Consumer Disputes*

Complaints that are classified as neither civil nor disciplinary are sometimes described as 'consumer disputes'. This is not a term used by the *LPA,* however the *Legal Profession Act 2004* (NSW) ('*NSW Act*') defines 'consumer dispute' as:

> a dispute between a person and an Australian legal practitioner about conduct of the practitioner to the extent that the dispute does not involve an issue of unsatisfactory professional conduct or professional misconduct.[17]

An equivalent provision under the *Legal Practice Act 1996* (Vic) (repealed) ('*1996 Act'*), the previous version of the *LPA,* provided that complaints that did not raise an issue of 'misconduct' or 'unsatisfactory conduct,' as the former disciplinary standards were known, were treated as 'disputes.'[18] Like disciplinary complaints, consumer disputes may involve allegations of negligence, delay, poor communication, and other conduct issues in relation to which there is no costs dispute or pecuniary loss claim. However, unlike disciplinary complaints, consumer disputes describe 'run-of-the-mill' service issues[19] and are not considered to warrant a formal investigation as they will fall short of the disciplinary standards in the majority of cases. In the course of their review of the *1996 Act*, Sallmann and Wright thought that consumer disputes would also fall short of 'quasi-professional' disputes such as breaches of undertakings or conflicts of interest.[20] In many cases they are similar to disputes that may arise between service providers and consumers in any area of trade or industry.[21]

In their final report Sallmann and Wright note that the distinction between disciplinary complaints and consumer disputes is unnecessary and unhelpful given that complaints frequently fall under both categories.[22] The defined term, 'disputes,'[23] under the *1996 Act* was not preserved in the *LPA,* which is a good indication that legislators in Victoria felt the same way. The term is used loosely by complaints handlers to refer to minor conduct issues which are unlikely to warrant a formal investigation, however it is not routinely used to explain to complainants why the LSC is unwilling to investigate their allegations. Rather a complainant may be told that the conduct complained of is insufficient to warrant taking disciplinary action or that the Tribunal would be unlikely to find the practitioner guilty of UPC or PM. Nonetheless the concept of a consumer dispute is useful for the current purpose of distinguishing between disciplinary complaints and conduct allegations which, as will be discussed, currently fall through a gap in the regulatory framework.

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competent and diligent and there has been no substantiated complaint about the practitioner within the last 5 years: s 4.4.13(3).

16 Ibid s 4.4.13(2).

17 *Legal Profession Act 2004* (NSW) (*'NSW Act'*) s 514.

18 *Legal Practice Act 1996* (Vic) s 142 (repealed).

19 Peter Sallmann and Richard Wright, 'Legal Practice Act Review: Issues Paper' (Issues Paper, Department of Justice, Victoria, 2000), 16.

20 Ibid. This is not a defined category under the *LPA.*

21 Ibid.

22 Sallmann and Wright, 'Regulation of the Victorian Legal Profession,' above n 2, 40.

23 *Legal Practice Act 1996* (Vic) s 142 (repealed).

III EMPIRICAL EVIDENCE

Given that the equivalent term has been discontinued, it is difficult to determine the number of consumer disputes which are dealt with by the LSC with any precision. The LSC's 2010-11 Annual Report ('Annual Report') data for 'service related complaints' or 'potential disciplinary complaints' is included in the category of disciplinary complaints.[24] The Annual Report reveals that 2,609 complaints were finalized during the 2010-11 reporting period, 1,322 of which were determined to raise disciplinary or conduct issues.[25] In relation to 338 of those complaints (26%), the LSC formed the view that the Tribunal would be unlikely to find the practitioner guilty of a disciplinary breach.[26] However the number of consumer disputes is likely to be much higher as those 338 complaints do not include the 182 mixed civil and disciplinary complaints in relation to which the LSC formed the view that the Tribunal would be unlikely to find the practitioner guilty of a disciplinary breach.[27]

The number of complaints received in 2010-11 that involved consumer disputes is likely to be significant. This is further supported by the nature of the most frequent allegations received by the LSC. Table 1 shows that allegations involving negligence, delay, communication, documents and instructions (which are frequently the subject of consumer disputes) were among the top ten most common allegations reported in 2010-11. However, despite the frequency of such allegations, only a fraction of these conduct related claims were the subject of disciplinary applications (see Table 2). The LSC formed the view that the Tribunal was likely to find the practitioner guilty of a disciplinary breach in relation to 152 disciplinary complaints (11%), however only 36 disciplinary applications were made to the Tribunal in the reporting period.[28]

In relation to the total number of disciplinary applications which were referred to the Tribunal and/or determined in 2010-11 (42 applications),[29] by far the most frequent charges related to trust money and disbursements (59 charges and 20 charges), engaging in legal practice whilst not an Australian legal practitioner (19 charges) and other dishonest or misleading conduct (22 charges) (see Table 2). In contrast, only seven charges of delay and two charges of failing to communicate effectively were brought. In relation to the charges of delay, only two applications were made which did not also involve other charges and both of the communication related charges involved other charges in relation to trust money and/or dishonesty.

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24 Legal Services Commissioner, 'Annual Report 2011' (Annual Report, Legal Services Commissioner, September 2011) 8.

25 Ibid 75.

26 Legal Services Commissioner, above n 24, 78.

27 Ibid 15.

28 Nine applications were heard by the Tribunal during 2010-11 and 27 applications were filed and yet to be heard and/or were awaiting orders by the Tribunal as of 30 June 2011. Two applications were made under the *1996 Act*: Legal Services Commissioner, above n 24, 78.

29 In the 2010-11 reporting period, 17 disciplinary applications were heard and determined by the Tribunal (these included applications which were referred to the Tribunal in the previous reporting period) and 25 disciplinary applications were referred to the Tribunal and were yet to be heard and/or were awaiting orders as at 30 June 2011: ibid, 79-84.

Table 1: *Allegations featured in new complaints*[30]

Nature of allegation: 2010-11	
Costs and bills	838
Negligence – including bad case handling	369
Trust money – including failure to account, mismanagement of funds	133
Dishonest or misleading conduct	131
Documents – including retention and lost	108
Communication with client – including failure to return calls	102
Instructions – including failure to comply	92
Conflict of interest	86
Delays	81
Duress, pressure or intimidation	66
Breach of *LPA*, rules, court orders or undertakings	65
Abusive or rude	60
Costs communication	33
Debts – including practitioner's failure to pay	33
Gross overcharging	17
Communication with other party	14
Confidentiality breach	11
Court system	5
Advertising	4
Other disciplinary issues	162

Table 2: *Charges in disciplinary applications referred to and/or heard and determined by the Tribunal*[31]

Nature of charge: 2010-11	
Trust money – including unauthorized withdrawal and failure to deposit	59
Other dishonest or misleading conduct – including falsification of documents	22
Misappropriation of disbursement amounts	20
Engaging in legal practice whilst not an Australian legal practitioner	19
Other charges	12
Failure to comply with a request made by the LSC under s 4.4.11(1) *LPA*	9
Delays	7
Charging – including grossly excessive legal costs	6
Failure to comply with a condition to which practicing certificate was subject	4
Abusive/Rude – including threats and provocative language	2
Failure to communicate effectively and promptly	2
Engaging in conduct that led to conviction for tax offence	2
Conflict of interest	1
Breach of an undertaking	1
No costs disclosure	1

[30] A complaint may contain a number of allegations. This means that there are more allegations than complaints: ibid 73.

[31] An application may contain a number of charges. This means that there are more charges than applications. Note these figures may vary from the actual number of each type of charge. They are based on the summaries of the charges in the LSC's 2011 Annual Report: Legal Services Commissioner, above n 24, 79-84.

This asymmetry between the frequency of certain conduct-related allegations and the number and nature of applications made to the Tribunal is consistent across the Australian jurisdictions.[32] It reveals that a large number of conduct related complaints are not considered to warrant an investigation and that only a fraction go as far as the Tribunal. Allegations of negligence, delay and failure to communicate effectively were among the most common sources of client dissatisfaction and yet disciplinary action focused on a small number of allegations, most of which involved some form of dishonesty.

The above complaints data reflects the fact that a large number of complaints describe poor standards of service (such as abruptness, insensitivity or a one-off mistake) and only very few describe disciplinary breaches which warrant having a practitioner struck off, suspended or imposing conditions on their practicing certificate.[33] In relation to 333 of the disciplinary complaint outcomes 2010-11 (25%), the complainants were satisfied after hearing the practitioner's explanation for the conduct complained of and withdrew their complaint.[34] Such complaints are summarily dismissed as requiring no further investigation.[35] In 157 cases (12%) the alleged conduct lacked legal substance. For example it is not uncommon for a complaint to arise following a settlement or other outcome that the complainant was not completely satisfied with. However it is not the LSC's role to make an assessment as to whether the practitioner's advice was appropriate in the circumstances, especially given that there is not a 'right' answer in relation to most legal matters.[36] Such complaints are summarily dismissed as being misconceived, lacking in substance, or even vexatious or frivolous in some instances.[37]

IV DISCIPLINARY STANDARDS

The complaints data discussed in the previous section reveals that the threshold for disciplinary action is high. This is based on the way in which the Tribunal, courts and subsequently regulators, have determined whether allegations amount to a disciplinary complaint under the *LPA*.[38] The LSC describes disciplinary complaints as relating to a lawyer's behaviour[39] and which 'are of a character that do not seem capable or appropriate for negotiated resolution.'[40] For example they may include

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32 For example, the New South Wales Office of the Legal Services Commissioner's ('OLSC') Annual Report reveals that complaints relating to negligence and communication were the most common received in 2009-2010 (17.9% and 15.3% respectively). Of the 2,661 written complaints received, 1,812 were classified as consumer disputes and 849 were investigated. Of the 334 investigations finalised, 223 were dismissed upon the basis that there was no likelihood of a finding of UPC or PM and only 7 practitioners were referred to the Administrative Decisions Tribunal: New South Wales Office of the Legal Services Commissioner, '2009-10 Annual Report' (Annual Report, Office of the Legal Services Commissioner, 2009-10) 6-8.

33 John Briton, 'Unsatisfactory professional conduct – Should it be handled different?' (2007) 27(9) *Proctor* 37, 37.

34 Legal Services Commissioner, above n 24, 78.

35 *Legal Profession Act 2004* (Vic) s 4.2.10(1)(f).

36 Jennifer Pakula, 'The Legal Services Commissioner: ADR in Complaints Handling' (Legal Services Commissioner, July 2011) 2.

37 *Legal Profession Act 2004* (Vic) s 4.2.10(1)(b).

38 Ibid s 4.2.3.

39 Legal Services Commissioner, 'Handling Disciplinary Complaints' (Fact Sheet, Legal Services Commissioner) 1.

40 Legal Services Commissioner, above n 24, 12.

allegations of poor communication, delays caused by the practitioner, incompetence, inadequate service or a conflict of interest.[41] These types of allegations may form the basis of disciplinary complaints or consumer disputes and the division is far from clear-cut. The classification, and subsequently the procedures that will be adopted in dealing with the complaint, will depend on whether the allegations, if established, would amount to UPC or PM. Both standards are inclusively defined under the *LPA*. PM includes:

> conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and conduct that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.[42]

Only a small number of very serious cases fall into this category such as taking an executor's commission without obtaining the consent of the beneficiaries, trust account breaches and dishonest and fraudulent activity.[43] The less serious standard of UPC includes:

> conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.[44]

These definitions are seemingly broad and there is no clear legislative intention to confine their application to certain types of conduct. However the *LPA* provides that failing to comply with a condition of a practicing certificate will constitute UPC[45] and that a willful or reckless failure to comply with such a condition or with an undertaking given to a court, tribunal, the LSC or the Legal Services Board ('Board'), will constitute PM.[46] The *LPA* also specifies that certain conduct, such as committing certain offences, charging excessive legal costs and becoming insolvent, is capable of constituting UPC or PM.[47] However these provisions do not limit the definitions and there is otherwise no statutory guidance as to their content.

The court in *Byrne v Marles and Another* ('*Byrne*')[48] commented that the assessment as to whether a complaint will amount to a disciplinary issue is 'necessarily subjective', at least to begin with, given that Part 4 of the *LPA* requires that 'classification take place at the outset when there is often only limited information about the alleged facts and circumstances'.[49] The court in *Byrne* also commented that,

> given the range of functions accorded to the commissioner by Pt 6.3 of the Act, and the staffing structures envisaged by Pt 6.4 of the Act…it is apparent that the

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41 Legal Services Commissioner, above n 39, 1.

42 *Legal Profession Act 2004* (Vic) s 4.4.3(1). For the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice, regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under the *LPA* or for the grant or renewal of a local practicing certificate: s 4.4.3(2).

43 Pakula, above n 36, 3.

44 *Legal Profession Act 2004* (Vic) s 4.4.2.

45 Ibid s 4.4.5(1).

46 Ibid s 4.4.6.

47 Ibid s 4.4.4.

48 *Byrne v Marles and Another* (2008) 19 VR 612, 625 ('*Byrne*').

49 Ibid 627.

> commissioner is intended to rely upon assessments prepared by her officers on a routine basis.[50]

Opinions are likely to differ as to what types of conduct and level of gravity will be required to meet each standard.[51] It is important that the Tribunal, courts and regulators have a consistent understanding of what the standards mean given the significance of classification for the procedures that will be adopted and the prospect of disciplinary action. In the following sections the statutory and common law definitions of UPC and PM will be examined in greater detail.

A *Towards a Uniform National Approach*

Since July 2001 the Standing Committee of Attorneys General ('SCAG') has been concerned with facilitating national legal practice and developing a uniform approach to the regulation of the legal profession across the Australian jurisdictions.[52] In 2004 SCAG released a draft *Model Bill* for adoption by the States and Territories aimed at harmonising the laws across jurisdictions, including with regard to complaints definitions and procedures ('*Model Bill*').[53] On 30 April 2009 the Council of Australian Governments ('COAG') established a Taskforce to prepare draft legislation to 'unify, simplify and increase the effectiveness of legal profession regulation'[54] and to make recommendations in relation to a proposed national framework.[55] In September 2011, then Attorney-General Robert McClelland released the most recent draft legislation in relation to the COAG's *Legal Profession National Law*.[56]

The SCAG *Model Bill* requires States and Territories to implement certain core provisions in relation to lawyer discipline. These include the current statutory definitions of UPC and PM in Victoria,[57] which were adopted from New South Wales and have been maintained in the COAG draft *Legal Profession National Law*.[58] While there has been no attempt to introduce a uniform national complaint handling process,[59] the SCAG *Model Bill* aims to create a uniform standard in relation to the

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50 Ibid. Victoria Marles was the Legal Services Commissioner in Victoria at the time of this case.

51 Ibid.

52 Council of Australian Governments, 'National Legal Profession Reform Project: Consultation Regulation Impact Statement' (May 2010) 3.

53 Standing Committee of Attorneys-General, 'Legal Profession – Model Laws Project: Model Bill' (Model Provisions, 2nd Edition, August 2006) ('*Model Bill'*). In August 2006, a revised version of the *Model Bill* was released (and with minor corrections was released again on 2 February 2007). In 2006 SCAG released *Model Regulations,* a revised version of which was released again in June 2007: Standing Committee of Attorneys-General, 'Legal Profession – Model Laws Project: Model Regulations' (Model Regulations, 2nd Edition, June 2007). The nationally agreed regulatory structure also consists of a national set of ethical rules: Law Council of Australia, 'Model Rules of Professional Conduct and Practice' (Model Rules, March 2002).

54 Council of Australian Governments, above n 52, 4.

55 Ibid 3.

56 Council of Australian Governments, 'Legal Profession National Law' (Draft Provisions, 31 May 2011) ('*Legal Profession National Law'*).

57 Standing Committee of Attorneys-General, 'Legal Profession – Model Laws Project: Model Bill' (Model Provisions, 2nd Edition, August 2006) ss 4.2.1-4.2.3.

58 Council of Australian Governments, above n 56, ss 5.4.2-5.4.3.

59 Rather the *Model Bill* intends that each State and Territory will decide what body or bodies will be responsible for receiving, investigation and prosecuting complaints. Local provisions will identify the appropriate local authority or authorities and make consequential

treatment of disciplinary complaints, which has been incorporated by all the States and Territories except South Australia.[60] As discussed, the *LPA* offers little guidance as to the types of conduct that will amount to UPC or PM. The *1996 Act* was similarly silent in this regard. However, in light of this move towards uniform national standards, the evolution of the disciplinary definitions in Western Australia and Queensland offers some guidance as to how the Victorian provisions should be interpreted.

Under the *Legal Practitioners Act 1893* (WA) (repealed), the disciplinary matters that could attract sanction were 'illegal or unprofessional conduct, or neglect, or undue delay in the course of the practice of the law'.[61] Under the succeeding *Legal Practice Act 2003* (WA) (repealed) this description was replaced by the term 'unsatisfactory conduct'.[62] This has in turn been superseded by the *Model Bill* provisions which were implemented under the current *Legal Profession Act 2008* (WA) ('*WA Act*').[63] Past legislative reform in Queensland is also informative. The *Queensland Law Society Act 1952* (Qld) (repealed) defined 'unprofessional conduct or practice' as including 'serious neglect or undue delay'[64] and 'a failure to maintain reasonable standards of competence of diligence'.[65] The uniform standards of UPC and PM were implemented under the *Legal Profession Act 2003* (Qld) and are maintained under the current *Legal Profession Act 2007* (Qld).[66] There has been no suggestion that the types of conduct that may meet the legislative standards has changed, although the terms themselves have.[67] The Second Reading Speech to the *WA Act* explained,

> although the Legal Profession Bill takes a much more comprehensive and detailed approach to regulating the legal profession … the overall character and ethos of the regulatory regime remains unchanged. … The bill sets high standards for legal practitioners, but none that is substantially different from those that already apply.[68]

The uniform definitions of UPC and PM should be interpreted as including conduct that was specified under previous versions of Australian legislation, as opposed to being limited to dishonesty and trust account breaches. However, as will be discussed in the next section, the uniform definitions are arguably even broader than their former equivalents.

B *Changing Common Law Approaches*

The common law test for PM was formulated by the English Court of Appeal in 1894 in the case of *Allinson v General Council of Medical Education and Registration* ('*Allinson*').[69] *Allinson* involved a medical practitioner however the test set out by

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adjustments: Standing Committee of Attorneys-General, above n 57, chapter 4, introductory note 2.

60 South Australia has to date been unable to enact the *Model Bill* because of a deadlock over the Bill in the South Australian Legislative Council: Council of Australian Governments, 'National Legal Profession Reform Project,' above n 52, 3.

61 *Legal Practitioners Act 1893* (WA) s 25(1)(c) (repealed).

62 *Legal Practice Act 2003* (WA) s 164(1)(c)(ii) (repealed).

63 *Legal Profession Act 2008* (WA) ('*WA Act'*) ss 402 (UPC) and 403 (PM).

64 *Queensland Law Society Act 1952* (Qld) s 3B(1)(a).

65 Ibid s 3B(1)(c).

66 *Legal Profession Act 2003* (Qld) ss 162 (UPC) and 163 (PM); *Legal Profession Act 2007* (Qld) ss 418 (UPC) and 419 (PM).

67 Chris Zelestis, 'Legal Profession At 2007: Changes to the Legal Practitioners Complaints Committee' (2008) 35(7) *Brief* 23, 23.

68 Second Reading Speech, Legal Profession Bill 2007 (WA) 2.

69 *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 ('*Allinson*').

Lopes LJ has subsequently been applied to charges of PM brought against legal practitioners.[70] Lopes LJ defined PM as 'conduct which would reasonably be regarded as disgraceful or dishonourable by Solicitors of good repute and competency.'[71] The test was refined in 1984 by the New South Wales Court of Appeal in *Qidwai v Brown* ('*Qidwai*')[72] which divided it into two distinct elements:

> (a) Proof of departures by the practitioner from accepted rules, standards or procedures within the profession; and
> (b) Proof that the conduct was in such breach of the accepted rules, standards or practices that it would reasonably incur the strong reprobation of fellow practitioners of good repute and competence.[73]

There is no equivalent common law test for UPC as disciplinary action has focused on the most serious allegations.[74] However it is unclear what role the common law test for PM still has in light of the new uniform definitions of UPC and PM. As discussed, the current definitions can be reasonably interpreted as including conduct that was specified under previous versions of the legislation. However, it is arguable that the new standards are even wider than those they superseded.[75] This is because the benchmark for UPC is now what members of the public (which includes consumers of legal services) are entitled to expect rather than what members of the profession of good repute are entitled to expect of their fellow practitioners[76] (although PM requires a 'substantial or consistent failure' to reach that benchmark[77]). As Queensland's Legal Services Commissioner, John Briton, explained,

> the legislators are making it plain … that the concept extends beyond the sorts of ethical violations that are encompassed within the traditional common law approach to discipline to include failures of competence and diligence.[78]

The 'traditional common law approach' that Briton refers to is the idea that the system for dealing with complaints and discipline is exclusively concerned with upholding ethical standards and 'weeding out bad apples'.[79] The problems with such an approach will be discussed later on, however for current purposes Briton's comment suggests that a wider range of conduct may be capable of attracting sanction at least under the current definition of UPC. Similarly the High Court in *Walsh v Law Society of New South Wales*[80] thought that the inclusion of UPC, while not required to determine its limits, was intended to address certain conduct falling short of proper standards of competence and diligence that complaint handlers had previously neglected.[81] Whitelaw argues that, in light of the new statutory definitions, there is no

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70 See for example, *Re A Solicitor; Ex parte The Law Society* [1912] 1 KB 302; *Re A Solicitor (No 2)* (1924) 93 LJKB 761; and *Myers v Elman* [1940] AC 282.
71 *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, 763.
72 *Qidwai v Brown* [1984] 1 NSWLR 100 ('*Qidwai'*).
73 Ibid 105-6 per Priestley JA.
74 Linda Haller, 'Imperfect Practice under the Legal Profession Act 2004 (Qld)' (2004) 23 *The University of Queensland Law Journal* 411, 418.
75 Linda Haller, 'Imperfect Practice under the Legal Profession Act 2004 (Qld)' (2004) 23 *The University of Queensland Law Journal* 417-8.
76 Briton, above n 33, 40.
77 *Legal Profession Act 2004* (Vic) s 4.4.3(1)(a).
78 Briton, above n 33, 40.
79 Ibid 37; Steve Mark, 'The Office of the Legal Services Commissioner – consumer protection' [2009] (90) *Precedent* 12, 12-13.
80 *Walsh v Law Society of New South Wales* (1999) 198 CLR 73.
81 Ibid [60] per McHugh, Kirby and Callinan JJ.

obvious need to apply the *Qidwai* test as well,[82] although the definitions remain inclusive.

It would be difficult, and indeed undesirable, comprehensively to set out the types of conduct that would satisfy the standards of PM and UPC.[83] As the Law Society of New South Wales remarked, '[e]ach case of alleged professional misconduct must be determined on its own particular facts'.[84] The law in this field 'is necessarily a living thing' and must be free to change, expand and adapt to new circumstances'.[85] In the regulatory context it is more common for the standards to be explained negatively in relation to the kinds of allegations that will not be sufficient, rather than those that will. This is because it is clear-cut that certain instances of inadequate service are inherently unlikely to amount to UPC, let alone PM. The benchmark is of a *reasonably* competent practitioner such that not all negligent acts will amount to conduct issues.[86] For example, in relation to a one-off error by a medical practitioner who mistakenly filled in a prescription, the Court of Appeal in *Pillai v Messiter [No 2]*[87] remarked,

> the error of transcription by the appellant is accepted. It must be put to one side as being a terribly unfortunate mistake but nonetheless an accidental one which could occur in a busy professional practice without misconduct. … No purpose would be served, to achieve the objective of the statute of protecting the public, to remove the appellant from the register.[88]

Similarly, a single instance of delay will not, without more, justify a practitioner being struck off or even suspended.[89] This threshold is reflected in the applications that were referred to and/or heard by the Tribunal in 2010-11 (see Table 2). As discussed, only two charges involving delay were made which did not also involve other charges. In relation to the application that was heard and determined within the reporting period, delay was found to amount to PM only in a situation of 'gross delay,' where the practitioner had failed to return documents after being requested to do so by a solicitor acting for the plaintiff, the LSC and the Supreme Court.[90] In other words, the circumstances demonstrated a far more substantial and consistent failure to reach or maintain a reasonable standard of competence and diligence than an isolated instance of inadequate service.

Notwithstanding any widening of the statutory definitions, a large proportion of the service-related issues reported to the LSC are unlikely to meet the objective standards. The LSC website explains that PM 'is behaviour involving fraud,

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82 Christopher J Whitelaw, 'Proving Professional Misconduct in the Practice of Medicine or Law: Does the Common Law Test Still Apply?' (1995) 13 *Australian Bar Review* 65, 78.

83 Law Society of New South Wales, 'Complaints and discipline**: s**ubmission on the making, investigation and adjudication of complaints concerning the professional competence or conduct of solicitors and the effectiveness of the investigation and adjudication of such complaints by the professional body' for the Law Reform Commission of New South Wales (1977**)** 18.

84 Ibid.

85 Ibid 20.

86 Pakula, above n 36, 2.

87 *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 ('*Pillai'*).

88 Ibid 201-2 per Kirby P.

89 See *Mellifont v Queensland Law Society Inc* [1981] Qd R 17, 28; *Pawlowski v Tottrup; Re Estate of Andrew Pawlowski (No 2)* (Unreported, Supreme Court of New South Wales, Young J, 28 August 1995).

90 *Legal Services Commissioner v Morgan (Legal Practice)* [2010] VCAT 1543; Legal Services Commissioner, above n 24, 80.

dishonesty, breach of trust or conflict of interest'.[91] This interpretation reflects the types of conduct issues that are most frequently brought before the Tribunal. Such limiting of the definition is not prescribed by the *LPA*. However, it is an indication to potential complainants of the high threshold of seriousness required, rather than an attempt to exclude certain conduct. In other words, service-related matters will generally lack the requisite gravity required for the LSC, as 'model litigant,' to put them before the Tribunal. This approach to the disciplinary standards is linked to the Tribunal's disciplinary powers. As discussed, the implication of a complaint being classified as PM (or UPC in some circumstances) is that the LSC may make a disciplinary application to the Tribunal which is charged with the power to recommend that a practitioner be struck off from the rolls etc.[92] This potential consequence means that the definitions (particularly that of PM) are inherently limited in their application to the most extreme violations and the most common sources of client dissatisfaction will only qualify for investigation, let alone discipline, in limited circumstances.

V A GAP IN THE FRAMEWORK

As discussed, the statutory powers available to the LSC in finalising complaints are limited by whether the relevant conduct is likely to amount to UPC or PM under the *LPA*. The LSC *must* apply to the Tribunal for an order under Division 4 if it is satisfied that there is a reasonable likelihood that the Tribunal would find the practitioner guilty of PM.[93] In relation to conduct that is reasonably likely to amount to UPC, the LSC has limited options under s 4.4.13(3) of the *LPA*. It may:

> (a) apply to the Tribunal for an order under Division 4 in respect of the practitioner; or
> (b) with the consent of the practitioner, reprimand or caution the practitioner; or
> (c) take no further action against the practitioner if satisfied that –
> (i) the practitioner is generally competent and diligent; and
> (ii) there has been no substantiated complaint (other than the complaint that led to the investigation) about the conduct of the practitioner within the last 5 years.[94]

If the investigation arose from a complaint under which the complainant requested a compensation order, the LSC may require the practitioner to pay compensation to the complainant as a condition of deciding not to make an application to the Tribunal.[95]

If, following an investigation, the LSC is satisfied that there is no reasonable likelihood that the Tribunal would find the practitioner guilty of PM or UPC, the LSC must take no further action against the practitioner.[96] As a result, if a complaint does not meet the threshold for UPC, the complainant may not have their concerns addressed. In 2010-11, 338 (25%) complaints fell within this category.[97] In other words they were not summarily dismissed as a result of the complainant failing to provide further information or for lacking legal substance (these outcomes are separately recorded in the Annual Report), rather the conduct complained of lacked the requisite gravity required in order for the LSC to form the view that the Tribunal would be

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91 Legal Services Commissioner, *How complaints are dealt with* < http://www.lsc.vic.gov.au/cms.php?user=legalservicesvic;doc=Home;page=;pageID=180>.
92 *Legal Profession Act 2004* (Vic) pt 4.4 div 4.
93 Ibid s 4.4.13(2).
94 Ibid s 4.4.13(3).
95 *Legal Profession Act 2004* (Vic) s 4.4.13(4).
96 Ibid s 4.4.13(5).
97 Legal Services Commissioner, above n 24, 76.

likely to find the practitioner guilty of a disciplinary breach.[98] Even if the LSC forms the view that the Tribunal is likely to find the practitioner guilty of UPC, they may still opt to take no further action under s 4.4.13(3)(c) *LPA,* which is often the case. In 2010-11, 152 (11%) complaints were considered likely to amount to a disciplinary breach and yet only 36 (<1%) disciplinary applications were made to the Tribunal.[99]

The current statutory framework for dealing with complaints remains focused on the most extreme violations. The asymmetry between the most frequently reported allegations and the types of applications made to the Tribunal reveals a disjunction between regulatory processes and consumer expectations and amounts to a serious weakness in the current approach to lawyer discipline.[100] Consumer disputes often relate to conduct that is unsatisfactory and gives rise to legitimate cause for concern, although it may not warrant suspension or striking off. Such allegations are arguably just as, if not more, damaging to the reputation of the profession than the fraction which are heard by the Tribunal, based on their frequency.[101] It follows that the complaint handling system needs to be redirected towards addressing the wide range of complaints received, particularly those that are the most frequent. This is essential in order to protect consumers of legal services and maintain public confidence in both practitioners and regulators. As Briton commented,

> I don't want to understate the importance of getting rid of the bad apples – that is an essential ingredient of any effective regulatory regime – but the statutory system for dealing with complaints and discipline has to be conceived much more fundamentally, in terms of promoting and protecting the rights of consumers in their day-to-day dealings with legal practitioners and improving standards of conduct in the profession generally.[102]

This criticism of the current approach to complaint-handling and lawyer discipline is not entirely accepted.[103] As discussed, consumer disputes are in many ways the same as disputes between service providers and consumers in any area of trade or industry,[104] and it has not been suggested that the incidence of incompetence amongst legal practitioners is especially great or indeed worse than within other occupations.[105] In fact it has been submitted that the incidence of consumer type matters in the legal profession is less than in relation to other service providers and that consumers receive proficient service from Australian legal practitioners.[106] It is further held that, if the disciplinary system were to become an overriding influence on the profession, the provision of legal services would cease to be a profession at all.[107]

The proposition that disputes between lawyers and their clients are essentially no different from those encountered in other areas of trade and industry is often disputed by arguing that legal practice is fundamentally different from other occupations and that higher standards should be, and have always been, demanded of lawyers and other professionals such as medical practitioners and accountants.[108] As Sallman and Wright identify in their review of the *1996 Act*, lawyers often handle large amounts of money

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98 Ibid.
99 Ibid 78.
100 Briton, above n 33, 37.
101 Ibid 38.
102 Ibid 37.
103 Sallmann and Wright, above n 19, 16.
104 Haller, above n 3, 95.
105 Law Society of New South Wales, above n 83, 22.
106 Law Society of New South Wales, above n 83, 22.
107 Ibid.
108 Council of Australian Governments, above n 52, 4.

on behalf of their clients, in relation to whom they enjoy a unique position of power,[109] they occupy an important position in the court system and deal with 'matters of law and justice'.[110] As the Law Institute of Victoria's *Professional Conduct and Practice Rules 2005* provide,

> a practitioner is endowed by law with considerable privileges, including exclusive entitlement to appear in some courts and tribunals, exclusive entitlement to conduct some transactions and draw some documents, and special protection against disclosure of client confidences. These privileges require that the community has confidence that a practitioner must at all times be fit to enjoy those privileges.[111]

While recognising the validity of these points, Sallmann and Wright were not entirely convinced that lawyer-client disputes are sufficiently distinguishable in this regard.[112] Whether or not the distinction is accepted, it will be argued in the next two sections that the disjunction described above is problematic in light of the purposes of the complaint handling system and in relation to upholding legal profession rules.

A *Purposes of the Complaint Handling System*

It is vital that the complaint-handling system, however it may be focused, operates consistently with clearly recognised objectives. As discussed, the failure to address certain frequently reported grievances threatens to undermine public confidence in the legal profession and cause harm to consumers of legal services. Addressing these concerns has long been recognised as the purpose of systems for lawyer discipline[113] and is frequently a focus of reviews of regulatory approaches. For example, the July 2000 review of the *1996 Act* ('the 2000 review') set out to examine key features of the legislation 'having regard to the need to strengthen consumer and community confidence in the legal system'.[114] The 2000 review commented that the purposes of the complaints and discipline provisions were not made clear in the *1996 Act*, which led to confusion in applying the regulatory scheme. [115] In response to this concern, the *LPA* adopted the purposes of the *NSW Act,*[116] which have been maintained in the *Model Bill*[117] and in the draft *Legal Profession National Law*.[118] These are:

> (a) to provide a 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*;
> (b) to promote and enforce the professional standards, competence and honesty of the legal profession;
> (c) to provide a means of redress for complaints about the legal profession.[119]

These provisions situate legal profession regulation within the context of consumer protection. Specifically they confirm that protecting the public interest

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109 Sallmann and Wright, 'Legal Practice Act Review' above n 19, 16.
110 Ibid.
111 Law Institute of Victoria Ltd, *Professional Conduct and Practice Rules* (at 30 September 2005), 38.
112 Sallmann and Wright, 'Legal Practice Act Review,' above n 19, 16.
113 Briton, above n 33, 37.
114 Sallmann and Wright, 'Legal Practice Act Review,' above n 19, inside front cover.
115 Ibid 9.
116 *Legal Profession Act 2004* (NSW) s 494.
117 Standing Committee of Attorneys-General, above n 53, s 4.4.1.
118 Council of Australian Governments, above n 56, s 5.5.1.
119 *Legal Profession Act 2004* (Vic) s 4.1.1 (emphasis added).

'generally' and maintaining the standards of the legal profession as a whole underlie the regulatory scheme, as opposed to protecting a class of consumers whose misfortune it is to experience the most extreme ethical violations. In acknowledging these widely accepted purposes, it is clear that the aforementioned disjunction between the regulatory framework and consumer expectations is heightened by a similar incoherence between the purposes of legal regulation and the narrow focus that it adopts in practice. This is despite the fact that the definitions of UPC and PM have been brought more in line with the prescribed purposes by setting a benchmark based on public expectations. The complaint-handling framework should be geared towards protecting and facilitating outcomes for clients, whether the conduct involved warrants the most drastic disciplinary consequences or something less serious, rather than focused on practitioners who show complete ignorance of or disregard for professional standards.

B *Upholding Ethical Codes*

According to the purposes outlined above, the role of the complaints and discipline systems is 'to promote and enforce the *professional standards*, competence and honesty of the legal profession'.[120] In light of the reference to 'protection of consumers of legal services and the public *generally'* and the broader consumer protection context in which the *LPA* is situated, it is unlikely that these 'professional standards' refer only to those of UPC and PM. In other words it seems incongruous for legislators to have intended for indirect protection to flow to consumers generally by dealing with the fraction of extremely incompetent practitioners. Rather the more likely intended meaning, and indeed the more desirable, is for the regulatory system to promote and enforce the professional standards as laid out in subordinate legislation and legal profession rules, which deal in more specific terms with the subject matter of consumer disputes.

Under s 3.2.9 of the *LPA*, the Board and, with the approval of the Board, the Victorian Bar and the Law Institute of Victoria may make rules about legal practice in Victoria ('legal profession rules'). Legal profession rules may make provision for any aspect of legal practice, including standards of conduct expected of practitioners.[121] The current legal profession rules include the *Professional Conduct and Practice Rules 2005* for solicitors[122] and the *Victorian Bar Incorporated Practice Rules 2009* for barristers.[123] The object of these rules is to ensure that legal practitioners:

> act in accordance with the *general principles of professional conduct*, discharge their obligations in relation to the administration of justice and supply to clients legal services of the highest standard unaffected by personal interest.[124]

The legal profession rules specify that acting in accordance with such 'general principles' requires that practitioners refrain from engaging in conduct which is 'dishonest or otherwise discreditable,' or 'likely to diminish public confidence in the legal profession…or otherwise bring the legal profession into disrepute'.[125] These objects, consistent with those of the complaint-handling and disciplinary systems as a

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120 Ibid s 4.1.1 (emphasis added).
121 Ibid s 3.2.11(1).
122 Law Institute of Victoria Ltd, *Professional Conduct and Practice Rules* (at 30 September 2005).
123 Victorian Bar Inc., *Incorporated Practice Rules: Rules of Conduct and Compulsory Continuing Professional Development Rules* (at 22 September 2009).
124 Ibid rule 2 (emphasis added).
125 Law Institute of Victoria Ltd, above n 122, 9; Victorian Bar Inc., above n 123, rule 4.

whole, clearly evidence an intention for high standards to be maintained in relation to the profession as a whole and with respect to a variety of aspects of the lawyer-client relationship. For instance, under the legal profession rules, practitioners 'must communicate effectively and promptly with clients'[126] and ensure that their communications with other practitioners are courteous and that they avoid 'offensive or provocative language or conduct'.[127]

The *LPA* does not spell out the intended ambit of legal profession rules except to say that they are binding on Australian legal practitioners and other individuals and bodies to whom they apply[128] and that a failure to comply is capable of constituting UPC or PM.[129] In contrast, the *1996 Act* provided that 'misconduct' included 'wilful or reckless contravention…of practice rules that apply to the practitioner'[130] and that the lesser violation of 'unsatisfactory conduct' meant 'contravention of…practice rules that apply to the practitioner…not amounting to misconduct'.[131] Under the *LPA,* references to violations of the legal profession rules have been removed from the specifications of conduct constituting UPC and PM,[132] although s 4.4.4 provides that a contravention of the legal profession rules 'is capable of' constituting UPC or PM. This difference in the drafting of the *1996 Act* and the *LPA* suggests that, under the latter, legislators only intend for contraventions of the legal profession rules to amount to a disciplinary breach in more serious cases and/or that complaint handlers should be able to exercise more discretion in making such an assessment. Notwithstanding these speculations, it appears incongruous for regulators to concern themselves with breaches of the legal profession rules only in circumstances where the relevant conduct is likely to meet the high disciplinary standards. This is especially so in light of the general principles of professional conduct contained therein, which prohibit conduct that is likely to diminish public confidence in the profession or otherwise bring it into disrepute.[133]

VI RAPID RESOLUTION

In 2010, the LSC, under the current Commissioner Michael McGarvie, introduced some significant changes to the complaint-handling process in response to a review by the Victorian Ombudsman in 2008-09. The review identified, as a primary concern, that undertaking a full disciplinary investigation in relation to even the most minor conduct matters often resulted in delays in finalising complaints.[134] Subjecting large numbers of complaints, that would inevitably be summarily dismissed, to lengthy investigations was not only time consuming for complaints handlers,[135] but also frustrating for complainants when no prosecution resulted.[136] The Rapid Resolution Team (RRT) was established in April 2010 to 'deal creatively and effectively' with the large category of complaints which is neither civil nor disciplinary,[137] through informal dispute resolution mechanisms. The LSC claims that this approach offers complainants

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126 Law Institute of Victoria Ltd, above n 122*,* rule 39.1.
127 Ibid rule 21.
128 *Legal Profession Act 2004* (Vic) s 3.2.17(1).
129 Ibid s 3.2.17(2).
130 *Legal Practice Act 1996* (Vic) (repealed) s 137(1)(i).
131 Ibid s 137(b).
132 *Legal Profession Act 2004* (Vic) ss 4.4.5-4.4.6.
133 Law Institute of Victoria Ltd, above n 122*,* 9; Victorian Bar Inc., above n 123*,* rule 4.
134 Legal Services Commissioner, above n 24, 4.
135 Ibid
136 Pakula, above n 36, 8.
137 Ibid 4.

a more timely resolution where possible as well as the opportunity to be heard and for their concerns to be acknowledged.[138] If a complaint is unable to be resolved by the RRT it may proceed to the investigations phase. More serious allegations which appear to meet the disciplinary standards will always proceed straight to investigation.[139]

The RRT deals with a variety of matters. These include matters with potential disciplinary aspects, which involve elements that can be resolved.[140] However, the majority of complaints referred to the RRT involve service-related issues. For example, a complainant trying to locate his late brother's will contacted the law firm that dealt with his late mother's estate to confirm whether they had a copy.[141] The office manager said she would check but then failed to return the complainant's telephone calls when he attempted to follow up on his request. The complainant engaged a lawyer to help him find the will however the practitioner also failed to respond to this lawyer's correspondence. Upon receiving the complaint, a member of the RRT contacted the practitioner, relayed the complainant's request and told them that he hoped the matter could be resolved promptly and without the need for a more formal investigation. The practitioner responded that day and promised to look for the will. A short time later she was able to confirm that her firm did not have a copy and the complainant was satisfied that his concerns had been resolved.

The establishment of the RRT has important implications for consumer disputes. It introduces a degree of flexibility in relation to different types of disputes and moves away from a 'one size fits all' model of complaint handling.[142] Under the previous approach, complaints such as the one described would have been formally investigated and, in all likelihood, summarily dismissed as relating to conduct which, even if proven, is unlikely to amount to UPC or PM. However, it is often the case that a telephone call from the LSC to the practitioner will be sufficient to prompt them to improve their practices, whether that means responding to correspondence in a more timely or polite manner or improving their record keeping systems or other office administration procedures. The RRT aims to deal with service-related complaints and matters that will inevitably be summarily dismissed in an efficient and informal matter in order to provide more complainants with solutions to their disputes in circumstances where an application will not be made to the Tribunal.[143]

VII BROADER SUMMARY POWERS

The introduction of the RRT addresses the disjunction between complaint handling processes and consumer expectations about the role of regulators. It does this by finding solutions to a category of disputes which previously fell outside of the regulatory framework. In 2010-11, in relation to 333 matters (25%), complainants withdrew their complaint after receiving a satisfactory outcome compared with 211 in 2009-10. This is due to the efforts of the RRT.[144] Despite this increase in the number of satisfactory outcomes, there remains a significant body of complaints in relation to which complainants do not have their concerns resolved, although there is no doubt that this gap has been narrowed since the introduction of the RRT. In 2010-11, 338

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138 Pakula, above n 36, 8.
139 Ibid.
140 Ibid 7.
141 Legal Services Commissioner, above n 24, 12.
142 Sallmann and Wright, 'Legal Practice Act Review,' 16.
143 Pakula, above n 36, 4.
144 Legal Services Commissioner, above n 24, 12.

complaints (26%) were unresolved because the LSC formed the view that the Tribunal would be unlikely to find the practitioner guilty of a disciplinary breach.[145] A further 172 (13%) were dismissed because the LSC was unable to resolve the matter and, as the conduct was unlikely to amount to a disciplinary breach, no further investigation was undertaken.[146] One option is for a further relaxing of the definitions of UPC and PM. However, in the past this resulted in delays in finalising complaints and it is unnecessary and not feasible for a larger proportion of complaints to be heard by the Tribunal. As such, the recommendation proposed here is for a widening of the powers exercisable by the LSC.

This approach is contemplated by the *Model Bill* which anticipates that the 'appropriate authority' in each jurisdiction will have the power to publicly reprimand practitioners (or privately, if there are special circumstances) and/or impose a fine of a specified amount.[147] Like the *LPA* the authority must first be satisfied that there is a reasonable likelihood that the practitioner would be found guilty of UPC by the Tribunal (but not PM)[148] and that the practitioner is generally competent and diligent and that no other material complaints have been made against them.[149] Each State and Territory may determine whether such minor penalties may be imposed with or without the consent of the practitioner and whether to include review or appeal mechanisms.[150] Like the *LPA,* the *Model Bill* provides that the authority may suggest to a complainant and a practitioner that they enter into a process of mediation, which may be carried out only with the consent of each party.[151]

The draft *Legal Profession National Law* contemplates that complaint handlers may exercise an even wider array of summary powers. Again, only if it is determined that the practitioner concerned has engaged in UPC, the complaint handling authority may determine a disciplinary matter by making any of the following orders:

> (a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;
> (b) an order reprimanding the respondent or a legal practitioner associate of the respondent law practice;
> (c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;
> (d) an order requiring the respondent or a legal practitioner associate of the respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;
> (e) an order requiring:
> (i) the respondent lawyer; or
> (ii) the respondent law practice to arrange for a legal practitioner associate of the law practice; to undertake training, education or counseling or be supervised;
> (f) an order requiring the respondent or a legal practitioner associate of the respondent law practice to pay a fine of a specified amount (not exceeding $25,000) to the fund referred to in section 9.6.7;
> (g) an order recommending that the Board impose a specified condition on the Australian practising certificate or Australian registration certificate of the respondent lawyer or a legal practitioner associate of the respondent law practice.[152]

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145 Ibid 24, 78.
146 Ibid 12.
147 Standing Committee of Attorneys-General, above n 57, s 4.7.3(2).
148 Ibid s 4.7.3(1).
149 Ibid s 4.7.3(1)(c).
150 Ibid s 4.7.3(2), notes 1 and 2. Attention is drawn to s 540(5) of the *Legal Profession Act 2004* (NSW).
151 *Standing Committee of Attorneys-General,* above n 57*,* pt 4.5.
152 Council of Australian Governments, above n 56, s 5.4.5(1).

Under the *Legal Profession National Law* there is no requirement that the authority first be satisfied that the practitioner is generally competent and diligent, nor is it anticipated that the practitioner's consent must be gained before any of the orders may be made. It also empowers the authority to compel the parties to attend mediation in relation to 'consumer matters'.[153] However 'consumer matters' is defined circularly given that there are parts of a complaint that the LSC can determine should be resolved by the exercise of functions relating to consumer matters[154] as opposed to those not involving an issue of UPC or PM.

The above provisions under the *Model Bill* and, to a greater extent, the *Legal Profession National Law,* support the view that increased powers for complaints handlers will enable them to resolve conduct matters more efficiently, effectively and consistently with their objectives.[155] Increasing the options available to them will have a number of positive effects. Practitioners will be more willing to co-operate during the investigation phase in order to avoid certain consequences[156] and regulators will be less likely to under-regulate. That is, if, on its face, a complaint appears unlikely to meet the threshold for disciplinary action it may be prematurely dismissed before the issues have been adequately examined, 'in the same way that police are said to avoid arresting drunk drivers if the only outcome is mandatory imprisonment'.[157] It will also address the dichotomy between the perceptions of law and justice held by consumers and practitioners.[158] As New South Wales Commissioner, Steve Mark, explains,

> members of the community who seek justice almost exclusively consider justice in terms of outcome, while the profession, when confronting the concept of justice, almost always discuss it in terms of process. This dichotomy inevitably leads to lawyers and clients not only speaking different languages, but having totally different mindsets.[159]

Consumers generally expect that the LSC will be able to provide an outcome in relation to their grievance. They are not usually concerned about whether the Tribunal would be likely to find the practitioner guilty of a disciplinary breach, rather they want to see consequences follow for the practitioner, such that the risk of the conduct being repeated is decreased. This may be seeing the practitioner fined, required to undertake training or merely receiving an acknowledgement or apology.[160] This is not inconsistent with the LSC's function to help resolve disputes rather than punish practitioners[161] and to protect the community rather than compensate individual complainants.[162] Allowing for a broader range of possible outcomes provides the LSC with more opportunities to correct the behaviour of practitioners, in line with the wider objective of public protection.[163]

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153 Ibid s 5.3.4(2).

154 Ibid s 5.2.5(1). Consumer matters include costs disputes: s 5.2.5(2). A complaint may contain both consumer matters and disciplinary matters: s 5.2.4(2).

155 Council of Australian Governments, above n 52, 40.

156 Malcolm M Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (Basic Books, 1983), 126-38 cited in Haller, 'Imperfect Practice under the Legal Profession Act 2004 (Qld),' 421.

157 Ibid 421.

158 Steve Mark, 'The Office of the Legal Services Commissioner – consumer protection' [2009] (90) *Precedent* 12, 13.

159 Ibid

160 Pakula, above n 36, 4.

161 Ibid 6.

162 Mark, above n 158, 16.

163 New South Wales Attorney General's Department, 'A Further Review of Complaints Against Lawyers' (Issues Paper, November 2001), 11-12.

Western Australia provides an example of how an increase in summary powers might operate in practice. The provisions of the *Model Bill* were adopted under the *WA Act*.[164] In Western Australia the Legal Profession Complaints Committee ('Committee'), which performs the same role as the LSC in Victoria,[165] has jurisdiction to make orders with respect to minor disciplinary matters, although such orders may still be made only with the practitioner's consent.[166] The Committee's summary jurisdiction powers are restricted in the same way as the LSC's in this regard however there are some important differences. If the Committee is satisfied that there is a reasonable likelihood that the practitioner would be found guilty of UPC, but is satisfied that the practitioner is generally competent and diligent, it may:

> (a) publicly reprimand the practitioner or, if there are special circumstances, privately reprimand the practitioner;
> (b) order the practitioner to pay the Board a fine of a specified amount not exceeding $2500;
> (c) make a compensation order;
> (d) order that the practitioner seek and implement, within a period specified in the order, advice from the Board, or from a person specified in the order, in relation to the management and conduct of the practitioner's practice, or the specific part of aspect of the practice specified in the order.[167]

The Committee may also make an order requiring the practitioner to pay all or part of the costs of either or both the complainant and the Committee in relation to an investigation,[168] even where no finding is made against the practitioner.[169] The Committee publishes in its Annual Report the conduct matters in respect of which it exercised its summary powers during the relevant reporting period.[170] This record of the types of matters which have led to on the spot fines, reprimands and other orders ensures that the exercise of the Committee's powers is subject to public scrutiny. The following are examples from 2009-10:

- A practitioner who failed to properly advise a client in relation to the expiry of an appeal period was fined $200.[171]
- A practitioner who failed to progress a claim for damages by her clients against their former real estate agents who managed a property owned by them, adequately or at all between 14 November 2006 and 29 February 2008 was fined $750.[172]
- A practitioner who unreasonably denied another legal practitioner, with whom he shared premises, access to that practitioner's legal files over a five-day period was fined $2,000.[173]

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164 Second Reading Speech, Legal Profession Bill 2007 (WA), 2.
165 The Committee is the statutory regulatory authority charged with the functions of supervising the conduct of legal practitioners and enquiring into complaints and conduct concerns in Western Australia: *Legal Profession Act 2008* (WA) s 557.
166 New South Wales Law Reform Commission, *Complaints Against Lawyers: An Interim Report*, Report No 99 (2001), 95.
167 *Legal Profession Act 2008* (WA) s 429(2).
168 Ibid s 429(1).
169 Ibid s 429(2).
170 Western Australia Legal Practitioners Complaints Committee, 'Annual Report 2009-10' (Annual Report, Legal Practitioners Complaints Committee, 2009-10), 19-22.
171 Ibid 21.
172 Western Australia Legal Practitioners Complaints Committee, above n 170, 20.
173 Ibid 21.

The Annual Report reveals how the Committee's broad range of summary powers allows it to deal with a wide range of allegations and to determine the appropriate action based on the individual circumstances of each complaint. It is able to deal directly with service-related issues, which, although they may be isolated in most cases, are nonetheless unsatisfactory, but may not be able to be resolved through informal means. This approach is more in line with the current definition of UPC which contemplates that a wider selection of conduct issues will meet the threshold with reference to the reasonable expectations of members of the public, rather than members of the profession. It follows that an increase in the LSC's summary powers will address the disjunction between statutory concepts of misconduct and consumers' reasonable expectations that the body charged with the function of dealing with complaints about practitioners will also be charged with sufficient powers to resolve them effectively, in the appropriate circumstances.

It has been argued that increasing the remedial powers of regulatory bodies, by allowing on the spot fines, reprimands without consent, and orders for compulsory mediation, blurs the distinct roles of the LSC and the Tribunal. Many complainants wrongly perceive of the LSC as a court, assuming that it has the power to reduce or cancel a bill for instance.[174] However, while the LSC is responsible for receiving and investigating complaints, the Tribunal is charged with 'imposing disciplinary sanctions which are capable of enforcement',[175] a clear judicial function. This separation is emphasised by prohibiting the exercise of the LSC's remedial powers without the practitioner's consent. [176] Maintaining a reasonably clear distinction between the roles of investigative and determinative bodies is supported for a number of reasons. It is argued that a practitioner who is reprimanded without a proper hearing is deprived of procedural and substantive due process and is subject to the absolute discretion of the LSC acting according to its own precepts.[177] However, both the *Model Bill* and the draft *Legal Profession National Law* anticipate that the LSC's summary powers will only be exercised in relation to conduct which is considered likely to amount to UPC. Accordingly, such discretion will only be exercised following a full investigation, during which a practitioner is given innumerable opportunities to provide submissions and any relevant material by way of evidence.

It is also argued that charging regulators with greater summary powers will preclude the Tribunal from hearing allegations in appropriate circumstances such that more severe disciplinary consequences may not follow where they are warranted and the public may not be adequately protected against future wrongdoing by the practitioner concerned. Their exercise may impede the development of the disciplinary standards, which provides helpful examples to other legal practitioners and guidance to regulators in classifying and dealing with future complaints. This approach may result in a lack of case law surrounding the meaning of UPC in particular, with only certain categories of conduct being heard before the Tribunal (contrary to what legislators may intend) and resulting confusion as to what kinds of conduct matters should be heard by the Tribunal rather than determined by the LSC. These sorts of concerns are particularly relevant to complaints which sit closer to the fine line between consumer disputes and disciplinary matters and are most frequently voiced in relation to the question of compulsory mediation.[178]

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174 Pakula, above n 36, 4.

175 New South Wales Law Reform Commission, above n 166, 94.

176 Ibid.

177 Law Society of New South Wales, above n 83, Appendix 4:2.

178 Compulsory mediation has so far been avoided in all jurisdictions except New South Wales, which empowers the LSC to require the parties to enter into mediation in connection with 'consumer disputes' only: *Legal Profession Act 2004* (NSW) s 517(1). A consumer dispute is a dispute between a person and an Australian legal practitioner about conduct of the

However any uncertainty as to which complaints should be dealt with by which body would not necessarily be any greater than the current uncertainty in relation to the disciplinary standards. Charging the LSC with a broader range of power in relation to allegations of UPC would facilitate the development of clearer disciplinary standards by stimulating discussion about how different kinds of complaints should be determined. This is preferable to the current approach whereby the most extreme allegations, generally of PM, are put before Tribunal and the LSC has only limited powers to deal with the majority of complaints which consistently fall short of UPC. Under the current approach, the majority of disciplinary complaints that are thought to amount to UPC are still summarily dismissed. In light of this practice, and the new focus on public expectations under the standardised definitions, it seems appropriate for regulators to be given a broader range of powers in relation to the lesser standard of UPC. This is further supported by acknowledging the practical problems associated with a complete separation of roles.[179] If the Tribunal were entirely responsible for the determination of complaints its workload would be unmanageable.[180] As such, certain minor conduct matters are more appropriately dealt with by giving remedial powers to investigative bodies.[181] It is also relevant to note that very few disputes are referred to formal mediation, let alone consumer type matters, as it is generally only appropriate where there are complex issues and significant sums of money involved.[182]

It has been argued that an increase in the regulation of lawyers is unnecessary in light of the broader remedies available to consumers of legal services. Alongside the duties specified under the *LPA* and the legal profession rules there are general law duties of care, fiduciary duties and obligations in tort for breach of negligence. The LSC reminds complainants that they may bring a private legal action for negligence if they suspect that their lawyer has been negligent and are not satisfied that their concerns have been resolved. However, consumers are generally reluctant to commence legal action for financial and other practical reasons. Many complainants will not have the means to fund private litigation and run the risk of having a costs order made against them, while practitioners will often be funded by professional liability insurers.[183] They may also be reluctant to hire another practitioner or take a position adverse to the legal profession in general by this stage in the complaints process.

VIII CONCLUSION

Re-directing the focus of regulation towards the most frequently reported concerns will complement the educational dimension of the LSC's functions. The LSC's objectives include educating the legal profession about issues of concern to the profession and to consumers and educating the community about legal issues and obligations that flow from the client-practitioner relationship.[184] The LSC undertakes a variety of activities directed at fulfilling these statutory responsibilities. These include attending meetings with managing partners of large and mid-tier law firms and

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practitioner to the extent that the dispute does not involve an issue of UPC or PM: s 514. If and so far as it involves issues of UPC or PM, the complaint is to continue to be dealt with by the LSC after or during mediation: s 517(2)(b). The failure of the practitioner to comply with a notice to attend is capable of constituting UPC or PM: s 517(3).

179 New South Wales Law Reform Commission, above n 166, 97.

180 Ibid.

181 Ibid.

182 Pakula, above n 36, 7.

183 New South Wales Law Reform Commission, above n 166, 40.

184 *Legal Profession Act 2004* (Vic), s 6.3.2.

professional associations to discuss issues including maintaining positive relationships with clients and avoiding the most common complaints. Education of consumers focuses on engagement with community support organisations that provide useful feedback in relation to a range of consumer issues.

Many of the submissions received as part of the 2000 review of the *1996 Act* raised the point that the complaint-handling system should be more geared towards addressing complainants' main grievances including by 'using the complaints process to improve the overall standard of legal services'.[185] Enabling the LSC to take a more hands on approach in relation to a broader range of conduct concerns will allow it to gain even greater insight into consumers' concerns and the types of issues that arise most often between clients and practitioners. Knowledge gained from the complaint handling process will provide even greater scope for the LSC to explore different means of addressing different types of disputes, fulfill its educative functions and give the complaints process a more positive dimension. [186] This will in turn contribute towards the ultimate objective of reducing the number of complaints made about practitioners.

In October 2011, Attorney-General Robert McClelland announced that Victoria, Queensland, New South Wales and the Northern Territory will participate in the *Legal Profession National Law* scheme, with legislation to pass through the respective Parliaments in early 2012.[187] The participating jurisdictions are expected to pass the provisions as they are, which include a far broader range of summary powers for regulators. This move will help bridge the gap in current complaint-handling procedures in relation to consumer complaints. It acknowledges the multiple aims of the complaints and discipline system including the protection of the general public by promoting and enforcing the highest professional standards in relation to the profession as a whole. The anticipated commencement date for the *Legal Profession National Law* in Victoria is currently expected to be some time in 2013.

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185 Sallmann and Wright, 'Regulation of the Victorian Legal Profession,' above n 2, 23.

186 Ibid.

187 Attorney-General for Australia, 'Host state for National Legal Profession Reform announced' (Media Release, 19 October 2011) <http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_FourthQuarter_19October2011HoststateforNationalLegalProfessionReformannounce>.