DISCUSSION PAPER

REFORM OF COMPLAINT HANDLING
PROVIDING REDRESS FOR SERVICE DELIVERY COMPLAINTS

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WHAT ARE THE OBJECTIVES TO BE MET BY A SYSTEM HANDLING COMPLAINTS ABOUT LEGAL PRACTITIONERS?

- It must recognize and provide a response to the double layer of lawyers' responsibilities: both professional and business conduct. A lawyer serves not just an individual client, but also the collective client: the community and its interest in rule of law and proper administration of justice. Hence any complaint system must balance equally the needs of the individual and the collective consumer.

- It must respond holistically to the complaint. All complaints about legal professionals lie along a continuum between complaints about the lawyer as a business person or service provider (eg communication, delay, rudeness, competence) and complaints about the lawyer as a professional lawyer (eg conflicts of interest, following instructions). These overlap. At times poor service delivery should have professional repercussions, and professional conduct should have business repercussions. At others, they should not. The system must retain the flexibility to address complaints which fall at all points along the continuum or at multiple points.

- It must respond holistically to the individual complainant. The complaint system should reflect the complainant's experience of the problem, rather than require the problem to be reconstructed in a manner suited to the system. An individual complainant experiences the services of a lawyer, or a firm of lawyers, as one process and does not usually distinguish between professional conduct issues and service delivery issues. An appropriately responsive complaints system should enable all of a complainant's issues to be dealt with without duplication, repetition and without regard to what branch of the profession the practitioner practises in.

- It must respond to the needs of the collective consumer. The protective nature of professional discipline and complaint handling is integral to the maintenance of confidence in the rule of law and administration of justice.

The complaint system must facilitate the ready identification of issues of concern to the collective consumer, which may be longer term and wider in scope than the concerns of the individual consumer. Resolution and redress of individual consumer issues must not come at the expense of the protection of the collective consumer: i.e. mediating away concerns about behaviours which are unacceptable on a wider level and ultimately detrimental to the community, rule of law, administration of justice.

- It must be simple to access, and not require specialist skills or assistance. Addressing the needs of the collective consumer should not come at the expense of further distress and disadvantage to an individual consumer. Their access to redress needs also to be addressed at the same time. (see *OECD Recommendation on Consumer Dispute Resolution and Redress (2007)*)

WHAT ARE THE SHORTCOMINGS OF THE PRESENT SYSTEM?

- The balance between the interests of the individual consumer and those of the collective consumer is skewed too far towards the collective consumer. The present system is still too close to the model where only professional regulation issues were considered appropriate for investigation. Complaint handling bodies are still seen as principally disciplinary, with dispute resolution tacked on to address the "less significant" complaints which are not substantial enough to warrant a disciplinary outcome. The organizational cultural impacts of this approach can result in lower priority to purely service delivery issues and more dismissive attitudes toward them and their resolution.

- The present system does not meet consumer expectations, which are founded increasingly on experience of industry based schemes. This is particularly the case in relation to complaints about business conduct and poor service, where there is an expectation that the complaint handler will be able to direct an outcome which redresses the problem in cases where the service provider does not provide redress.

- There are no avenues of redress for aggrieved consumers. Compensation is only available in response to professional conduct issues, and then limited to monetary compensation. There is no power anywhere in the system to direct corrective action or compensation for poor service delivery.

- Although Australia is a member of the OECD, the present system does not meet OECD standards. The *OECD Recommendation of Consumer Dispute Resolution and Redress (2007)* requires tailored mechanisms which provide for both the resolution of disputes and redress for economic harm. The Recommendation notes that redress may involve restorative conduct (eg services, rescission of a contract) as well as monetary compensation. It states that "member countries should pay special attention to the ability to obtain or facilitate monetary redress for

consumers which is an important element of a comprehensive consumer protection enforcement framework".

WHY IS AN INDUSTRY OMBUDSMAN MODEL INAPPROPRIATE?

- The stakeholder analysis on which the industry ombudsman model is constructed is flawed when considered in relation to professions. The industry ombudsman model proceeds from the position that the principal stakeholders are the individual consumers and the service providers. (Many, including the UK – see below – even exclude non-clients and corporates from participating in the process). When dealing with a profession, the collective consumer is an equal stakeholder to the individual consumer.

- Law is not an industry like any other, but a profession which is also an industry. The comparison to industry regulation *simpliciter* is therefore inapt. The obligations of industry derive from contractual obligations between purchaser and supplier and commercial obligations between the directors, managers and shareholders of the supplying entity. All are private rights. A profession involves duties to the collective consumer: i.e. the society and its need for rule of law, and proper administration of justice.

- The obligations to the individual and the collective consumer are at times at odds. For example, at times the interest of the community in the rule of law will dictate that a practitioner cannot implement her client's instructions, or cannot advance the client's interests in the way sought. This overlay is absent from purely industry based schemes and will not be addressed by resolutions directed solely at individual transactions on a case by case basis.

- Industry models are designed to achieve outcomes for individual consumers in individual cases, and do not provide broad or general statements of principle. In fact, a major driver of outcomes in industry schemes is often the desire to confine the outcome to the instant case rather than risk a broad and more binding ruling that would affect others. This can have a negative social justice impact since the less articulate, less assertive, more disadvantaged consumers are less likely to use the system and therefore will not get redress. Only the individual cases of those who complain will be remedied (a much cheaper outcome than paying back everyone affected by a particular form of conduct). In relation to a profession, there needs to be a mechanism for providing broad and public statements, usually in the form of rules, and this is best achieved when those with responsibility for the rules and their implementation also have a direct connection to the complaints and consumers.

- Enforcement issues pose problems. Ultimately industry models are commercial in their basis and voluntary in participation. They work because there is an economic incentive for their members. However,

members are free not to join or to withdraw; and if the economic incentive is withdrawn they will do so. Once out of the scheme, there is no basis for pursuit of redress. Such a basis is not appropriate for a profession providing a core social service and with broader responsibilities. Sanctions for non-compliance need to be included and there cannot be any "opt out" provisions. There are no appropriate industry comparators here.

- Industry schemes are designed only to deal with service delivery issues, not with professional conduct issues. Hence proposals for this kind of structure invariably involve hiving off the latter to a separate expert body, meaning the individual complainant with a matter which involves more than simple service delivery concerns will need to deal with different agencies.

WHY IS SEPARATION OF PROFESSIONAL CONDUCT AND BUSINESS CONDUCT COMPLAINTS INAPPROPRIATE?

- The division into consumer and conduct issues is a false dichotomy, which is of more significance to the regulator than the consumer. The individual consumer merely experiences what they consider to be poor service and the collective consumer experiences the risk of, or actual, breakdown of important social systems. Neither perceives the distinction (so clear to regulators) until it is pointed out to them, usually by a complaint handling body in the process of moving some or all of the complaint elsewhere.

- In reality, many complaints involve both service delivery issues and professional conduct issues. They arise from the same factual matrices and are often intertwined. Such hybrid complaints are explicitly recognized in the *Legal Profession Act 2004* (see s 516). Under a "split" system they would have to be dealt with twice over, by different handlers and organizations.

- It is likely that such hybrid complaints will be handled clumsily with some aspects being less than thoroughly addressed – to detriment of both the individual and the collective consumer.

- Creating separate organizations will inevitably create separate organizational cultures. Organizational dynamics are likely to develop in which each sees its aspect of conduct as the most important, and the other as secondary (as presently, where professional conduct issues tend to be prioritized). The consumer however needs all aspects addressed.

- A consequence of this is likely to be that separate organizational structures will entrench cultural differences in approach. Complaint resolvers and conciliators will concentrate on these approaches and investigators on investigative responses. Many complaints require both sets of skills in order effectively and efficiently to address the issues raised.

- Even if there is a single gateway, consumers with hybrid complaints will find themselves dealing with different entities and processes about the same subject matter. The potential for duplicated effort on both sides, especially where complex factual matters are concerned, is clear as is the consequent potential for inconsistencies of approach and consumer dissatisfaction and frustration.

- The profession and legal practitioners are also stakeholders in the complaints process, and it must be remembered that many complaints are found to be without foundation. Even so, costs are incurred in dealing with them, which will inevitably be reflected in the market.

- Separation into different organizations risks leaving the identification and response to emerging issues of professional education and responsibility for professional development out of the equation.

FOREIGN COMPARATORS

England

- The Legal Complaints Service ("LCS") deals with complaints about poor service and or solicitors' bills. This includes negligence, even where proceedings are available (subject to discretion; see below).
- Non-financial remedies are available, including direction to take corrective steps within a timeframe (eg hand over file, complete probate).
- Bill reduction is available: there is no limit on the amount. Litigious matters require court assessment. Court assessment is available but not compulsory for other matters.
- Compensation is available for "distress and inconvenience" as well as monetary loss (called "financial effects"). The maximum amount is GBP 15,000. Compensation for monetary loss only is available to corporate complainants.
- A party dissatisfied with an outcome can refer the matter to the Legal Services Ombudsman for a review of the handling of complaint.
- Generally the LCS adjudicator's decision on complaints is final, but can be reconsidered on application to the LCS if "we think it was fundamentally wrong" (see www.legalcomplaints.org.uk).
- Large doses of discretionary powers are involved at all stages in the process, including whether to accept or investigate a complaint. This may cause difficulties in relation to consistency, comparability and transparency of process, especially in relation to bill reductions.
- THE LCS IS UNAVAILABLE FOR: complaints about barristers; complaints by other solicitors; complaints "where it would be more appropriate for you to take court proceedings" i.e. "where we would need to decide complicated issues of fact or law"; third party complainants; beneficiaries where the solicitor is not the executor. In summary, the complainant must generally be the client. Many significant categories of complainant in our system would not be able to access this service.

- Complaints which raise issues of compliance with professional rules are passed to Solicitors Regulation Authority ("SRA").
- The SRA takes reports from the LCS and from others.
- The SRA has coercive investigative powers, similar to those of OLSC.
- The SRA can impose minor disciplinary sanctions: advice; warnings; reprimand; severe reprimand. It can close practices or enter into agreements on regulatory matters (similar to ACCC enforceable undertakings?). It can also order a practitioner to pay the costs of investigation up to set amounts.
- An internal appeal is available, but not against decisions to order costs or to prosecute.
- The SRA prosecutes in the Solicitors Disciplinary Tribunal
- THE SRA PROCESS IS UNAVAILABLE FOR: unpaid experts or agents unless there is a judgement; non-payment of counsel's fees unless reported by Bar Council.

Scotland

- The Scottish Legal Complaints Commission ("SLCC") is effective from 1 October 2008.
- The SLCC is an independent body, funded through a levy on the legal profession.
- The SLCC is a single gateway for all complaints about solicitors. It deals with all "service complaints" relating to matters instructed after its commencement. Until 2010 the Law Society of Scotland (LSS) deals with service complaints instructed prior to commencement of the SLCC.
- As from commencement all conduct complaints are referred to the LSS for investigation.
- The LSS attempts resolution of service complaints and investigates if this is not possible. A report is prepared, by an external Reporter. If either party disagrees with the opinion, the matter proceeds to the LSS Client Relations Committee.
- Conduct complaints cannot be settled by agreement. The report goes to a Client Relations Committee and conduct issues are then considered by a Professional Conduct Committee unless the Client Relations Committee agrees that no further action is required.
- Outcomes for service complaints include: directed corrective action; full or partial fee reductions; compensation up to GBP 5000.
- Outcomes for conduct complaints include: referral to Tribunal, which can censure, fine or restrict, suspend or strike off a solicitor.
- THE SLCC IS UNAVAILABLE FOR: complainants not directly affected by the solicitor's action (i.e. access is broader than in the UK: opposing parties and affected third parties can complain).
- Solicitors can appeal sanctions to a Tribunal.
- The SLCC can review the LSS' handling of a complaint, including recommending reconsideration of a decision in whole or part and ordering the LSS to pay compensation to a complainant.

New Zealand

- Complaints are made to the Law Society of New Zealand ("NZLS") which is subject to oversight and review by the Legal Complaints Review Officer ("LCRO"), an officer of the Ministry of Justice.
- The NZLS complaints service sends complaints to Standards Committees for consideration, where an officer investigates and reports to the relevant committee.
- 18 Standards Committees operate at multiple locations in NZ.
- A Standards Committee can ask parties to resolve their dispute by negotiation, conciliation or mediation (using an external mediator). They can also determine to take no further action.
- The complaints service can inquire into a bill, which generally must be for more than $2000 and less than two years old.
- If a Standards Committee determines that a solicitor is guilty of unsatisfactory conduct, it has powers to order an apology; compensation up to $25,000 (for actual loss only); reduction or cancellation of fees; corrective action; a fine up $15,000; costs of the complaint; steps to improve the standard of the solicitor's practice.
- An appeal lies to the LCRO. There is a charge for application, and the costs of the review may be awarded to a party.
- Both the LCRO and Standards Committees can refer to the Disciplinary Tribunal. The Tribunal can make orders as above as well as orders to suspend or strike off a practitioner or place restrictions on practice.

Canada – British Columbia

- Complaints are made to the Law Society's Professional Conduct Department.
- Priority is given to protecting the public interest.
- After investigation, competency concerns are referred to the Practice Standards Committee, and ethical concerns or rule breaches to the Discipline Committee.
- The Practice Standards Committee may direct skills upgrades, provide guidance on practice etc.
- The Discipline Committee can decide on peer review or a formal hearing. A hearing may lead to a reprimand, fine, suspension or strike off.
- There is no power to: pay compensation; regulate the amount of a bill; make a finding of negligence.
- The LS also operates a Fee Mediation Program, which is used to resolve fee disputes. Participation is voluntary and the LS provides three hours' free mediator time. Thereafter mediation is at the cost of the parties.
- Fee Reviews are conducted by British Columbia Supreme Court Registrar. This is a formal process, similar to a hearing.

Canada – Upper Canada

- The Law Society deals with conduct matters.
- The Law Society's processes are unavailable for fee disputes (which must go to the Assessment Office of the Ontario Superior Court of Justice) and negligence complaints (in relation to which the complainant must sue).
- The LS funds an arm's length Discrimination and Harassment Counsel program which deals with resolution of such allegations.

- Most complaints are addressed by the LS without a formal disciplinary hearing.
- Review is available from the Office of the Complaints Resolution Commissioner for cases where the LS has decided to close a complaint file.
- Third party complaints may be accepted in some circumstances.

A DOMESTIC COMPARATOR
Health Care Complaints Commission (NSW)

- The HCCC handles complaints about individual health practitioners and health care organizations in NSW.
- The HCCC handles complaints which cover the field of health care provision. Its role derives from the nature of the service provided, not the professional status of the provider. Thus its coverage is broad, including doctors, acupuncturists and optometrists as well as organizations such as hospitals.
- After initial assessment, complaints which are not referred to other bodies or rejected are directed to investigative or dispute resolution streams.
- Dispute resolution centres on local resolution and negotiation or formal conciliation through the Health Conciliation Registry run by the HCCC. These are voluntary processes, and are used for matters where financial outcomes such as refunds are sought.
- The investigative stream may result in referral to tribunals or other disciplinary processes.
- Essentially, consumer complaints unrelated to professional conduct cannot lead to compulsory directions to provide redress.
- Outcomes from professional disciplinary actions do not include financial or other redress measures.

THE JURISPRUDENTIAL FOUNDATION FOR A CONSUMER REDRESS POWER

- As discussed above, the legal foundation for the imposition of directed redress in industry schemes is contractual. The parties subject to the directions agree to be bound by them in establishing the scheme and are therefore liable in contract. Withdrawal from the scheme, or indeed establishing another competitive alternative, is always an option.

- In order to ensure universal applicability and a single point of access for consumers, any such scheme in the legal profession would need to be compulsory. Protection of the interests of both the individual and collective consumer requires that opting out to avoid sanction not be available, and maximum consumer accessibility requires that there not be multiple bodies dealing with the same issues.

- A compulsory process however raises issues of the rule of law. There must be a clear legal foundation for the power to direct redress and proper

avenues of review. An administrative direction which causes financial or other cost to a party, and which is without review, is likely ultimately to be found to be unlawful.

- Given the need for reviewability, a process which does not fit easily within the present philosophy of the law and courts is likely to be read down, or otherwise altered on review. From a policy perspective this jeopardizes the achievement of the desired outcomes.

- Professor Dal Pont characterizes lawyers' duties and their principal sources as follows (see *Riley's Soilcitors Manual* paras 2000 ff; *Lawyers' Professional Responsibility* 3rd Edn pp 15ff):
    - Duties of performance, principally deriving from the retainer contract and from the tortious duty of care
    - Duties to account, originally derived from general law and equity but now principally codified and specified in statute
    - Duties of loyalty, principally derived from fiduciary law and equity (including the laws relating to confidentiality and privilege)
    - Duties in relation to costs, principally derived from statute
    - Duties imposed by general statutes not limited to lawyers, such as the *Trade Practices Act*

- The general approach of the common law world has been not to recognize a fiscal liability to a client for breach of a lawyer's professional duties where the breach is unrelated to tort or contract law. (See for example *Reader & Ors v. Molesworths Bright Clegg* [2007] All ER 107 per Smith LJ.) This is reflected in the dominant paradigm of professional regulation, where consumer issues are kept separate from professional conduct, and compulsory consumer redress is provided only in a limited fashion based in statute.

- In Australia, fiduciary duties have been traditionally regarded as duties of proscription rather than prescription and this view has been explicitly endorsed by the High Court (see *Breen v. Williams* 186 CLR 71 at 13 per Gaudron J and McHugh J, although this case deals with medical practitioners rather than lawyers). Attempting to ground an expansion of directed consumer remedies in fiduciary duties may therefore be expected to meet judicial resistance, with the possible exception of matters involving loyalty to clients.

- A duty of loyalty to clients, particularly former clients, has been recognized in Victoria (see for example *Spincode Pty Ltd v. Look Software Pty Ltd* (2001) 4 VR 501; *Village Roadshow Limited v. Blake Dawson Waldron* [2003] VSC 505) but has not been universally endorsed (see for example *Belan v. Casey* [2202] NSWSC 58 at 21; *AG Australia Holdings Ltd v. Burton* (2002) 58 NSWLR 464 at139).

- There is considerable precedent for statutory expansion and codification of extant areas of lawyers' liability and responsibility. Good illustrations are to be found in the extensive statutory provisions addressing costs and trust

issues. These both reflect the general law and expand it to meet changing community expectations.

- The fiduciary duties and the duties of loyalty which have been recognized of late are still firmly grounded in the relationship of solicitor and client, and hence have strong connection to the concept of the retainer. An expansion into consumer redress based on this area would therefore be problematic if it were to encompass redress to be provided to non-clients or opposing clients, as it is submitted that any comprehensive such system must do.

- The law of tort presents the most amenable jurisprudential basis for expansion. It is inherent in the tort of negligence that duties can be owed beyond the direct contractual or interpersonal relationship, which means that it would provide a philosophical basis for liability to non-clients. Further, statutory torts have been created in the past and have survived judicial scrutiny.

- Providing redress for consumer/business conduct issues will inevitably cross into the area of negligence. Many consumer complaints would be based on claimed errors.

- Consumer complaints usually raise issues of costs or competence or both. There is ample precedent for review of costs, and competence issues could be addressed differently based on whether the problem was considered to be a simple error or indicative of a more pervasive lack of skill. The former, for example, might be remedied by corrective action or a financial payment whereas the latter might require further study or guidance to the practitioner.

- Reviewability would still be an issue, and would of necessity raise the need for procedural fairness in the process. While discretion can be provided for, procedures will still need to meet the necessary standards. This is inherent in any process which is not voluntary.

- Consultation with insurers will be required, but it is arguable that such a process would be in their interest. Small level payments are likely to be within the excess on most policies, and the identification of practitioners with poor practices could be a helpful risk management tool.

OPTIONS FOR REFORM – SOME POSSIBLE MODELS

- There is an urgent need to establish systems which provide redress for individual consumers, regardless of the classification of their complaint for regulatory purposes. Poor service delivery and poor professional conduct alike must be capable of being redressed thorough a complaints mechanism. Such a mechanism must provide opportunities for redress for individual consumers regardless of whether, for regulatory purposes, the

impugned conduct raises professional or business conduct issues.

- Australia should comply with the OECD Recommendations, which include: "Member countries should work towards ensuring the consumer protection enforcement authorities have the ability to take action and obtain or facilitate redress for consumers, including monetary redress. Where appropriate, in seeking such remedies, consumer protection enforcement authorities may be assisted by other enforcement entities such as private consumer organizations."

- There should be a single entry point for handling complaints and the handling of all kinds of complaints should be kept together. Appropriate avenues for review should be provided. The extent to which separate management of issues of business or professional conduct is required should be a matter for the complaint handling body to recognize and address, while providing continuous contact for complainant.

- Cultural change is required more than structural change. Consumer and conduct issues should be seen as points along the spectrum of professional business activity which are of equal importance and sensitivity. An important consideration is the sequencing of resolution in hybrid complaints. A delay in. or the denial of, redress to an individual consumer during the investigation and or prosecution of professional conduct issues is a significant injustice and causes significant community ill-will.

Model 1 – Increase the compensation powers available under the present system

- An expanded range of compensation powers, including the power to direct corrective action and compel payment of fees to third parties (such as registration authorities or stamp duty offices) would provide more flexibility to regulators dealing with hybrid complaints.

- Such a reform would be comparatively simple to achieve, since it would require only amendment to already existing powers. The national model laws approach could be used to facilitate national consistency.

- Such a reform would also be comparatively simple to administer since it would not require major structural change to present regulatory bodies or significant change in approach or culture.

- This model would not provide true consumer redress since it would still anchor compensation powers to professional disciplinary findings. It would not address most service delivery issues.

- This model would not provide any stimulus to cultural or attitudinal change in those bodies dealing with consumer disputes, which would continue to be seen as less important than professional conduct issues. This is

unlikely to lead to increased consumer satisfaction with the process.

Model 2 – A national Industry Ombudsman model

- A national industry organization could be created to handle complaints, along the lines of industry ombudsman models.
- Such an organization could be industry funded, from fees charged to members.

- A national membership based body would be able readily to leverage its influence with the profession, and could be expected to assist in accelerating the development of national standards and the national profession.

- Such a body could be empowered to make findings in relation to service delivery issues which could include directions as to future conduct, remedial action and payment of compensation in the absence of an adverse professional conduct finding.

- If membership were to be optional, however, the model would not meet the needs of the collective consumer for protection from unsatisfactory practitioners and establishment of appropriate professional standards. Doubtful practitioners could simply withdraw from the scheme or refuse to recognize the penalties imposed (which might then lead to expulsion from the scheme). Neither of these outcomes would provide an enforceable means of consumer redresss.

- Compulsory membership would meet the needs of the collective consumer, but could be expected to encounter rule of law issues. Full natural justice principles would have to apply to any investigations, and there would need to be proper review mechanisms available. The costs of such mechanisms would need to be incorporated into the cost of membership, with the result that there may be unacceptable burdens placed on smaller members.

- Compulsory membership would also be expected to meet competition law issues. The body would effectively be a national version of the present professional bodies, compulsory membership of which is now considered to be anti-competitive.

- The risk of regulatory capture would be high. Such an approach would effectively be a return to full self-regulation. Even if non-lawyers were to be appointed to the relevant authorities, the organization itself being involved in their selection would create the perception, if not the reality, of biased selection of "friendly" individuals. Popular support would be unlikely.

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Model 3 – Amendment to existing legislation to include a power to make findings of, and provide redress for, negligence.

- Such a reform would easily fit within the present regulatory structure, requiring only amendment to the present powers of regulatory bodies. It could also easily be adapted to a national profession.

- Such a reform could be implemented comparatively quickly, and would not require major structural changes to regulatory bodies. A degree of cultural change would be required, to move from the "mere negligence" mindset.

- A consumer redress system could be developed based on the concept of small negligence claims, which are insufficient to sound in conduct, being addressed outside of the court system by regulators. The gross negligence likely to sound in professional discipline would be unlikely to fall within such a system, unless there is a very high, or no, monetary limit on the consumer redress mechanisms (which, it is submitted, would be unadvisable)

- Unless the right to resort to the courts were removed for claims falling within the regulatory jurisdiction, there would be risks of inconsistencies developing between the approaches taken by the regulators and the courts. There may also be risks of added costs to the profession, if the same conduct were able to be addressed in different fora, whether simultaneously or sequentially.

- Decisions about negligence made by regulators may have a wider impact on the law of negligence generally. This is likely to be of concern to insurers and stakeholders in other industries and would require further negotiations with a broader consultative base. This may delay any changes.

- In the absence of a national profession, the reform would need to be administered on a state by state basis, which leaves open the possibility of differences unless the provisions can be agreed to be core and uniform within the terms of the national model.

- The courts have traditionally dealt with negligence issues. There may well be judicial resistance to such a change. Further, given that the changes would need to be state based, it is possible that different courts might take different interpretations in reading down the statutory changes.

- The courts and tribunals which deal with professional conduct issues have strongly eschewed any responsibility for addressing questions of negligence. Even if there were to be no reading down of the statute, it may be that there is insufficient expertise in the tribunals to address the issue when brought on appeal.

- The tort of negligence as it presently stands would not encompass many of the aspects of poor service delivery which are the subject of complaint.

For example, a sustained course of poor conduct would not of itself breach a duty of care to an individual client. Rudeness and similar poor service would not lead to directly identifiable and quantifiable damages.

- Such a reform may be resisted by insurers, and would need to be negotiated carefully. It could however be seen as a risk reduction tool, as discussed above.

Model 4 – create a statutory duty of care to provide competent consumer service.

- Such a reform would easily fit within the present regulatory structure, requiring only amendment to the present powers of regulatory bodies. It could also easily be adapted to a national profession.

- In creating the statutory duty, the general law of negligence would remain unaltered and the rights of those outside the legal profession would be less likely to be affected. This would reduce the need for broader consultation and consequent delay.

- A statutory duty could also provide a statutory range of remedies, again without impacting significantly on the broader law of tort and the court system.

- The courts and tribunals which deal with professional conduct issues have strongly eschewed any responsibility for addressing questions of negligence. There may not be sufficient expertise in appeal bodies to deal with these issues, which may require further appointments or training.

- In the absence of a national profession, the reform would need to be administered on a state by state basis, which leaves open the possibility of differences unless the provisions can be agreed to be core and uniform within the terms of the national model.

RECOMMENDATION

- It is recommended that reform along the lines of Model 4 be pursued.

- Such a model would provide maximum flexibility to create a consumer redress system which is responsive to the specific needs of the consumers of legal services, both individual and collective. It would maximize the development of holistic responses to both complaint and complainant.

- This model would allow a single consumer gateway and would avoid the issues of regulatory capture and adverse public perception involved in a national membership body.

- The model would allow cultural change to be driven in regulatory bodies, to heighten focus on the need to redress consumer issues.

- The model would minimize unanticipated effects on other areas of law.

- The model could be amended to fit with any changes which may come about as the development of the national profession project advances.