

PROTECTING THE PUBLIC, MAINTAINING PROFESSIONAL AND ETHICAL STANDARDS IN THE LEGAL PROFESSION – A STUDY OF RECENT REFORMS IN NEW ZEALAND, AUSTRALIA (NEW SOUTH WALES) AND FIJI

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INTRODUCTION

An Australian survey tells us that health professionals continue their domination of Australia's most highly regarded professions with 94% of Australians rating nurses as either 'very high' or 'high' for their ethics and honesty. Nurses have topped the annual survey for 23 years running since being included for the first time in 1994.¹ In this survey lawyers were rated at 35% whilst union leaders rated at 17%, insurance brokers at 10% and at the lowest end were advertising people at 5% and car salesmen at 4%. There are many reasons why the legal profession is rated lower than it should be. The populace are concerned with the lack of access to justice, high cost of going to a lawyer and inordinate delays, poor results and often cumbersome practices and procedures which the legal profession has.

Individuals and often whole communities feel that lawyers far too often lack honesty and professional ethics and the law is usually not servicing either the individual or the community at large. The profession is facing considerable scrutiny and on occasions warranted criticisms. The Fijian Attorney General in 2019 raised issues of concern about the legal fraternity. He said some lawyers were charging high fees for representing their clients, showed tardiness in their dealings with clients and did not

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¹ "Roy Morgan Image of Professions Survey 2017: Health professionals continue domination with Nurses most highly regarded again; followed by Doctors and Pharmacists", *Roy Morgan Research* June 7 2017

<https://www.roymorgan.com/findings/7244-roy-morgan-image-of-professions-may-2017-201706051543> (Accessed 1 February 2020).

discharge their work in a timely fashion. Some lawyers were also singled out for their lack of preparation and ability to discharge their duties properly.²

The framework for lawyer regulations in New Zealand, Australia (New South Wales hereinafter NSW) and Fiji, each trace their roots to lawyer regulation in England and Wales, but have evolved and developed quite separately. There has been a long-term trend away from self-regulation to various models of co-regulation. In England and Wales today, solicitors conduct is regulated by an independent statutory body called the Solicitors Regulatory Authority (SRA). This paper examines how legal, ethical and professional standards for lawyers are dealt with in New Zealand, Australia (NSW) and Fiji.

NEW ZEALAND

As in other jurisdictions, the degree to which the legal profession should self-regulate has been a hugely contested issue resulting in a more co-regulatory structure being installed in New Zealand in 2008 with the introduction of Lawyers and Conveyances Act 2006³ (LCA).

Under the LCA, the Minister for Justice has considerable powers of oversight and intervention. Amongst the raft of reforms is a requirement for significant redrafting of the relevant professional rules of conduct including the incorporation of statutorily mandated principles of ‘client care’.⁴ New Zealand Law Society Executive Director (Acting), Mary Olivia had this to say on the operation of the new Act 10 years after it came into force:

‘the previous Act had allowed 14 different district law societies to carry out regulatory functions under their own prescribed rules.

² “Nicolette Chambers, A-G Highlights: Lawyers Charging High Fees, Not Showing Up on Time” *Fiji Sun* 22 August 2019 <https://fijisun.com.fj/2019/08/22/a-g-highlights-lawyers-charging-high-fees-not-showing-up-on-time/> (Accessed 1 February 2020)

³ The *Lawyers and Conveyances Act 2006* replaced the regime developed under *Law Practitioners Act 1982*. It brought substantial changes to governance and discipline and came into force on 1st August 2008.

⁴ See Duncan Webb, “Are Lawyers Regulatable?” 1 https://ir.canterbury.ac.nz/bitstream/handle/10092/2138/12607864_Webb.pdf?sequence=1 (Accessed 1 February 2020)

Each society issued practicing certificates and regulated lawyers in their respective areas. The provisions for investigating complaints were not consumer focussed and the processes followed varied from district to district. There was no obligation for central or public reporting by each district. The new Act has a strong consumer focus and introduced a more responsive and consistent complaints service which allowed compensation to be paid to clients where appropriate. It introduced a new regulated profession of conveyancers and new conduct and client care rules. It also created offence provisions for people holding themselves out to be lawyers. Lawyers were made to be more accountable. The Law Societies also required to report annually on its regulatory activities.⁵

Regulation of Lawyers

The New Zealand Law Society is responsible under the LCA for regulating lawyers. No person may practice law in New Zealand unless they have a practicing certificate issued by the Law Society. Lawyers apply to the Law Society for a practicing certificate and a certificate is granted where certain criteria are met including that the person is considered to be a fit and proper person to hold a practicing certificate.⁶

The Law Society's functions include:

- Control and regulate lawyers engaged in legal practice in New Zealand;
- Uphold the fundamental obligations imposed on lawyers who provide regulated services;
- Monitor and enforce the provisions of the Act, regulations and rules that relate to lawyers; and
- Assist and promote law reform.⁷

The Law Society operates the Lawyers Complaints Service which handles all complaints about:

- A lawyer or a former lawyer;

⁵ New Zealand Law Society, "Law Society Marks First Decade of Lawyers and Conveyancers Act" <https://www.lawsociety.org.nz/news-and-communications/news/law-society-marks-first-decade-of-lawyers-and-conveyancers-act>, 1 August 2018 (Accessed 1 February 2020).

⁶ Section 39 (4)(b)(ii) of LCA

⁷ Section 65 of LCA

- An incorporated law firm or a former incorporated law firm;
- Someone who is not a lawyer but who is or was an employee of a lawyer or an incorporated law firm.⁸

All lawyers must have procedures for handling complaints and they must tell their clients about these procedures before they commence work for their clients.⁹ The LCA Rules 2008 provides for inter-alia the following:

- Standards of conduct, engagement, client service and client care;
- The requirement that lawyers provide clients in advance with information on the main aspects of client service;
- The kinds of conduct for which a lawyer or a former lawyer may be disciplined;
- Invoicing and setting of fees and conditional fee agreements.

Rule 3.5 (a) requires that all lawyers should provide clients with a written copy of client care and service information before undertaking any work under a retainer. This ensures that all clients know exactly what standards they can expect and places them in a position to complain should practitioners fail to discharge their obligations. Thus, if a lawyer does not meet various standards enshrined in client care rules, the client can raise the matter directly with the lawyer through that lawyer's internal complaints process. If this does not resolve matters, the client can then consider laying a complaint with the Lawyers Complaint Service. Once a complaint is made, the service is obliged to investigate all complaints brought before it. Complaints can vary but usually fall within two categories, conduct and cost.¹⁰

If the complaint is not resolved, it is then referred to a Standards Committee to consider. The Lawyers Complaint Service has a statutory duty to deal with all complaints fairly, efficiently and in an effective manner.¹¹ There is no statutory requirement for a lawyer to respond in writing, but a failure to do so may result in a requirement from the Committee for that person to attend in person and in practice will

⁸ Section 120 of LCA

⁹ Sections 94 and 95 of LCA

¹⁰ Section 129 (1) (2) of LCA

¹¹ Section 123 (1) of LCA

almost make things worse. Most lawyers respond to the complaint and in accordance with natural justice, the response is usually given to the complainant.

The Standards Committee has wide-ranging powers to make orders against a lawyer to resolve a complaint. It can refer parties to negotiation, conciliation or mediation.¹² It may also decide to appoint an investigator who will submit his report to the Standards Committee. That report is considered in private. The Committee in its discretion can communicate the contents of that report to all affected parties.¹³

The Standards Committee can also proceed with a hearing. If the matter goes to a hearing (usually in more serious matters) this will normally be on the papers unless the Standards Committee directs otherwise.¹⁴ The Committee is required to make its determination on the basis of written material before it.¹⁵

The Standards Committee is made up of senior experienced lawyers and lay members who are persons of standing in the community. There are 24 Standards Committees throughout New Zealand. A Standards Committee considering a complaint must have at least 2 lawyers and one lay member (but may have up to 7 lawyers and 2 lay members). The names of those sitting on this Committee is usually provided to both the lawyer and the complainant.

The Standards Committee has wide ranging powers and may make orders against a lawyer to resolve the complaint. It can:

- Censure or reprimand, or order an apology to be made;
- Order the lawyer to pay compensation up to NZ\$25,000;
- Order that fees be reduced or cancelled or refunds made and errors or omissions rectified;
- Order that a lawyer's practice be made available for inspection;
- Order a lawyer to take management advice or undergo training or education such as attending the Stepping Up course;

¹² Section 143 of LCA

¹³ Section 144 – 150 of LCA

¹⁴ Section 153 of LCA

¹⁵ Section 153 (7) of LCA

- Fine the lawyer up to NZ\$15,000;
- Order the lawyer to pay cost of enquiry and for costs/expenses of complainant.¹⁶

The decision(s) of Standards Committee can be reviewed by the Legal Complaints Review Officer (an independent statutory officer who must not be a lawyer).¹⁷ This review can be initiated by the complainant, the person in respect of whom the complaint can be made or the New Zealand Law Society.¹⁸ The Legal Complaints Officer can direct a Standards Committee to consider and determine either whole or part of the complaint.¹⁹

Disciplinary Tribunal

The Lawyers and Conveyances Disciplinary Tribunal (hereinafter referred to as the Tribunal) hears and determines complaints referred to it by Standards Committees and the Legal Complaints Review Officer²⁰. Usually these are the most serious complaints which can involve a public hearing. The Tribunal can make findings of unsatisfactory conduct and it has jurisdiction to impose all orders which are available to Standards Committees.²¹ In addition the Tribunal has powers to remove a lawyer from practice (either temporarily by way of suspension for up to 3 years or permanently strike off that lawyer from the roll of barristers and solicitors).²² The Tribunal also hears applications to have persons restored to roll of or register of legal practitioners and hears appeals against a refusal to issue a practicing certificate to a practitioner. The Standards Committees can make findings of unsatisfactory conduct only, as it does not have power to make a finding of misconduct which is only given to the Tribunal. A Standards Committee will in practice refer most cases to the Tribunal if the alleged conduct is sufficiently serious to warrant consideration of suspension or striking off.²³

¹⁶ Sections 156 and 157 of LCA

¹⁷ Section 192 of LCA

¹⁸ Section 194 of LCA

¹⁹ Section 209 of LCA

²⁰ Section 227 of LCA

²¹ Section 242 of LCA

²² Section 244 of LCA

²³ *Hart v Auckland Stand of the New Zealand Society* (2013) 3NZLR 103

The Tribunal deals with serious cases. It hears charges referred to it by a Standards Committee or the Legal Complaints Review Officer.²⁴ Half of those presiding at any one time (in addition to the Tribunal Chair) must be lay members, thus practicing lawyers are no longer in the majority as they were under Legal Practitioners Act 1982 (now repealed). This is quite significant as it portrays a good picture for the Tribunal. The Tribunal now has a very good balance of lay people and their inclusion sends a clear message that the consumers of legal services will be represented and heard on all complaints against lawyers. Practicing lawyers do not sit either as Chair or Deputy Chair. Instead such appointments are made on the advice of the Minister for Justice, and the Act requires persons who are not practicing but who have not less than 7 years practice as a lawyer. This effectively makes either sitting or retired judges the most likely appointees.²⁵

The charges that are brought before the Tribunal deal with professional misconduct. The misconduct under LCA covers both professional behaviour and private conduct.²⁶ In assessing a professional misconduct charge the Tribunal looks for conduct falling well below expected standards, and then for something extra that elevates that failure to a level worthy of professional misconduct label. This test is encapsulated by Mr Justice Kirby's often quoted formulation in the Australian case of *Pillay v Messiter* where he said:

*'The statutory test (misconduct in professional respect) is not met by mere professional incompetence or by deficiencies in the practice of the profession, something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and abuse of privileges which accompany registration as a medical practitioner.'*²⁷

²⁴ Section 228 of LCA

²⁵ See www.justice.govt.nz/tribunals Judge Clarkson is the first Chairperson of the Tribunal having been appointed at its inception in 2008. Judge Clarkson retired as a full time District Court Judge in 2006. Annual Report of the New Zealand Lawyers and Conveyances Disciplinary Tribunal.

²⁶ Section 7 of LCA

²⁷ *Pillay v Messiter* (No.2) [1989] 16 NZWLR 197 (CA) at 200

Although this case was against a medical practitioner, the case has been approved by the High Court of New Zealand as the appropriate standard to be applied for lawyers when considering professional misconduct charges.²⁸

The standard of proof is statutorily defined to be on balance of probabilities.²⁹ In New Zealand as of 30 June 2018 there were 14,177 lawyers with practicing certificates.³⁰ Given the relatively large number who practice law, the lawyers that have been struck off or suspended is however relatively small. Below is a breakdown of the profession who were struck off under LCA for the period 2016-2018.³¹

YEAR	TYPE OF ORDER	NUMBER OF ORDERS MADE
2016	Struck off the Roll	1
	Suspended from Practice	6
2017	Struck off the Roll	4
	Suspended from Practice	10
2018	Struck off the Roll	5
	Suspended from Practice	10

It has been noted that the most common allegations made against practitioners concerned misleading or providing false information to the courts, other practitioners or relevant agencies; conviction for offences reflecting adversely on practitioner's fitness; misuse of client trust account funds; failing to comply with requirements made in the ordinary course of the profession, such as providing requested documents; inappropriate claiming of fees from clients and/or from legal aid services; acting in or failing to disclose a conflict of interest; abusing the relationship of trust and confidence with a client; breaking undertaking and failing to adequately advise or communicate with clients.³²

²⁸ Complaints Committee No.1 of the *Auckland District Society v C* [2008] 3NZLR 105 at 31-33

²⁹ Section 241 of LCA

³⁰ New Zealand Law Society, "Becoming a Lawyer"

www.lawsociety.org.nz/practiceresources/newzealandlawsocietyguidefornewlawyers/becomingalawyer (Accessed 29 December 2019)

³¹ Annual Reports of New Zealand Lawyers and Conveyances Disciplinary Tribunal for 2016/2017/2018 <https://www.justice.govt.nz/tribunals/lawyers-and-conveyancers/lc-disciplinary-tribunal/> (Accessed 1 February 2020)

³² Alice Selby, *A Dissertation Submitted in Partial Fulfilment in the Degree of Bachelor of Laws* (Honours), University of Otago, 12 October 2012, 21 <https://www.otago.ac.nz/law/research/journals/otago043933.pdf> (Accessed 1 February 2020)

The Tribunal has adopted a procedure used in criminal courts, hearing first the prosecution and then the practitioner before retiring to decide whether they are satisfied that the charges have been established on a balance of probability standard. In its 2018 Annual Report, Judge Dale Clarkson says that the:

'Act has a more consumer orientated approach than its predecessor. It also seeks to put in place a more responsive regulatory regime'.³³

He continues:

'the Act would appear to be achieving its aims in this regard, but also in ensuring the continuing high reputation of the profession. As at 30 June 2018 there were 14,177 lawyers holding practicing certificates. The very small number of lawyers (less than 0.2%) appearing before the Tribunal in comparison with the total number of lawyers practicing in New Zealand suggests that these high standards are being upheld'.³⁴

AUSTRALIA

Australian States have historically had different standards for regulation of lawyers in each State. Despite this they are very similar in terms of principles that they aim to protect. Some of these principles are that lawyers must not engage in conduct which is dishonest, prejudicial to the administration of justice or likely to diminish public confidence in the legal profession or the administration or to bring the legal profession into disrepute. New Zealand and Fiji approach is pretty similar to Australia's. Since 2004, all States and Territories (except South Australia) have enacted their laws relating to legal profession on the basis of a national model Bill. However, a single framework was not achieved due to variations between jurisdictions. The Council of Australian Governments (COAG) decided to bring regulation of legal profession into its microeconomic and regulatory reform agenda. In February 2009 the National Legal Profession Reform Taskforce was appointed to make recommendations

³³ The New Zealand Society of Conveyancers, *Annual Report of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal*, 1 <https://www.justice.govt.nz/assets/Documents/Publications/2018-LCDT-annual-report.pdf> (Accessed 1 February 2020)

³⁴ *Idem*, 12.

and propose draft legislation. In addition to achieving uniformity, the Task Force agreed that the reform process provided an opportunity to enhance and clarify accessibility of consumer protection which had become one of the recurring themes in the reform process. Following wide scale consultation lasting almost two years, the Task Force released its interim report in December 2010 which included draft legislation. Further meetings followed which finalised this draft.

On 5th December 2013 New South Wales and Victorian governments executed an Inter-Governmental Agreement formalising their joint participation in the new regulatory scheme. On 10th December 2013 the new Legal Profession Uniform Law Application Bill was introduced in the Victorian Parliament. The Bill passed both Houses without amendment in March 2014. The New South Wales Parliament introduced legislation applying the Legal Profession Uniform Law in March 2014. It passed both Houses without amendment in May 2014.

The Uniform Law creates a common legal services market across New South Wales and Victoria encompassing almost three quarters of Australia's lawyers. All other States and Territories chose not to participate in the National Scheme and decided to rely on their State legislations to govern the legal profession.

As noted by the Legal Services Council and Commissioner for Uniform for Legal Services Regulation, the Uniform Law harmonises regulation of the legal profession, cuts red tape and creates a single system to govern legal practice.³⁵ It also promotes informed consumer choice and has strong consumer protection measures. The overall objectives of the law are to promote the administration of justice and an efficient and effective Australian legal profession through:

- Consistency between States and Territories in the law applying to the Australian legal profession;
- Ensuring legal practitioners are competent and maintain high ethical and professional standards;
- Enhancing the protection of clients and the public;

³⁵ Legal Services Council and Commissioner for Uniform for Legal Services Regulation, Uniform Law <http://www.legalservicescouncil.org.au/Pages/uniform-framework/uniform-law.aspx> (Accessed 1 February 2020).

- Empowering clients to make informed choices about their legal options;
- Efficient, effective, targeted and proportionate regulation;
- A co-regulating framework with appropriate independence for the legal profession.³⁶

Position in New South Wales (NSW)

The Legal Profession Uniform Law Act 2014 (LPUL) took effect in NSW on 1st July 2015.³⁷ For lawyers in NSW the regulatory scheme is now comprised of the following instruments:

- Legal Profession Uniform Law Act 2014;
- Legal Profession Law Application Act 2014;
- Legal Profession Law Application Regulations 2015;
- Legal Profession Uniform General Rules 2015;
- Legal Profession Uniform Conduct (Barristers) Rules 2015;
- Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015
- Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015
- Legal Profession Uniform Law Australian (Solicitors) Rules 2015
- Legal Profession Uniform Legal Practice (Solicitors) Rules 2015

These instruments replace the Legal Profession Act 2004 (NSW), the Legal Profession Regulation 2005 (NSW) and the New South Wales Barristers Rules 2014.

‘Despite the legislative regime being entirely new, the substantive changes to the rules and regulations applicable to barristers in NSW are not significant. This is because many of the rules and regulations which have been introduced by the Uniform Laws replicate or are

³⁶ *Idem.*

³⁷ *Legal Profession Uniform Law (NSW)* http://www5.austlii.edu.au/au/legis/nsw/consol_act/lpul333/ (Accessed 1 February 2020)

*based on rules and regulations that have been previously been in place in NSW under the old regulatory regime’.*³⁸

More significant changes have been introduced however for those who do not work as Barrister sole. Corporate lawyers are also now required to hold practicing certificates. Overall those practicing as solicitors are now subject to greater responsibility and scrutiny. Law practices must now provide a receipt whenever trust money is received not just on request.³⁹ By Rule 42 of the Legal Profession Uniform General Rules which outlines when money can be withdrawn for payment of legal cost introduces changes to when trust money can be withdrawn;

- Trust money can be withdrawn seven business days after the client is given the bill relating to the money and if the person does not object to the bill. Previously the time frame was seven calendar days.
- Trust money can be withdrawn in accordance with the cost agreement only if that agreement is with a commercial or government client. The bill must also refer to the proposed withdrawal. This is a new concept in the context of the withdrawal of trust money for legal costs. Trust money can however be still withdrawn in accordance with instructions authorising the withdrawal and for reimbursement of expenses paid.

From 1st July 2016 trust account statements need to be provided when:

- The ledger account or record has been opened for less than six months; or
- A trust account statement has been furnished within the previous 12 months and there has been no subsequent transaction affecting the ledger account or record.⁴⁰ This was not required under previous legislation in NSW.

Law Practices with computerised accounting systems are no longer required to keep paper copies of trust records. Electronic records will suffice provided they are in printable and readable form.⁴¹ However law practices may still need to maintain proper records for certain purposes (example tax).

³⁸ Robertson David, «An Overview of the Legal Profession Uniform Law». 2015(Summer) *Bar News: The Journal of the NSW Bar Association*, 37.

³⁹ *Legal Profession Uniform General Rules 2015* – Rule 36 (1)

⁴⁰ *Idem*, Rule 52(5)

⁴¹ *Idem*, Rule 38

Trust account abuse by unscrupulous lawyers is a problem for most jurisdictions and NSW is no exception. The new trust account provisions now ensure that all trust money is held by law practices in a way that protects the interest of persons for whom money is held, minimises compliance for law practices that provide legal services within and outside NSW and ensures that the supervising entity can work effectively with corresponding authorities in other jurisdictions in relation to the regulation of that trust money and trust accounts.

During July each year a law practice must now give the designated regulatory authority written notice of the associates and Australian legal practitioners (including their names and addresses) who are authorised as at 1st July in that year:

- To sign cheques drawn on a general trust account of the practice; or
- Otherwise to effect, direct or give authority for the withdrawal of money from a general trust account of the practice.

There is no need to provide this information if it has already been provided or will be provided in an external examiner's report.⁴²

One of the biggest impacts of the new law is on cost. These are some substantive changes to previous provisions relating to legal cost. Legal practices as a new duty are now required to charge costs that are no more than fair and reasonable, and in particular are proportionately and reasonably incurred, and proportionate and reasonable in amount.⁴³ Under previous legislations the question of whether costs were fair and reasonable arose as a factor in cost assessments and reviews. A law practice is also required to take reasonable steps to satisfy itself that their clients understand and consent to the proposed cause of action and proposed costs. This requirement applies whenever full disclosure is given.⁴⁴ All costs in the sum of A\$3001 and over requires full disclosure to be given to the client. Where a contravention of the cost disclosure obligation occurs, recovery of cost will depend on a cost assessment by the local

⁴² *Idem*, Rule 50 (2)

⁴³ Section 172 LPUL

⁴⁴ Section 1743 LPUL

authority. The local authority may reduce cost on review in proportion to the seriousness of the failure to disclose.

To apply interest, a bill must now be given no later than six months after completion of the matter. Limited exceptions apply where an original lump sum is given within six months or when the bill is issued later than six months by request.⁴⁵ The NSW Commissioners can now resolve cost disputes where the total bill for the matter is less than A\$100,000 or where the total amount in dispute is less than A\$10,000.⁴⁶

Under LPUL there is now a duty on principals of law practices to take reasonable steps to ensure that:

- All legal practitioners of the law practice comply with the Uniform Law and Rules; and
- The legal services provided by the law practice also comply.⁴⁷

Principals will only be liable for contraventions of the Uniform Law and/or Rules by law practices if they knowingly authorised or permitted the contravention or were in a position to influence the law practice's conduct.⁴⁸ Failure to uphold these responsibilities can amount to unsatisfactory professional conduct or professional misconduct.⁴⁹ There is no equivalent provision in Fiji.

The new Uniform Law has established new regulatory bodies to oversee the regulatory regime. These are the Standing Committee of Attorney Generals, the Legal Services Council, The Commissioner for Uniform Legal Services and the Admissions Committee. These new bodies are intended to operate alongside the regulatory bodies which previously exercised functions under the Legal Profession Act 2004. The new Uniform Law continues to rely on local regulatory authorities to exercise regulatory powers in particular local jurisdictions.

⁴⁵ Section 195 LPUL

⁴⁶ Section 291 LPUL

⁴⁷ Section 34 LPUL

⁴⁸ Section 35 LPUL

⁴⁹ Sections 34 and 35 (2) of LPUL

The Standing Committee of Attorney Generals currently has only two States (NSW and Victoria) as participants. This Committee has a general supervisory role over the Legal Services Council and the Commissioner for Legal Services together with local regulatory authorities.⁵⁰ The Standing Committee's role includes overseeing the finances of the Council and approving its budget. Having a Standing Committee to oversee Legal Services Council and the Commissioner has driven greater collaboration between New South Wales and Victoria. It has created an environment in which issues and opportunities are identified and addressed in a more proactive and cordial manner. Thus far there is little evidence to suggest that there has been any undue influence exerted by the Executive. This arrangement is unique to Australia because of its federal system and there is no equivalent arrangement in New Zealand and Fiji.

The Legal Services Council monitors the implementation of Uniform Law and ensures its consistent application across participating jurisdictions. The Legal Services Council tried to ensure that the LPUL remains 'efficient, targeted and effective and promotes the maintenance of professional standards.'⁵¹ One of its functions is to make Legal Profession Uniform Rules. This Council inter-alia made Barristers and Solicitors Conduct Rules.

The Legal Services Commissioner is an independent statutory body that deals with complaints about lawyers under the Uniform Law.⁵² The Legal Services Commissioner receives all complaints about barristers and solicitors in NSW. In addition to receiving complaints, the Commissioner:

- Oversees the investigation of complaints;
- Plays a major role in resolving consumer matters; and
- May take disciplinary action against a barrister or solicitor, or commence disciplinary proceedings in the NSW Administrative Tribunal (NCAT) – Occupational Division.

⁵⁰ Section 391 LPUL

⁵¹ Section 394 (2) (b) LPUL

⁵² Section 398 LPUL

The Uniform Law has introduced a more structured process for resolving complaints. Complaints to the Legal Services Commissioner can be about:

- Consumer matters – a complaint about the services provided to the complainant. A consumer matter can be a ‘costs dispute’ about legal costs or the manner in which services were provided.
- Disciplinary matters – a complaint that may lead to a finding of unsatisfactory conduct or professional misconduct.
- Mixed complaints – these involve both a disciplinary and consumer matter.

Complaints about costs dispute must be made 60 days after the costs become payable (or if an itemised bill was requested, 30 days after the itemised bill was provided). Section 269 of the Uniform Law defines consumer matters, somewhat unhelpfully as costs disputes or ‘so much of a complaint about a lawyer or a law practice as relates to the provision of legal services to the complainant by the lawyer or law practice’, as the designated local regulatory authority determines, (for example the Bar Council) should be resolved by the exercise of functions relating to consumer matters. These functions are addressed primarily in part 5.3 of the Uniform Law and provide a mechanism by which consumer matters are to be mediated, settled or if necessary, determined by the Bar Council. However, a conduct underpinning a complaint can be both a consumer matter and a disciplinary matter.⁵³

The Office of the Legal Services Commissioner has an Inquiry Line to help and answer questions one may have about a complaint. Any person who has had concerns about the conduct of a solicitor or barrister can make a complaint by filling in a complaint form. The complaint form must include the name of the individual lawyer, a description of the complaint, information about when the conduct complained about occurred (with dates if possible) and copies of any supporting documentation.

A complaint must be lodged within 3 years of the conduct which is alleged to have occurred. The Legal Services Commissioner may however deal with the complaint “out of time” if the Commissioner determines:

⁵³ Section 268 (2) LPUL

1. It is just and fair to do so having regard to the delay and the reason for the delay;

or

2. The complaint concerns an allegation of professional misconduct and it is in the public interest to investigate the complaint.

The Legal Services Commissioner is required to complete a preliminary assessment of any complaints received and he/she can close the complaint in certain circumstances, for example, if the complaint is made after the deadline or that it lacks substance.⁵⁴ The Legal Services Commissioner's staff assess all complaints. They are trained lawyers and investigators who are employed by the Commission. The Office is reasonably well resourced with legal/mediation and investigation officers to deal with a variety of complaints. In comparison, the Fiji Legal Practitioners Unit has limited staff with lesser scope to conduct preliminary assessments in the same way as its NSW counterpart. In NSW the overwhelming majority of complaints are made against barristers. A disciplinary matter is defined by Section 270 of the Uniform Law as 'so much of a complaint about a lawyer as would, if the conduct concerned were established amount to unsatisfactory professional conduct, or professional misconduct.' Distinguishing conduct which would if established amount to unsatisfactory professional conduct from that which has the potential to be professional misconduct is important. Unsatisfactory professional misconduct is defined in Section 296 of the Uniform Law as:

'conduct of a lawyer 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 lawyer'.⁵⁵

Section 297 goes on to define professional misconduct as:

⁵⁴ Section 277 LPUL

⁵⁵ Section 296 LPUL

a. 'unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

b. conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would if established justify a finding that the lawyer is not fit and a proper person to engage in legal practice'.⁵⁶

Section 298 of the Uniform Law identifies, in a non-exhaustive way, types of conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

According to the Office of the Legal Services Commissioner, unsatisfactory professional conduct can include:

- Threatening or abusive behaviour.
- Failure to comply with an undertaking
- Poor advice and representation
- Serious delay
- Non-disclosure of costs
- Minor breach of Solicitors Conduct or Practice Rules or confidentiality⁵⁷

And professional misconduct according to the Legal Services Commissioner can include:

- Gross overcharging
- Conflict of interest
- Acting contrary to instructions
- Misleading or dishonest conduct in or outside court
- Misappropriation of trust money⁵⁸

⁵⁶ Section 297 LPUL

⁵⁷Office of the Legal Services Commissioner, *Types of Complaints*
http://www.olsc.nsw.gov.au/Pages/lsc_complaint/olsc_type_complaint.aspx#WhatIsUnsatisfactoryProfessionalConduct? (Accessed 1 February 2020)

⁵⁸*Idem.*

Disciplinary proceedings initiated against lawyers are heard in the occupational division of NSW's Civil and Administrative Tribunal. This Tribunal usually sits as a panel of three. Members are a senior judicial officer, a practitioner and a lay person or two practitioner members and a lay member. Below are some recent judgements delivered by the Civil and Administrative Council.

Legal Services Commissioner v Harb

Harb was found guilty of professional misconduct for failing to disclose receipt of privileged and/or confidential information and failing to destroy and/or return privileged and/or confidential information. The Tribunal found him guilty and ordered his name to be removed from the roll of lawyers.⁵⁹

Legal Services Commissioner v Huggett

Huggett was found guilty of professional misconduct for attempting to procure a falsely witnessed statutory declaration from his clients. He had sent his clients statutory declaration for execution (required for replacing a lost Certificate of Title) together with a pen and instructions on a post with a note that the client sign the Statutory Declaration in the marked places and that 'I will witness your signature when you return them and complete all the balance details – please send the same pen back.' The Tribunal found his behaviour lacked integrity. He was reprimanded, fined A\$2,500.00, ordered to pay costs and undertake a professional education course in ethics and integrity.⁶⁰

Legal Services Commissioner v Potkonyak

⁵⁹ See the Office of the Legal Services Commissioner, *2016-2017 Annual Report*, 7 <http://www.olsc.nsw.gov.au/Documents/2016%202017%20OLSC%20AnnRep.pdf> (Accessed 1 February 2020)

⁶⁰ *Idem*, 7.

In May 2017 George Potkonyak was found to have engaged in professional misconduct in approaching matters under Children and Young Persons (Care and Protection) Act 1998 (Care Act) with a preconceived mind-set without any apparent concern for the underlying interests of the client, or the essential work carried out by the Children's Court under the Care Act, and for making scurrilous and ill-considered comments and unfounded criticism of judicial officers and fellow legal practitioners.⁶¹

On 9 January 2018 the Tribunal found him guilty and Potkonyak's name was removed from the roll of lawyers. Potkonyak has appealed the Tribunal's decision.

In 2016-2017 reporting year, the Legal Services Commissioner received a total of 2579 written complaints and completed investigations on 2333 complaints. In 2017-2018 it received a total of 2645 written complaints and completed investigations on 2601 complaints. The overall work rate of the Commissioner is extremely high and most matters are resolved through a variety of means. A small number of complaints progress each year as disciplinary cases before the Administrative Tribunal. In comparison Fiji has a bigger backlog of complaints and it takes much longer to complete the investigations. This is due largely to statutory framework, number and qualification of regulatory staff and the relationship of the regulator with the profession.

FIJI

Position before 2009

Fiji's first Legal Practitioner's Act dates back to colonial times which continued to apply in Fiji after she gained independence in 1970. Whilst that law was quite effective for its time, and had many features which such laws have throughout the Commonwealth, it was replaced by a new Legal Practitioner's Act in 1997. The 1997 Act established a Board of Legal Education to regulate legal training, continued and

⁶¹ *Idem*, 7.

strengthened the role of Fiji Law Society, made it compulsory for all legal practitioners to undertake 10 hours of continuing legal education before one would be eligible to renew his/her practicing certificate for the following year. The Act also provided for maintenance of self-regulation for professional standards of the profession. Under this Act lawyers conduct was regulated by Disciplinary Tribunals set up by the Fiji Law Society. All investigations into allegations of misconduct were conducted by the Fiji Law Society, which was also responsible for prosecuting the case before the Disciplinary Tribunal.

Prior to enactment of the Legal Practitioner's Act 1997, its predecessor legislation, the Legal Practitioner's Act Cap 254 of the Laws of Fiji provided that lawyers were to be disciplined by Committees appointed by the Chief Justice. One of the drawbacks of proceedings under this Act was that there were very few hearings before the Tribunal. When such hearings took place it was usually behind closed doors and on review by the courts, the judge hearing the case took care to suppress names of lawyer(s) charged with disciplinary offences.⁶²

The 1997 Legal Practitioners Act allowed for full names of the offending lawyer to be publicised. Nonetheless this process was similar whereby two lawyers and a lay member usually comprised the 3-member panel. The Fiji Law Society continued to receive complaints from public against lawyers but there were few prosecutions. There was one high profile prosecution of a lawyer who took an oath to serve as Attorney General in the Government which was established unlawfully by George Speight and his followers who instigated the coup d'état. Rakuita Vakalalabure was charged and convicted for disciplinary offences and his name was struck off the roll of Barristers and Solicitors.⁶³

Members of the public via different mediums continued to complain about lawyers and in 2008 the Consumer Council of Fiji said,

'The Council is therefore calling for a holistic reform of the current system of self-regulation, the introduction of an independent regulator to cover the whole of the legal service industry, and

⁶² *A Barrister and Solicitor In re* [1999] 45 FLR 59

⁶³ *Fiji Law Society v Raikuita Vakalalabure* – Disciplinary Matter No. 3 of 2002

*available sanctions to tackle firms providing poor service. An independent body with transparent and democratic decision-making powers will ensure that consumers will be heard.*⁶⁴

The government promulgated Legal Practitioners Decree on 22 May 2009.⁶⁵ This is now known as the Legal Practitioners Act (LPA) by virtue of consequential amendments legislation passed in 2016.⁶⁶ The reasons why a new law was necessary in Fiji has never been fully explained by government. However, self-regulation was not working very well and may be a key reason for the introduction of new law. There were many outstanding complaints against lawyers with the Fiji Law Society which had not been resolved for many years. In its report titled ‘Fiji: The Rule of Law Lost’, the Law Society Charity of England and Wales *inter-alia* said:

*‘the Chief Registrar is quoted as indicating that there were 348 outstanding complaints to be dealt with as at 1 September 2009. This seems a very high figure given the small size of the Fiji population.’*⁶⁷

The LPA repealed Legal Practitioners Act 1997. It changed the entire structure of the Law Society which continues in existence but membership is now voluntary. Its role is set out in Sections 12 and 13 of the Act. The Society now plays no role in the discipline of lawyers. All matters of practice of law including issuance and regulation of legal practice is now the responsibility of the Chief Registrar of the High Court. The Chief Registrar is also responsible for receiving, investigating and prosecuting all complaints against lawyers. LPA has created the office of the Independent Legal Services Commission, retained Board of Legal Education and created new provisions for dealing with disciplinary matters.

Fiji’s law is paired down version of New South Wales (NSW) model, and the Act also has a code of conduct for Fijian lawyers in the schedule. Whilst the Act

⁶⁴ Consumer Council of Fiji, “No lawyer is above the law”, Press Releases, 8 December 2008 <http://www.consumersfiji.org/press-releases/press-releases-2008/no-lawyer-is-above-the-law> (Accessed 1 February 2020)

⁶⁵ *Decree No. 16 of 2009* www.paclii.org

⁶⁶ *Legal Practitioners Act No. 31 of 2016* www.parliament.gov.fj

⁶⁷ The Law Society Charity, Fiji: “The Rule of Law Lost”, January 2012 file:///C:/Users/morse/Downloads/Law_Society_Fiji_Rule_of_Law_Report_2012.pdf (Accessed 1 February 2020)

contains some new features, many things are similar to NSW, though, the Fijian equivalent is not that comprehensive.

Regulatory Framework for Complaints against Lawyers under LPA

Complaints Procedure

A complaint can be made to the Chief Registrar (CR) of the High Court by any person for any alleged professional misconduct or unsatisfactory professional conduct by any legal practitioner, law firm, or any employee or agent of any practitioner or any law firm.⁶⁸ It is also common for members of the public to complain directly to the Attorney General or the Law Society. If such complaints are received, they are made to the CR by the respective offices.⁶⁹

After receiving a written complaint, the CR is required to notify the practitioner or the law firm of that complaint.⁷⁰ The CR usually requires a response to that complaint within a defined timeframe and the CR may conduct further investigation on that complaint.⁷¹ Following his/her investigation the CR may do one of the following:

- Summarily dismiss the complaint
- Make efforts to facilitate resolution which may involve mediation
- Commence disciplinary proceedings before the Commission

The CR with the consent of the complainant, may refer a complaint which involves charging of excessive fees or charging full legal fees where the legal practitioner has not completed the work to the Master or Judge of the High Court, for, either taxation or assessment of costs or fees.⁷² Where a legal practitioner or a law firm fails to respond to CR's Notice for Explanation, the CR is then required to notify the practitioner or law firm in writing and give further 14 days to respond. Failure to

⁶⁸ Section 99 LPA

⁶⁹ Section 102 LPA

⁷⁰ Section 104 LPA

⁷¹ Section 105 LPA

⁷² Section 109 LPA

respond during this period can lead to a disciplinary charge of professional misconduct.⁷³

Where the CR dismisses a complaint summarily under one of the provisions of the section, the unsatisfied complainant can commence disciplinary proceedings directly before the Commission.⁷⁴ Thus far no one has commenced an action directly.

Disciplinary Proceedings before the Commission

The CR may commence disciplinary proceedings against a legal practitioner or a law firm including an employee or agent of that legal practitioner or law firm. Single or multiple disciplinary charges are filed for professional misconduct or unsatisfactory professional conduct.⁷⁵ These charges are brought before the Independent Legal Services Commission (ILSC) which is established pursuant to Section 84 (1) of the LPA. The ILSC's principal function is to hear disciplinary proceedings brought by the CR. These hearings are open to public. Lawyers can either represent themselves or be represented by legal counsel. ILSC is presided by a Commissioner who is appointed by the President, on the advice of the Attorney-General.⁷⁶ The Commissioner must be a person who is qualified to be a judge under Fiji's 2013 Constitution. Since enactment of this Act in 2009 Fiji has had 4 Commissioners who have all either served as judges of the High Court, or are still serving as a Judge.

In comparison, NZ LCA Tribunal includes a chairperson, deputy chairperson plus members drawn from a pool of lay and professional members. The Tribunal has two divisions, one chaired by the Chairperson and the other by the Deputy Chairperson. When a division of the Tribunal sits, it comprises the chair of that division plus two lay members and two professional members. This clearly demonstrates fair trial principles and effective delivery of justice. It is hoped that in future, Fiji's legislation is amended to include professional and lay members sitting on ILSC.

⁷³ Section 108 LPA

⁷⁴ Section 110 (4) LPA

⁷⁵ Section 111 LPA

⁷⁶ Section 85 (1) LPA

The ILSC hears disciplinary proceedings which involves the ILSC considering conduct of a legal practitioner which would lead to a finding of unsatisfactory professional conduct or professional misconduct. Unsatisfactory professional conduct is conduct which:

*'falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner.'*⁷⁷

Some examples of conduct capable of constituting unsatisfactory professional conduct includes:⁷⁸

- Charging excessive costs
- Charging for work not completed by the legal practitioner or incomplete work
- Disrespectful behaviour
- Poor advice and representation

Professional misconduct is conduct involving:

'A substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'

or conduct which shows that a person is not:

*'a fit and proper person to engage in legal practice.'*⁷⁹

Some examples of types of conduct capable of constituting professional misconduct includes:

- Appearing in court without a valid practicing certificate
- Misappropriation of trust money
- Misleading the court
- Failing to respond to CR
- Convictions for a criminal offence (excluding traffic offences); or a tax offence; or an offence involving dishonesty; or contempt of court

⁷⁷ Section 81 LPA

⁷⁸ Section 83 LPA

⁷⁹ Section 82 LPA

- Practitioner fails to comply with the orders of CR and/or the Commission

The CR has set up a Legal Practitioner's Unit to assist him to effectively and expeditiously investigate and process complaints against legal practitioners. This Unit is responsible for all investigations and prosecutions. The Unit is also responsible for trying to arrange mediation between all parties to garner successful resolution of a dispute. If mediation fails, then the complaint is referred to the Prosecution Unit which prosecutes the offending legal practitioner under the Act. Where the prosecution is successful, the Commissioner has a wide range of powers to deal with the legal practitioner found guilty.⁸⁰

The Commissioner may make one of more of the following:

- Order cancellation or suspension of the lawyer's practicing certificate
- Publically reprimand the legal practitioner
- Impose a fine up to F\$500,000.00
- Strike off the name of the legal practitioner from the registrar of lawyers

Since its establishment in September 2009, the Commission has dealt with a number of cases to date. These cases cast an interesting light on Fiji legal practice. In September 2017 Dr Thomas Hickie, Commissioner ILSC, delivered a paper at the Fiji Law Society Convention where he highlighted five major areas of complaints against legal practitioners⁸¹

5 Major Areas of Complaints		
1	21%	Failure to respond to the Chief Registrar
2	16%	Practicing Certificate issues
3	13%	Trust account issues
4	14%	Other (disrespectful behaviour)
5	10%	Failure to obtain instructions

⁸⁰ Section 121 of LPA

⁸¹ Arieta Vakasukawqa Sigatoka, «Hickie to Lawyers: Address Mistakes» *Fiji Sun* 3 September 2017 <https://fjijisun.com.fj/2017/09/03/hickie-to-lawyers-address-mistakes/> (Accessed 1 February 2020)

The work of the Commission is commendable, but the disposal rate of cases is rather slow when compared with its counterparts in NSW and New Zealand. The ILSC Annual Report of 2016 is worthy of mention.⁸²

Between 2009 and December 2015, 108 applications were filed.

Year	Number
2009	9
2010	21
2011	7
2012	12
2013	29
2014	14
2015	16
TOTAL	108

Thirteen applications were withdrawn in that period. There were 56 judgements delivered by the Commission in the same period.

Year	Number
2009	9
2010	3
2011	6
2012	11
2013	20
2014	3
2015	4
TOTAL	56

Selected Cases Decided by ILSC

- a. Failure to respond to Chief Registrar

*Chief Registrar v John Rabuku*⁸³

John Rabuku failed to respond to a complaint by CR and thereafter again failed to respond to a subsequent reminder notice issued by CR. He was charged with

⁸² The Independent Legal Services Commission, *Annual Report 2016*
<http://ilsc.com.fj/storage/2018/03/Annual-Report-2016.pdf> (Accessed 1 February 2020)

⁸³ *Chief Registrar v John Rabuku* [2013] ILSCJ 07 (30 July 2013)
<http://ilsc.com.fj/storage/2017/12/13-July-1.pdf> (Accessed 1 February 2020)

one count and found guilty. He was publicly reprimanded, fined \$500 and suspended from practice for 3 months. Commissioner Madigan said,

'failure to respond to the Chief Registrar (Chief Registrar of High Court), is not only indirect contravention to the stipulation in Section 105 (Registrar may require explanation) of the Legal Practitioners Decree, but it is also showing complete disdain and disregard for the authority of the regulatory arm of the profession. Should such practice go unchecked then the profession could become unmanageable with the public being unprotected and the spirit of the legislation defeated.'

Chief Registrar v Sushil Sharma⁸⁴

Sushil Sharma failed to respond to CR's notice and then again failed to respond to a reminder. He was charged with one count and found guilty. Sharma was publicly reprimanded, fined F\$500 and had his practice suspended for one month.

Chief Registrar v Kafoa Muaror⁸⁵

Kafoa Muaror was charged with one count of failure to respond to CR's notice and again with failure to respond to a reminder. He was found not guilty with the Commissioner saying that he provided a reasonable excuse for not responding to the reminder.

Chief Registrar v Aman Ravindra Singh⁸⁶

Aman Singh was charged with failure to respond to CRs notice followed by failure to respond to a reminder. He was found guilty, ordered to pay cost to the

⁸⁴ *Chief Registrar v Sushil Sharma* [2013] ILSCJ 06 (30 July 2013)
<http://ilsc.com.fj/storage/2017/12/13-July-2.pdf> (Accessed 1 February 2020)

⁸⁵ *Chief Registrar v Kafoa Muaror* [2013] ILSCJ 09 (20 August 2013)
<http://ilsc.com.fj/storage/2017/12/13-Aug-3-1.pdf> (Accessed 1 February 2020)

⁸⁶ *Chief Registrar v Aman Ravindra Singh* [2018] ILSCJ 06 (Heard on 2 November 2018 and Judgement delivered on 25 March 2019 and reported in Fiji Sun on 29 March 2019)
<https://fijisun.com.fj/2019/03/29/aman-ravindra-singhs-practising-certificate-suspended/> (Accessed 1 February 2020)

Commission in the sum of F\$3000.00 and F\$500.00 to the CR. He also had his practicing certificate suspended. Commissioner Gounder said,

‘Such professional misconduct can potentially harm the reputation of lawyers and bring the legal profession in disrepute.... The nature of the sanction that is imposed will depend on factors such as seriousness of the actual conduct of the legal practitioner and the mitigating and aggravating circumstances of that conduct.’

b. Practicing certificate issues

Chief Registrar v Adi Kolora Naliva⁸⁷

Naliva was charged with four counts of appearing in different courts without a valid practicing certificate and one count of witnessing a document as Commissioner of Oaths when she was not one. She was found guilty, but due to her impecuniosity she was only reprimanded and her practicing certificate was suspended for 6 months.

Chief Registrar v Siteri Cevalawa⁸⁸

Cevalawa was found guilty of appearing in different courts on 8 different occasions without a valid practicing certificate. She was publicly reprimanded and fined a sum of F\$1000.00

Chief Registrar v Laisa Lagilevu⁸⁹

Lagilevu was charged with one count of unsatisfactory professional conduct and on her own admission was found guilty of the offence. She was publicly reprimanded and fined F\$1000.00. Her practicing certificate was suspended

⁸⁷ *Chief Registrar v Adi Kolora Naliva* [2011] ILSCJ 13 (5 December 2011) - <http://ilsc.com.fj/storage/2017/12/11-Dec-3.pdf> (Accessed 1 February 2020)

⁸⁸ *Chief Registrar v Siteri Cevalawa* [2011] ILSCJ 14/15 (5 December 2011) <http://ilsc.com.fj/storage/2017/12/11-Dec-2.pdf> (Accessed 1 February 2020)

⁸⁹ *Chief Registrar v Laisa Lagilevu* [2012] ILSCJ 04 (16 March 2012) <http://ilsc.com.fj/storage/2017/12/12-March-3.pdf> (Accessed 1 February 2020)

until the fine was paid and she was also required to satisfy the Trust Account requirements of CR.

Chief Registrar v Viliame Vosaroqo⁹⁰

Vosaroqo was charged with allegation of unsatisfactory professional conduct for not having a valid practicing certificate of his own and hence instructing another legal practitioner who also did not have a valid practicing certificate in a matter before Suva High Court. Commissioner Madigan was quite clear in his deliberations. He said,

‘It is the finding of this Commission that, to instruct another practitioner to act for him/her is an act of professional practice, and to do so without being licenced, is per se unsatisfactory professional conduct. That being so, this allegation is established.’

Commissioner Madigan found both the junior counsel and Vosaroqo guilty. Vosaroqo was publicly reprimanded and fined F\$2500.00.

Chief Registrar v Nitij Pal⁹¹

Pal was charged with professional misconduct. He opened a law firm in Fiji when he was not a holder of a valid practicing certificate. Commissioner Madigan said,

‘Operating a practice without a practicing certificate issued by the Chief Registrar is a serious offence. It creates a risk to the members of the public who might seek legal advice from that firm at that time’.

The Commission found Pal guilty and ruled that for five months he would not be eligible to apply for practicing certificate and fined him F\$2000.00

⁹⁰ *Chief Registrar v Viliame Vosaroqo* [2013] ILSCJ 10 (20 August 2013) <http://ilsc.com.fj/storage/2017/12/13-August-1.pdf> (Accessed 1 February 2020)

⁹¹ *Chief Registrar v Nitij Pal* [2015] ILSCJ 02/03 (21 July and 23 October 2015) - <http://ilsc.com.fj/storage/2017/12/15-Jul-1.pdf> and <http://ilsc.com.fj/storage/2017/12/15-Oct-1.pdf> (Accessed 1 February 2020)

c. Trust Account issues

Chief Registrar v Akuila Naco⁹²

Naco was charged with one count of unsatisfactory conduct. His trust account was overdrawn for 3 days from 29 March to 31 March 2005 as Naco wrote a trust account cheque in the sum of F\$2000.00 to Kundan Singh, a retail supermarket. He pleaded guilty to the charge and was fined F\$1000.00 by the Commissioner and was publicly reprimanded.

Chief Registrar v Alipate Qetaki⁹³

Qetaki was charged with two counts of professional misconduct. He opened a trust account with a bank without first obtaining the written approval of the Attorney General. The Commissioner found both counts of professional misconduct to have been proved by the applicant's guilty plea. The Commissioner however found the level of misconduct to be low and imposed no sanctions. Qetaki was however ordered to pay F\$1000.00 as costs.

d. Disrespectful Behaviour

Chief Registrar v Alena Koroi⁹⁴

Koroi was charged with one count of unsatisfactory professional conduct. On 9 July 2010 in a court case before a High Court Judge she showed discourtesy by raising her voice at the Judge and when directed by Mr Justice Hettiarachchi to calm down, she persisted in her discourtesy by refusing to lower her voice. At the trial Koroi tried to justify her conduct rather than to deny it. She was found guilty and publicly reprimanded. The Commissioner also ordered that she be supervised in her practice by a named senior practitioner who would mentor her

⁹² [2010] ILSCJ 12 (16 June 2010) - http://ilsc.com.fj/storage/2017/12/Chief-Registrar-v-Naco_13042010.pdf (Accessed 1 February 2020)

⁹³ *Chief Registrar v Alipate Qetaki* [2017] ILSCJ 09 (18 April 2017) <http://ilsc.com.fj/storage/2017/12/17-April-4.pdf> (Accessed 1 February 2020)

⁹⁴ *Chief Registrar v Alena Koroi* [2011] ILSCJ 12 and 03 (1 December 2011 and 14 March 2012) <http://ilsc.com.fj/storage/2017/12/12-March-2.pdf> (Accessed 1 February 2020)

for 12 months. Her practicing certificate for 2013 would be dependent on her supervisor's report to the Chief Registrar.

Chief Registrar v Amrit Sen⁹⁵

Sen was charged with two counts of professional misconduct. On count one, he attacked the reputation of a prosecutor by uttering the following words, 'you tell lies to the court and your mouth stinks. Nobody wants to sit near you.' On count two, he was charged with showing discourtesy to the Court by raising his voice to an unacceptable level in attacking the prosecutor in front of the magistrate. Following a full trial, he was found guilty on count two. The Commissioner ordered Sen to be publicly reprimanded and pay a fine of F\$5000.00.

Chief Registrar v Ram Chand⁹⁶

Chand was charged with one count of professional misconduct. He deceived and misled the High Court by his letter dated 17 October 2011 when he sought adjournment due to his medical condition. In the letter he said that he had undergone an eye operation and doctors had advised him not to stress his eyes for at least 3 months. It was subsequently discovered that on that same day he appeared and conducted a full hearing in Tailevu Magistrate's Court. He was found guilty and publicly reprimanded and fined F\$5000.00. In addition his practicing certificate was suspended for 5 months.

e. Other Miscellaneous Conduct

Chief Registrar v Mohammed Azeem Ud-Dean Sahu Khan⁹⁷

Khan was charged with professional misconduct in that since 2009 until 2013 he represented on his letterhead that he had been called to the Bar of Lincoln's

⁹⁵ *Chief Registrar v Amrit Sen* [2013] ILSCJ 21 (6 November 2013)
<http://ilsc.com.fj/storage/2017/12/13-Nov-2.pdf> (Accessed 1 February 2020)

⁹⁶ *Chief Registrar v Ram Chand* [2013] ILSCJ 16 (3 October 2013)
<http://ilsc.com.fj/storage/2017/12/13-Oct-2.pdf> (Accessed 1 February 2020)

⁹⁷ *Chief Registrar v Mohammed Azeem Ud-Dean Sahu Khan* [2013] ILSCJ 08 (30 July 2013) -
<http://ilsc.com.fj/storage/2017/12/13-July-3.pdf> (Accessed 1 February 2020)

Inn England when he was not a Barrister of that Inn, and never been admitted to practice law in England from that Inn.

He pleaded guilty and claimed that his father had added that information to the letterhead, and that he personally had no intention to deceive. He said he was a student at Lincoln's Inn, but was never admitted as a barrister there. In his judgement Commissioner Madigan said,

'The fact that his father added the false qualification to the letterhead is no excuse. The practitioner obviously knew it was untrue and for at least three years when signing correspondence it would have been seen by him at the bottom of the page. He cannot because of that say that the misrepresentation was unintentional and an oversight. A false representation such as this cannot be an oversight for more than three years.'

Khan was publicly reprimanded, his practicing certificate was suspended for 18 months and he was fined F\$20,000.

Chief Registrar v Iqbal Khan⁹⁸

Khan was charged with two counts of professional misconduct. Count one was in relation to derogatory remarks made by him against police officers on Fiji One Television news and count two was his comments in the same news when he commented on a High Court matter which was still pending in Court. Commissioner Madigan said,

'it was an exercise of poor judgement on the part of the practitioner on a programme that he knew was being viewed nationwide and in the course of that programme over two consecutive days proceeded in very strong language to talk about the actions of certain police officers.'

Khan was found guilty on both counts and had his practicing certificate suspended for 15 months, fined F\$1500 and was publicly reprimanded.

⁹⁸ *Chief Registrar v Iqbal Khan* [2013] ILSCJ 26 (11 December 2013) - <http://ilsc.com.fj/storage/2017/12/13-Dec-1.pdf> (Accessed 1 February 2020)

These cases illustrate that since inception ILSC has dealt with approximately 40% of offences in Fiji which are either for not replying to Legal Practitioners Unit or for other administrative issues relating to practicing certificates. In comparison, majority of complaints made in New Zealand and NSW relate to actual conduct issues. There is clearly room for the Legal Practitioners Unit to do more and change its own practices and procedures to direct its limited resources in dealing with more serious cases.

Most cases once completed by ILSC have not been appealed further, although there is provision for appeal to the Fiji Court of Appeal from final orders of the Commissioner.⁹⁹

CONCLUSION

In recent past New Zealand and Australia (NSW) have introduced new and improved measures for regulating lawyers. They have also developed a healthy body of case law dealing with unsatisfactory professional conduct and professional misconduct. Fiji's 2009 reforms have resulted in a more effective system for regulating lawyers than what existed previously. However, Fiji's system still has room for improvement. The pathway towards that will entail the regulator, the legislator (Office of the Attorney General) and the legal profession (through Fiji Law Society) to be equal partners in plotting that pathway in improving regulatory efficiency and promoting a more competent and ethical legal profession.

In all three jurisdictions under consideration the legal profession was largely self-governing. Self-regulation helped maintain the professions independence from executive domination. An independent profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for right to practice.¹⁰⁰

⁹⁹ Section 128 LPA

¹⁰⁰ See Jayne Reardon, "Are Lawyer Ethics Rules Effective?" 2019 <https://www.2civility.org/are-lawyer-ethics-rules-effective/> (Accessed 1 February 2020).

Self-regulation is however a thing of the past. Over time it has become apparent that in Fiji discipline was administered by the legal profession which was slow in responding to complaints, was overly lenient and notoriously unresponsive to consumer concerns. After some experiments and false starts, meaningful reform has occurred in Fiji. Nonetheless despite the improvements there remains a challenge for the regulator, the Law Society and the Office of the Attorney General to develop a strategic partnership to work together and deal with problems in a shared way.

Currently the Legal Practitioners Unit has two functions. Firstly, it deals with all lawyer licences and admission. Secondly it deals with administration of all complaints and discipline. To give greater credibility, complaints and discipline should be independent from the executive and the judiciary.

In Fiji ILSC has developed a small body of case law. Complaints of overcharging continues to dominate each year. There is a definite need for greater regulation on fees for contentious as well as for non-contentious matters. There is no reason why there should not be more mediation on fee disputes. Fiji legislation does provide for taxation of costs, but there are no committees and no schedule of costs prepared in the last 10 years. This is a clear case where the Fiji Law Society and the Regulator need to develop strategies to work together and ensure that overcharging is minimised.

There is also a definite need for regular training for new lawyers on how to avoid getting into conflict situations, how to perform one's duty towards their clients, with each other and how to conduct themselves before judges, magistrates and fellow practitioners. There should also be awareness programmes for clients on what information they are entitled to know from their lawyer.

In the last dozen years the profession has grown three times in size, there is presently a sizeable number of outstanding complaints to be dealt with, there are three law schools, young lawyers have restricted job prospects, serious cases of lawyer misconduct occurs regularly through ISLC process, the legal Practitioners Unit and the Fiji Law Society are not working together to deliver education and training on ethics and senior lawyers are leaving the profession due to overzealous regulatory practices driving up cost of business especially for sole practitioners. In addition, a lawyer found

guilty of disciplinary offence by ILSC is now ineligible for appointment to the High Office of Attorney General.¹⁰¹

On the positive side however, the legal profession is now regulated better with the setting up of ILSC. One hopes that unscrupulous lawyers will continue to be punished following due process and the profession will remain in a healthier state than what it was 10 years back. Ultimately the consumers of legal profession and the general public will be the rightful judges on whether the profession is heading in the right direction.

¹⁰¹ Section 96(2) (b) of the *Constitution of Fiji* 2013