



Government of Samoa

Samoa
Law Reform Commission
Komisi o le Toefuataiga o Tulafono a Samoa

LAW PRACTITIONERS ACT 1976
Report 05/11

June 2011



GOVERNMENT OF SAMOA
OFFICE OF THE PRIME MINISTER AND MINISTER FOR THE
SAMOA LAW REFORM COMMISSION

The Honourable Speaker

THE LEGISLATIVE ASSEMBLY OF SAMOA

In compliance with Section 9 (2) of the Samoa Law Reform Commission Act 2008, I have the honour of submitting to you copies of the Report 05/11 on the review of the Law Practitioners Act 1976, as referred to the Samoa Law Reform Commission for review.

This Report sets out recommendations for reform of the Law Practitioners Act 1976 after public consultations and research in accordance with section 4 of the Samoa Law Reform Commission Act 2008.

(Tuilaepa Fatialofa Lupesoliai Aiono Neioti Dr. Sailele Malielegaoi)

PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM
COMMISSION



GOVERNMENT OF SAMOA

Tuilaepa Fatialofa Lupesoliai Aiono Neioti Dr. Sailele Malielegaoi

PRIME MINISTER AND MINISTER FOR THE SAMOA LAW REFORM COMMISSION

In compliance with Section 9 (2) of the Samoa Law Reform Commission Act 2008, I have the honour of submitting to you copies of the Report 05/11 on the review of the Law Practitioners Act 1976, as referred to the Samoa Law Reform Commission for review.

This Report sets out recommendations for reform of the Law Practitioners Act 1976 after public consultations and research in accordance with section 4 of the Samoa Law Reform Commission Act 2008.

(Leota Theresa Potoi)

EXECUTIVE DIRECTOR

SAMOA LAW REFORM COMMISSION

Preface

The Law Practitioners Act (“LPA”) of Samoa was enacted in 1976 with the aim of regulating lawyers in the conduct of their legal duties. It is the first piece of legislation of its kind and the only amendment to the legislation was in relation to section 2(2) contained in the Offshore Banking Act 1988 No. 7 comprising the addition to the proviso to subsection (2).¹ However, the LPA is 35 years old and in need of reform. Other comparable jurisdictions have all enacted more modern legislation. This report suggests that Samoa do the same.

The legal profession is significant to the legal system of our country and in the maintenance of the Rule of Law. Professional standards must be maintained and the legal profession has a special duty collectively and individually. It is a duty which is profoundly moral and ethical as well as legal.²

This report sets out the Samoa Law Reform Commission’s recommendation for a new LPA. Proposed reforms include:

- 1) The use of terms “barrister” and “solicitor”;
- 2) The criteria for Commencement of Private Practice;
- 3) Requirement for the admission of practitioners to the bar;
- 4) New disciplinary procedures.

The Commission is grateful for the assistance of *Professor Paul Rishworth, Faculty of Law, University of Auckland* who provided comments on earlier drafts of this paper.

¹ The amendment refers to the expression ‘practise as a solicitor’ in drawing and preparing on behalf of any person any conveyance/deed relating to any real or personal property or tenancy agreement (s 2(2)).

² Law Society of Alberta, 2000, *The Self Regulation of the Legal Profession in Canada and in England and Wales*, Canadian Cataloging and Publication Data.p.i.

Table of Contents

<i>Preliminary Section</i>	9
1. Rules of Professional Conduct for Barristers and Solicitors of Samoa	9
2. Continuing Legal Education (CLE).....	10
3. Issuing Practising Certificates.....	11
4. Annual General Meeting.....	11
5. Incorporation of Law Firms	12
6. Parliamentarians to discontinue legal practice.....	12
7. Barrister and Solicitor- <i>Fused or Not?</i>	13
<i>Introduction</i>	13
<i>The Samoa Situation</i>	14
<i>Comparable Jurisdictions</i>	14
New Zealand.....	14
Queensland	14
Tonga	14
<i>Submissions</i>	15
<i>Commission's Views</i>	15
8. Admission of Practitioners.....	16
<i>Introduction</i>	16
<i>Current Law and Practice</i>	17
Samoa	17
Eligibility	17
Application	17
Admission	18
Roll of Practitioners	18
<i>Comparable Jurisdictions</i>	18
New Zealand.....	18
Queensland	19
<i>Submissions</i>	20
Upolu consultation.....	20
Savaii consultation.....	20
Private Law Firms (Tamati Law Firm and Drake Co).....	21

Samoa Law Society	21
<i>Commission's View</i>	22
Eligibility	22
Age limit	22
Citizenship and Residency	23
Good Character	23
Prescribed Qualifications	25
Temporary and Permanent Rolls	25
Reciprocal Admission.....	27
Oath of admission	27
9. Commencement of Private Practice.....	27
<i>Introduction</i>	27
The Samoa situation.....	27
Eligibility	27
<i>Comparable Jurisdictions</i>	28
New Zealand	28
Queensland	28
<i>Submissions</i>	29
<i>Residency</i>	30
<i>Commission's view</i>	30
10. Disciplining the Legal Profession.....	31
<i>Introduction</i>	31
<i>Current Law and Practice</i>	32
Responsible Body	32
Role of Council.....	32
Investigative powers	33
Conduct leading to disciplinary proceedings	33
Investigating and determining disciplinary disputes.....	34
Public nature of hearings	34
Sanctions.....	34
Role of Courts.....	35
<i>Comparable Jurisdictions</i>	35

Conduct leading to Disciplinary proceedings	35
Australia.....	35
New Zealand.....	37
Sanctions for minor charges	37
Australia.....	37
New Zealand.....	37
Sanctions for more serious charges.....	38
Australia.....	38
New Zealand.....	38
Public Nature of Hearings.....	39
New South Wales.....	39
New Zealand.....	39
<i>Discussions</i>	39
Body responsible for complaints handling and disciplinary proceedings.....	40
Independent complaints-handling services	40
Disciplinary courts and tribunals	41
Oversight.....	42
<i>Submissions</i>	43
<i>Commission's views</i>	44
Body responsible for complaints handling and disciplinary proceedings.....	44
Requiring the Council of the Law Society to establish a complaints service	45
A separate 'Disciplinary Committee'	45
Conduct leading to disciplinary proceedings	46
Investigating and determining disciplinary disputes.....	48
Ensuring complaints are investigated and heard.....	48
Time limits.....	49
Provision of information to complainants.....	50
Natural justice	51
Public nature of hearings	51
Provision of reasons.....	52
Interim suspensions.....	52
Sanctions.....	52

Maximum fine.....	52
Expanding the range of sanctions available.....	53
Appendices	56
List of recommendations	56

Preliminary Section

In the preliminary sections of the new LPA legislation, the Samoa Law Reform Commission (“Commission”) recommends to have in place the following provisions relating to the fundamental obligations of lawyers. These provisions should be contained in a ‘*Preamble section*’ or ‘*Purpose*’ of the new LPA legislation:

Recommendation 1: Every lawyer who provides regulatory services must, in the course of his or her practise, comply with the following fundamental obligations:

- a) the obligation to uphold the rule of law and to facilitate the administration of justice in Samoa;*
- b) the obligation to be independent in providing regulated services to his or her clients;*
- c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;*
- d) the obligation to protect, subject to his or her overriding duties as an officer of the court and to his or her duties under any enactment, the interest of his or her client.*

The above provisions are from section 4 of the Lawyers and Conveyancers Act 2006 (NZ).

General Matters

1. Rules of Professional Conduct for Barristers and Solicitors of Samoa

1.1 The Rules of Professional Conduct for Barristers and Solicitors of Samoa are not exhaustive and are used for regulating the conduct of the law profession and provides guidelines in the conduct or practice generally³. Such rules include:

- a) Independence of practitioners and conflicts of interest;*
- b) Conduct of practice generally;*
- c) Relationship with clients;*
- d) Distributing information about legal services;*
- e) Relationship between practitioners;*
- f) Relations with third parties;*
- g) Court proceedings and practice;*
- h) Advocate for prosecution and defense;*
- i) Practice of Barristers.*

³ Rules of Professional Conduct for Barristers and Solicitors of Samoa: Chapter 2

- 1.2 The above provisions are not adequately addressed in the LPA. Some of the law society members submitted that the Rules be incorporated into the new legislation to strengthen its effect. On the other hand, one of the private law firms submitted to have the Rules under a Regulation or perhaps a simple provision allowing the Rules to be adopted after a 2/3 majority in a special meeting of the Law Society.
- 1.3 The submissions from the majority of members of the Law Society proposed to incorporate the current Rules of Professional Conduct for Barristers and Solicitors of Samoa into the new legislation where relevant.

Recommendation 2: The Rules should form part of the new LPA in accordance with section 14 of the LPA. Powers and duties of the Law Society extend to making rules regulating the officers of the Society and the conduct of its members. These rules shall bind all members of the Law Society and all other persons to whom under the LPA such rules may be applied. Therefore, the Commission recommends a simple provision in the LPA allowing the Rules to be adopted after a 2/3 majority in a special meeting of the Law Society.

2. Continuing Legal Education (CLE)

- 2.1 Continuing Legal Education (CLE) is a professional education of lawyers that takes place after their initial admission to the bar. This form of training educates lawyers on the developments of the law over the years and changes in the law. In Samoa, CLE is held every two years and organized by a CLE Committee made up of law society members selected by the Council of the Law Society. The CLE Committee is committed to the establishment in the next two years of set programs and trainings that will provide a permanent basis for education to be part of the members activities held within a year. The establishment of set programs will also assist the CLE Committee in its search and securing of funds for these trainings.
- 2.2 Given the importance of CLE to members of the Law Society, the CLE Committee submitted to incorporate in the new legislation a provision which relates to the need for members of the Law Society to have regular trainings within a year on any subject that will assist in the development and advancement of the knowledge of its members in any law or changes in the law in Samoa. Reference can be made to Part 8 of the *NZ Lawyers and Conveyancers Act 2006* of New Zealand which establishes the Council for Legal Education and its relevant functions.

Recommendation 3: Incorporate into the new LPA a provision which empowers the Law Society to have regular CLE trainings within a year on any subject that will assist in the development and advancement of the knowledge of its members in any law or changes in the law

in Samoa. CLE trainings should be made mandatory in the new legislation as a capacity building programme for lawyers. (Refer to Part 8 of the *NZ Lawyers and Conveyancers Act 2006* for guidance).

3. Issuing Practising Certificates

3.1 The Secretary of the Law Society submitted to amend section 31 of the LPA and replace ‘Registrar’ with the ‘Secretary of the Law Society’ to issue annual practising certificates. The reason behind this proposal is the unnecessary costs incurred by the Law Society for annual practising certificates for its members. This key function should be left to the Law Society to administer as it is a self-regulatory profession established by statute. However, the role of the Registrar in maintaining the rolls of practitioners should be maintained.

Recommendation 4: Section 31 of the LPA should be amended to have the Secretary of the Law Society issue annual practising certificates. Other roles of the Registrar in the LPA should be maintained.

4. Annual General Meeting

4.1 Section 15 of the LPA provides that the Law Society shall in every calendar year hold an annual general meeting to elect officers of the Law Society. The issue in question is the quorum needed to hold an annual general meeting. The current law (s 15 (6)) states that no less than 40 percent of the members of the Law Society personally present shall constitute a quorum. The Secretary of the Law Society submitted to reduce the quorum to 30 percent given occasions where annual general meetings have been postponed a number of times because the 40 percent quorum required by the Act has been unreachable. This issue also has cost implications on the Council of the Law Society in terms of preparation costs in hosting annual general meetings.

4.2 There were also submissions to amend the status of the Attorney General as an ex-officio member, to a voting member of the Law Society, pursuant to section 15(8). In practice, the Attorney General is regarded as an ex-officio member but this is not reflected in the LPA. Hence, the new legislation should state that the Attorney General is an ex-officio member of the Council. As head of the Samoan bar, the Commission sees no reason why the AG should not have voting rights.

Recommendation 5: Section 15(6) should be amended to reduce the quorum to 30 percent of paying permanent members. In the event that the quorum is not met and meeting is again adjourned, members present at the adjourned meeting should suffice for meeting to proceed.

Recommendation 6: The new legislation should specifically state that the Attorney General is an ex-officio member of the Council. The Attorney General as head of the Samoan Bar should be a voting member of the Law Society at annual general meetings pursuant to section 15(8) of the LPA.

5. Incorporation of Law Firms

5.1 This is also an important issue to be considered in this report given trends in jurisdictions such as New Zealand and Australia. In the *Legal Profession Act 2007* of Queensland, law practices or law firms have been permitted to incorporate, with eligible requirements (ss 111 and 113). In New Zealand, the concept of law firm incorporation was introduced with the *Lawyers and Conveyancers Act 2006* (ss 15 and 16). The NZ Act specifies conditions of an incorporated law firm, one which provides that incorporating a law firm protects the directors and the shareholders from personal liability for debts of the incorporated law firm (s 17(1). However, lawyer directors and shareholders will be liable for any theft that may occur (s 18). Misconduct and unsatisfactory conduct also applies to incorporated law firms in the same way as to other lawyers.

5.2 The Commission realizes the importance of such provisions to be incorporated into the new legislation. The current law in Samoa is the *Companies Act 2001* which requires all applications for incorporations to be made to the Registrar of Companies. The issue is whether the new legislation should address a specific provision relating to the incorporation of law firms. The Commission is of the view that incorporation should be open to all lawyers. In the interest of members who wish to incorporate as private law firms, such an issue should be addressed in the new legislation. Reference should be made to legislation in New Zealand and Queensland.

Recommendation 7: Incorporation of law firms should be open to all lawyers. Given trends in New Zealand and Queensland, such a provision should be addressed in the new legislation.

6. Parliamentarians to discontinue legal practice

6.1 One of the important issues arising from the 2011 elections in Samoa is the status of those parliamentarians who practise law. The Commission is of the view that conflict of interest is of utmost importance in the legal profession as provided in the Rules. Once a lawyer becomes a member of Parliament, he or she then becomes part of the law making arm of Government responsible for passing laws as well as the Executive arm if he or she is a Minister or Associate Minister. In the Commission's view, this affects their independence as officers of the Court and may also invoke issues of conflict of interest.

6.2 As officers of the court, the paramount duty of any lawyer regardless of status is to the court. The court has a right and a duty to supervise the conduct of its solicitors. Any lawyer must be committed and honest to his or her calling and must not jeopardize the integrity of the legal profession by serving two masters at the same time. It is then recommended that the lawyer must not continue to practise once he or she becomes a Minister or Associate Minister. This recommendation should also apply to lawyers who become Head of State or Council of Deputies.

Recommendation 8: Lawyers who become Ministers or Associate Ministers, or holds prominent positions such as the Head of State or Council of Deputies must not continue to practise given that as officers of the court, there may be potential conflict of interest with the Executive arm and legislative arm of government.

7. Barrister and Solicitor- *Fused or Not?*

Introduction

7.1 Since its beginning, Samoa has had a fused legal profession- meaning that all lawyers are admitted to the Bar and hence qualified to practise as barristers or solicitors, or both. This is in contrast to the United Kingdom (“UK”), where historically the profession has been divided into barristers, on one hand, and solicitors on the other. Barristers had, until recent reforms, exclusive rights of audience in the superior courts. They must be instructed by solicitors, and cannot receive instructions from members of the public directly. In having a fused profession, Samoa has followed NZ and is in line also with Tonga and other Australian states such as Queensland.

7.2 This chapter will address the following issues:

- a) Should the terms barrister and solicitor be retained given the fused profession, or should the generic term ‘lawyer’ or ‘legal practitioner’ be used?
- b) Barrister sole;

7.3 Submissions were received from members of the Law Society of Samoa on this topic.

7.4 This chapter will also discuss similar provisions from comparable jurisdictions namely New Zealand, Queensland, Tonga and Solomon Islands to find feasible options. This will assist the Commission in formulating its views and recommendations.

The Samoa Situation

7.5 A person is qualified to be admitted as a ‘barrister *or* solicitor’ or as a ‘barrister *and* solicitor’ of the Supreme Court of Samoa.⁴

7.6 In relation to the practice of law, no person may practise as a barrister or solicitor unless he or she is a barrister and a solicitor of the Supreme Court and holds a practising certificate.

7.7 The Rules of Professional Conduct for Barrister and Solicitor of Samoa 2004⁵ (“Rules”) makes reference to a barrister sole. This is a person who has been admitted as a barrister or solicitor or both, but has been briefed to act as a barrister by a practitioner not in his or her own firm or employment.⁶

7.8 The LPA does not define a ‘barrister’ and a ‘solicitor’ but uses the term ‘practitioner’ to refer to both.

Comparable Jurisdictions

New Zealand

7.9 A person admitted in the High Court of New Zealand must be admitted as a ‘*barrister and solicitor*’. The legislation defines the term ‘lawyer’ as a person who holds a current certificate as a ‘barrister’ or as a ‘barrister and solicitor’. In admission, a person must be admitted as both a barrister and a solicitor. In legal practice, he or she may hold a practising certificate as a barrister sole or as both barrister and solicitor.

Queensland

7.10 The terms ‘barrister’ and ‘solicitor’ are no longer used in the legislation. Currently, the terms ‘lawyer’ and ‘legal practitioner’ are used to refer to barristers and solicitors. A lawyer is defined as a person admitted to the legal profession. A legal practitioner is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.

Tonga

7.11 The terms ‘law practitioner’ is widely used in the legislation.⁷ A person is a law practitioner in Tonga if his or her name is on the Roll of Law Practitioners and he or she has

⁴ Law Practitioners Act 1976 (Samoa) section 19

⁵ The Rules was endorsed by the Law Society in 2004 pursuant to section 14(3) of the LPA. The Rules bind all members of the Society and are intended to regulate the conduct of all law practitioners.

⁶ Rules of Professional Conduct for Barristers and Solicitors of Samoa: Chapter (10.1 & 10.2)

⁷ Tonga Law Practitioners Act 1989 s.2.

in force a valid practising certificate. A person must also be admitted and holds a practising certificate.

Submissions

7.12 Submissions were received from the stakeholders particularly the Samoa Law Society (“SLS”) and private law firms. Tamati Law Firm expressed the view to use the term ‘lawyer’ as it is the term widely used by the public. Also, this law firm submitted to clarify ‘practising lawyer’ and a ‘non practising lawyer’. Tamati further proposed to use either ‘lawyer’ or ‘legal practitioner’. Mata Tuatagaloa of Brunt Keli (before her elevation to the bench) also supports the use of term ‘lawyer’ instead of ‘legal practitioner’ as this may be taken or viewed differently by other jurisdictions which clearly differentiate between a ‘lawyer’ and ‘legal practitioner’. However, she further submitted that should the terms ‘barrister’ and ‘solicitor’ be maintained, then there is a need to clearly define the difference between the two.

7.13 Drake &Co Law Firm expressed the view to maintain the distinction between a solicitor and a barrister. However, in the event that someone wishes to practise solely as a barrister, then the new legislation should address this so that it can be kept distinct from those people who practise as both barrister and solicitor.

Commission’s Views

Should the terms barrister and solicitor be retained given the fused profession, or should the generic term ‘lawyer’ or ‘legal practitioner’ be used?

7.14 A fused profession refers to jurisdiction where the legal profession is not divided between barristers and solicitors and any lawyer can practise as one or the other. A ‘fused’ profession discards any distinction between the role of barristers and solicitors i.e. barristers and solicitors can both appear in court.⁸ These terms are used widely in Commonwealth countries which include Samoa and New Zealand.

7.15 A ‘divided’ profession strictly differentiates the role of barristers and solicitors, as in the case of England. Theoretically, barristers are advocates and specialists in various fields of law, and solicitors are lawyers who deal with clients directly employing barristers for advice and advocacy in higher courts.⁹

7.16 For many years, this ‘divided’ profession was positively viewed as maintaining independence and specialty on the roles of barristers and solicitors. However, this perception

⁸ Ibid at n6

⁹ Ibid at n6

has changed over the years and many jurisdictions have moved towards a ‘fused’ profession where there is no restriction. In other words, lawyers must be free to practise as both barristers and solicitors without unnecessary restrictions to maintain liberty under the law.¹⁰

7.17 The Commission is of the view to maintain a fused profession in Samoa in which all lawyers are admitted to the bar as barristers and solicitors.

7.18 A lawyer’s choice to practise without any unnecessary restrictions includes practising as a ‘barrister sole’. There have been cases in Samoa where a lawyer has opted to practise as a ‘barrister sole’ pursuant to the Rules. The new legislation should provide for those who wish to practise only as barristers to do so under the Rules governing ‘barrister sole’.

7.19 The term ‘practitioner’ is generally used in the LPA to refer to barristers and solicitors in Samoa. The term ‘lawyer’ was proposed to be used by two private law firms. The Commission is of the view to maintain the terminology ‘barrister’ and ‘solicitor’ and refer to barrister and solicitor generically as ‘lawyers’. This is defining lawyer as a person admitted as a barrister and solicitor in the Supreme Court.

Recommendation 9: Maintain a fused profession in which all lawyers are admitted to the bar as barristers and solicitors.

Recommendation 10: There is no need to define the distinction between ‘barristers’ and ‘solicitors’ as any lawyer can practise as both in a ‘fused’ profession.

Recommendation 11: The new legislation should provide for those who wish to practise only as barristers to do so only under the Rules governing ‘barrister sole’.

Recommendation 12: Maintain terminology ‘barrister’ and ‘solicitor’ and refer to barrister and solicitor generically as ‘lawyers’. The definition of a ‘lawyer’ should remain as barrister and solicitors of the Supreme Court.

8. Admission of Practitioners

Introduction

8.1 This chapter looks at issues such as eligibility requirements for admission of lawyers in Samoa. It will also look at jurisdictions in the region with similar legislation for clarity on some of the contentious issues associated with admission of lawyers. These contentious issues include the appropriate age of admission, prescribed qualifications, proposed reforms

¹⁰ Ibid at n6

concerning the approval of applications for admission by the relevant body and a suitable approach towards admission of overseas lawyers.

8.2 This chapter integrates all submissions from the relevant stakeholders and the public with whom the Commission has consulted regarding the above issues. These submissions together with the Commission's independent research have assisted in formulating independent views and recommendations on a way forward in this area.

Current Law and Practice

Samoa

Eligibility

8.3 A person is qualified for admission as a barrister or as a solicitor, or as a barrister and solicitor, of the Supreme Court of Samoa if he or she:¹¹

- a) Is a citizen of Samoa;
- b) Has attained the age of 21 years;
- c) Is of good character; and
- d) Holds the prescribed qualifications.

8.4 With reference to subsection (d) above, 'prescribed qualifications' are prescribed from time to time by the Council and are published in the Gazette.¹² The following qualifications are recognized by the Council for the purpose of admission:¹³

- a) An academic qualification in law; or
- b) A professional qualification in law; or
- c) An academic and professional qualification in law in any country or territory which in the opinion of the Council has a legal system similar to that of Samoa.

Application

8.5 Application for admission shall be made by the applicant to the Supreme Court in the manner prescribed by rules of Court, or, if there are no such rules, then in such manner as the Supreme Court may direct.¹⁴ A certificate issued by the Council and signed by the secretary, that the applicant is of good character and holds the prescribed qualification, shall be sufficient evidence that the applicant has the qualifications prescribed above.¹⁵ An admission fee is imposed on applicants for admission. Fees are prescribed by the Law Society.

¹¹ *Law Practitioners Act 1976* (Samoa) section 19

¹² Section 4(1) of the *Act Interpretation Act 1974* (Samoa) defines *Gazette* and *Samoa Gazette* as Gazette published by or under the authority of the Government of Samoa and shall include any publication of the Savali. A reference to the Gazette includes a reference to the Savali. (also refer to section 4 (2))

¹³ *ibid* at n16, section 19(3)

¹⁴ *ibid* at n16, section 20(1)

¹⁵ *ibid* at n16, section 20(2)

Admission

8.6 The Supreme Court shall make an order admitting the applicant as a barrister or as a solicitor, or as a barrister and solicitor, upon satisfaction that the applicant is qualified in accordance with the above legal requirements.¹⁶ Pursuant to **Recommendation 9**, applicants should be admitted as a barrister and solicitor given the historical nature and trends in comparable jurisdictions.

8.7 There are provisions for temporary admission. Temporary admission is granted to a non-citizen if the Supreme Court is satisfied that the applicant meets the legal requirements above.¹⁷ The applicant shall practise for such period not exceeding 3 years at a time as the Court shall specify in the order. On the other hand, no person shall be temporarily admitted for any periods exceeding in the aggregate 6 years.

8.8 In the event that the application is refused by the Supreme Court, further applications of the same are restricted for such period not exceeding 2 years.

8.9 Once a person is admitted upon order of the Supreme Court, he or she shall take an oath of admission.¹⁸ In practice, a practising certificate is issued by the Registrar of the Supreme Court. This is issued upon satisfaction of the Registrar that the lawyer has paid to the Law Society that practising fee, which is to be paid annually by the lawyer in order to practise.¹⁹ The practising certificate expires on the 31st day of December in the year in which it is issued.

Roll of Practitioners

8.10 Once a person is admitted in the Supreme Court, his or her name shall be enrolled onto the rolls of practitioners.²⁰ The Registrar maintains the roll of practitioners and is responsible for entering the name of the admitted practitioners onto the appropriate roll. There is a roll for permanent practitioners and a roll for temporary practitioners.²¹

Comparable Jurisdictions

New Zealand

8.11 Every person admitted by the High Court under the *New Zealand Lawyers and Conveyancers Act 2006* must be admitted as a barrister and solicitor; and no person may be admitted as a barrister or solicitor only.

¹⁶ Ibid at n16, section 21

¹⁷ *Law Practitioners Act 1976* (Samoa) section 22

¹⁸ *Law Practitioners Act 1976* (Samoa)

¹⁹ Ibid at n22, section 31

²⁰ Ibid at n22, section 8

²¹ Ibid at n22, section 8

8.12 A person is qualified to be admitted as a barrister and solicitor in the High Court of NZ if he or she is in at least one of the categories in this section. The first category is a person who:

- a) has all the qualifications for admission prescribed or required by the NZ Council of Legal Education;*
- b) is a fit and proper person to be admitted as a barrister and solicitor of the High Court; and*
- c) meets the criteria prescribed by rules made under section 54.²²*

8.13 The second category is a person who:

- a) has been admitted as a barrister, solicitor, barrister and solicitor, advocate, or an attorney by the superior court of any other country;*
- b) has all the qualifications prescribed or required by the NZ Council of Legal Education in consultation with the Council of the NZ Law Society;*
- c) is a fit and proper person to be admitted and that he or she does not have any criminal record; and*
- d) meets the criteria prescribed by rules provided in section 54.²³*

8.14 Once the applicant satisfies the Council of the above legal requirements, the Executive Director of NZ Law Society or any authorized person issues a certificate to the applicant declaring that the applicant is both a fit and proper person to be admitted as a barrister and solicitor of the High Court. Consequently, the High Court shall make an order admitting the applicant as a barrister and solicitor of the High Court. An oath of admission is also required to be taken by the applicant.

8.15 There are no provisions for temporary admission. However, reciprocal admission is provided whereby the Governor General of NZ may order the admission of a practitioner from another country if he or she has the documents verifying that the applicant has been admitted in a superior court of that country, which recognizes that the applicant possesses proper and relevant qualifications.²⁴

Queensland

8.16 A person is eligible for admission as a local lawyer if he or she has:²⁵

²² *Lawyers and Conveyancers Act 2006* (NZ) section 54 (Rules of Court as to admission)

²³ *Ibid* at n25, section 54

²⁴ *Lawyers and Conveyancers Act 2006* (NZ)

²⁵ *Legal Profession Act 2007* (Queensland) section 30

- a) attained 18 years of age or more and is a natural person;*
- b) attained approved academic qualifications or corresponding academic qualifications; and*
- c) satisfactorily completed approved practical legal training requirements or corresponding practical legal training requirements.*

8.17 The Queensland Legal Profession Act 2007 requires that a person suitable for admission must be a fit and proper person.

8.18 Once the above requirements are satisfied, the applicant may apply for admission to the Supreme Court of Queensland.²⁶ The Supreme Court, having considered the application and is of the opinion that the applicant is a fit and proper person, may make an order of admission to the legal profession. The Supreme Court is assisted by the Legal Practitioners Admissions Board, which issues recommendations of eligibility and suitability of applicants in the form of a certificate of compliance.²⁷

Submissions

8.19 There were submissions from the public, both in Upolu and Savaii, regarding issues associated with admission requirements. The public mainly expressed concerns about the suitability of an overseas lawyer to commence private practice in Samoa.

Upolu consultation

8.20 The public supports the idea that Samoan overseas lawyers should be eligible to practise in Samoa. This is their right as Samoans living overseas to provide legal assistance to the people of Samoa. The public also expressed the view that it is everyone's constitutional right to hire any lawyer they want, including a Samoan overseas lawyer or a relative who is a lawyer to represent them in court.

8.21 However, there was also skepticism regarding the opening up of opportunities for overseas lawyers to practise in Samoa given past client's grievances with overseas lawyers. Some submitted that overseas lawyers should not be allowed to practise in Samoa as there are already enough local lawyers to provide legal services in Samoa.

Savaii consultation

8.22 There were strong views against overseas lawyers practising in Samoa mainly due to dissatisfaction of local clients, as discussed in the Upolu consultation. The local client may be at risk if the court case is to be heard on a particular day when the overseas lawyer is not

²⁶ Ibid at n28, section 34

²⁷ Ibid at n28, section 35

in the country. There are also cost implications of hiring an overseas lawyer. Another concern raised was the lack of understanding of overseas lawyers of local culture and traditions. This is a crucial element of legal practice in Samoa as it involves a relationship with the community. On the other hand, a few people during this consultation expressed the view to allow only Samoan lawyers overseas to practise in Samoa. However, these Samoan lawyers overseas should pay annual practising fees to the Samoa Law Society.

Private Law Firms (Tamati Law Firm and Drake Co)

8.23 One of the issues raised in the Issues Paper is whether Samoa should have a reciprocity system whereby foreign lawyers can be admitted in Samoa given that local lawyers can also be admitted in that foreign country.

8.24 The private law firms expressed the view that a reciprocity system is risky and could result in a multitude of applications from all sorts of countries that have legal systems which are different from Samoa. Samoa is a small jurisdiction and such arrangements would favor large multi-national law firms. The basis for admission in Samoa should always be the need to reside in Samoa and practise.

8.25 With regards to eligibility for admission, the private law firms' support maintaining the current age of admission (21 years of age) as maturity is an essential factor. Any person as young as 18 years of age could be undermined by members of the public.

8.26 One of the private law firms submitted to remove the distinction between temporary and permanent rolls; however a local roll and a foreign roll are preferred to be in place. The other private law firm expressed the view that the current rolls should be maintained; however, the permanent roll should be for resident citizens of Samoa who wish to practise in Samoa, and the temporary roll should cater for non-Samoan citizens.

8.27 The temporary roll for non-Samoan citizens should be restricted to short term residents who are on a contractual arrangement in Samoa. For instance, secondment to the Attorney General's Office. Time frame for temporary admission should be aligned to counsel's contracts. One of the private law firms raised the possibility of an 'ad hoc' Roll, where overseas counsels are allowed 'ad hoc' admission. This is restricted only for a case or matter in which that counsel is involved. Such admissions are based on necessity, not citizenship.

Samoa Law Society

8.28 The Samoa Law Society expressed the view that a 'residency requirement' is essential in order to practise and be admitted to the permanent roll in Samoa. This requirement also applies to solicitors residing overseas who wish to practise in Samoa.

8.29 With regards to the permanent roll, the Law Society submitted that this roll should be reserved for those members who are citizens and who reside in Samoa. Lawyers who are not citizens can be enrolled under the temporary roll. However, if the non-citizen does not reside in Samoa but wishes to practise, he or she can also be enrolled under the temporary roll, or on an ad hoc basis, in line with overseas counsel who appear and practise on a case by case basis. In relation to the issue of 6 years on temporary roll, the Law Society submitted that a better way to control is to prescribe the type of legal work that those on the temporary roll can and cannot perform.

8.30 An important issue raised by the Secretary of the Law Society relates to the admission requirements of applicants applying for admission. The current practice is that the Council of the Law Society must be fully satisfied of the person's application in order to approve admission. In doing so, affidavits and supporting documentations are to be provided by the applicant for the Council's approval. The concern here is the credibility of those providing character references. The Secretary submitted that the lawyers providing character references must be older than the applicant and have known the applicant for at least 5 years. Further to admission requirements, the Secretary submitted to put an advertisement in a newspaper calling for submissions on the applicant's character prior to admission. The duration of such advertisement should be for 7 days.

Commission's View

Eligibility

8.31 The eligibility requirements for admission in any profession or occupation ensure that the people admitted are competent.²⁸ In the legal profession itself, requirements for admission to the bar differ depending on the country. In the comparable jurisdictions above, the practice is that applicants for admission must firstly meet prescribed educational requirements and secondly, establish that they are of good character.

Age limit

8.32 The Commission is of the view that the age of 21 years should remain the benchmark for admission. Setting the age of admission at 21 years reflects the level of maturity that such a person would need to face the work and challenges of the legal profession. There may be constitutional challenges in setting an age restriction for admission hence the Council of the Law Society must be fully satisfied after thorough examination of the application that an applicant is eligible and proves to be qualified for admission as a barrister and solicitor in Samoa.

Recommendation 13: The age of admission of 21 years of age should be maintained.

²⁸ Disney J, Basten J, Redmond P & Ross S, (1977) 'Lawyers' The Law Book Company Limited, Sydney.

Citizenship and Residency

8.33 The issue of ‘citizenship’ has always been a controversial subject in the context of legal practice. There have been strong views expressed by stakeholders to impose a ‘residency requirement’ for overseas lawyers willing to practise in the country. The Commission is of the view that ‘*residency*’ should remain an essential admission requirement, as far as the permanent roll is concerned. Should an overseas lawyer wish to practise in Samoa, he or she must reside in Samoa for a continuous period of time (‘continuous residence’) which the Council of the Law Society deems sufficient. There should not be an automatic system of admission on the grounds that a lawyer is of Samoan descent. The overseas lawyer must have ‘*adequate knowledge of the Samoan law and practice*’ in order to practise in Samoa.

8.34 For all overseas lawyers who wish to be admitted to the legal profession in Samoa, the test should be that:

‘the system of jurisprudence administered in the overseas jurisdiction is equivalent to, or in the opinion of the Council of the Law Society is substantially equivalent to the system of jurisprudence administered in Samoa...’.

8.35 The requirement of ‘residency’ should be imposed on overseas lawyers wishing to practise in Samoa. They must have ‘*adequate knowledge of Samoan law and practice*’. This can be done by sitting an exam or undertaking a workshop/training on Samoan laws and customs. Legal experience from other jurisdictions may be considered by the Council of the Law Society in determining whether the overseas lawyer should be admitted into the legal profession in Samoa.

Recommendation 14: A ‘*residency requirement*’ should be imposed on all overseas lawyers who wish to be admitted and set up private practice in Samoa. They must continuously reside in Samoa for such a period as the Council of the Law Society deems adequate. For overseas lawyers, they must have, in addition to the current requirements, ‘*adequate knowledge of Samoan laws and practice*’ to be admitted in Samoa. This can be done firstly by sitting an exam or undertaking a workshop/training on Samoan laws and customs.

Good Character

8.36 Admission as a barrister or solicitor, or both, places a person in a privileged position in the community. A lawyer receives both money and confidences from clients and thereby places him or her in a position of trust.²⁹ In any jurisdiction, the State requires high standards of qualification, such as good moral character or proficiency in its laws, before it admits an applicant to the bar.³⁰ However, any qualification must have a rational connection with the

²⁹ Ibid at n20

³⁰ Disney J, Basten J, Redmond P & Ross S, (1977) ‘*Lawyers*’ The Law Book Company Limited, Sydney.

applicant's fitness or capacity to practise law. In NZ and Australia, the admitting bodies are empowered to admit 'fit and proper' persons or persons of 'good fame and character'. Two approaches are adopted in an attempt to ensure that only persons likely to comply with the trust reposed in them are admitted to the profession:-³¹

- 1) all law students undertake a course of legal ethics which is expected to make them aware of their duties to their future clients and the legal system; and*
- 2) they must satisfy their admission board/body that they are of good character.*

8.37 In Samoa, an applicant must be of good character for admission into the legal profession. In practice, an application is examined by the Council of Law Society to determine 'good character'. The Council also conducts inquiry (only if necessary) if it finds an issue with the application. This is good practice and the Commission is of the view that it should be reflected in the new legislation that an applicant must satisfy the Council that they are of good character. In relation to the advertisement requirement raised by the Secretary of the Law Society in paragraph 8.30, the Commission is of the view that such practice may be of little use in Samoa given the size of its legal profession. This practice may discourage people from applying for admission or worse may provide an opportunity for some to cause unnecessary discomfiture.

8.38 There are a number of methods open to admission boards/bodies which would allow them to satisfy themselves of an applicant's good character. For instance, an interview with the applicant as a routine part of the admission process, if an interview is desirable. In practice, an interview is conducted when the Council, after thorough inquiry, suspects that an applicant is not of good repute and character. Alternatively, an applicant should make a personal declaration of his or her good repute. A lawyer who has been admitted in one or more jurisdictions is also required to make a personal declaration verifying that he or she is of good repute. The failure to make full disclosure of such personal declaration should be treated seriously.

Recommendation 15: A more stringent approach should be adopted by the Council of the Law Society in examining an application for admission. For instance, the current provision requiring an interview as a routine part of the admission process should be strengthened to ensure credibility and reliability of members of the legal profession. In addition, some form of personal declaration must be made by the applicant verifying that he or she of good repute. This also should apply to all applicants applying for admission.

³¹ Ibid at n22, page 146

Recommendation 16: There should be a provision that holds a lawyer liable to disciplinary actions if he or she fails to make full disclosure of any information that may affect the outcome of his or her application. In the event the lawyer has failed to disclose any relevant information, his or her admission shall be void.

Recommendation 17: In providing character references, lawyers providing it must be of good repute with practicing experience of more than 5 years and have known the applicant for at least 3 years. This is subject to flexibility in the event the applicant cannot find a lawyer character referee who does not meet the above requirements. The Commission notes that the LPA does not restrict character referees to lawyers only.

Prescribed Qualifications

8.39 The Commission is of the view that the academic stage should provide the student with the following essential requirements: a basic knowledge of the law and where to find it; an understanding of the relationship of law to the social and economic environment in which it operates; and the ability to handle facts and to apply abstract concepts to those facts.³² These essential requirements should be reflected in the academic and professional qualifications in law of an applicant for admission. The current prescribed qualifications in the LPA are still applicable. The relevant provisions should be maintained.

Recommendation 18: The current provision of prescribed qualifications should be maintained. However, the Council of the Law Society must thoroughly examine applications for admission given recent cases of fraudulent representations of academic records and transcripts.

Temporary and Permanent Rolls

8.40 The Commission is of the view that the current law and practice concerning the different rolls in the LPA should be clear-cut on legal criteria for eligibility. Temporary rolls should remain to enrol non-Samoan citizens who are in the country for legal work in any law firm or Government body. The current law states that the duration of temporary roll is 6 years in total. The temporary roll should be treated as a temporary admission of non-citizens to practise in Samoa on a case by case basis, or when there is a great need for legal representation in the country.

8.41 In practice, all lawyers are issued with 1 year annual practising certificates to practice in Samoa. Lawyers on the temporary roll are issued with 1 year practising certificates for the total of 6 years. The concern in this area is that lawyers on the temporary roll may not continuously be in Samoa to use up their 1 year as they may only appear on a case by case basis. Hence, setting a time frame at 6 years is redundant as these lawyers only appear on a

³²Ibid at n22

case by case basis. There is also the issue of non-Samoan lawyers marrying into Samoa and this should also be considered in this context. There is no need to define a time frame for temporary roll. The period of temporary admission should be left open and hence the limit of 6 years should be removed.

8.42 In cases where overseas lawyers (Queen’s Counsels or lawyers under specific exchange programmes) are hired or contracted to assist in handling court work, depending on the duration of the case or matter, a provision should be in place to allow limited temporary admission of these lawyers by the Council. The terms of limited temporary admission must be confined to what he or she has been hired or contracted to perform in Samoa, however, a fee must be paid to the Samoa Law Society for admission. Admission is not necessary if legal consultants are hired to perform out of court work such as legislative drafting and consultancy contracts. However, the Council must closely monitor these legal consultants to ensure that they perform what they have been hired to do in Samoa.

8.43 The permanent roll should remain to enrol Samoan citizens, with a stringent residency requirement. An overseas lawyer who is a Samoan citizen and who wishes to practise in Samoa must reside in Samoa for such period that the Council of the Law Society deems adequate to grant permanent admission.

8.44 The Commission is of the view that the terms ‘local roll’ and ‘foreign roll’ are contentious as it may create more issues concerning citizenship and background of the legal practitioner which may be prejudicial.

Recommendation 19: Eligibility for temporary roll should be clear-cut. In other words, non-Samoan citizens should remain enrolled on the temporary roll for admission. Duration of temporary roll should be treated on a case by case basis upon which the overseas counsel performs his or her work or when the contract expires. The latter should also be subject to flexibility in the event an overseas counsel is contracted in Samoa for longer periods of time such as 10 years. In this case, the overseas counsel must pay practising certificate fee every year hence he or she need not reapply every year. The 6 years time limit on the temporary role should be removed. This recommendation should also take into account non-Samoan lawyers marrying into Samoa and how their interest can be represented in this context.

Recommendation 20: The permanent roll provision should remain to enrol Samoan citizens. For overseas lawyers who are Samoan citizens, a stringent ‘*residency requirement*’ should be imposed if they wish to set up a private practice in Samoa. The length of residency is to be left to the Council of the Law Society.

Reciprocal Admission

8.45 This concept is commonly used to refer to the general question of admission of practitioners from other jurisdictions. This is a sensitive issue and a complex one in the legal profession in Samoa. The Commission is of the view that such concept is inapplicable and impractical in Samoa given population size. Currently, the admission to temporary roll is adequate to enrol overseas lawyers. On the other hand, reciprocal admission should be considered in the future in line with the WTO standards and rules. Furthermore, domestic legislation may not be sufficient to guarantee admission of Samoan lawyers into other jurisdictions. Bilateral agreements would need to be negotiated.

Recommendation 21: Reciprocal admission is unworkable and impractical in Samoa. However, such a concept should be considered by the Law Society in light of Samoa's accession to WTO rules and principles.

Oath of admission

8.46 The oath is a pledge of service to the symbol of law and justice. It is the crucial stage of admission whereby a lawyer swears to conduct him or herself in a manner of integrity and professionalism in providing legal services to the people. The Commission is of the view that the oath of admission should remain in the LPA.

Recommendation 22: The provision for an oath of admission should remain part of the admission process.

9. Commencement of Private Practice

Introduction

9.1 This chapter examines issues and questions around the current law governing commencement of private practice. This chapter looks at NZ and Queensland. The outcome of discussions concerning these jurisdictions will form the basis of the Commission's view.

The Samoa situation

Eligibility

9.2 A solicitor cannot commence practice on his or her own account or in partnership unless:-

- 1) *he or she during the period of 5 (five) years immediately preceding the date on which he or she commences private practice:-*
 - a) *has had three (3) years of experience as a barrister or solicitor; or legal officer in government either in Samoa or in any other country.*³³

³³ The Law Practitioners Act (Samoa) section 6(1) (a)

9.3 The above provision highlights that a person can only go into private practice as a solicitor if he or she has complied with the provision ss 6(1)(a) above. Alternatively, the Supreme Court on the application by a barrister or a solicitor in Samoa may grant leave for him or her to commence practice on his or her own account.

Comparable Jurisdictions

New Zealand

9.4 There are a number of legal requirements that a lawyer must comply with before he or she can commence private practice. i.e a lawyer is eligible to practise on his or her own account if during eight (8) years before commencement of private practice, he or she has had no less than three (3) years of legal experience in NZ. The lawyer must have received adequate instructions and examination on duties of a lawyer that relate to the receipt and handling of client money and the operation of a lawyers' trust account. The final requirement provided for in the Rules, is that a lawyer must satisfy the Council of the Law Society in NZ that he or she is a suitable person to practice on his or her own account as a barrister and solicitor. The Council considers the following:

- i) *the lawyer's legal experience;*
- ii) *the intention of the lawyer to practice whether as a sole practitioner or a partner in a firm; or otherwise*
- iii) *the fields of law in which the applicant intends to practice; and*
- iv) *other matters that are relevant to the Council.*

9.5 Once the lawyer has fulfilled the above requirements to commence private practice, the High Court of New Zealand will grant leave to him or her to practise on his or her own account. Lawyers that have been approved to practise as barristers and solicitors, or barristers sole, can be directors of incorporated law firms³⁴.

Queensland

9.6 There is no provisional requirement for lawyers to commence private practice in providing legal services. However, there is a provision in relation to incorporated legal practices and multi-disciplinary partnerships.³⁵ The requirement for the commencement of such practices is that notice must be given to the Queensland Law Society of the intention of lawyers to provide these legal services.³⁶

³⁴ Lawyers and Conveyancers Act 2006 (NZ) s.6 Interpretation Section

³⁵ Queensland Legal Profession Act 2007 Part 2.7 Incorporated legal practices and Multi-disciplinary tribunals

³⁶ Ibid at n7 s114 and s146

Submissions

- 9.7 There were responses from stakeholders in relation to the commencement of private practice. The stakeholders include the Samoa Law Society ('SLS'), private law firms and public submissions during public consultations in February 2010.
- 9.8 Submissions from the SLS expressed the view to reassess the current law to take into account legal officers who have taken on a contractual position with government, which is normally for a period of 3 years. Judge Mata Tuatagaloa proposed to extend the current period of '*...immediately preceding five years*' to '*immediately preceding 8 years*' to address those legal officers who have taken contractual positions for 3 years. This will regulate private practice but at the same time increasing the relevant experience will ensure the quality of the services being provided to the public. Judge Mata Tuatagaloa further expressed the view that the relevant experience must be gained from working as a lawyer at the Attorney General's office or private law firm or at a government department as a legal officer.
- 9.9 Another issue raised is in relation to the nature of legal work performed by legal officers in a government department. The SLS expressed the view to examine these situations as some legal officers may not carry out a lot of 'legal' work, and are more involved in administrative type work. These legal officers should satisfy the Council of the Law Society ("Council") that their experience is relevant to private practice. However, the Council should consider such issues on a case by case basis as some legal officers in government departments and ministries canvass legal issues but do not possess the basic skills set for private practice.
- 9.10 On the other hand, submissions from Drake and Co. expressed the view to maintain the current provision requiring a lawyer in Samoa to complete three out of the preceding five years of practical legal experience as barrister and solicitor. However, the issue is whether the period of 3 years would be sufficient to meet the practical legal experience requirement, as the type of work carried out may not necessarily be the type of practical legal experience that would assist the lawyer in practising on his or her own account. Hence, Drake and Co. proposed that the lawyer be required to prove relevant practical legal experience to the satisfaction of the Council.
- 9.11 During public consultations, the public expressed views in relation to the commencement of private practice. The main issue raised by the public was the '*residency requirement*' in Samoa to commence private practice. This is due to difficulties faced by some people in having an overseas lawyer representing them who is not available at the trial.

Residency

- 9.12 Submissions by the public during public consultations expressed the view that overseas lawyers who wish to practise law in Samoa should establish a private law office in Samoa manned by a sufficiently senior lawyer, and reside in Samoa.
- 9.13 Private law firms such as Tamati Law Firm, Drake and Co and Judge Mata Tuatagaloa expressed the view that a resident requirement be a mandatory requirement for private practice in Samoa. This is given the problems encountered with lawyers who try to practise in Samoa yet continue to reside overseas. Hence, a residency requirement should be imposed.
- 9.14 A residency requirement should also be imposed as it is difficult to effect service of documents to a practitioner overseas. Those practitioners may not appear in court on matters because they do not reside in Samoa.

Commission's view

- 9.15 The above submissions raised some crucial issues regarding requirements for commencement of private practice. The current law and practice adopts the approach which requires three (3) years of legal experience as a barrister, or a barrister *and* solicitor in the government or other organizations in order to commence private practice.
- 9.16 A person holding a practising certificate in Samoa as a barrister and solicitor does not necessarily imply that a person is carrying out court work. For instance, lawyers employed in Government Ministries (in-house counsel).
- 9.17 The Commission is of the view that in order to address the eligibility to commence private practice, a lawyer has to provide proof that he or she has met the requirements stated in the LPA. The Commission is of the view that residence in Samoa should also be a requirement and should be incorporated in the new legislation. This may have implications on WTO negotiations currently underway. The Attorney General's Office will be able to provide advice on this issue.
- 9.18 In New Zealand, a lawyer must provide proof that during the three years before the commencement of private practice, the lawyer has received adequate instructions and examination of the duties of a lawyer that relate to receipt and handling of client money and the operation of a lawyer's trust account.
- 9.19 The Commission is of the view that three years of practical legal experience is sufficient to commence private practice but should also include a provision which requires a lawyer to provide proof of sufficient knowledge in the receipt and handling of client money and also the operation of trust funds. It should also be subject to the approval of the Council that the

practical legal work carried out by the applicant is sufficient for him or her to establish their own private practice.

9.20 In the area of trust accounts, the onus lies with the SLS to provide training in the area of trust accounts and receipts and handling of client money (Refer to **Recommendation 3**). This training should also include compulsory auditing of trust accounts. This is particularly important if a lawyer has met the 3 years requirement, the residency requirement but does not have proof of trust account knowledge or receipt and handling of client money. In this situation, the lawyer can then undertake training provided by the SLS in order to gain SLS approval to set up private practice.

Recommendation 23: The three years of legal experience requirement should be maintained. The preceding five (5) years in practice should be increased to eight (8) to cater for senior lawyers who have taken on government contracts.

Recommendation 24: There should be a provision in the new legislation to include a residency requirement in Samoa for three (3) years prior to commencement of private practice, in order to be allowed to establish a private law firm. The private law firm should be manned at all times by a sufficiently senior lawyer.

Recommendation 25: The new legislation should require proof of practical legal experience and also handling of clients' money and lawyers trust funds subject to the satisfaction of the Council, before commencing private practice. This should also include compulsory auditing of trust accounts. The new legislation should have a provision that states that the Council is responsible for providing training on handling of client money, lawyer's trust fund and other matters that relate to money, if the lawyer wanting to commence private practice has no practical experience in handling clients' money and trust funds. [Refer to **Recommendation 3**]

Recommendation 26: The new legislation should follow the NZ legislation provision on the commencement of private practice for guidance.

10. Disciplining the Legal Profession

Introduction

10.1 This Chapter considers provisions which relate to the disciplining of the legal profession. It will discuss in detail the relevant body responsible for handling disciplinary proceedings in Samoa and disciplinary processes to be followed.

10.2 This Chapter also looks generally into different conducts/behaviors subject to disciplinary proceedings and how they are dealt with in accordance to different categories of misconduct in the legal profession. It will also look at relevant areas of the law needing reform particularly areas such as: - an appropriate independent body to investigate complaints and proposed different disciplinary measures to be imposed. Relevant provisions from overseas legislation will be considered to further clarify the current law and practices on the issue of discipline within the legal profession.

Current Law and Practice

Responsible Body

10.3 The Council of the Law Society of Samoa (“Council”) which is the executive body of the Law Society is responsible for inquiring into and determining complaints made against legal practitioners. The Council is comprised solely of members of the Law Society. The LPA does not make specific provision for a body to receive complaints about legal practitioners. In practice, this role is fulfilled by the Council. Section 35 of the LPA provides that the Council may inquire into any charge of professional misconduct, or of conduct unbecoming a barrister or a solicitor.

Role of Council

10.4 As noted above, the Council has the discretion to inquire into and determine charges brought against barristers and solicitors. Where, after making preliminary inquiries, the Council finds reasonable cause to support a finding of professional misconduct or conduct unbecoming of a barrister or a solicitor, it must notify the practitioner in writing of the charge. The notice must:

- *state the time and place of the hearing, not being sooner than 21 days after the notice was served; and*
- *include sufficient detail to enable the practitioner to prepare any defence.*³⁷

10.5 The LPA includes limited provisions about the manner in which proceedings should be conducted. The Council may appoint any member of the Law Society to present the case against the practitioner. A practitioner against whom a charge has been brought is entitled to:

- *be represented personally or by counsel;*
- *to cross-examine witnesses called against him or her, and*
- *call evidence in his or her defence; and to address the Council on the charge.*³⁸

³⁷ Law Practitioners Act 1976 (Samoa) s 36.

³⁸ Law Practitioners Act 1976 (Samoa)

Investigative powers

10.6 The Council, for the purpose of investigating, hearing and determining any charge against a practitioner, is granted the same powers and privileges as a Commission of Inquiry under the *Commissions of Inquiry Act 1964* of Samoa.³⁹ This includes the power to:

- hold an inquiry in public, private or partly in public and partly in private;
- prohibit publication of reports, accounts of evidence, and names of witnesses; and
- admit any evidence which appears to be relevant, whether or not it would be admissible in a court of law.

10.7 The Commission of Inquiry has the power and status of a judge of a court of law in respect of citing parties, summoning witnesses, administering oaths, hearing evidence, and conducting and maintaining order at the inquiry. The Commission of Inquiry also has the power to make costs orders for the whole or any portion of an inquiry.

10.8 Witnesses in disciplinary proceedings are given the same protection as they have under the *Commissions of Inquiry Act 1964*, which is equivalent to the privileges and immunities of witnesses in a court of law.⁴⁰

10.9 Under s 38 of the LPA, the Council may suspend a practitioner against whom a charge is pending without notification. The Council in the same manner may also revoke such an order. The LPA does not specify criteria that the Council should take into account in deciding whether to suspend a practitioner.

10.10 A practitioner who the Council has suspended from practice due to a finding of conduct unbecoming or professional misconduct, or against whom the Council has given any other disciplinary sanction, has a right of appeal to the Supreme Court.⁴¹ The Law Society is a party to an application to the Supreme Court for an appeal and is entitled to be represented by counsel and to be heard in the proceedings.

Conduct leading to disciplinary proceedings

10.11 Grounds for disciplinary sanctions under the LPA arise where a legal practitioner is found to have committed ‘professional misconduct’ or ‘conduct unbecoming a barrister or a solicitor’. The LPA does not specify what types of conduct will fall within these terms. The most relevant point of reference is the Rules, which set out requirements, for example, in

³⁹ Ibid at n41, s 39.

⁴⁰ Ibid at 41

⁴¹ Ibid at n41

relation to confidentiality and the manner in which privileged documents may be shared. However, the Rules are not an exhaustive code of the conduct for which a practitioner may be disciplined. Action may also commence, for example, in response to a criminal offence. Not every breach of a rule will lead to a disciplinary hearing: this is confined to breaches that are considered ‘sufficiently serious’.

Investigating and determining disciplinary disputes

10.12 The LPA gives limited guidance on the manner in which disciplinary disputes should be investigated and determined, beyond adopting the powers and privileges of a Commission of Inquiry. Procedural issues that have been explored in other jurisdictions include:

- a) requirements for complaints to be investigated and heard;*
- b) limitations on the time in which complaints are to be processed;*
- c) public accessibility to hearings and judgments; and*
- d) requirements for information to be provided to complainants and respondent practitioners.*

Public nature of hearings

10.13 Under the *Commissions of Inquiry Act*, Commissioners have the power to direct that a Commission of Inquiry be held in public, in private, or partly in public and partly in private.⁴² Since the Council of the Law Society is given the same powers and privileges as a Commission of Inquiry, the Council has the discretion to hold hearings in public or in private, or partly in public and partly in private.

Sanctions

10.14 The sanctions that the Council may issue where a charge is successfully made out depend on the nature of the finding. If the Council is satisfied that the practitioner is ‘not a fit and proper person to practice as a barrister or as a solicitor’, or if the practitioner has been found guilty of an offence involving dishonesty, the Council may:

- *order that his or her name be struck off the roll of barristers and/or of solicitors; or*
- *suspend him or her from practice as a barrister and/or a solicitor for a period not exceeding three years.*⁴³

10.15 In every case in which a charge is successfully made out, the Council may:

⁴² *Commissions of Inquiry Act* 1964 (Samoa) s 6.

⁴³ *Law Practitioners Act* 1976 (Samoa)

- *order that the practitioner not practise on his or her own account until authorized by the Council to do so;*
- *order that the practitioner pay a fine to the Law Society not exceeding 10 penalty units;*
- *censure the practitioner; and*
- *order that the practitioner reimburse the Society for the costs and expenses of the inquiry and investigation.*⁴⁴

Role of Courts

10.16 Consistent with other common law countries, the Supreme Court of Samoa has inherent jurisdiction to discipline barristers and solicitors.⁴⁵ As explained by the UK House of Lords in the case of *Myers v Elman*,

*A solicitor ... was long ago held to be an officer of the Court on the Roll of which he was entered and as such to be subject to the discipline of that Court. The Court might strike him off the Roll or suspend him.... But alongside the jurisdiction to strike off the Roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both. ...The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally.*⁴⁶

10.17 The conduct of barristers and solicitors may also be held to account through actions in contract or negligence in the civil courts.⁴⁷

Comparable Jurisdictions

Conduct leading to Disciplinary proceedings

Australia

10.18 Bad professional work such as incompetence, delay and failures to meet accepted standards of professional work are the most common type of complaints made about legal

⁴⁴ *Law Practitioners Act 1976* (Samoa)

⁴⁵ *Ibid* at n47, section 47

⁴⁶ *Myers v Elman* [1940] AC 282.

⁴⁷ See, eg, *Metai v Drake* [2000] WSSC 49, in which the Supreme Court of Samoa considered whether to issue an order for security for costs with respect to a claim in negligence against a firm of barristers and solicitors for their failure to file a statement of claim within the requisite limitation period.

practitioners. Yet reports have noted that professional associations routinely dismiss these types of complaints in disciplinary proceedings. As stated by the NSWLRC:

One of the clearest problems to emerge in the Commission's earlier work on the legal profession was the profound gap between what angered clients and what lawyers and their professional associations saw as important enough to merit disciplinary action. Clients most frequently complained about matters of negligence, incompetence, delay, poor communications, discourtesy and over-charging, while the professional associations almost never considered that these matters amounted to 'professional misconduct'.⁴⁸

10.19 One response has been the introduction of a category of 'unsatisfactory professional conduct'. The Australian Model Laws set out a uniform definition of unsatisfactory for Australian legal practitioner legislation, being:

conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.⁴⁹

10.20 This operates alongside a conduct category of 'professional misconduct', being:

- *unsatisfactory professional conduct, where the conduct involves a 'substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'; and*
- *Conduct—whether occurring in connection with the practice of law or otherwise—that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.⁵⁰*

10.21 The Australian Model Laws provide further guidance on the types of conduct that may lead to disciplinary proceedings through a non-exhaustive list of conduct capable of being 'unsatisfactory professional conduct' or 'professional misconduct'. This includes, for example:

- *conduct that contravenes relevant legal disciplinary legislation, regulations or legal profession rules;*
- *charging excessive legal costs in connection with legal practice;*

⁴⁸ New South Wales Law Reform Commission, *Discussion Paper—Scrutiny of the Legal Profession* (DP 26) (1992), [5.29].

⁴⁹ Standing Committee of Attorneys-General, *Legal Profession—Model Laws Project: Model Provisions* (2004) <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws> 22 July 2010, s 1104.

⁵⁰ *Ibid*, s 1105.

- *conduct in respect of which there is a conviction for a ‘serious offence’, a tax offence or an offence involving dishonesty;*
- *conduct leading to insolvency of a legal practitioner; and*
- *conduct leading to disqualification from managing or being involved in the management of a corporation.*⁵¹

New Zealand

10.22 In NZ, ‘unsatisfactory conduct’ in relation to a lawyer or an incorporated law firm is defined to include ‘conduct 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’, or ‘conduct that would be regarded by lawyers of good standing as being unacceptable’.⁵²

10.23 In some jurisdictions, legal practitioner legislation also sets out strategies for dealing with ‘consumer disputes’—that is, conduct that does not fall within ‘professional misconduct’ or ‘unsatisfactory professional conduct’. This issue is considered later in this chapter.

Sanctions for minor charges

Australia

10.24 Under the Australian Model Laws, a disciplinary body may issue a sanction without requiring the matter to proceed to a full disciplinary hearing where it is satisfied that there is a reasonable likelihood that the practitioner will be found guilty of unsatisfactory professional conduct, but not professional misconduct. Sanctions may include a public or private reprimand and/or a fine.⁵³

New Zealand

10.25 A more extensive range of sanctions are available to a standards committee in NZ which has conducted a hearing on the papers and made a determination of unsatisfactory professional conduct. The committee may, for example:

- *order that some or all terms of a settlement made in alternative dispute resolution between the person to whom the complaint relates and the complainant are to have effect, by consent; and*
- *censure or reprimand the person about whom the complaint relates; and*

⁵¹ New South Wales Law Reform Commission, *Discussion Paper—Scrutiny of the Legal Profession* (DP 26) (1992), [5.29].

⁵² *Lawyers and Conveyancers Act 2006* (NZ) s 12.

⁵³ Committee of Attorneys-General, *Legal Profession—Model Laws Project: Model Provisions* (2004) <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws> 22 July 2010, s 1131.

- *order the person about whom the complaint relates to apologize to the complainant; and*
- *order the payment of compensation to a person who has suffered loss, to a maximum of \$25,000;*⁵⁴

10.26 A number of jurisdictions have adopted a system whereby minor disciplinary charges are heard by a dedicated committee of a professional association or a statutory office holder, and more serious disciplinary charges brought before a tribunal. Different sanctions are available depending on which of these options are followed.

Sanctions for more serious charges

Australia

10.27 The Australian Model Laws set out a lengthy list of orders which may be given by a disciplinary tribunal which has found a practitioner guilty of professional misconduct or unsatisfactory professional conduct. These include, for example, an order:

- *recommending that the name of the practitioner be removed from the local roll; and*
- *that the practitioner's practising certificate be suspended or cancelled;*
- *that a practising certificate not be issued to the practitioner before the end of a specified period; and*
- *that specified conditions be imposed on the practitioner's practising certificate;*
- *that the practitioner pay a fine of a specified amount—in NSW, presently set at \$75,000;*⁵⁵

10.28 A tribunal *must* make an order for a legal practitioner whom it has found guilty of unsatisfactory professional conduct or professional misconduct to pay costs, including the costs of the disciplinary body and the complainant, unless 'exceptional circumstances' apply.⁵⁶

New Zealand

10.29 In NZ, the Disciplinary Tribunal may make any order available to a standards committee on the final determination of a complaint, in addition to an order that:

⁵⁴ *Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008* (NZ) r 32.

⁵⁵ Committee of Attorneys-General, *Legal Profession—Model Laws Project: Model Provisions* (2004) <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws> 22 July 2010, s 1147.

⁵⁶ *Ibid* s 1150.

- *a practitioner's name be struck off the roll; and*
- *a practitioner be suspended from practice for a period not exceeding 36 months; and*
- *a practitioner not practice on his or her own account until authorized by the Tribunal; and*
- *a practitioner's employment in a law firm be terminated, or that no practitioner or law firm employ that practitioner so long as the order remains in force; and*
- *a practitioner pay to the Law Society a fine not exceeding \$30,000.*⁵⁷

10.30 The Disciplinary Tribunal can only make an order striking a person's name off the roll or an order canceling the registration of a practitioner if it is of the opinion that, by reason of his or her conduct, the practitioner is not a fit and proper person to be a practitioner.⁵⁸

Public Nature of Hearings

New South Wales

10.31 In NSW, all hearings conducted by the disciplinary tribunal are open to the public, unless the tribunal orders otherwise.⁵⁹ This is consistent with the Australian Model Laws, which require a hearing to be open to the public, except where the tribunal orders otherwise on the basis that it is not in the public interest.⁶⁰

New Zealand

10.32 Similarly, in NZ, hearings of the disciplinary tribunal are in public unless the disciplinary tribunal orders otherwise.⁶¹

Discussions

10.33 Governments across the world have commissioned a multitude of inquiries into the manner in which the legal profession is disciplined, including the complaints-handling process. Below, the Commission briefly assesses key international trends in the regulation of the legal profession. The Commission gives particular attention to the model provisions which were endorsed by the Standing Committee of Attorneys-General on 7 August 2003 as

⁵⁷ *Lawyers and Conveyancers Act 2006* (NZ) s 242.

⁵⁸ *Ibid* s 244.

⁵⁹ s 75 of the *Administrative Decisions Tribunal Act 1997* (NSW)

⁶⁰ Committee of Attorneys-General, *Legal Profession—Model Laws Project: Model Provisions* (2004) <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws> 22 July 2010, s 1145.

⁶¹ *Lawyers and Conveyancers Act 2006* (NZ) s 238.

the basis for consistent laws for the regulation of Australia's legal profession (the 'Australian Model Laws').⁶² These have been substantially adopted by every Australian jurisdiction.

10.34 Where relevant, the Commission also looks to similar Samoan legislation most particularly, the *Healthcare Professions Registration and Standards Act 2007*.

Body responsible for complaints handling and disciplinary proceedings

Independent complaints-handling services

10.35 Reforms of the regulation of the legal profession have stressed the need for consumers of legal services to be assured that complaints will be handled 'promptly, efficiently, sensitively and impartially'.⁶³ This raises the question of whether 'professional associations' are the appropriate body to handle the receipt of complaints.

10.36 A major report into regulation of the legal profession undertaken by the American Bar Association (the 'US Report') recommended that a central intake office should be established to receive all complaints about lawyers, in addition to responsibilities such as helping complainants state their complaints and making preliminary determinations about the validity of complaints.⁶⁴ This model has been followed, for example, in Queensland Australia, where the Legal Services Commissioner—an independent statutory office holder—is responsible for receiving complaints and making a preliminary assessment of their validity.⁶⁵

10.37 In some jurisdictions, the professional association remains responsible for the complaints-handling service. For example, the New Zealand (NZLS) Law Society is under an obligation to establish a complaints service to receive complaints made by any person about the conduct of lawyers and former lawyers. Under the *Lawyers and Conveyancers Act 2006* (NZ), the complaints service is required to deal with all complaints received by the complaints service in a 'fair, efficient, and effective manner'.⁶⁶

10.38 Under the Australian Model Laws, there is a requirement that disciplinary bodies in each jurisdiction produce, and make publicly available, information about the making of

⁶² Standing Committee of Attorneys-General, *Legal Profession—Model Laws Project: Model Provisions* (2004) <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws> 22 July 2010.

⁶³ New South Wales Law Reform Commission, *Discussion Paper—Scrutiny of the Legal Profession* (DP 26) (1992), [5.7].

⁶⁴ American Bar Association, *Lawyer Regulation for A New Century: Report of the Commission on Evaluation of Disciplinary Enforcement* (1992).

⁶⁵ *Legal Profession Act 2007* (Qld) pt 4.4.

⁶⁶ *Lawyers and Conveyancers Act 2006* (NZ) s 123.

complaints and the procedure for dealing with complaints. In addition, the body must give assistance to members of the public seeking to make complaints.⁶⁷

Disciplinary courts and tribunals

10.39 To varying degrees, international jurisdictions have shifted responsibility for disciplining the legal profession from professional associations to ‘*independent courts and tribunals*’.

10.40 The strictest separation in this regard was put forward in the US Report, which recommended that lawyer discipline should be controlled and managed exclusively by ‘the highest court of a state’, rather than professional associations.⁶⁸ This was to ensure that disciplinary bodies were free from even the appearance of conflicts of interests or impropriety. Many states have in place frameworks where the Supreme Court appoints a disciplinary committee, which works under the authority of the court.⁶⁹ In some other states, the professional association works with, or under the authority, of the state’s Supreme Court to discipline the legal profession.⁷⁰

10.41 New Zealand and some Australian jurisdictions retain a link between professional associations and disciplinary processes but have established administrative checks and balances to promote independence—in particular, in the determination of serious disciplinary disputes. In NSW and NZ, for example, dedicated committees of the professional associations are responsible for investigating complaints about legal practitioners and are empowered to administer a limited range of disciplinary sanctions to deal with findings of unsatisfactory professional conduct. In more serious cases, the committee must refer the matter to an independent disciplinary tribunal. The parties to hearings are the legal practitioner against whom the complaint has been made and the referring disciplinary body.⁷¹

10.42 In Queensland, an independent statutory officer holder—the Legal Services Commissioner—is responsible for dealing with complaints regarding a legal practitioner. The Commissioner has the discretion to dismiss a complaint; refer a complaint to the relevant professional association; or investigate a complaint him or herself. The Commissioner *must* investigate a complaint if he or she is satisfied that it is in the public

⁶⁷ Standing Committee of Attorneys-General, *Legal Profession—Model Laws Project: Model Provisions* (2004) <http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws> 22 July 2010 s 1174.

⁶⁸ American Bar Association, *Lawyer Regulation for A New Century: Report of the Commission on Evaluation of Disciplinary Enforcement* (1992).

⁶⁹ For example, California, Massachusetts, Nebraska, Wisconsin.

⁷⁰ For example, Alabama, Florida, Nevada, North Dakota.

⁷¹ See *Legal Profession Act 2004* (NSW) ch 4; *Lawyers and Conveyancers Act 2006* (NZ) pt 7.

interest. Depending on the outcome of an investigation, the Commissioner may initiate disciplinary proceedings in an independent tribunal.⁷²

10.43 A common feature of each of the above jurisdictions is a requirement for consumer representation on committees making disciplinary determinations, in addition to legal professionals. The NSW Law Reform Commission (NSWLRC) has advocated the need for legal and lay-person representation as follows:

*effective regulation of the legal profession, including the area of complaints, discipline and professional standards, calls for the striking of a delicate balance. There is a need for lawyers to be involved in this task of regulation. Without them, and the knowledge and skill which they have, there cannot be professional or public confidence that the relevant authority will perform its task properly. Also, there is a need for non-lawyers. Without them, the authority is without proper access to public attitudes, and different and wider viewpoints. And, without them, there cannot be public confidence that decisions will be made with due regard to the interests of both non-lawyers and lawyers.*⁷³

10.44 Under the *Healthcare Professions Registration and Standards Act 2007* (Samoa), disciplinary Committees convened to deal with ‘serious breaches’ by healthcare professionals are comprised of:

- *a District Court judge, who is the Chairperson; and*
- *two members of the relevant Council.*⁷⁴

Oversight

10.45 Where professional associations have responsibility for receiving complaints and making disciplinary determinations, independent bodies have been established to oversee the manner in which they perform these roles. For example, the disciplinary activities of professional associations in NZ and NSW Australia are subject to review by statutory oversight bodies.⁷⁵ A similar model operates in England and Wales, in which the Legal Services Ombudsman reviews the handling of complaints by the professional associations. The Ombudsman has the power to:

⁷² *Legal Profession Act 2007* (Qld) pt 4.4.

⁷³ New South Wales Law Reform Commission, *Discussion Paper—Scrutiny of the Legal Profession* (DP 26) (1992), [5.23].

⁷⁴ *Healthcare Professions Registration and Standards Act 2007* s 18.

⁷⁵ In NZ, a Legal Complaints Review Officer reviews the determinations or orders of standards committees: *Lawyers and Conveyancers Act 2006* (NZ) ss 190–225; In NSW, the Legal Services Commissioner can review decisions of the Council: *Legal Profession Act 2004* (NSW) pt 4.6.

- *recommend that the professional association re-investigate some, or all, aspects of the complaint;*
- *formally criticize the professional association;*
- *award the complainant compensation for any distress or inconvenience caused by the professional body.*⁷⁶

Submissions

10.46 There were submissions from the Samoa Law Society and private law firms concerning these issues. The Samoa Law Society expressed the view that the Council through its Disciplinary Sub-Committee should be able to handle complaints about its own members as opposed to referring disciplinary matters to bodies outside of the Society. Tamati Law Firm submitted that a body separate from the Council should deal with the complaints before referring these complaints to the Council, considering the availability of resources to establish such a body. Drake and Co submitted that there is no need to have other bodies to deal with complaints or create other bodies when the Disciplinary Committee exists. Mata Tuatagaloa expressed the view that the current Disciplinary Committee is sufficient to look at any complaints but the LPA should leave it open or discretionary for the appointment of one or two sub committees. There were no submissions received from the public.

10.47 In the Issues Paper, the Commission raised a number of questions about the operation of the disciplinary system under the LPA:

- *Are there sufficient disciplinary provisions under the Act?*
- *Should the Act spell out a detailed process for complaints handling and the time in which complaints should be dealt with?*
- *Should any other bodies deal with complaints before they are taken to the Council for inquiry?*
- *Are any changes warranted to the Council's powers to investigate disciplinary charges?*
- *Should the fines be increased for a practitioner found guilty of a disciplinary charge?*
- *Should the Act define 'professional misconduct' and 'unsatisfactory conduct'?*

⁷⁶ Office of the Legal Services Ombudsman for England and Wales, *About the Legal Services Ombudsman* <<http://www.olso.org/about.asp>> 22 July 2010.

Commission's views

10.48 The discipline of legal practitioners should continue to be the responsibility of the Samoa Law Society. However, in order to ensure that disciplinary proceedings are transparent and non-biased, the manner in which complaints are investigated and proceedings are conducted needs to be regulated more closely. In particular, a separate committee administered by the Law Society should be established to deal with the investigation and hearing of disciplinary matters (the 'Disciplinary Committee'). The Disciplinary Committee should include both legal and lay representatives. Reference can be made to disciplinary procedures in the *Healthcare Professions Registration and Standards Act 2007*(Samoa).

10.49 In addition, the kinds of conduct that may result in disciplinary proceedings should be expanded to ensure that consumers have redress for the most common types of complaints about legal practitioners—those relating to unsatisfactory professional work.

10.50 Finally, strategies should be put in place to lessen the likelihood of disputes arising in the first place, including a requirement for legal practitioners to enter into written costs agreements with their clients.

Body responsible for complaints handling and disciplinary proceedings

10.51 As discussed above, a marked trend in Australia and New Zealand has been the establishment of independent disciplinary tribunals to hear serious misconduct matters, while more minor transgressions are heard by statutory authorities or dedicated committees of the professional associations. In many states of the United States, independence has been sought by establishing disciplinary committees under the authority of the Supreme Court. A number of jurisdictions also have established independent complaints-handling bodies. This raises the question of whether comparable systems should be adopted in Samoa.

10.52 The Commission does not consider it to be feasible at this time to establish an independent tribunal outside of the Law Society for the purpose of receiving complaints or hearing legal disciplinary matters. Considering the small number of legal practitioners and resulting disciplinary disputes, this would involve a disproportionate use of resources. There was a lack of support from stakeholders for moving responsibility for disciplining legal practitioners away from the Law Society. In the Commission's view, a better use of resources would be enhancing the actual and perceived independence of the Council's complaints-handling and disciplinary roles. This can give adequate credibility and transparency without the costly measure of establishing additional bodies.

10.53 In particular, the following changes is proposed to be made in the LPA in relation to the bodies responsible for receiving complaints about and disciplining legal practitioners:

- *Requiring the Council of the Law Society to establish and administer a complaints service through a separate committee of the Law Society to deal with the investigation and hearing of disciplinary charges (the ‘Disciplinary Committee’), which should include the following:*
 - *A District Court Judge (or a lawyer who is capable of becoming a Supreme Court Judge) who is the Chairperson;*
 - *Two members of the Council (to be appointed by the Chairperson);*
 - *legal representatives; and*
 - *one lay representative.*

[The prosecution can be handled by the Disciplinary Committee]

- *Establishing independent oversight of the complaints-handling service and the Disciplinary Committee.*

10.54 Changes that the Commission recommends below, in relation to the manner in which disciplinary matters, are received, investigated and heard—for example, opening disciplinary hearings to the public and requiring complaints to be investigated other than in certain defined circumstances—will also improve the credibility and transparency of decisions made by the Disciplinary Committee.

Requiring the Council of the Law Society to establish a complaints service

10.55 The LPA does not require the Law Society—or any other body—to receive complaints about legal practitioners and former legal practitioners. The Commission understands that, in practice, complaints are usually directed to the Law Society. However, the position should be clarified by imposing a clear obligation on the Council of the Law Society to establish and administer a complaints-handling service. This should include a requirement to provide, and appropriately publicize, the places at which complaints about legal practitioners and former legal practitioners may be lodged, and the procedure to be used in lodging such complaints. This matter could be resolved if the Samoa Law Society had an adequately manned office or headquarters, as this could be the place to lodge complaints.

Recommendation 27: The new legislation should require the Council of the Law Society to establish and administer a complaints-handling service. This should include a requirement to provide, and appropriately publicise, places at which complaints may be lodged, and the procedure to be used in lodging such complaints.

A separate ‘Disciplinary Committee’

10.56 In the Commission’s view, an important component of a just disciplinary system is ensuring that charges are heard by a committee that is—and is seen to be—impartial from the legal profession. To this end, the LPA should provide for the establishment of one or

more ‘Disciplinary Committees’ to investigate and hear disciplinary charges. Standards committees established under the *Lawyers and Conveyancers Act* (NZ) provide an instructive model for how such Disciplinary Committees could be constituted.

10.57 A consistent feature of modern legal disciplinary systems is the inclusion of significant numbers of lay representatives on disciplinary bodies. Requiring lay representatives on Disciplinary Committees would ensure that these decisions reflect a wider spectrum of viewpoints than those within the legal profession. It would also increase public confidence that the committee’s decisions have been made with regard to the interests of both lawyers and non-lawyers.

10.58 In the Commission’s view, Disciplinary Committees should comprise at least one lay person. In NZ, for example, each standards committee must consist of at least three persons, with at least one of these being a lay member.⁷⁷ Membership of the Disciplinary Tribunal in NZ includes between seven and 15 lay members, and between seven and 15 lawyers.⁷⁸ Having an equal number of lay persons and lawyers is not seen by the Commission as efficient and effective.

Recommendation 28: The new legislation should require the Law Society to establish one or more separate committees for the purpose of investigating and hearing disciplinary charges (‘Disciplinary Committee’).

Recommendation 29: Disciplinary Committees should comprise of a District Court Judge who is the Chairperson, two Council members appointed by the Chairperson, one legal representative (lawyer) and one lay person. The role of the Disciplinary Committee is the disciplining of legal practitioners through thorough investigations and hearing of complaints. The principles of fairness and justice must be considered in light of these proceedings.

Conduct leading to disciplinary proceedings

10.59 International experience has demonstrated that the conduct categories of ‘professional misconduct’ and ‘conduct unbecoming a barrister or solicitor’ are insufficient to deal with many complaints received about legal practitioners—for example, charging excessive costs, or performing work without sufficient competence or diligence.

10.60 In the Commission’s view, the LPA should be amended to cover ‘unsatisfactory professional conduct’. This may be defined as ‘conduct 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 legal practitioner’.

⁷⁷ *Lawyers and Conveyancers Act 2006* (NZ) s 129.

⁷⁸ *Ibid* s 228.

10.61 In addition, the LPA should define ‘professional misconduct’. A good model is provided in the Australian Model Laws, where this term is defined as:

- unsatisfactory professional conduct, where the conduct involves a ‘substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence’; or
- conduct—whether occurring in connection with the practice of law or otherwise—that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

10.62 Adopting this definition removes the need for a separate conduct category of ‘conduct unbecoming a barrister or solicitor’. As such, this category should be removed as a ground for disciplinary action under the LPA. Neither Australia nor NZ have retained a discrete conduct category of ‘conduct unbecoming’.

10.63 Further clarity about the relationship between bad professional work and disciplinary action under the LPA may be gained by including in the legislation a non-exhaustive list of conduct capable of being unsatisfactory professional conduct or professional misconduct. This could include, for example:

- *conduct that contravenes relevant legal disciplinary legislation, regulations or legal profession rules;*
- *charging excessive legal costs in connection with legal practice;*
- *conduct in respect of which there is a conviction for a ‘serious offence’ or an offence involving dishonesty.*

Recommendation 30: Disciplinary action under the LPA should be available for:

- (a) ‘unsatisfactory professional conduct’, defined as conduct 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 legal practitioner; and
- (b) ‘professional misconduct’, defined as:
 - (i) *unsatisfactory professional conduct, where the conduct involves a ‘substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence’; or*

(ii) *conduct—whether occurring in connection with the practice of law or otherwise—that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.*

Recommendation 31: The new legislation should include a non-exhaustive list of conduct that may amount to ‘unsatisfactory professional conduct’ or ‘professional misconduct’.

Recommendation 32: Conduct unbecoming a Barrister or Solicitor should be replaced by Professional misconduct.

Investigating and determining disciplinary disputes

Ensuring complaints are investigated and heard

10.64 A consumer of legal services justifiably may feel as though lawyers are ‘protecting their own’ if his or her complaint is dismissed without being investigated. This is especially concerning in a model where the decision not to investigate, or further investigate, a complaint is made by the professional association. In the Commission’s view, a Disciplinary Committee should be required to investigate complaints about legal practitioners except in limited and defined situations.

10.65 In particular, a Disciplinary Committee should be required to investigate a complaint unless, in the opinion of the Committee:

- *the length of time that has elapsed between the incident that is the subject of a complaint and the date on which the complaint was made makes investigation of the complaint impracticable or undesirable;*
- *the subject matter of the complaint is trivial;*
- *the complaint is frivolous or vexatious or is not made in good faith;*
- *the person aggrieved does not desire that action be taken or continued;*
- *the complainant does not have sufficient personal interest in the subject matter; or*
- *an adequate remedy is available through other channels.*

10.66 This follows the position in NZ, which is broadly consistent with Australian jurisdictions.

10.67 Pursuant to s 36 of the LPA, the Council must initiate a disciplinary hearing if, after making preliminary inquiries, there is ‘reasonable cause to suspect that any practitioner is

guilty of professional misconduct or of conduct unbecoming a barrister or solicitor'. This should be expanded to include where there is reasonable cause to suspect that a practitioner is guilty of unsatisfactory professional conduct, and conduct unbecoming a Barrister or Solicitor should be removed.

10.68 The Commission recommends that the Samoa Ombudsman or some other body should be tasked with overseeing the disciplinary functions of the Law Society. This should include decisions not to investigate a complaint or initiate a hearing.

Recommendation 33: The new legislation should require a Disciplinary Committee to investigate all complaints the Samoa Law Society receives about legal practitioners or former legal practitioners unless, in the opinion of the Council:

- (a) *the length of time that has elapsed between the incident that is the subject of a complaint and the date on which the complaint was made makes investigation of the complaint impracticable or undesirable;*
- (b) *the subject matter of the complaint is trivial;*
- (c) *the complaint is frivolous or vexatious or is not made in good faith;*
- (d) *the person aggrieved does not desire that action be taken or continued;*
- (e) *the complainant does not have sufficient personal interest in the subject matter; or*
- (f) *an adequate remedy is available through other channels.*

Recommendation 34: Section 36 of the LPA should be amended to require a Disciplinary Committee to initiate a hearing where the Committee has reasonable cause to suspect that a practitioner is guilty of unsatisfactory professional conduct.

Recommendation 35: The Commission recommends that the Samoa Ombudsman or some other body should be tasked with overseeing the disciplinary functions of the Law Society. This should include decisions not to investigate a complaint or initiate a hearing.

Time limits

10.69 An ongoing source of dissatisfaction with the Samoan legal disciplinary system is the time taken for many complaints to be dealt with. The Commission considers that an important reform in this context will be requiring Disciplinary Committees to deal with complaints in a timely manner. In the Commission's view, the LPA should adopt the phrasing of the Australian Model Laws—that is, that a Disciplinary Committee must deal with complaints 'as efficiently and expeditiously as is practicable'. In determining whether a

Disciplinary Committee has fulfilled this obligation, regard may be had to the obligation on Councils in the context of healthcare professionals to deal with complaints within 30 days.

Recommendation 36: The new legislation should require a Disciplinary Committee to deal with complaints as efficiently and expeditiously as practical. The recommendation of the Committee should then be referred to the Council for consideration. Time limit should be for 30 days to hear and resolve complaints.

Provision of information to complainants

10.70 The LPA does not specify any requirements to notify complainants about the progress of disciplinary investigations and determinations. The closest requirement is for the Secretary of the Law Society to publish details of disciplinary decisions in the *Gazette* and the *Savali*—many of which will remain unseen by the original complainants. A lack of information may lead to complainants feeling alienated from the proceedings and perceiving the proceedings to be unfair.

10.71 In the Commission's view, the Law Society should be required to notify a complainant in writing when his or her complaint has been received, and, if a Disciplinary Committee decides not to investigate the complaint or initiate a hearing, reasons for such a decision. Section 134 of the *Lawyers and Conveyancers Act 2006* of NZ provides that the Standards Committee that receives a complaint must as soon as practicable, advise the complainant and the person to whom the complainant relates of the procedure that the Standards Committee proposes to adopt.⁷⁹ The Standards Committee may decide to take no action (s 138) and such decision must be made known in writing to the complainant and to whom the complaint relates (s 139). Section 141 provides that the Standards Committee must send particulars of the complaint or matter to whom the complaint or inquiry relates, and invite that person to make a written explanation in relation to the complaint or matter. This opportunity is also given to the person whom the complaint is made against.

10.72 The Commission recommends that Disciplinary Committees should be required to provide persons, including the complainant, with written reasons for a determination of a disciplinary charge. The Commission recommends that the disciplinary functions of the Law Society should be subject to oversight from the Ombudsman or another body. If these recommendations are accepted and implemented, complainants should be notified of their right to seek a review of the Council's disciplinary practices, including any decision not to investigate a complaint or initiate a hearing.

⁷⁹ The Standards Committee is appointed by the New Zealand Law Society, as part of its Complaint Service to inquire into complaints. (ss 126, 129, 130) *Lawyers and Conveyancers Act 2006* (NZ)

Recommendation 37: The new legislation should require the Law Society to notify a complainant in writing:

- (a) *when his or her complaint has been received;*
- (b) *if a Disciplinary Committee has decided not to investigate the complaint and/or initiate a hearing, reasons for such a decision; and*
- (c) *if Recommendations (a) and (b) are accepted and implemented, of the complainant's right to seek a review of the Council's disciplinary practices.*

Recommendation 38: Should recommendation 37 be accepted, complainants should be notified of their right to seek a review of the Council's disciplinary practices, including any decision not to investigate a complaint or initiate a hearing. Pursuant to Recommendation 35, disciplinary functions of the Law Society should be subject to the oversight from the Ombudsman or another body.

Natural justice

10.73 The *Law Practitioners Act* makes minimal provision for the manner in which disciplinary proceedings should be conducted, other than giving the Council of the Law Society powers and privileges similar to those of Commissions of Inquiry, and witnesses protections similar to those in Commissions of Inquiry. This does not place an express obligation on the Council to conduct proceedings fairly.

10.74 In the Commission's view, the *Law Practitioners Act* should require Disciplinary Committees to conduct hearings in accordance with the rules of natural justice. This is consistent with requirements on bodies hearing legal disciplinary disputes in Australia and NZ.

Recommendation 39: The *Law Practitioners Act* should require the Council of the Law Society to conduct hearings in accordance with the rules of natural justice.

Public nature of hearings

10.75 Holding hearings in private can lead to public distrust of the fairness of decisions. It also may be in breach of art 9 of the *Samoa Constitution*—right to a fair trial. In the Commission's view, disciplinary proceedings under the *Law Practitioners Act* should be in public, except where the Council makes an order otherwise on the basis that it is not in the public interest. This is consistent with the position in NZ and Australia.

Recommendation 40: Disciplinary hearings should be in public, except where the Council makes an order otherwise on the basis that it is not in the public interest.

Provision of reasons

10.76 The *Law Practitioners Act* does not impose an express requirement on the Council of the Law Society to give written reasons for its determinations. This is inconsistent with modern legal disciplinary legislation and the promotion of fair and transparent decision making. In the Commission's view, Disciplinary Committees should be required to provide written reasons for any determination, including justification of any sanctions imposed. A copy of the reasons should be sent to the Council of the Law Society, the practitioner about whom the charge relates and the complainant.

Recommendation 41: The new *Law Practitioners Act* should require Disciplinary Committees to provide written reasons for any determination, including justification of any sanctions imposed. A copy of the reasons should be sent to the Council of the Law Society, the practitioner about whom the charge relates and the complainant.

Interim suspensions

10.77 An interim suspension while awaiting determination of a disciplinary charge places considerable social and economic hardship on a legal practitioner. There should be clear criteria to be considered by the Council of the Samoa Law Society in determining suspension of a legal practitioner. Stakeholders stressed the importance of instituting such criteria. The Commission supports the grounds for suspension set out in the legal disciplinary legislation in NSW, Australia—that is, that immediate suspension is considered necessary 'on the ground of the seriousness of the complaint which has been made'. This limits the situations in which a Disciplinary Committee suspends a practitioner to those with the necessary level of seriousness, whilst retaining enough flexibility to promote the protective nature of disciplinary proceedings.

Recommendation 42: The new *Law Practitioners Act* should restrict the power of the Council to issue an interim suspension of a legal practitioner to situations where the Council considers immediate suspension to be necessary on the ground of the seriousness of the complaint which has been made.

Sanctions

Maximum fine

10.78 During the course of this Inquiry, stakeholders expressed the view that the maximum fine for a misconduct charge should be raised. At present, the maximum fine that a practitioner against whom a misconduct charge has been made out can be ordered to pay to the Law Society is 10 penalty units (\$1,000). This is equivalent to the maximum fine for a healthcare

practitioner against whom a ‘serious breach’ is made out under the *Healthcare Professions Registration and Standards Act 2007*.

10.79 There is some precedent internationally for a higher fine—in NSW Australia, for example, a finding of professional misconduct can lead to a fine of up to \$75,000. However, given the different socioeconomic conditions, the Commission considers that maximum fines in jurisdictions such as Australia and NZ have limited applicability in Samoa.

10.80 The Commission supports keeping the maximum fine for legal practitioners and healthcare professionals against who misconduct charges are made out broadly equivalent. Only a short period of time has passed since the *Healthcare Professions Registration and Standards Act* was enacted and, as such, the Samoan Parliament has given recent consideration to these penalty levels. Accordingly, the Commission is not recommending an increase in the maximum fine available under the *Law Practitioners Act*. In the future, the Samoan Government may choose to reconsider the fines available under both the *Law Practitioners Act* and the *Healthcare Professions Registration and Standards Act (Samoa)*.

Expanding the range of sanctions available

10.81 A number of sanctions are available in international jurisdictions that are not specified in the *Law Practitioners Act*. Some of these are directed towards providing additional education and guidance to a legal practitioner, or preventing the misconduct from being repeated in the future, including orders that:

- *specified conditions be imposed on the practitioner’s practising certificate;*
- *the practitioner undertake and complete a specified course of further legal education;*
- *the practitioner undertake a specified period of practice under specified supervision;*
- *the practitioner do or refrain from doing something in connection with the practice of law;*
- *the practitioner’s practice be subject to periodic inspection by a specified person for a specified period.*

10.82 Other sanctions are directed towards compensating consumers of legal services for losses they incurred or damage suffered because of a legal practitioner, including an order that:

- *the practitioner pay compensation—up to a prescribed maximum amount—to a person who has suffered loss by reason of his or her act or omission (‘compensation order’);*

- *the practitioner repay the whole or a specified part of the amount charged for the legal services about which the complaint related;*
- *the practitioner cancel or reduce legal fees;*
- *the practitioner rectify, at his or her own expense, any error or omission; and*
- *the practitioner apologise to the complainant.*

10.83 In the Commission’s view, these sanctions would provide a valuable supplement to the orders currently available to the Council of the Law Society. Those sanctions related to further education and practical supervision are particularly appropriate in the context of a finding of unsatisfactory professional conduct—a lower order charge to those presently available under the *Law Practitioners Act*. Orders for compensation supplement redress that may be available through the civil courts for bad professional work. This recognizes the power imbalance for a complainant who seeks to sue his or her lawyer—especially in a small country like Samoa where there are limited options for legal representation.

Recommendation 43: In every case where the Council makes a disciplinary finding of ‘unsatisfactory professional conduct’ against a legal practitioner, the Council should have the power to:

- (a) *impose specified conditions on the practitioner’s practising certificate;*
- (b) *require the practitioner to undertake and complete a specified course of further legal education;*
- (c) *require the practitioner to undertake a specified period of practice under specified supervision;*
- (d) *require the practitioner to do or refrain from doing something in connection with the practice of law;*
- (e) *make the practitioner’s practice subject to periodic inspection by a specified person for a specified period;*
- (f) *require the practitioner to apologise to a person or persons;*
- (g) *require the practitioner to pay compensation (up to a prescribed amount) to a person has suffered loss by reason of his or her act or omission*
- (h) *require the practitioner to repay the whole or a specified part of the amount charged for the legal services about which the complaint related;*

- (g) require the practitioner to cancel or reduce his or her legal fees with respect to the services about which the complaint related; and*
- (h) require the practitioner to rectify, at his or her own expense, any error or omission with respect to the services about which the complaint related.*

Note: In the event the practitioner fails to comply with the Council's decision, the Council at last resort may impose sanctions under 'professional misconduct' in Recommendation 44 below.

Recommendation 44: In every case where the Council makes a disciplinary finding of 'professional misconduct' against a practitioner, the Council should strengthen the following powers already provided in section 37 of the LPA:

- (a) order that the practitioner's name be struck off the roll of barristers and/or solicitors; or*
- (b) suspend him or her from practice as a barrister and/or a solicitor for a period not exceeding three years.*
- (c) automatic disbarment if convicted of criminal offence.*

In every case in which a charge is successfully made out, the Council may:

- (c) order that the practitioner not practice on his or her own account until authorized by the Council to do so;*
- (d) order that the practitioner pay a fine to the Law Society not exceeding 10 penalty units;*
- (e) censure the practitioner; and*
- (f) order that the practitioner reimburse the Society for the costs and expenses of the inquiry and investigation.*

Note: Should Recommendations 43 and 44 be accepted, time frame for compliance is 21 days from date of decision.

Appendices

List of recommendations

Recommendation 1: Every lawyer who provides regulatory services must, in the course of his or her practise, comply with the following fundamental obligations:

- a) *the obligation to uphold the rule of law and to facilitate the administration of justice in Samoa;*
- b) *the obligation to be independent in providing regulated services to his or her clients;*
- c) *the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;*
- d) *the obligation to protect, subject to his or her overriding duties as an officer of the court and to his or her duties under any enactment, the interest of his or her client.*

The above provisions are from section 4 of the Lawyers and Conveyancers Act 2006 (NZ)

Recommendation 2: The Rules should form part of the new LPA in accordance with section 14 of the LPA. Powers and duties of the Law Society extend to making rules regulating the officers of the Society and the conduct of its members. These rules shall bind all members of the Law Society and all other persons to whom under the LPA such rules may be applied. Therefore, the Commission recommends a simple provision in the LPA allowing the Rules to be adopted after a 2/3 majority in a special meeting of the Law Society.

Recommendation 3: Incorporate into the new LPA a provision which empowers the Law Society to have regular CLE trainings within a year on any subject that will assist in the development and advancement of the knowledge of its members in any law or changes in the law in Samoa. CLE trainings should be made mandatory in the new legislation as a capacity building programme for lawyers. (Refer to Part 8 of the *NZ Lawyers and Conveyancers Act 2006* for guidance).

Recommendation 4: Section 31 of the LPA should be amended to have the Secretary of the Law Society issue annual practising certificates. Other roles of the Registrar in the LPA should be maintained.

Recommendation 5: Section 15(6) should be amended to reduce the quorum to 30 percent of paying permanent members. In the event that the quorum is not met and meeting is again adjourned, members present at the adjourned meeting should suffice for meeting to proceed.

Recommendation 6: The new legislation should specifically state that the Attorney General is an ex-officio member of the Council. The Attorney General as head of the Samoan Bar should be a voting member of the Law Society at annual general meetings pursuant to section 15(8) of the LPA.

Recommendation 7: Incorporation of law firms should be open to all lawyers. Given trends in New Zealand and Queensland, such a provision should be addressed in the new legislation.

Recommendation 8: Lawyers who become Ministers or Associate Ministers, or holds prominent positions such as the Head of State or Council of Deputies must not continue to practise given that as officers of the court, there may be potential conflict of interest with the Executive arm and legislative arm of government.

Recommendation 9: Maintain a fused profession in which all lawyers are admitted to the bar as barristers and solicitors.

Recommendation 10: There is no need to define the distinction between ‘barristers’ and ‘solicitors’ as any lawyer can practise as both in a ‘fused’ profession.

Recommendation 11: The new legislation should provide for those who wish to practise only as barristers to do so only under the Rules governing ‘barrister sole’.

Recommendation 12: Maintain terminology ‘barrister’ and ‘solicitor’ and refer to barrister and solicitor generically as ‘lawyers’. The definition of a ‘lawyer’ should remain as barrister and solicitors of the Supreme Court.

Recommendation 13: The age of admission of 21 years of age should be maintained.

Recommendation 14: A ‘*residency requirement*’ should be imposed on all overseas lawyers who wish to be admitted and set up private practice in Samoa. They must continuously reside in Samoa for such a period as the Council of the Law Society deems adequate. For overseas lawyers, they must have, in addition to the current requirements, ‘*adequate knowledge of Samoan laws and practice*’ to be admitted in Samoa. This can be done firstly by sitting an exam or undertaking a workshop/training on Samoan laws and customs.

Recommendation 15: A more stringent approach should be adopted by the Council of the Law Society in examining an application for admission. For instance, the current provision requiring an interview as a routine part of the admission process should be strengthened to ensure credibility and reliability of members of the legal profession. In addition, some form of personal

declaration must be made by the applicant verifying that he or she of good repute. This also should apply to all applicants applying for admission.

Recommendation 16: There should be a provision that holds a lawyer liable to disciplinary actions if he or she fails to make full disclosure of any information that may affect the outcome of his or her application. In the event the lawyer has failed to disclose any relevant information, his or her admission shall be void.

Recommendation 17: In providing character references, lawyers providing it must be of good repute with practicing experience of more than 5 years and have known the applicant for at least 3 years. This is subject to flexibility in the event the applicant cannot find a lawyer character referee who does not meet the above requirements. The Commission notes that the LPA does not restrict character referees to lawyers only.

Recommendation 18: The current provision of prescribed qualifications should be maintained. However, the Council of the Law Society must thoroughly examine applications for admission given recent cases of fraudulent representations of academic records and transcripts.

Recommendation 19: Eligibility for temporary roll should be clear-cut. In other words, non-Samoan citizens should remain enrolled on the temporary roll for admission. Duration of temporary roll should be treated on a case by case basis upon which the overseas counsel performs his or her work or when the contract expires. The latter should also be subject to flexibility in the event an overseas counsel is contracted in Samoa for longer periods of time such as 10 years. In this case, the overseas counsel must pay practising certificate fee every year hence he or she need not reapply every year. The 6 years time limit on the temporary role should be removed. This recommendation should also take into account non-Samoan lawyers marrying into Samoa and how their interest can be represented in this context.

Recommendation 20: The permanent roll provision should remain to enrol Samoan citizens. For overseas lawyers who are Samoan citizens, a stringent '*residency requirement*' should be imposed if they wish to set up a private practice in Samoa. The length of residency is to be left to the Council of the Law Society.

Recommendation 21: Reciprocal admission is unworkable and impractical in Samoa. However, such a concept should be considered by the Law Society in light of Samoa's accession to WTO rules and principles.

Recommendation 22: The provision for an oath of admission should remain part of the admission process.

Recommendation 23: The three years of legal experience requirement should be maintained. The preceding five (5) years in practice should be increased to eight (8) to cater for senior lawyers who have taken on government contracts.

Recommendation 24: There should be a provision in the new legislation to include a residency requirement in Samoa for three (3) years prior to commencement of private practice, in order to be allowed to establish a private law firm. The private law firm should be manned at all times by a sufficiently senior lawyer.

Recommendation 25: The new legislation should require proof of practical legal experience and also handling of clients' money and lawyers trust funds subject to the satisfaction of the Council, before commencing private practice. This should also include compulsory auditing of trust accounts. The new legislation should have a provision that states that the Council is responsible for providing training on handling of client money, lawyer's trust fund and other matters that relate to money, if the lawyer wanting to commence private practice has no practical experience in handling clients' money and trust funds. [Refer to **Recommendation 3**]

Recommendation 26: The new legislation should follow the NZ legislation provision on the commencement of private practice for guidance.

Recommendation 27: The new legislation should require the Council of the Law Society to establish and administer a complaints-handling service. This should include a requirement to provide, and appropriately publicise, places at which complaints may be lodged, and the procedure to be used in lodging such complaints.

Recommendation 28: The new legislation should require the Law Society to establish one or more separate committees for the purpose of investigating and hearing disciplinary charges ('Disciplinary Committee').

Recommendation 29: Disciplinary Committees should comprise of a District Court Judge who is the Chairperson, two Council members appointed by the Chairperson, one legal representative (lawyer) and one lay person. The role of the Disciplinary Committee is the disciplining of legal practitioners through thorough investigations and hearing of complaints. The principles of fairness and justice must be considered in light of these proceedings.

Recommendation 30: Disciplinary action under the LPA should be available for:

- (a) 'unsatisfactory professional conduct', defined as conduct 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 legal practitioner; and

(b) ‘professional misconduct’, defined as:

(i) *unsatisfactory professional conduct, where the conduct involves a ‘substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence’; or*

(ii) *conduct—whether occurring in connection with the practice of law or otherwise—that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.*

Recommendation 31: The new legislation should include a non-exhaustive list of conduct that may amount to ‘unsatisfactory professional conduct’ or ‘professional misconduct’.

Recommendation 32: Conduct unbecoming a Barrister or Solicitor should be replaced by Professional misconduct.

Recommendation 33: The new legislation should require a Disciplinary Committee to investigate all complaints the Samoa Law Society receives about legal practitioners or former legal practitioners unless, in the opinion of the Council:

(a) *the length of time that has elapsed between the incident that is the subject of a complaint and the date on which the complaint was made makes investigation of the complaint impracticable or undesirable;*

(b) *the subject matter of the complaint is trivial;*

(c) *the complaint is frivolous or vexatious or is not made in good faith;*

(d) *the person aggrieved does not desire that action be taken or continued;*

(e) *the complainant does not have sufficient personal interest in the subject matter; or*

(f) *an adequate remedy is available through other channels.*

Recommendation 34: Section 36 of the LPA should be amended to require a Disciplinary Committee to initiate a hearing where the Committee has reasonable cause to suspect that a practitioner is guilty of unsatisfactory professional conduct.

Recommendation 35: The Commission recommends that the Samoa Ombudsman or some other body should be tasked with overseeing the disciplinary functions of the Law Society. This should include decisions not to investigate a complaint or initiate a hearing.

Recommendation 36: The new legislation should require a Disciplinary Committee to deal with complaints as efficiently and expeditiously as practical. The recommendation of the Committee should then be referred to the Council for consideration. Time limit should be for 30 days to hear and resolve complaints.

Recommendation 37: The new legislation should require the Law Society to notify a complainant in writing:

- (a) when his or her complaint has been received;*
- (b) if a Disciplinary Committee has decided not to investigate the complaint and/or initiate a hearing, reasons for such a decision; and*
- (c) if Recommendations (a) and (b) are accepted and implemented, of the complainant's right to seek a review of the Council's disciplinary practices.*

Recommendation 38: Should recommendation 37 be accepted, complainants should be notified of their right to seek a review of the Council's disciplinary practices, including any decision not to investigate a complaint or initiate a hearing. Pursuant to Recommendation 35, disciplinary functions of the Law Society should be subject to the oversight from the Ombudsman or another body.

Recommendation 39: The *Law Practitioners Act* should require the Council of the Law Society to conduct hearings in accordance with the rules of natural justice.

Recommendation 40: Disciplinary hearings should be in public, except where the Council makes an order otherwise on the basis that it is not in the public interest.

Recommendation 41: The new *Law Practitioners Act* should require Disciplinary Committees to provide written reasons for any determination, including justification of any sanctions imposed. A copy of the reasons should be sent to the Council of the Law Society, the practitioner about whom the charge relates and the complainant.

Recommendation 42: The new *Law Practitioners Act* should restrict the power of the Council to issue an interim suspension of a legal practitioner to situations where the Council considers immediate suspension to be necessary on the ground of the seriousness of the complaint which has been made.

Recommendation 43: In every case where the Council makes a disciplinary finding of ‘unsatisfactory professional conduct’ against a legal practitioner, the Council should have the power to:

- (a) impose specified conditions on the practitioner’s practising certificate;*
- (b) require the practitioner to undertake and complete a specified course of further legal education;*
- (c) require the practitioner to undertake a specified period of practice under specified supervision;*
- (d) require the practitioner to do or refrain from doing something in connection with the practice of law;*
- (e) make the practitioner’s practice subject to periodic inspection by a specified person for a specified period;*
- (f) require the practitioner to apologise to a person or persons;*
- (g) require the practitioner to pay compensation (up to a prescribed amount) to a person has suffered loss by reason of his or her act or omission*
- (h) require the practitioner to repay the whole or a specified part of the amount charged for the legal services about which the complaint related;*
- (g) require the practitioner to cancel or reduce his or her legal fees with respect to the services about which the complaint related; and*
- (h) require the practitioner to rectify, at his or her own expense, any error or omission with respect to the services about which the complaint related.*

Note: In the event the practitioner fails to comply with the Council’s decision, the Council at last resort may impose sanctions under ‘professional misconduct’ in Recommendation 44 below.

Recommendation 44: In every case where the Council makes a disciplinary finding of ‘professional misconduct’ against a practitioner, the Council should strengthen the following powers already provided in section 37 of the LPA:

- (a) order that the practitioner’s name be struck off the roll of barristers and/or solicitors; or*
- (b) suspend him or her from practice as a barrister and/or a solicitor for a period not exceeding three years.*
- (c) automatic disbarment if convicted of criminal offence.*

In every case in which a charge is successfully made out, the Council may:

- (c) *order that the practitioner not practice on his or her own account until authorized by the Council to do so;*
- (d) *order that the practitioner pay a fine to the Law Society not exceeding 10 penalty units;*
- (e) *censure the practitioner; and*
- (f) *order that the practitioner reimburse the Society for the costs and expenses of the inquiry and investigation.*

Note: Should Recommendations 43 and 44 be accepted, time frame for compliance is 21 days from date of decision.