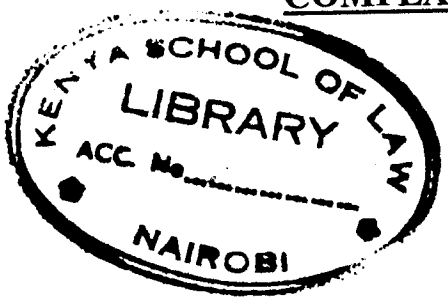
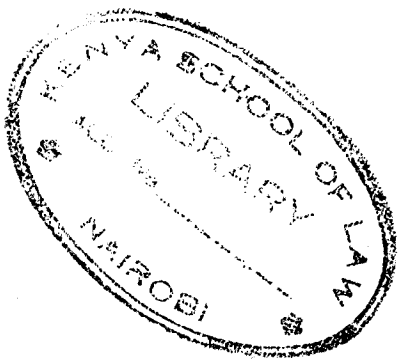
KAMBUNI 3

REVIEW OF THE EFFECTIVENESS OF THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA AND THE COMPLAINTS COMMISSION





MARK STOBBS
Head of the Professional Standards
And Legal Services Department
Bar Council of England and Wales

IBA Consultant

May 2002

REVIEW OF THE EFFECTIVENESS OF THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA AND THE COMPLAINTS COMMISSION

SUMMARY OF FINDINGS AND RECOMMENDATIONS

1. The two principal disciplinary bodies, the Complaints Commission and the Disciplinary Committee, are under-funded, under-resourced and with management systems that are no longer able to cope with the volume of complaints.

2. While the Complaints Commission's procedures are broadly appropriate (though there are training needs and ways of improving service), the Disciplinary Committee's procedures are cumbersome and in need of urgent reform to provide a coherent case management system and reduce the substantial delays that exist.

3. With this in mind, I have set out what I believe to be appropriate procedures and timescales that should be aimed at. In particular, an initial decision on whether the complaint should be prosecute should ideally be taken within 90 days of receipt of the complaint and no more than a further 3 months should elapse before it is referred to the Committee. The Committee should aim to have resolved simple cases within 4 months of referral and more complex ones within 9 months.

The Commission

4. **Recommendation 1:** The Commission should consider re-drafting its information leaflet about the system with a view to making it less technical and, possibly, translating it into Swahili. (Para 51)

5. **Recommendation 2:** A computerised case-management system should be established urgently in the Commission. This should be capable of storing information about the complaint and its progress and of generating standard letters. (Para 53)

6. **Recommendation 3:** The system described above needs to be built to a carefully consider specification and be subject to tender. It should also be consistent with other programmes recommended for the Committee. (Para 54)

7. **Recommendation 4:** If this proves too costly or takes time to develop, improved manual systems should be implemented urgently. (Para 54)

8. **Recommendation 5:** A Deputy Commissioner should have responsibility for managing the case-load of the staff and monitoring performance. (Para 55)

9. **Recommendation 6:** The prosecutor responsible for drafting the charge for the Committee should normally handle the prosecution as a whole and there should at

least be close liaison being prosecutors dealing with cases against the same advocate. (Para 56)

10. **Recommendation 7:** There needs to be a formal audit of the tasks and staffing levels of the Commission, although I give my own views as to the likely level of staffing required. (Paras 58 -61)

11. **Recommendation 8:** These recommendations will not deal with the backlog at the Commission and a Deputy Commissioner post should be established with additional staff to reduce the backlog and to implement the changes, particularly the management systems that I have suggested here. (Para 62)

12. **Recommendation 9:** The Commission should concentrate on reducing its backlog and work on seminars and other events should be put on hold until this has been achieved. (Para 64)

13. **Recommendation 10:** Prosecutors should interview all witnesses and complainants before a case is referred to the Committee in order to save time being wasted in front of the Committee. (Para 65)

14. **Recommendation 11:** Formal training for prosecutors in prosecution techniques should be established. (Para 66)

15. **Recommendation 12:** More senior advocates should be recruited to the Commission to deal with the more complex and difficult complaints and particularly if proposals to give the Commission powers to tax bill and make binding orders are to be implemented. (Para 67)

16. **Recommendation 13:** The additional powers should not be brought into force until the Commission has the staff and expertise to exercise them properly. (Para 68)

17. **Recommendation 14:** The quarterly reports should be produced annually. (Para 69)

<u>The Committee</u>

18. **Recommendation 15:** The Committee should have the option to hear cases under a Summary Procedure to enable the simpler, less serious cases to be heard speedily. (Para 72)

19. **Recommendation 16:** The Committee should appoint a Directions Officer with similar functions to a Master in the court. That Officer should deal with uncontroversial and administrative matters and set timetables and make other orders to ensure that a case is ready for hearing. (Para 73)

20. **Recommendation 17:** The rules (and, if necessary, the Act itself) should make clear what counts as proper service and provide a procedure for dealing with advocates who fall ill prior to hearings. (Para 74)

21. **Recommendation 18:** The Committee should seek to complete a matter in a single hearing. In particular, the judgement, mitigation and sentence should be given immediately after the hearing unless the issues are so complex that time is needed for the Committee to consider its verdict. (Para 75)

22. **Recommendation 19:** Amendments should be made urgently to permit adjourned hearings to take place even if the full panel is not there, subject to there being at least one advocate and one lay person available. (Para 76)

23. **Recommendation 20:** Even with the proposed increases, the membership of the Committee is unlikely to be sufficient to manage its workload and the Committee should have powers to co-opt advocates. (Para 78)

24. **Recommendation 21:** Membership of the panel should be open to advocates of 5 years standing or more and that two elected places should be reserved for individuals of between 5 and 10 years' standing. (Para 79)

25. **Recommendation 22:** A greater number

26. of lay representatives are likely to be needed and the procedure for their appointment needs to be clarified. (Para 80)

27. **Recommendation 23:** The Committee should establish a computerised case-management system to hold details of cases and enable proper management of cases to take place. (Para 83)

28. **Recommendation 24:** The Committee's computer system should be implemented in tandem with that of the Commission and be consistent with it. (Para 85)

29. **Recommendation 25:** If, however, no agreement to the establishment of a unified system can be reached within 6 months then the Committee should establish its own system. (Para 85)

30. **Recommendation 26:** If a fully computerised system is impossible then manual systems should be set up to improve the monitoring of cases and provide statistical information. (Para 86)

31. **Recommendation 27:** The Committee should consider publishing an information leaflet about its work for advocates and complainants. (Para 87)

32. **Recommendation 28:** The backlog must be addressed as a matter of urgency and the Directions Officer should take the steps outlined in the report to establish whether cases should continue to be pursued or not. (Para 88)

33. **Recommendation 29:** Once the backlog has been reduced to manageable proportions, a review should be conducted to establish whether (a) the Directions Officer needs to continue to be a full-time appointment and (b) the staffing levels recommended here need to be maintained. (Para 89)

34. **Recommendation 30:** This procedure will place a substantial amount of pressure on the Complaints Commission and Commission should take steps to consider the staffing levels needed to deal with the case management powers recommended here. (Para 90)

Sanctions

35. **Recommendation 31:** The present powers of the Committee could be extended to include ones aimed at protecting the public and improving the advocate's performance. (Para 92)

36. **Recommendation 32:** For consistency, the Committee, in consultation with the Commission and the Chief Justice should prepare guidelines setting out its policy on sentencing. (Para 93)

37. **Recommendation 33:** The existing powers concerning costs are too wide and should be more restricted. (Para 95)

Appeals

38. There are problems because advocates will judicially review the Committee and obtain a stay of sentence, rather than prosecute an appeal. Once the sentence has been stayed, then neither the JR nor the appeal is pursued.

39. **Recommendation 34:** The absence of a stay of sentence on appeal is draconian and this provision should be abolished where the order is that the advocate be struck off, suspended or fined more than 50,000 shillings. (Para 97)

40. **Recommendation 35:** The rules should contain sanctions to encourage advocates to prosecute appeals expeditiously and to penalise frivolous appeals as suggested in the report. (Para 98)

41. **Recommendation 36:** The number of judges hearing appeals should be reduced and the need for a further appeal to the Court of Appeal should be reconsidered. (Para 100).

Enforcement

42. **Recommendation 37:** The LSK ought to establish a post charged with pursuing such fines through the courts and taking steps to enforce them. (Para 101)

43. **Recommendation 38:** Insofar as it does not happen already, there needs to be formal liaison between the LSK and the Registrar to ensure that judges are informed of strikings off and suspensions immediately. (Para 102)

Miscellaneous Recommendations

Reasons

44. **Recommendation 39:** Insofar as it is not done already the Commission should give reasons if it decides to dismiss a complaint. (Para 103)

Convictions by the Courts

45. **Recommendation 40:** The Commission should have power to prosecute convictions whether or not a complaint is received and there should be requirements on advocates to inform the Commission of such convictions. (Paras 104-5)

Offices outside Nairobi

46. **Recommendation 41:** While I sympathise with the reasoning behind proposals for offices outside Nairobi, these should not be implemented without full research into the likely costs and the possible alternatives. (Para 108)

The Registrar and the LSK

47. **Recommendation 42:** In the long term, consideration should be given to linking the LSK and the Registrar's office by computer and it may be unnecessary for every practising certificate to be signed personally by the Registrar. (Para 112)

The Background to Complaints

46. The main issues giving rise to complaints seem to involve failures to account to clients for money, to keep the clients informed of progress and delay. Many of the complaints would appear to involve criminal conduct. I make a number of recommendations aimed at reducing the incidence of such complaints.

47. **Recommendation 43:** consideration should be given to the introduction of a contingency fee system to give advocates some additional remuneration above those prescribed in the Remuneration Order. (Para 119)

48. **Recommendation 44:** The rules concerning touting should be reconsidered with a view to providing proper regulation of this activity rather than banning it. (Para 120)

49. **Recommendation 45:** There should be agreed and well publicised rules dealing with cases where lawyers are entitled to retain clients' money to set off against other fees owed by the client. (Para 121)

50. **Recommendation 46:** Proposals for compulsory continuing education and changes to the educational arrangements should include client care. In implementing such schemes, however, the LSK should ensure that there are proper resources to manage their enforcements. (Para 122)

51. **Recommendation 47:** The LSK can play a major part in encouraging good practice by providing written guidance and standards for client care, practice administration and handling clients' funds. (Para 124)

52. **Recommendation 48:** Consideration should be given to requiring junior advocates to spend more time in firms before being permitted to practise on their own as sole practitioners. (Para 127)

53. **Recommendation 49:** The LSK should issue more guidance in the area of practice management and client care and should consider instituting some form of accreditation system. (Para 129)

54. **Recommendation 50:** The LSK or the Complaints Commission should consider appointing an accountant who would have the power to inspect accounts at short notice, take evidence and report short-comings. (Para 131)

55. **Recommendation 51:** The LSK or the Commission should have powers to intervene in and take over practices in order to protect clients in cases where the advocate is unable to continue to advise the client or where it is appropriate that he be prevented from so doing. (Para 133)

56. **Recommendation 52** It is clearly appropriate that some form of compensation fund be established to provide redress for clients who suffer from dishonest practitioners but that this be delayed until the other protections mentioned in this report can be implemented too. (Para 137)

57. **Recommendation 53:** Indemnity insurance for advocates should be made a pre-requisite for practice. (Para 139)

58. **Recommendation 54:** The Rules of Conduct governing advocates should be reviewed and made more comprehensive and appropriate. (Para 142)

59. **Recommendation 55:** The LSK should consider preparing information to be publicised to clients about what they can expect from an advocate. (Para 143)

The Regulation of Lawyers

60. The legislation governing advocates in Kenya is complex and divides responsibility between too many individuals. The result has been that there has been no central control over performance or any real ownership of the system. The changes to the legislation proposed do not help in that they blur the distinctions between investigation and adjudication and provide over-draconian remedies to problems.

61. **Recommendation 56:** If the Commission is to have powers to require advocates to return property, there must be proper procedures for exercising them. (Para 150)

62. **Recommendation 57:** The powers of judges in section 56 of the Act should be clarified, ideally to limit those powers to providing informal advice or rebuke with more serious matters sent for investigation by the Commission or the Committee. (Para 154)

63. **Recommendation 58:** Consideration should be given to giving the judges representation (possibly as chairman) on the Disciplinary Committee. (Para 154)

64. **Recommendation 59:** If, however, it is thought that the judges should have the full panoply of powers to discipline advocates, then an appropriate procedure should be established governing the exercise of such powers. (Para 155)

65. **Recommendation 60:** The multiplicity of functions for the Attorney General is unfortunate and at the least, he ought not to chair the Disciplinary Committee or be represented at its hearings. (Para 158)

66. **Recommendation 61:** Similarly, the Secretary to the LSK should not be secretary to the Committee. (Para 159)

67. **Recommendation 62:** If the Committee is to have powers to make enforceable judgements, it must be clear that, if the complainant chooses that route, he may not seek to have the matter litigated again in the courts. (Para 163)

68. **Recommendation 63:** There needs to be a clear policy over matters which are the subject of criminal investigation and the Commission and the Committee should not investigate complaints which are the subject of police investigations until either a decision has been taken not to prosecute or any prosecution has been completed. (Para 165)

Criminal Penalties

69. **Recommendation 64:** The Act provides too many criminal offences for matters which are either not sufficiently serious to merit criminal sanctions or which are rarely enforced. The offence of under-charging should be reviewed and that the offence of failure to respond to the Complaints Commission abolished. (Para 167)

70. **Recommendation 65:** A major overhaul of the legislation will be needed to make the system more efficient. I am concerned that in many cases the legislation seems unnecessarily detailed and prescriptive and that many matters can be left to rules made under the legislation. The Act should be looked at with this in mind. (Para 172)

The Future System

71. **Recommendation 66:** There should be a single agency to deal with the investigation and prosecution of advocates. (Para 187)

72. **Recommendation 67:** Complaints should only be brought directly to the Committee where the prosecutor is the LSK or it comes by way of an appeal from the complainant against a failure of the Commission to investigate properly. (Para 187)

73. **Recommendation 68:** The same agency should run the Disciplinary Committee although it should be serviced by a separate secretariat, reporting to the Directions Officer. There should be appeals from the Committee to the court. (Para 191)

74. **Recommendation 69**: It will be most satisfactory for the complaints agency to be run by the LSK provided that the LSK is willing to undertake this task and prepared to fund it. If it is not prepared to do so then urgent work needs to be done by the Kenyan Government to fund the Complaints Commission to the state where it is able to its job properly. Consideration should also be given to taking the Disciplinary Committee out of the management structure of the LSK. It is not obvious, however, that Government should be responsible for providing the funding of it. (Para 194)

75. **Recommendation 70:** The LSK faces major problems in finding the finance and staff to take on such responsibilities and work needs to be done to explore where the finance is to come from. (Para 199)

76. **Recommendation 71:** I see no point in transferring functions to the LSK until the Disciplinary Committee is running properly. However, once the backlog of the Committee has been cleared, the staff taken on to deal with that backlog should move to start taking on complaints on behalf of the Committee and investigating them. At that point, the LSK could begin to take on new complaints while the Commission deals with its backlog. (Para 200)

77. **Recommendation 72:** If this were to be accepted, then the Attorney-General should, in addition to his powers in respect of lay representatives, have an overall task of keeping the system under review. It seems to me that that task should include:

- The setting of targets in terms of time-scales and case management for the various functions carried out by the agency;
- Approval of rules governing the system;
- The power to establish an alternative system if it is clear that the existing one is failing and to charge the profession for its administration. (Para 202)

78. **Recommendation 73:** If the LSK is unwilling or unable to take on this task, then the system could be taken outside Government and the profession altogether. For this, legislation could establish an independent body with responsibility for running an investigation and prosecution body and a Disciplinary body. In my view, the body should have as its Directors, the Attorney-General, the Chief Justice, the Chairman of the LSK and a distinguished lay person. This body would employ the necessary staff and oversee the procedures. The funding difficulties would remain. (Para 205)

REVIEW OF THE EFFECTIVENESS OF THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA AND THE COMPLAINTS COMMISSION

PART I – INTRODUCTION

1. I have been asked to consider in general the regulatory provisions and the handling of complaints against advocates in Kenya. My terms of reference are at Annex A to this review.

2. I visited Nairobi between 25th April 2002 and 3rd May 2002. I attended a meeting of the Disciplinary Committee and, in addition, I met the following:

   - Ms Raychelle Omamo, Chairperson of the Law Society of Kenya
   - Mr George Kegoro, Secretary to the Law Society of Kenya
   - Ms Caroline Murimi, Deputy Secretary, Law Society of Kenya
   - Ms Bibiana Mwongeli, clerk to the Disciplinary Committee
   - Mr Rauta Athiambo, Secretary to the Complaints Commission
   - Mrs Esther Aduma, Deputy Chief State Counsel, Complaints Commission
   - Mr Joseph Nyere, State Counsel, Complaints Commission
   - Mr Joseph Were, State Counsel Complaints Commission.
   - Ms Jane Umaru, State Counsel, Complaints Commission
   - Mr C W Gatonye – Advocate and Member of the Disciplinary Committee
   - Mr J D Murimi – Advocate and Member of the Disciplinary Committee.
   - Mr Amos Wako – Attorney-General
   - Professor O B Ojwang, Dean of the Faculty of Law, University of Nairobi
   - Mr Jonny Havelock, Mr Fred Odienjo of Kaplan and Stratton, Advocates
   - Mr Leonard Njagi, Principle, Kenya School of Law.
   - Mrs Florence Simbiri-Jaoko, Deputy Registrar, Civil Appeals Office.
   - Mr Harun Ndubi, Executive Directive, Kithuo cha Sheria
   - Mrs L K Waweru, Advocate

   I also wrote to the Chief Justice setting out some of the recommendations I was proposing. At the time of writing, I had received no response.

3. I was most grateful for the opportunity to talk to all of these people and for the openness with which they were prepared to speak of the problems and the issues. I should make it clear that any criticisms made in this report are not of any individuals. I should also add that, in the short time I was in Kenya, it is likely that I will have misunderstood or failed to appreciate a number of matters. Any such errors in this report are, of course, my fault.

4. In this report, I shall consider first the legal provisions governing the system for looking into complaints against advocates in Kenya. I shall then consider the existing institutions and make a number of general recommendations for improvements to the system and dealing with the particular problems that exist at the moment. I shall then look at the wider factors giving rise to complaints and suggest ways in which the some of the difficulties could be combated. I shall then consider in general the issues concerning self-regulation against co-regulation. Finally, I shall look at the costs and consider an action plan implementing my recommendations.

PART II - THE DISCIPLINARY SYSTEM FOR ADVOCATES IN KENYA

The Legislative Provisions

5. The law governing complaints against lawyers and the disciplinary regime is set out in the Advocates Act. At the time of my visit, amendments to the Act were being proposed in the Statute Law (Miscellaneous Amendments) Bill 2002. I shall look at these separately.

Complaints Commission

6. Section 53 of that Act establishes a Complaints Commission, the purpose of which is to investigate complaints against advocates, firms of advocates, their members or employees. The Commissioners are appointed by the President, who can prescribe remuneration for them. The staff supporting the Commission are appointed by the Attorney General, who may also make rules regulating the Commission's structure and operation. The Commission has power[1] to require any person whom it wishes to assist it to do so, though it is not clear what mechanism exists to enforce this. The Commission has a duty to consider complaints by any person against an advocate and it may:

   - Reject the complaint;
   - If the matter appears to constitute a disciplinary offence[2], refer the matter to the Disciplinary Committee[3];
   - If there appears to be substance to the complaint, investigate the complaint and call upon the person complained against to answer the complaint;
   - Following enquiry in a non-disciplinary matter, require the advocate to re-imburse the complainant for loss or damage up to 10,000 shillings[4] – and enforce this as if it were an order of the court (though the procedure for achieving this is unclear);
   - Refer the complainant to the courts if it considers that they are the most appropriate forum to resolve the dispute;
   - In cases which do not appear to be of a serious or aggravated nature promote reconciliation and an amicable settlement.

7. Parties aggrieved by a decision (and this appears to include both complainant and advocate) can appeal to the High Court from any decision of the Commission. The Commission also has a duty to publish quarterly report.

---

[1] Section 53(3).
[2] The meaning of this term is not defined
[3] This power is being clarified under the new Bill to make it clear that the Commission is able to investigate complaints prior to referring them to the Committee.
[4] To be increased to 100,000 shillings under the Bill.

The Court

8. Advocates are also subject to the jurisdiction of the Court and the Act[5] clearly contemplates that there are powers in the Chief Justice and the other judges to deal with misconduct. It is not clear what these are and I understand that this jurisdiction has never been exercised.

Disciplinary Committee

9. The Disciplinary Committee consists of the Attorney-General, the Solicitor-General or a person deputed by the Attorney-General (who sits as Chair), three advocates of not less than 10 years standing who are elected to hold office for 3 years[6]. The Act contemplates that it should sit as a body of either 3 or 5 members[7] and that the chairman or vice-chairman of the Law Society may also sit for convenience.

10. Any person may make a complaint of professional misconduct to the Committee, which the Committee may either dismiss or, invite the advocate to attend and, following the attendance may admonish, suspend, fine or strike off the advocate. It is notable that there appears to be no power to refer the matter to the Complaints Commission or to advise the complainant to go to the courts. In practice, I understand that most lay complainants are referred by the Committee to the Commission, but that the Committee will consider complaints brought directly by the Law Society and, occasionally, by another lawyer.

11. The Committee has power to make orders as to costs against any party (including, it would appear, the complainant and any advocate representing a party) and has similar powers to the Commission to enforce such orders.

12. On reaching its decision, the Committee refers its decision to the Registrar who publicises it. Where the complaint reveals a breach of trust, the Committee may refer the matter to the Attorney-General for possible prosecution.

Appeals

13. As has been noted, there is an appeal from the Commission to the High Court[8]. Appeals from the Committee may be made by an advocate to the High Court where the matter may be heard by 2 or 3 judges. There is a further appeal to the Court of Appeal. An appeal does not act as a stay of sentence.

14. The Registrar is responsible for taking action concerning the publicity of the decision and for striking an individual off the Roll.

---

[5] Section 56

[6] The Bill proposes that the number of members should be increased to 6, that they should be elected so that their terms do not end at the same time and that 3 non-lawyers should also be appointed by the Attorney-General on the recommendation of the Law Society.

[7] The Bill does not specify who chooses which members shall sit on which Committee, nor that a lay representative has to be present.

[8] But see the amendments under the new Bill.

15. The Chief Justice has power to order the Registrar to return an individual to the Roll in almost any circumstance he sees fit[9].

16. The Act, therefore, seems to contemplate that the Commission exists to deal with complaints that do not amount to professional misconduct and to refer complaints concerning conduct to the Disciplinary Committee. That Committee may also accept complaints concerning misconduct. The Court may also deal with misconduct by itself.

Rule Making

17. The Rules governing advocates are generally made by the Law Society with the concurrence of the Chief Justice[10].

The New Bill

18. The new Bill makes a number of important amendments to the powers and constitution of these various bodies. The main features, in addition to those noted in footnotes, seem to be as follows:

- The creation of an offence of non-co-operation with the Commission;
- Clarification that orders of the Commission can be registered with the Court and be enforced as if they were court orders;
- A power to require the advocate to surrender funds or property to the complainant where that advocate does not dispute that they are owed to the complainant;
- An appeal to the Disciplinary Committee against orders that an advocate surrender funds or property;
- A power to require an advocate to supply fee notes and to assess fees if the advocate fails to comply;
- A power in the Commission to investigate the accounts of an advocate.
- A further 3 advocates to be elected to the Disciplinary Committee;
- The appointment by the Attorney-General of 3 lay people to the Committee on the recommendation of the Law Society, though there does not appear to any formal provisions setting out that they must sit at every hearing;
- Provision to remunerate members of the Committee out of public funds at a level determined by the Attorney-General;
- A power in the Committee to require an advocate to pay compensation of up to 5m shillings;
- A power in the Committee to determine fees and to tax costs;
- A power in the Committee to order the advocate to pay the complainant any amount in dispute;
- Powers in the Committee to deal with inadequate professional service, in particular to reduce the advocate's fees, direct the advocate to rectify the error or take such other step in the client's interest as the Committee may require.

[9] Under the new Bill, this power will be limited to cases where the Committee recommends that the Advocate be restored.
[10] Section 81.

These powers obviously provide greater powers to compensate clients and take steps which might normally be taken only by a court.

The Workings of the Disciplinary Bodies

19. I examined in detail the workings of the Complaints Commission and the Disciplinary Committee. I discussed the role of the judiciary with the people that I met, but I understand that no cases are known where the powers in section 56 of the Advocates Act have been exercised.

The Complaints Commission

20. The Commission's role is set out in section 53 of the Advocates Act. Its main function is to investigate complaints against advocates and either to resolve them or to refer them to the Disciplinary Committee.

21. The Commission is headed by a Commissioner and staffed by around 18 members of staff. These include the Secretary and a number of State Counsel whose roles involve either the investigation of a complaint or its prosecution. There is a small support staff to register complaints, deal with the stationery and other requirements of the office and to type work. There appeared to be a few computers in the office but I did not see them being used, the majority of the typing being done on electric typewriters.

22. On receipt of a complaint, the complaint is analysed by the senior State Counsel, a file is then opened and allocated to a State Counsel. That State Counsel writes to the advocate complained against and to others, for example, the relevant insurance company, who may be able to help. In most cases, the State Counsel prepares a summary of the complaint rather than sending the actual papers. I understand that this is because many complaints are in inflammatory language. I see no objection to this practice, provided that the complainant is aware of the summary and has the opportunity to dispute it.

23. It is notable that many advocates make no response to the Commission. Others indicate that they will seek to resolve the matter and then fail to do so. This suggests that many advocates either do not take the Commission seriously or have no answer to the complaint. In the time available, I was not able to assess the scale of non-response but from the fact that the most cases referred to the Committee include a charge of failure to respond, I infer that it is large.

24. In the light of the responses, the Counsel considers whether the complaint can be dismissed, whether the advocate should be permitted the chance to conciliate the matter or whether to refer the complaint to the Committee. He recommends this to the Commissioner who endorses it or gives other instructions. If the matter is to be referred to the Committee it is referred to a different State Counsel to draft an affidavit setting out the complaint for the Commissioner to sign. This is then sent to

the Committee. It is notable that the Counsel who drafts the charge is not necessarily the Counsel who presents the matter to the Committee.

25. The Commission seems to receive between 300 and 400 complaints per quarter (ie around 1500 per year). It states that it aims to reach a decision on complaints in 90 days. The fact that it currently holds over 3200 live cases (ie more than 2 years' work) suggests that this aim is rarely, if ever, achieved.

26. I also heard concerns expressed that the standard of preparation of many prosecutions before the Committee was not high and, in particular, that many prosecutors were taken by surprise by the evidence given by complainants, thus causing delay. Members of the Commission agreed that this was the case.

27. In addition, the Commission organises conferences to inform the profession about such issues as client care and other issues. Many such conferences also provided resolutions for changes in the rules concerning indemnity insurance, client care and so forth. Such conferences, I suspect, take some time to organise and must divert resources from the main function of the Commission which is to deal with complaints.

28. On visiting the Commission it was clear to me that its resources are entirely inadequate to cope with the task in hand. All letters are typed manually and it appears to take at least a month for a letter to be ready for signature. There is no method of tracking where a file is or the progress made on that file. This means that information cannot be given to complainants making enquiries about their case and that it is difficult for letters to be married to their relevant files. I was told by one advocate that, although he had replied to complaints made against him, he had often been informed by the Commission that it had not received them. This did not surprise me.

29. The storage and registry facilities are also inadequate and it seemed to me that completed files ought to be destroyed or archived elsewhere. Moreover, I was told that many complainants launch multiple complaints against the advocate in respect of the same matter. There is no way to identify these. Nor is there any obvious monitoring of the progress of complaints before the Committee. There are discrepancies in the numbers that each body thinks are before the Committee.

Disciplinary Committee

30. The Disciplinary Committee is an independent body run by the Law Society. The Secretary to the Society is also Secretary to the Committee (though he and his Deputy take it in turns to attend meetings). The Society provides two support staff to undertake the administrative work of the Committee. The Committee meets every Friday, except the last one in the month and its members rotate: in effect each member sits either 2 or 3 times per month.

31. The Committee hears all aspects of a prosecution and a typical meeting begins with the consideration of pleas in respect of the latest cases. A date is then set for the hearing. Following the hearing, the matter is adjourned for a judgement and, following that is again adjourned for mitigation and sentence. Thus, even if all goes smoothly, a case in which the advocate is found guilty will come before the Committee four times. If the advocate is absent at the plea stage then the Committee, if satisfied that the advocate has been properly served, enters a plea of not guilty. If the advocate is absent at subsequent hearings, the Committee will generally adjourn.

32. It should also be noted that the same panel must hear each stage of the complaint. If one of their number is absent, the matter must be adjourned. Since the members are, quite properly, busy, respected practitioners and are not paid for their attendance, it is understandable that they may on occasion be unable to attend through pressure of other work. At the hearing I attended, seven mitigations and sentences were adjourned for this reason. This cannot be satisfactory either for advocate or complainant. In addition, there seems to be a culture growing up by which the advocate can delay a hearing by producing sick note, by promising to conciliate all of which adds to the considerable delay.

33. According to the figures that I have seen, 1305 cases had been referred to the Committee by the end of the year 2000. Since then, 199 cases were referred in 2001 and, at the time of writing, 88 in 2002. This makes a total of 1592 cases. By February 2001, 195 cases had been concluded. Between then and the date of writing, a further 51 cases had been concluded, which leaves a total number of outstanding cases of 1356. In short, the Committee has been able to deal with less than 20% of the cases referred to it in the last 11 years.

34. What is particularly disturbing is that the Committee is clearly unable to cope with the backlog and that there is little hope that many of these cases will be resolved in the foreseeable future. I have looked at the cause list and from that, it seems to me that there are 1083 cases which are not listed for consideration at all this year. In particular, there are over 300 cases which have been outstanding since 1994 and earlier. None are listed for consideration this year. I am told that this is likely to be because there is on-going civil or criminal action which has caused the adjournment or that the matter awaits further prosecution work. It is hard to escape the conclusion that, in the absence of any case management system at either the Commission or the Committee, many have simply been lost or forgotten.

35. Backlogs of this level bring the entire system into disrepute. It is unfair to both the complainant and the advocate that a complaint should be delayed for 8 years or more before it is resolved. It is hard to see how any Committee can satisfactorily deal with cases of this age: memories will have faded, evidence will be unreliable, some complainants and advocates may even have died.

Appeals

36. Although an appeal procedure is prescribed by the Act, I have been told that, on occasion, advocates have sought to judicially review the findings of the Committee rather than to seek an appeal. The advantage of their doing so is that they can ask the court for a stay of the rule that the sentence into effect whether or not the advocate appeals. This is often granted. I have also heard that, having gained such a stay, neither the appeal nor the judicial review proceedings are prosecuted by the advocate. While I can understand that the rule that appealing shall not act as a stay of sentence is draconian, it is confusing and unsatisfactory for the courts to intervene where an appeal procedure exists.

Sentencing

37. I looked at the Report setting out the findings and sentences of the Committee in previous cases. I understand that this is used to inform the Committee of previous decisions in respect of individual lawyers. It would not be right for me to comment on sentences in individual cases since I have not had the opportunity to look at individual files or, indeed, to hear the mitigation advanced and I make the following observations bearing that in mind.

38. Initially, I was surprised at the apparent leniency of some sentences in cases involving failure to account and, in effect, stealing clients' money. In the UK such cases would invariably result in the advocate being struck off or suspended for some considerable time. It was explained to me, however, that (a) the amounts involved were relatively small and (b) the main concern was to see that the client received his money.

39. I understand the logic behind this and appreciate the need to protect the client's interest. I should stress, however, that in due course the Committee will need to take a tougher stance. Repeated offences of the same sort must call into question the advocate's suitability to have the trust of clients and be a member of the profession. Moreover, if the educational and other steps recommended below are taken, in due course it may well be appropriate for a single offence to be sufficient for suspension or striking off to be imposed.

40. I also noticed that there seems to be some inconsistency in sentences. For example, an advocate who had been without a practising certificate for 18 months was fined less than a colleague who had been without one for 12 months. Similarly, one advocate who was guilty of separate, similar offences received a lower penalty for the second than for the first. If my recommendations below about the number of advocates serving on the Committee are adopted, this problem is likely to be exacerbated because the new members will be unfamiliar with the previous policy of the Committee.

41. Finally, the Report is not a particularly user-friendly document. It is not easy to find individual names on it or to identify readily similar offences. This is inevitable in a single paper document. A computer system based on a database would enable a lawyer's previous convictions to be identified and even previous sentences for similar cases.

Enforcement

42. There are two particular problems concerning enforcement. First, advocates frequently ignore orders of the Committee – in extreme cases advocates have been known to continue practising even though they have been struck off. Secondly, there is no staff tasked with enforcing the fines. I am told that over 13 million Kenyan shillings are currently outstanding and that, in the year 2000, the LSK subsidised the Committee to the extent of 450,000 shillings as a result of uncollected fines. This seems to me to be the result of two problems: insufficient resources at the LSK and the Commission to enforce the orders and insufficient communication with judges.

43. This is one area in which the statutory mechanism appears to me to provide, either now or as a result of the forthcoming Bill, the necessary powers to enable the LSK and individual complainants to enforce orders made by the Commission or the Committee. Essentially, orders may be registered with the court and enforced as if they were orders of the court. This seems to me to be an appropriate level of enforcement. The LSK also will have the power to publish findings in the press. Again, this seems appropriate to me.

PART III - RECOMMENDATIONS FOR IMPROVEMENTS TO THE INSTITUTIONS

44. In making recommendations for improvements to the workings of the individual institutions, I have had particular regard to the need to ensure that the system works as quickly as is consistent with fairness. I have also borne in mind that resources should be used efficiently: complaints which are clearly invalid or are simple should be dealt with quickly so that time can be spent on the serious and complex complaints.

45. I considered how long it should take to complete consideration of complaints. There is no obvious answer to this: complex, contested complaints will take longer to resolve than simpler ones. Nevertheless, it seems to me that the following timetable is one that is both realistic and consistent with fairness for the majority of cases:

- Files should be opened and the first actions on them taken within 14 days of receipt of the original complaint.
- Letters should be answered and action taken on their contents within 10 days of receipt.
- Advocates, complainants and others should be chased for replies to letters after no more than 4 weeks have elapsed since the letter was sent.
- It should not be necessary to send more than two reminders that a reply is needed – if one is not received in that time a view should be taken on whether to close the complaint or take it further.
- If an advocate asks for time to respond or to conciliate the matter, strict time-limits should be imposed – 4 weeks ought to be sufficient. If it cannot be achieved within that time a decision on the whether the complaint should be taken further or not should be taken.

46. This covers the initial investigation of the complaint. At that stage, a view should be taken as to whether the complaint can be dismissed or should be referred to the Committee. If it is dismissed, the reasons should be given to the complainant and the advocate. The aim should be to have reached this stage within 90 days of receipt of the original complaint. Obviously exceptions to this will apply if there are ongoing legal proceedings, if attempts to conciliate are made or if for good reason, one of the parties cannot answer within the given times.

47. If it is decided to refer the matter to the Committee, the complaint should be referred to a prosecutor. That prosecutor should have the following tasks:

- To examine the evidence gained so far;
- To decide whether further evidence is needed and to collect it;
- To obtain a signed statement from the complainant and other witnesses, having either prepared it himself or asked a suitably qualified agent to do so; and
- To draft an affidavit for the Commissioner to send to the committee.

The matter should only be sent to the Committee if it is clear following this further investigation that there remains a case to answer. In my view the aim should be for this work to be completed within 3 months of the decision by the investigator.

48. The Committee should have its own targets for dealing with cases. Cases that are simple and unlikely to result in the advocate being suspended or struck off should be determined within 4 months of referral by the Commission. More complex cases should be determined within 9 months of such referral. These timescales reflect the fact that more complex and seriously cases are likely to require more adjournments and there may be practical difficulties in obtaining dates that are convenient to all the parties.

49. Finally, appeals should be heard as soon as possible after the hearing and there should be penalties to discourage delay and frivolous appeals.

50. I now consider the changes that need to be made to achieve these timescales and other general matters that could improve the system.

The Commission

51. The procedures adopted by the Commission are typical of most complaints handling systems and, if they were operated efficiently, would represent good practice. The Commission copies all letters to complainants and seems genuinely to have the interests of complainants at heart. It has produced a leaflet and complaints form for complainants to use. It struck me that this leaflet used rather technical language which might be difficult for an uneducated complainant to understand, particularly if English is his or her first language. I **recommend** that consideration be given to re-drafting the leaflet using simpler language and, possibly, producing a version in Swahili.

52. Many of the problems facing the Commission referred to in the previous chapter could be mitigated by a computerised case-management system which enabled the State Counsel to send standard letters directly from it. I was told that such a programme had been promised many times and money included in the budget for it, but that the system had never materialised. It would also make sense if such a programme were linked to any system developed for the Committee.

53. I **recommend** that such a system be established urgently. It should have the capacity to:

- Hold the names and addresses of complainants and advocates;
- Identify the State Counsel with responsibility for the file;
- Hold brief details of the nature of the complaint;
- Have a diary facility for noting the transactions and correspondence dates;
- Hold the various standard letters with a merge facility to enable letters to be produced by the State Counsel rather than sent for typing;

- Enable cross-referencing of complaints involving the same advocate and complainant;
- Include a "bring forward" system to remind State Counsel to send relevant chasing letters or to take action so that a file is not lost.
- Provide statistical reports on numbers of cases, types of complaints, timescales and results.

54. I recognise that such a system is likely to be costly and, with this in mind, it is worth taking considerable care to ensure that an appropriate system is obtained. I therefore **recommend** that:

    - A detailed specification be drawn up, preferably in consultation with an individual with some expertise in what computerised systems can be achieve;
    - Tenders should be sought from a number of firms to provide it, with particular attention paid to the back-up provided by such firms;
    - The system should be compatible with any system for the Committee and, if possible, the two should be implemented in tandem.
    - Training should be provided for all staff to operate the system to its utmost capacity.

    If this is not possible and, in any event, in the time before such a system can be implemented, I **recommend** that improved manual file-tracking systems need to be set up which should enable managers to identify

    - The individual with current responsibility for the file,
    - the whereabouts of the file in the system (ie a document that is updated whenever the file is moved from one location within the office),
    - the correspondence that should be on a particular file and
    - when action was last taken on the file and whether it needs to be reviewed;

55. In addition, I **recommend** that some formal management is needed to monitor the workload of the State Counsel, ensure that individuals are not overloaded and to ensure that files are not forgotten. In my view this should be part of the job description of a Deputy Commissioner and that individual's caseload should be reduced to take account of that task.

56. For consistency in any case, I **recommend** that the prosecutor responsible for drafting the charges should, in general retain responsibility for prosecuting the case before the Tribunal unless it is clear that a more experienced prosecutor is needed.

57. I was told that it is policy that the same prosecutor should not in general deal with complaints involving a single advocate with many complaints against him. I understand the reasons for this, but should stress that it is crucial that those dealing with complaints against the same advocate should be aware of the full picture and that there should be liaison between them.

58. It is clear that there are insufficient staff employed by the Commission to support the workload. In the following paragraphs, I make some assessment of the likely numbers of staff needed to do so. I should make it clear that this is not based on any detailed examination of the case-load or the work involved in each type of case: the views are simply based on my own experience. For a more reliable view, I **recommend** that a consultant be appointed to establish how much it is appropriate to expect an individual to undertake and then to assess how many staff are needed given the caseload.

59. Given, these caveats, however, I think it is likely to be reasonable for an individual doing an initial investigation to have a caseload of between 150 and 200 complaints per year. A prosecutor, by contrast, should probably have no more than 30-40 complaints per year. The actual figures will obviously depend on the complexity of the cases concerned: I could imagine that 10 very serious, complex cases, could be easily occupy one prosecutor, while another might be able to manage well over 100 simple, uncontested cases.

60. If I am right in this, then it would seem that there needs to be a team of about 8 investigators and 5 prosecutors. They need proper secretarial and support staff, in the region of, I would estimate, at least 10 people and possibly more (particularly if no computer system is installed). The investigators and prosecutors should report to at least 2 Deputy Commissioners who have management responsibility for the running of the system and the performance of their staff. Any judicial functions undertaken by the Commission should be undertaken a Deputy Commissioner level if not by the Commissioner himself.

61. These figures seem to me to be necessary to maintain an efficient through-put of the existing caseload of 1200-1600 complaints per year with approximately 200 per year being sent to the Committee. It may be, however, that a more efficient procedure may result in more cases being sent to the Committee, in which case additional prosecutors will be needed.

62. These additional staff will not, however, be sufficient to make any inroad into what would appear to be quite a substantial backlog of complaints. Special measures need to be taken to reduce this. In particular, I **recommend** that a Deputy Commissioner should be appointed with the following responsibilities:

- The establishment of the management systems recommended here;
- The examination of the current caseload and the way it is allocated and, if necessary, making adjustments;
- A remit to consider all complaints that have been with the Commission for more than 6 months (whether or not they have been referred to the Committee) with a view to deciding (a) if they have not been referred to the Committee what needs to be done before they are ready for a decision and setting timetables for action; and (b) if they have been referred to the Committee, liasing with the Committee

over completing the Committee's consideration of it and also assessing whether there is actually sufficient evidence to justify a prosecution.

63. I have no doubt that additional staff will be needed to deal with the backlog, but it does not seem to me that either they or the Deputy Commissioner need be permanent appointments and that they could move to other duties once the backlog is reduced to manageable proportions.

64. In my view, the Commission should concentrate on dealing with its workload and backlog before undertaking more educational work, unless it gets a further increase in staff to enable it to do so. I **recommend** that further seminars should be postponed until the backlog is reduced. In the longer term, indeed, it seems to me that a view needs to be taken on whether the Commission or the LSK should be taking this role.

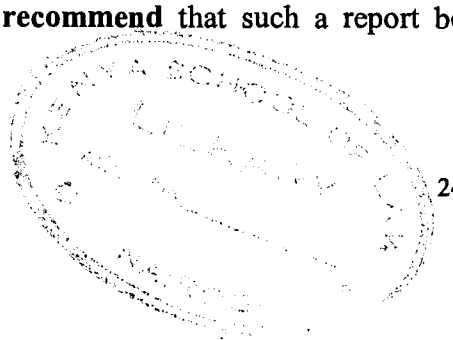
65. It also seemed to me that work needed to be done to improve the standard of preparation of cases referred to the Committee. Successful prosecutions tend to need work from the prosecution in the form of providing statements (in some cases sworn) by the complainant and other witnesses and some supporting evidence. I noted one case in which the Commission had simply placed the complaints form before the Committee with no further evidence whatsoever. This wastes the time of everyone involved. I **recommend** that prosecutors should ensure that witnesses are interviewed before a case is referred to the Committee and appropriate proofs taken. It may be possible, indeed, for such proofs to be treated as evidence by the Committee without the complainant needing to come to Nairobi.

66. I was told that there was no formal training for prosecutors in Kenya. I **recommend** that formal training for prosecutors be instituted and either that experts from abroad be invited to provide training sessions within Kenya or that prosecutors be invited to visit other jurisdictions to observe prosecution processes there.

67. I was also concerned that many of the State Counsel are young and, through no fault of their own, may lack the experience or authority to deal with complex cases or more senior advocates. I **recommend** that some more senior advocates be recruited as part of the recruitment recommended above to take on the more complex cases.

68. This issue is of particular importance if the Commission is to exercise the powers which are proposed for it in the Bill. Taxations of fees and decisions over ownership of property which are to have the force of an order of the court must be made by individuals with appropriate experience and training. I **recommend** most strongly that such powers should not be exercised until the Commission is satisfied that it has the people with the skills and time to make such orders.

69. Finally, it seemed to me that the requirement to produce a quarterly report was onerous and likely to place a burden on staff. It is obviously right that a body of this sort should be accountable to the public but I **recommend** that such a report be produced annually.



70. I was impressed by the commitment of the staff at the Commission to the task that they had. They have a number of imaginative ideas for improving standards. It is not their fault that they simply do not have the staff or other resources to do the task allotted to them. My recommendations here involve a substantial input of additional resources. I believe that they are crucial if the Commission is to begin to carry any respect or conviction. If its own processes are slow and inefficient, it is not in a strong position to lecture lawyers on client care or other matters.

The Committee

71. The Committee's work can be assisted and streamlined by a number of reforms which ensure that cases are not lost sight of and by which the Committee takes control of a case and, if necessary, carries on without the parties. It also seems to me that the Committee can distinguish between the seriousness and complexity of cases and have different procedures for dealing with them.

72. I **recommend** that the Committee should have the option to hear cases under a Summary Procedure. Cases suitable for such a procedure would have the following characteristics:

- There are no major disputes of facts and, in particular, witnesses should not normally need to be called;
- The facts of the case would be unlikely to lead suspension or striking off.

The powers under this procedure would be:

- A hearing date would be fixed on which the case would be heard within 4 months of its referral.
- The powers would be limited to a fine of up to 50,000 shillings[11], together with the other lesser sanctions discussed below.
- The hearing could take place in the absence of the advocate, provided that the Committee was satisfied that there had been proper service of the advocate;
- It could consider written submissions from the advocate if appropriate.
- The advocate could insist that the hearing be taken before the full Committee, with the Committee's additional powers.
- There should be an appeal to the full Committee.

Such a procedure would be valuable for dealing with cases of failure to reply to the Commission, non-payment of practising certificate fees and other matters where there is no obvious dispute of facts and which are at the lower end of scale of seriousness.

73. I further **recommend** that the Committee should appoint a Directions Officer with similar functions to a Master in the court. That Officer's role should be to:
    - take pleas or enter pleas of not guilty if there is no response;

[11] Or such other amount as appears appropriate to the Committee, given the summary powers.

- give Directions as to whether the complaint should be heard by the full Committee or by the Summary Procedure;
- direct in consultation with the prosecution and defence the date of the full hearing, its likely length, the witnesses that need to be present and other matters that need to be settled (if there are a number of cases involving the same advocate, he should consider whether they can be combined into one hearing);
- where it is clear that a case is not yet ready for hearing, make directions as to the action that needs to be taken and set timescales;
- strike out complaints if there appears to be no case to answer or if the prosecution has failed to take action that has been ordered in an appropriate time or if it would otherwise be unfair to the advocate to continue;
- set a date each time he considers the case for the matter either to be heard;
- take responsibility for the general management of the system and the cases and for the production of statistical reports;
- grant adjournments for good reason and deal with issues concerning non-attendance by the advocate and sickness.

There should be an appeal for the advocate to the Disciplinary Committee from decisions of the Directions Officer. I attach at Annex B a person specification for the post.

74. The rules[12] make clear what counts as proper service. I **recommend**, however that a formal policy be adopted for dealing with absence or illness of the advocate:

- Adjournments for absence should not be granted where it is clear to the Committee that the advocate has been properly served under the rules and no attempt has been made to contact the Directions Officer to seek adjournment – where such a request has been made and refused, the Committee may overrule the Directions Officer if it is satisfied that there is a good reason for non-attendance provided that a request is made in writing to the Committee.
- In respect of illness, the Committee should not grant an adjournment in the absence of a certificate from a doctor indicating the nature of the illness and certifying that the illness is sufficiently serious to prevent the advocate attending both to his professional commitments and to the needs of the Committee. It should also provide a prognosis for recovery.
- The Directions Officer should, in the light of the certificate, set a new date for the hearing. The advocate should be informed that, if he requires a further adjournment in respect of the same illness, he will need to be examined by an independent doctor appointed by the Committee and that the Committee will be reluctant to grant further adjournments in respect of illness. The advocate should be reminded that he can put submissions in writing or appear by counsel.
- Adjournments should not be granted if either the prosecution or defence have failed to comply with the directions made by the Directions Officer. In such cases, the SDC or the DC should consider striking the matter out or continuing with the matter, making appropriate inferences from the failure.

[12] Regulation 27.

75. I further **recommend** most strongly that the Committee should seek to complete a matter in a single hearing. In particular, the judgement, mitigation and sentence should be given immediately after the hearing unless the issues are so complex that time is needed for the Committee to consider its verdict.

76. The composition and number of members of the Committee need to be considered to ensure that it can deal with the workload. I **recommend** that amendments be made urgently to permit adjourned hearings to take place even if the full panel is not there, subject to there being at least one advocate and one lay person available.

77. I also consider that the commitment of, in effect, 2-3 days per month is too much to expect of practitioners and that a much larger panel needs to exist. This should have a number of advantages. There will be an opportunity to involve more of the profession in its regulation and to reduce the burden on individuals. Members may be prepared to offer their time free of charge for a day every three months rather than more often. It is a feature of most self-regulating professions that members are prepared to do such work for the good of the profession and it will be to the advantage of the LSK and the profession generally if this is developed in Kenya.

78. The Bill proposes that numbers should be increased to 6. This will not be sufficient and I **recommend** that the Committee should have powers to co-opt advocates as necessary to ensure that the workload is dealt with efficiently. This much wider number of members would allow the Committee to meet on different days, reduce the burden on individuals and enable a wider cross-section of the profession to be involved. Each panel, however, should contain one elected advocate.

79. I also **recommend** that membership of the panel should be open to younger advocates to enable their point of view to be heard. In my view, it would be appropriate to open the membership to advocates of 5 years standing or more and that two elected place should be reserved for individuals of between 5 and 10 years' standing.

80. The Bill allows for lay representatives to be appointed to the Committee. I support this. It provides an element of reassurance to the public that the profession will not be protecting its members. From my own experience in the UK, I know that such lay people can provide a valuable alternative perspective which can enhance the decision-making of such bodies.

81. I think, however, that there a three problems with the provisions as they stand. First, I do not believe that 3 lay representatives will be sufficient to enable the Committee to meet as often as it needs. Secondly, the procedure for their appointment is unclear. Finally, there is nothing to suggest that they actually have to sit on any individual panel of the Committee.

82. The result of this is that it seems to me that the Committee should be comprised of 6 elected advocates and such number of other advocates and lay representatives as

appear to the Directions Officer to be necessary to manage the work of the Committee efficiently. The Committee should hear matters either by Summary or Full Hearing. Summary hearings should consist of no more than 3 people, including at least one elected advocate and one lay representative. Full hearings should be of 3 or 5 people at the discretion of the Directions Officer. Again, there should be at least one elected advocate and one lay representative on each panel. As I suggest below, it may be appropriate for such panels to be chaired by a judge. Amendments need to be made to deal with this and I identify these at Annex C.

83. Administratively, I **recommend** that consideration should be given to the establishment of a computerised case-management system with the following features

- Details of the advocate complained against and the prosecutor;
- The date on which the case was referred to the Committee;
- A diary of events in the case which can provide the administrator with at-a-glance information about progress in order to deal with queries;
- Links to other cases involving the same advocate;
- Standard letters which can be sent out, linked to the diary;
- A bring forward system whereby the administrators are reminded of action that needs to be taken;
- A list of hearings which can avoid double listing and assist the administrator identify convenient dates;
- A report of findings;
- Statistical information about the number of new cases, the number of cases resolved and time scales.

84. I believe that such a system would improve the Committee's efficiency enormously, in that information could be provided which is currently unavailable and workload of the administrator would be reduced. I also consider that it would reduce the likelihood of administrative errors (for example, the Cause List at one stage had duplicated the list for two hearings – an understandable mistake for a busy administrator to make with a manual system).

85. I have made a similar recommendation that such a system should be put in place for the Commission and I further **recommend** that, if at all possible, the two systems should be implemented in tandem and should be consistent with each other and linked. My recommendations concerning the design and tendering process for the Commission's system apply here also. I recognise, however, that the costs are likely to prove prohibitive unless outside support is sought. I also recommend that the LSK may find it easier to put such a system in place than the Commission can. I would **recommend**, therefore, that if no agreement to the establishment of a unified system can be reached within 6 months then the Committee should establish its own system.

86. If a fully computerised system is impossible then I **recommend** that manual systems be set up which:

- Ensure that cases are brought forward on a regular basis and monitored – I suggest an 8-weekly report on the progress of every case;
- Provide statistical information about cases, findings and time scales.

I am aware that this will involve additional work and, therefore, staff costs. The LSK may well wish to consider whether, in the long term, it might not be cheaper to purchase the computer system.

87. The Committee does not have a leaflet to send to complainants explaining its work. Since it usually refers complaints directly to the Commission, this is understandable. I note that all correspondence with the advocate is copied to the complainant. This seems to me to be good practice. I **recommend**, however, that a short leaflet (possibly no more than a single side of paper) be produced by the Committee setting out for the benefit of the complainant what the Committee's procedure is and what it can do. Consideration could also be given to providing the advocate with a similar document or, at least, directing him to the relevant rules.

Dealing with the Backlog

88. The recommendations above should allow the Committee to manage its normal run of work satisfactorily. The backlog, however, must be addressed as a matter of urgency. I **recommend** that the following steps be taken to deal with it:

- The new rules should apply to all unresolved complaints and all advocates should be notified of this;
- On appointment, the Directions Officer and his staff should identify every outstanding case and link complaints involving the same advocate;
- The Directions Officer should set a timetable for the consideration of each case aiming to consider the oldest first (subject to cases involving the same advocate being considered together);
- The Directions Officer should inform the prosecution and the advocate of the date on which he will be considering the case. He should invite submissions from both as to whether the complaint should be continued or struck out, the level of hearing and the amount of time needed before the case can be ready. Both sides should have the opportunity to appear or be represented before him.
- Having heard submissions, the Directions Officer should make appropriate directions for the speedy resolution of the matter.
- A full Committee and a Summary Panel should sit on a weekly basis to hear cases referred by the Directions Officer and should work under the procedures outlined here. The LSK will need to consider whether such hearings should take place simultaneously or, as I think most effective on separate days.
- Additional staff will be needed. In particular, it seems to me that the following roles should be filled – a listing officer, responsible for listing cases and corresponding with prosecution and defence on behalf of the Registrar. Given the likely workload involved, I think that the listing officer will need at least one colleague at a similar to deal with cases if the officer is on holiday and to assist with correspondence and enquiries. Additionally, there needs to be at least one

clerk to the Committees (who, as I discuss below, should not be the Secretary to the LSK). In my view that role should involve sitting in on the discussions by the Committee, recording their decisions, maintaining the record and other statistical information and dealing with the enforcement of decisions by the Committee. In other words, an office of at least three supporting the Directions Officer and the Committee seems to be required. This suggests at least one further member of staff in addition to the Directions Officer.

89. In my view, if these recommendations are implemented soon and if the powers are exercised firmly then the backlog could be reduced to manageable proportions within a year. Once this has been achieved, then I **recommend** that a review be conducted to establish whether (a) the Directions Officer needs to continue to be a full-time appointment and (b) the staffing levels recommended here need to be maintained.

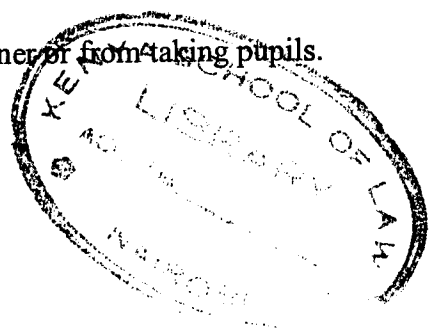
90. Finally, I should make it clear that this procedure will place a substantial amount of pressure on the Complaints Commission and that the result is likely to be that many complaints have to be dropped because the Commission does not have the resources to deal with these properly. I **recommend** therefore that the Commission take steps to consider the staffing levels needed to deal with the case management powers recommended here. Ultimately, however, delays of this sort are so pernicious that I regard it as preferable that complaints should be dropped rather than delayed for many years for resolution. I do not believe that the inability of the Commission to staff complaints properly should be a reason for advocates to suffer the uncertainty of a pending complaint for many years.

Sanctions

91. The present powers of the Committee are limited, in essence to the standard disciplinary sanctions ranging from admonishment to striking off, together with a power to compensate the complainant for any actual loss. The new legislation will allow the Committee to tax fees, require the advocate to pay compensation in respect of inadequate professional services and to reduce fees and to order the advocate to restore funds or property to the complainant. The Commission will have similar powers in respect of taxation and the restoration of property. These are to be enforced as if they were orders of a court.

92. Subject to the usual caveat expressed above, that such sanctions need to be imposed following appropriate procedures and subject to appeal, these seem to be appropriate sanctions for a complaints body. I **recommend**, however, that it might be sensible to add some further powers which are aimed at protecting the public and improving the advocate's performance. In particular, I consider that the Committee should be able to:

- require an advocate to undergo further training,
- restrict his area of practice;
- prohibit him from acting as a sole practitioner or from taking pupils.



I identify the necessary changes at Annex C.

93. For the sake of consistency, I **recommend** that the Committee, in consultation with the Commission and the Chief Justice should prepare guidelines setting out its policy on sentencing. These need not specify fixed sentences for particular offences but should set out general policy on what is appropriate in various circumstances, together with aggravating and mitigating factors.

94. The Committee has wide powers to impose costs. Indeed, at a hearing that I attended, the advocate appearing on behalf of the defendant barrister was required himself to pay the costs of the complainant's appearance at an aborted hearing. From the Record, it appears that awards of costs have been made against advocates who have been cleared of charges. While such a wide power to impose costs may concentrates minds, but it does seem to me that these powers are rather wider than is necessarily consistent with justice and the usual rule that costs follow the event.

95. It is obviously appropriate that an advocate found guilty should be required to contribute towards the prosecution costs, particularly the expenses of bringing the complainant and witnesses to Nairobi. If the advocate is acquitted, it may well be right for the Commission to contribute to the costs of his defence. In other circumstances, the power to award costs should only exist if costs have been incurred as a result of the behaviour of that individual. Thus a defendant advocate, even if acquitted, might well bear the costs of an adjournment and, in very rare circumstances, it might be appropriate similarly to penalise the defendant's representative. I **recommend** that amendments to restrict the powers be brought into force.

Appeals

96. I have referred to the problems caused by advocates seeking to judicially review the Committee in order to obtain a stay of the sentence. I consider that there are three things that can be done to avoid this, all of which will require legislation.

97. First, the absence of a stay of sentence on appeal is draconian and its effect could be devastating on an advocate whose appeal is successful. I **recommend** that this provision be abolished where the order is that the advocate be struck off, suspended or fined more than 50,000[13] shillings.

98. Secondly, I believe that rules need to encourage advocates to prosecute appeals expeditiously and to penalise frivolous appeals. In particular, I **recommend** that:

- A fee should be payable for lodging an appeal which should be refundable if the appeal is successful – I suggest that 10,000[14] shillings would be an appropriate amount;

[13] Or such other sum as may appear appropriate.
[14] As with other sums mentioned in this report, the exact amount should be for consideration locally.

- Failure to comply with the timetables currently set out in the Act should result in the sentence coming into effect automatically;
- There should be a right to seek an extension of those timetables for good reason – either by agreement with the Commission or by order of the court;
- The cost of providing a transcript of the Committee's proceedings should be borne by the advocate.

99. Finally, consideration should be given to providing explicitly that the courts should not intervene in such matters where an appeal procedure exists. These proposals may, however, make this unnecessary.

100. I would add further that the requirements for the number of judges to hear appeals seems high. The Act[15] provides for 2 judges to hear appeals. It seems to me that this could be reduced to one for appeals not involving suspension or striking off and 3 for appeals against such sentences. I am also unclear why there needs to be a further appeal to the Court of Appeal[16]. This seems calculated to make matters carry on far longer than is really necessary. In my view, such an appeal could be abolished or, at any rate, limited to appeals on points of law. I **recommend** accordingly.

Enforcement

101. The difficulties referred to in respect of enforcement seem to lie in the fact that neither the Commission nor the LSK has anybody charged with enforcing these fines. I note that the LSK has refused to grant practising certificates to individuals whose fines are unpaid and that this has led to a substantial number of payments. This is appropriate, but I also **recommend** that the LSK ought to establish a post charged with pursuing such fines through the courts and taking steps to enforce them

102. Secondly, it seems to me that steps need to be taken to ensure that judges are aware of who has been struck off and who does not possess a practising certificate. I am aware that this is done occasionally through liaison between the LSK and the office of the Registrar. It seems to me that this needs to be formalised and lists put out on a regular basis and the judges informed of strikings off and suspensions immediately.

Miscellaneous Recommendations

Reasons

103. It is crucial that bodies looking at complaints should give reasons for decisions that they take and that those reasons should address the issues of concern to the complainant. The Committee gives reasons for its decisions in written judgements. I do not know whether or not the Commission does so if it decides to dismiss complaints, but it is good practice to do so. If reasons are not given now, I

[15] Section 65
[16] Section 66

recommend that such reasons should be sent both to the advocate and the complainant.

Convictions by the Courts

104. I was told that the Commission occasionally reads in the press of advocates who are convicted of criminal offences but that it feels unable to take action against them until a complaint is received. Any criminal conviction against an advocate calls into question that individual's suitability to be a member of the profession. Obviously there are many minor offences, particularly, those which do not involve dishonesty or a prison sentence, which are unlikely to justify a serious sanction but, nevertheless, should be investigated. Moreover, the fact of a conviction is likely to save the Commission work in proving the facts leading to it: it will be sufficient to rely on the finding of the court.

105. I **recommend** that:

- Advocates should be required to inform the Commission of any criminal convictions (other, possibly, than some minor driving offences or others which are regarded as particularly technical or trivial in Kenya);
- The Attorney-General and the courts should be asked to provide the Commission with details of such convictions;
- It should be made clear, if necessary by amending the Act, that it is possible to investigate such convictions, for example, by seeking details from the courts, even if no complaint is made.

Offices outside Nairobi

106. Both the prosecution and members of the Committee expressed the view that it would be convenient if the Commission had offices in the major centres outside Nairobi and if the Committee could sit "on Circuit" occasionally. The main reason given for this was that it would save complainants the cost and time of coming to Nairobi on a number of occasions (for example to see the Commission and to attend the hearings of the Committee).

107. I have considerable sympathy with the proposal, particularly in respect of one case before the Tribunal for which the complainant had been required to travel to Nairobi 15 times without any resolution. I think, however, that care needs to be taken before it is adopted. I did not have the opportunity to look at the addresses complainants come from and how this compared with those of advocates. I understand that approximately 70% of advocates are based in Nairobi, though many of their clients will live far outside. Consideration also needs to be given to the costs of setting up offices outside Nairobi and of transporting Committee members and of accommodation for the hearing. These are likely to exceed the costs of transporting the complainant to Nairobi.

108. I **recommend** that before such a proposal is adopted, detailed research needs to be undertaken into the issues I have raise above. It should also explore other options: for example, employees of the Commission could visit the complainant themselves or

instruct local advocates to interview the complainant and prepare a report. Moreover, if my recommendations concerning case management are accepted, this should reduce the number of times the complainant has to come to Nairobi.

109. An alternative suggested to me was the re-establishment of the Boards of Enquiry that existed before the Commission was instituted. I have not had the opportunity to do sufficient research to understand fully how such Boards worked. Essentially, as I understand it, the LSK referred complaints to Boards constituted of local advocates who investigated the complaint and either took local informal action or referred the matter to the Disciplinary Committee. I can see that such a system worked well in a system where the number of advocates was very markedly lower than at present and where there were relatively few complaints. Assuming that complaints continue at the present level for the foreseeable future, any such system would need staff supporting it and strong levels or management and systems for accountability either to the LSK or the Commission. I think that the costs of establishing it would be substantial. If my recommendations reduce the number of complaints, then it might be worth considering such an option.

110. In my view, the establishment of regional offices is not as high a priority as the reduction of the backlog and implementation of appropriate systems to run the system efficiently. I advise against any work being done on this until the administrative systems are working properly and, only then, if it is clear that the costs of doing so can be afforded.

The Registrar and the LSK

111. Although it is not strictly part of my remit, I noted that the Registrar still signs every annual practising certificate. This struck me as cumbersome. It is now possible to obtain computer programmes which can print such certificates with a facsimile signature and it appeared to me that it would save time if the LSK could issue such certificates itself.

112. I was also told that the LSK's records and the Registrar's records are not always consistent, the Registrar's tending to be more complete. I **recommend** that, in the longer term it would desirable for the LSK's database of members to be linked to the Registrar's so that there is consistency between the two. It might also be appropriate for it to be available to the Commission. Again, if it were also available to the judges, it would enable them to check the status of anyone appearing before them. This is obviously a long term goal because, at the moment, the courts are not computerised at all.

PART IV - THE BACKGROUND TO COMPLAINTS

113. In this part, I look at some of the issues leading to complaints and what can be done to reduce the number coming to the Commission and the Committee.

114. From the reports of the Commission, it seems that the most common complaints concerned:

- Failure to keep clients informed
- Failure to account
- Withholding funds
- Delay
- Failure to render professional services.

I understand that the majority arose out of personal injury work. Typically, an advocate would represent a client in such a case. On some occasions this might be without the client's consent or knowledge. On others, the advocate would not keep a client properly informed of progress and, frequently, would obtain damages for his client but fail to inform the client of this and retain the money. On other occasions he would give the client a cheque which would be dishonoured.

115. So concerned have the insurance companies grown about lawyers' failure to account that they have started a "two cheque" system, with the award going to the client and the fee to the advocate. As lawyers have pointed out, this causes inconvenience in the context of a wider dispute with the client (for example, because the client owes them for other work). It is hard, however, to blame insurers for imposing such a system if there is good reason to believe that clients regularly do not get their entitlement.

116. I was also told, and have no reason to doubt, that many clients make complaints against advocates that are simply untrue or malicious, or result from a misunderstanding over fees or legal procedures generally. This reflects a number of different factors, notably:

- A low level of knowledge in Kenya about legal rights and procedures;
- A slow, complex judicial procedure dealing with such actions;
- failure by advocates to keep clients properly informed or to explain properly to them what to expect.

117. These are serious issues and I was keen to understand the background reasons for lawyers behaving in this way. These are commonly as follows:

- There is generally insufficient work for the number of practising lawyers in Kenya and lawyers are under substantial economic pressure to "borrow" client's money;

- Lawyers, particularly younger ones, are anxious to succeed in a material way as quickly as possible – the existence of money in the clients' account is a great temptation for them;
- Although touting and "ambulance chasing" are prohibited, both take place.
- Civil cases in Kenya take many years to complete and, frequently, the lawyer is financing the work himself. It is understandable that in such circumstances he may feel that that the fees available under the Remuneration Order are inadequate.
- The majority of advocates in Kenya set up as sole practitioners immediately on admission. Such advocates frequently have little experience of the administrative requirements of practice and have no partner or employer to whom they are accountable;
- There is little guidance or practical training available on such matters as client care, running a clients' account or, indeed, how to make agreements as to fees with clients;
- There are no resources aimed at prevention.

118. Consideration should be given to the following issues to assist in prevention of these problems so that complaints to the Commission are reduced.

The Remuneration System for Lawyers

119. I refer below to concerns that I have about the legislative arrangements for fees and it seems to me generally that this needs to be looked at again. More specifically, however, it may be that one of way reducing the incentive for lawyers to delay payment or hold on to money might be to look at the remuneration system. The introduction of a contingency fee system whereby a lawyer could take a percentage of the damages awarded to a client in recognition of the time invested in the case might provide such an incentive. There are a number of difficulties with conditional fees and there needs to be proper regulation of them so that the terms on which the lawyer is instructed are clear from the start and the client has time to consider whether they are appropriate before being locked in to one particular deal. Similarly, research would need to be taken as to how far such a system would actually benefit lawyers. Some considerable further work would be needed before this could be implemented, but I **recommend** that this be looked at to see whether it might provide a way for lawyers to charge on a different basis from that which currently applies.

Touting and Ambulance Chasing

120. Traditionally both of these activities have been frowned upon in legal professions and it is obviously wrong for clients to be pressed into instructing a particular lawyer. Nevertheless, in a society where legal knowledge and literacy is low, there is something to be said for lawyers being permitted to advertise their services to potential clients and inform those clients that a remedy exists. Clearly rules are needed to regulate such actions and to ensure that the client is not forced into taking action and has an appropriate cooling-off time but it is generally better for such activities to be regulated rather than be subject to unenforced prohibition. I **recommend** that this matter be looked at with a view to providing appropriate regulation of such conduct.

Disputes over Fees

121. I was told that difficulties also arise where a client and lawyer have a continuing relationship and the client owes a lawyer money in one context and the lawyer then receives money on behalf of the client from another case. A dispute often arises over whether the lawyer can keep the money received to set off against that which he is owed. My own view is that there is no reason of principle why he should not do so but that:

- the fact that this is possible should be made clear to the client; and
- this should be dealt with explicitly either in statute or in rules of conduct.

In this way there is clarity and I **recommend** that this be addressed.

Education for Lawyers

122. A recent report has been prepared recommending compulsory further legal education for lawyers. I have no doubt that it is an important measure likely to improve the services provided by lawyers in Kenya. It is important that in any scheme of education, elements dealing with client care are at least available to lawyers. I should, however, add one caveat. The experience of the Bar Council in implementing such a scheme is that considerable resources need to be devoted to enforcement of it, particularly in the early stages. Disputes arise over whether the relevant hours have actually been completed and many advocates are likely to be adept at finding arguments to avoid undertaking work. The resources to deal with these questions and to take disciplinary action over failure to comply, need to be in place at an early stage.

123. Secondly, I understand that a further report is being commissioned into education for aspiring advocates. I hope that it will be possible in the context of that report to consider whether the existing educational arrangements provide enough training for lawyers in handling accounts, client care and practice administration.

124. Finally, I believe that the LSK can play a major part in encouraging good practice by providing written guidance and standards for client care, practice administration and handling clients' funds. I have seen a useful article written by Mr A D O Rachier in 2001 which could provide a useful basis for guidance issued by the LSK which could be sent to all advocates. I think it would be helpful if they could also produce a model agreement and guidance for advocates to use when entering in relations with clients. These need not be mandatory, but the Code for advocates could usefully require advocates to have regard to such documents so that, if they failed to do so and problems arose, this could aggravate the seriousness of the offence.

"Sheltered Practice"

125. In most European jurisdictions rules exist whereby lawyers are prohibited from practising as sole practitioners until they have spent some time practising either as an

employee or from the same office as a more senior lawyer. Frequently that senior lawyer may have some supervisory duties. It has a number of advantages: the junior lawyer has someone to supervise his practice and provide guidance in the event of difficulty; he has the opportunity to learn how to run a practice to an extent that is unlikely to be practical in the training courses and, generally, he is unlikely to have the opportunity to steal clients' money.

126. A similar provision exists in Kenya[17] but it has yet to be brought into force. I understand that protests from students forced its abandonment. One problem that exists in Kenya is that, given that the vast bulk of advocates practise alone, it may prove difficult for young advocates to find firms. The result would be to prevent a large number of them from practising and, indeed, to reduce significantly the pool of junior lawyers.

127. In my view, the provisions in the Act should be implemented. Care, however, needs to be exercised in so doing. In the first place, its implementation should be delayed until those currently taking the course have completed it – in effect for four years. Secondly, the LSK should have regard to the number of places likely to be available and satisfy itself that there are sufficient to satisfy the majority of people wishing to practise. As an alternative, consideration could be given to a longer period of pupillage. The amount of time given to pupillage and the post-university training course struck me as short.

Practice Management

128. I have indicated that the LSK could play a substantial part in improving standards by giving guidance and providing continuing education. A particular focus of this should be the following areas:

- Accounts rules;
- Client care;
- Complaints procedures;
- General advice on administering an efficient practice.

129. Many jurisdictions now produce advice on good practice in this area and I believe that the LSK should do so also. It may also like to consider an independent accreditation system for lawyers' practices. Those lawyers who meet the requirements of good practice should be able to apply for accreditation under this scheme. This would provide them with a marketing advantage and an incentive to improve. I should stress, however, that such a scheme should set at a level which is attainable by the majority of competent advocates.

A Monitoring Accountant

130. I suspect that many advocates steal money because they believe that they will not be caught: a client can be fobbed off and may well never have heard of the

[17] Section 32 of the Act.

Complaints Commission. While they are required to submit an accountant's report to the LSK, I understand that doubts exist about the reliability of such reports.

131. I believe that either the LSK or the Complaints Commission should consider appointing an accountant who would have the power to inspect accounts at short notice, take evidence and report short-comings. The accountant should inspect a random number of advocates' accounts each year and should also be able to look at cases where there are particular reasons to believe that all may not be well.

Intervention

132. I have heard also that difficulties can arise where an advocate dies, leaves the country or in other circumstances is unable or unfit to practise. These can cause particular problems for clients of sole practitioners who may be left without access to papers or information about progress.

133. It is usual in many jurisdictions for local Bars to have the power to intervene in a practice and invite other lawyers to take the work over. This must be in the best interests of clients. I understand that the LSK was in the habit of exercising such powers until they were ruled illegal as a result of a conflict with the rules concerning the property of deceased individuals. I **recommend** that this conflict be resolved as a matter of urgency and that either the LSK or the Commission be given such powers as are necessary to ensure that clients are not disadvantaged. In particular, I **recommend** that, subject to safeguards (for example, providing prima facie evidence to and gaining permission from a magistrate), the LSK should have the power to intervene in a practice and appoint another suitable lawyer or firm to take it over in the following circumstances:

- Prima facie evidence of fraud or failure to keep proper accounts;
- Imprisonment or conviction for a serious criminal offence;
- Bankruptcy;
- Death or serious illness;
- Prolonged absence abroad.

134. In the last three circumstances, the powers should only be exercised if the LSK is satisfied that the lawyer himself has failed to take appropriate steps to protect the interests of his client.

Compensation Fund

135. Many jurisdictions operate a Compensation Fund to provide protection for clients who lose money through the dishonesty of a lawyer. This is to add further to the protection of indemnity insurance and covers occasions when insurance would not cover the loss. Essentially, lawyers are required to contribute annually to the fund which will pay out up to a maximum amount to clients who have lost money. I understand that no such system operates in Kenya and my terms of reference suggest that I should consider such a system. I have not, however, seen copies of the proposals mentioned in those terms.

136. I have no doubt that it would be beneficial to the public for the LSK to introduce such a system. The costs to the profession of doing so should not, however, be under-estimated. These involve not only the cost of the contributions to the Fund itself but also the cost of administering it and dealing with claims. Those costs are likely to remain high unless steps are taken urgently to reduce the occasions on which calls may be made on the fund.

137. For this reason, I would, however, suggest that the proposals above are implemented before establishing the Fund so as to reduce the likely burden on the profession.

Insurance

138. I understand that an Annual General Meeting rejected a proposal that indemnity insurance should be made compulsory in Kenya. Again, I have not seen the exact proposals, but I understand that the proposal did not involve substantial costs to individuals. I also understand that most lawyers undertaking commercial work are required by their clients to take out such insurance.

139. It is puzzling that there should be such resistance to a scheme that is in the interests of lawyers generally and of their clients. The likelihood of lawyers being sued for negligence is increasing and the availability of insurance is a major protection for both lawyer and client. I **recommend** that this requirement be pursued.

Codes of Conduct

140. The present rules governing the behaviour of advocates are found in a number of different locations: the Advocates Act itself and then in a number of different sets of Rules made under the Act[18] and in a guide to Conduct issued by the LSK. The latter is a motley mixture of rules dealing with a number of different problems that have obviously arisen in the past and includes guidance on smoking in court. I note that there is very little in the rules about administration of an advocate's practice, client care or, indeed, the relationship between the advocate and the various bodies that regulate his conduct. Moreover, there is no formal definition of professional misconduct – though failure to abide by some or all of these rules can amount to this.

141. Any professional person should have ready access to the rules governing his or her professional activities and be aware of what actions will or will not bring him into conflict with his regulator. Moreover, in bringing an action against an advocate, the Commission should have regard to the rules governing that advocate.

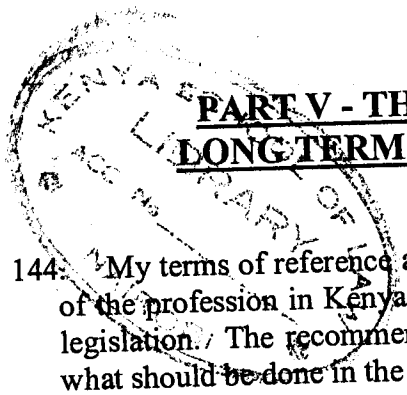
142. It is beyond my terms of reference to examine the provisions of these rules in detail, but I recommend that these rules be reviewed by the LSK with a view to

[18] I am aware of, in addition to the Rules governing admission and discipline, The Advocates (Remuneration) Order, the Advocates (Accounts) Rules, The Advocates (Practice) Rules, the Advocates (Deposit Interest) Rules, the Advocates (Accountant's Certificate) Rules and the Advocates (Practising Certificates)(Fees) Rules.

producing a single volume which sets out all the rules governing conduct as an advocate and provides, where appropriate, guidance on the interpretation of those rules. Professional misconduct should be limited to breach of those rules. Students wishing to qualify as advocates should be tested on the knowledge of these rules.

Education for Clients

143. While ultimately it is for the advocate to ensure that the client fully understands the arrangement between them, it seems to me that the LSK could play a role in providing general information explaining to clients what advocates can and cannot do. This would mean that clients might have less unrealistic expectations and reduce frivolous or unmeritorious complaints. I **recommend** that this be considered by the LSK.



PART V - THE REGULATION OF LAWYERS LONG TERM CONSIDERATIONS FOR KENYA

144. My terms of reference ask me a number of general questions about the regulation of the profession in Kenya and, in particular, to review the adequacy of the existing legislation. The recommendations that I have made in previous chapters deal with what should be done in the short term to address immediate problems. This part deals first with the legislation and, secondly, with the wider questions.

Legislation

145. I have a number of concerns about the general law governing the handling of complaints against advocates and particularly with many of the proposed amendments:

- There are three different agencies able to deal with complaints against lawyers – this is too many – and, at the same time neither the commission, LSK nor the judges have any full responsibility for the system;
- There is an increasing lack of distinction between the functions of the three bodies.
- The positions of the Attorney-General and of the Secretary to the LSK in the system seem likely to cause difficulties of principle;
- The distinction between the powers of the complaints handling bodies and those of the courts is not clear;
- The legislation itself on some issues is over-prescriptive and on others needs greater clarity and detail;
- In some cases the legislation provides over-draconian remedies and few incentives to co-operate.
- There is no obvious accountability in the system.

Distinction between the bodies in the System

146. As should be clear, broadly, the Commission is responsible for prosecutions under the system, but is increasingly being given powers to adjudicate and make orders. The Commission evidently carries little respect from lawyers and, despite the requirement to prepare quarterly reports, does not seem to be particularly accountable to anyone else in the system. The LSK is responsible for the funding of the Committee and for making rules and, in practice, prosecutes for breaches of certain practice rules but has no other control in the system and no accountability to anyone for the performance of the Committee. The judges have powers to discipline advocates, which they never use and can also hear appeals.

147. What has happened as a result of this is clear. The two principal bodies: the Committee and the Commission have been under-funded and so have failed to manage their tasks properly. As a result, legislation is to give the Commission

powers of adjudication which they do not have the resources to manage. It has given similar powers to the Committee. This does not provide a clear or coherent system.

148. In my view, the system for disciplining lawyers should be the responsibility of a single body (with an appeal to the court). There should obviously be a distinction between the adjudicative and investigative functions but there should be some overall control of the whole system.

149. The distinction between investigation and adjudication is important. While it is obviously right that the investigators should be able to conciliate and indicate that they will not prosecute if, for example, proper restitution is made to the complainant, it seems to me to be wrong that it should have the power to adjudicate and make enforceable orders. There is a danger of a perception of bias and, also, prosecution and adjudication are very different functions requiring different skills and separation.

150. Under the proposed legislation, the power in the Commission to require an advocate to return property applies only if the advocate does not dispute that they should be returned. In my view, this is unfortunately vague. It seems to me that, for such a power against property to be exercised, the Commission needs to have formal duties set out to satisfy itself that the advocate actually agrees (rather than does not dispute) that the property is owed and for the advocate to have the opportunity to make representations about the taxation of fees. There also needs to be a right of appeal. I suggest possible amendments that might achieve this at Annex C. I have recommended, indeed, that if the Commission is to have these powers, they should not be brought into force until the Commission has the appropriate resources to exercise them. In my view, however, it should take them on at all.

Judges

151. Section 56 of the Advocates Act explicitly retains an inherent power in the judiciary to discipline advocates. Nobody to whom I have spoken is aware of such a power being exercised nor, indeed, does there appear to be any information about the extent of such a power or the procedure for exercising it. This is unsatisfactory in that such uncertainty may result either in the power not being used, or it being misused with considerable scope for challenges to follow.

152. Many jurisdictions retain a power in the courts to discipline advocates. The fact that in Kenya advocates are admitted by the court and, following proceedings by the Committee, struck off or suspended by the court suggests that there is a theoretical reason for the court to have such a procedure.

153. Moreover, it is perfectly appropriate and sensible for judges to have the power to provide advice and, on occasion, rebuke to advocates who do reach an appropriate standard in front of them. I do not think, however, that it is appropriate for further powers to reside in the court when there are other mechanisms for dealing with such complaints.

154. I **recommend**, therefore, that the powers in section 56 be clarified. In my view, the powers of the judge should be limited to providing informal advice or rebuke and that judges should send more serious matters for investigation by the Commission or the Committee. I further **recommend** that consideration should be given to giving the judges representation (possibly as chairman) on the Disciplinary Committee.

155. If, however, it is thought that the judges should have the full panoply of powers, then there must be an appropriate procedure set out governing the exercise of such powers. Such a procedure must provide the advocate with an opportunity to deal with allegation, an appropriately composed hearing and clear sanctions.

The Position of the Attorney-General and the Secretary to the LSK

156. The Attorney-General is the minister with day-to-day responsibility for the Commission (albeit that he does not appoint the Commissioner). He is the Chairman of the Disciplinary Committee and expected to chair meetings of that Committee. That Committee can refer cases of fraud to him for prosecution under section 80 of the Act[19].

157. This multiplicity of function seems unfortunate. It is a well-established principle that there should be a separation between prosecution and judicial functions. It certainly seems to me that this multiplicity of functions falls foul of current human rights jurisprudence[20]. I recognise that the Attorney-General does not, in practice, chair many Committees and is not involved in the day-to-day decisions of the Commission in respect of individual complaints. I should make it clear that I have heard no suggestion that the present incumbent has ever sought to exercise his functions improperly. Nevertheless, it seems to me that the potential exists for a future Attorney-General to do so and that this needs to be addressed.

158. It is, nevertheless, in my judgement right that the executive should have some role in and oversight of the disciplinary system for lawyers. The Attorney-General is obviously the appropriate person in Kenya to have such a role and, later in this report, I make recommendations as to how this can be achieved in the longer term. I consider, however, that in the short-term it would be desirable for the Attorney-General's role to be clarified. Given that it is impractical for the Attorney-General to divest himself of his responsibilities for the Commission, I **recommend** that he ought not to chair the Disciplinary Committee or be represented at its hearings. At Annex B I suggest amendments that could achieve this.

159. The position of the Secretary to the LSK is slightly different, but as Secretary to the Committee, he may find himself in the invidious position of clerking a Tribunal in front of which his employer acts as prosecutor. I **recommend** that there should be a separation of the functions and that the Secretary to the LSK should cease to be secretary to the Committee.

---

[19] Section 61.

[20] I think particularly of Article 6 of the European Convention on Human Rights which gives the right to a fair trial.

Distinction between the courts and the disciplinary system

160. Any complaints system needs to consider how its provisions mesh with those of the general law. For example, many of the complaints (if not the majority) received by the Commission concern theft, fraud or forgery and it is arguable that these should be considered by the police and the criminal courts first. In other cases, the allegations may be of negligence or amount to a civil dispute over ownership of funds or the payment of fees. Again, it is arguable that these could be left to the courts and that the function of a complaints or disciplinary system is simply to deal with the suitability of members to be in the profession.

161. As has been noted, the legislation is increasingly giving the Commission and the Committee powers akin to the civil courts and the right to enforce its orders through the courts. It also gives the Committee power to refer cases of fraud to the prosecution authorities, thus clearly contemplating that it may deal with potentially criminal matters in advance of the courts. The aim appears to be to set up a special jurisdiction dealing with lawyers providing clients with an alternative to the courts.

162. I am aware that it can take a considerable length of time for cases to be resolved through both the civil and criminal courts in Kenya. It is clearly in the public interest that if a complaints procedure can resolve such matters satisfactorily it should do so. On the other hand, there must be safeguards to prevent duplication of effort and the advocate facing action against him in respect of the same matter in a number of different forums.

163. It is not clear to me that the legislation in fact gets this distinction right. While I can see no objections to the Committee having the ability to make orders concerning property and to tax fees, it should be made clear to the complainant that, if those powers are exercised, the complainant cannot litigate about the same issues, beyond seeking enforcement orders, unless those orders are overturned on appeal. I **recommend** that this be clarified.

164. Of course, many complaints are, in fact, criminal in nature in that they suggest theft or fraud, if not worse. The approach taken by the Commission and, to a great extent, the Committee is that it is preferable for the advocate to restore money to the complainant than for a strict approach to be taken. I understand that it is rare for complaints to be referred to the Attorney-General under section 61. This approach is understandable and probably appreciated by complainants who are more concerned to get what they are owed than to see criminal sanctions imposed on the advocate. There are obvious dangers, in the longer term, of so lenient an approach.

165. Nevertheless, I understand that complainants, frustrated by the procedure often take the matter to the police also. I do not see how the complaints system can prevent the police conducting an investigation and, possibly, prosecuting an advocate in respect of conduct of this sort. It also seems to me to be wrong that two investigations should be going on into the same issue at the same time. I **recommend**

that the Commission and the Committee should not investigate complaints which are the subject of police investigations until either a decision has been taken not to prosecute or any prosecution has been completed.

Criminal Penalties

166. The Act, perfectly properly, provides criminal sanctions against unqualified people pretending to be advocates. There are criminal sanctions also for advocates who breach the Remuneration Order and undercharge. Under the new legislation, individuals who do not co-operate with the Complaints Commission will also be guilty of an offence. I assume that this latter is a response to the difficulties that the Commission finds in obtaining responses from advocates and, occasionally from complainants in respect of its enquiries.

167. Care needs to be taken in applying criminal sanctions in this area. I find it strange that undercharging should be regarded as so heinous when no upper limit is placed on fees. I was told that this was, in effect, to protect practitioners. I was also told that it was widely ignored and never enforced. I have suggested that it would be sensible to look again at the rules concerning fees and would make the point here that it is pointless to have a criminal offence on the statute book if it is not enforced. It seems inappropriate for such matters to be the subject of criminal sanctions. A better approach would be to take this into account in deciding whether particular fees were enforceable and in taking a view on the standard of service offered by the advocate. I **recommend** that this be reviewed.

168. I have similar reservations about the proposed criminal offence of failure to assist the Complaints Commission. This appears to me to be extraordinarily draconian and outside the purview of the criminal law: it is akin to a police force having the power to require a victim or witness to assist against their will. I do not know whether the police have such a power in Kenya, but evidence brought under pressure of such a sanction might be thought to lose some of its value. Failure by an advocate to assist can be the subject of professional discipline – and it is clear the Committee imposes penalties in such cases. I **recommend** that this offence be abolished.

169. The imposition of criminal sanctions in this area has a feel of desperation about it: the system patently does not work and the impression that advocates continue to defraud clients continues. I suggest ways of discouraging them from doing so and for educating so as to improve practice earlier in this report. I urge that these be considered.

Legislation Governing the Procedure

170. It is clear to me that a major overhaul will be needed to make the system more efficient. I am concerned that in many cases the legislation seems unnecessarily detailed and prescriptive (for example, the composition of the Committee and details about alternates), containing matters which are more suitable for rules. In others, however, the legislation does not seem to me to provide sufficient detail for certainty (section 56 is an example, but there are others, particularly the proposed new 53(6B)

where the absence of a formal procedure could lead to injustice and challenge) and should, in my view, at least powers to make rules setting out procedures.

171. I take as a basic principle, the view that legislation should not be too detailed and that, in general, matters that are likely to need flexibility should be left to rules. In my view, therefore, the legislation should provide for the following matters:

- The structure of the regime governing lawyers, including the functions of the various players, accountability etc;
- The powers of the various players within that structure, particularly where those powers affect the rights of others;
- Responsibilities for payment for the various functions;
- Rule making powers which prescribe the parameters of the rules and procedures for approving those rules.

172. The detailed provisions should be left for rules which can be amended relatively easily. I **recommend** in particular that sections 58-60 be looked at with these principles in mind. I set out at Annex C a number of areas both in the legislation and in the roles where changes seem to me to be necessary.

The Regulation of Lawyers

173. At the start, it is worth setting out why lawyers need to be regulated.

174. In most jurisdictions, lawyers tend to have special rights to appear in courts and deal with certain transactions because they have the expertise to do so and because they are under special duties to the court and to their clients. The duty to the court is generally accepted in common law jurisdictions to involve not lying to the court about the facts of a case and being frank to the court about the law, whether it helps or hinders the case the lawyer is trying to advance. The duty to the client involves duties of confidentiality and trust and to avoid conflicts of interest. The monopolies which give professionals their security and status are inextricably interlinked with these duties: if professionals cannot be trusted, for example, to tell the truth to the courts and their clients, to act with the utmost probity and to have particular expertise, then there is no reason to prevent any unqualified or unregulated person from undertaking them.

175. Nevertheless, lawyers remain human beings. There is nothing magical in any admission ceremony to the Bar which turns a human being into a saint. Lawyers can and do act dishonestly or incompetently and any legal system must have ways of discouraging them from doing so and of dealing with those who do depart from proper standards. Such regulation need not, as some have suggested, interfere with a lawyer's independence. On the contrary, handled properly, it bolsters it in providing a structure in which clients and the public can have confidence in their dealings with lawyers.

176. Typically, regulation is dealt with by way of rules of conduct and an enforcement system dealt with by way of complaint. In my view, there are two major questions that need to be considered in this area:

- who should run the system? and
- What remedies should it offer?

Who Should Regulate the Profession?

177. There are a number of possible agencies to regulate the profession, which I consider below.

The Profession Itself

178. Until recently, self-regulation (ie by the professional body of which the individual is a member) has been seen as the most appropriate way of maintaining standards. The following justifications exist for this:

- Lawyers have an interest in maintaining public confidence in the probity and competence of their members – dishonesty reflects on the entire profession and can result, for example, in the "two cheque" system being adopted throughout.
- The professions are best placed to judge whether conduct meets the necessary standards of the profession and, on a technical basis, whether the lawyer has done an appropriate job or not;
- The independence of the profession from external interference is maintained;
- In many cases, senior members of the profession involve themselves free of charge in the regulatory system, providing an efficient system which achieves a high quality of investigation and adjudication.

179. There are a number of perceived difficulties with this, however, which are, broadly, as follows:

- The professions may also protect their own members either in individual disciplinary cases or, generally, by imposing restrictive rules which do not properly reflect the public interest;
- Some members of the profession will consider that the profession is run as a clique with a bias against particular individuals or types of practitioner;
- There is arguably an in-built bias to look at issues from the point of view of the lawyer, rather than the client – professional bodies are often good at dealing with issues of misconduct (ie conflicts of interest or other breaches of the rules) but less good at dealing with poor service to the client;
- There is no obvious accountability to any other authority;
- The profession can fail to fund the system adequately leading to backlogs, inefficient handling of complaints. This can often be the case when members perceive that the professional body is there to act as a "trade union" rather than as a regulatory body.

External Regulation

180. Under this model, some external body, either established by the State or run by the State itself will deal with the regulation of lawyers. Such systems can have the following advantages:

- The body will be perceived to be independent of the legal profession and so more likely to look at rules and complaints from the point of view of the client and enforce its decisions properly;
- The body is not under the control of the profession with regard to resources and so under-funding by the profession is unlikely;
- The State itself has a duty to satisfy itself that those practising law are subject to proper controls and regulation.

181. Disadvantages, however, are likely to be as follows:

- Such a body will inevitably need some input from lawyers in order to judge technical legal questions – lawyers are unlikely to be willing to give their services for free to an organisation outside their own profession, so costs may be high and the calibre of lawyer low.
- If the State runs the organisation, there is an obvious danger of State interference. In any free nation, the ability of lawyers to challenge the State without fear is crucial. The opportunities for a State to abuse a State-run system to victimise lawyers that act against the State or to favour those who, in a corrupt society, assist its ends are obvious.
- Such organisations remain dependent upon funding from somewhere, whether from the State or, through special taxation, the profession. Such an organisation would be one of many competing for funding from the State and is unlikely to be funded to do an adequate job.

182. In England and Wales, the Government still entrusts the profession to regulate itself but has appointed an Ombudsman to oversee their handling of complaints. At present this is funded by the Government.

The Judges

183. In many systems, including Kenya, advocates are admitted to a Roll held by the courts and it is the courts which are responsible, at least technically, for the admission of lawyers and their removal from the Roll. In some cases the court has a direct involvement in dealing with complaints against lawyers and hearing serious cases. The advantages of such involvement are:

- In many systems judges are independent both of the Executive and of the profession and are seen to be impartial;
- Judges have a direct interest in the standards of advocates appearing before them;
- Judges have the expertise and technical knowledge to deal with the complex technical issues in front of them.

184. There are, equally, disadvantages:

- In some jurisdictions (including Kenya), judges may never have practised as lawyers or may have done so in the distant past and so may be unaware of the legitimate practices or changes in standards that have taken place;
- Only a minority of complaints concern with an advocate's appearance in court – the majority involve issues of service and the relationship between the client and the advocate;
- Judges primarily exist to deal with disputes in the courts. Except for the most complex or serious cases, it is not appropriate to use their time to deal with, for example, penalising advocates who have practised without a practising certificate.
- In certain jurisdictions, judges had successful practices as lawyers before coming to the Bench. In others they depend upon the Executive for patronage. They may well not be perceived to be independent.

Other interests

185. Many countries have bodies representing consumer interests and competition authorities. Both have a direct interest in the way in which legal services are provided and while it is unlikely that they will have the interest, resources, or authority to run any regulatory system themselves, they have a contribution to make.

The Options for Kenya

186. There is no single right answer for the way in which the legal professions should be regulated. Any system needs to take account of the conditions applying in the particular country. Nevertheless, there seem to me to certain basic principles that any system for regulating lawyers must take into account:

- There must be some involvement from the profession in setting the rules and dealing with discipline;
- There should also be involvement from individuals and bodies outside the profession representing the various interests in society;
- Human rights jurisprudence;
- The paramount need for a system that works efficiently, is clear and carries public confidence;
- The resources available.

How should the System work?

187. From the above it should be clear that I **recommend** that there should be a single agency which deals with the investigation and prosecution of advocates. This avoids confusion and "forum shopping" by complainants. It enables that agency to establish a single policy and to gain expertise. It also enables that agency to sift complaints to ensure that only cases that show sufficient evidence to go to the Committee actually do so.

- The LSK is likely to gain more credibility if it can regulate its members properly.
- The Commission is patently under-funded and likely to remain so while it has to compete for scarce public resources with more attractive recipients, such as health or educational bodies. Until it is properly funded, the position of advocates in Kenya will continue to be tainted by the existence of their fraudulent colleagues and the inability of the system to do anything about it.

195. This assumes that the LSK is willing to undertake this task and prepared to fund it. If it is not prepared to do so (and I recognise that a number of advocates will not accept the analysis that I have provided) then this recommendation must fall. If that is the case then urgent work needs to be done by the Kenyan Government to fund the Commission to the state where it is able to its job properly. Consideration should also be given to taking the Disciplinary Committee out of the management structure of the LSK. Lest this appear to be an attractive option to the LSK, I think it is unlikely that Government will regard the funding of any system as its responsibility and there are obvious ways in which Government can transfer responsibility for funding the regulatory system onto lawyers without giving them the management responsibility for the system. For the LSK, this would be the worst of all worlds and I do not believe that it would be a desirable result for Kenya as a whole.

196. The problem that the LSK faces is in finding the finance and staff to take on such responsibilities. As I have indicated, the Disciplinary Committee is in my view under-resourced and it is not realistic to expect the LSK to take on the Commission's functions until it has (a) resolved the Disciplinary Committee's backlog and (b) has the funding to manage the investigative role. Taking on such tasks will be a considerable task and needs careful planning. I regard it as too early at this stage to make detailed recommendations on the management of this, but hope that the following thoughts will be helpful.

197. The funding is crucial to this and I see little alternative to the LSK taking it on. It is also essential that it should provide resources at the level needed to run the system properly. The costs of running such a system are likely also to be substantial. At Annex D I set out what appear to me to be the likely costs to the LSK of doing so. I do not have sufficient information about the pay scales for the Commission to be able to give such figures. The long term costs are high (and are based on what I was told were broadly realistic scales for this sort of work) and could add around 1m shillings per month on to the budget. In my view the short term costs are considerably lower.

198. This will increase substantially the burden on its members and ways need to be sought urgently to ameliorate this in the short term. Two options seem to me to be possible:

- To seek funding from external agencies to cover the set-up costs of, for example, the computer system and, if possible, the costs of the additional staff on a tapering basis over, say, five years, so that the profession can adjust gradually to the increased costs;

- To seek support from Government at least to the extent of its current support for the Commission for the early years of the scheme.

199. I **recommend** that both should be explored and I hope that the Government of Kenya would regard the second option as a way of responsibly shifting the burden on to the profession. I would urge in any case that the LSK undertake the work necessary to reduce the backlog and run the Disciplinary Committee efficiently even if it has to delay the longer term plans.

200. I see no point in transferring any functions to the LSK until the Disciplinary Committee is running properly. It also seems to me to be unfair to expect it to take on the backlog from the Commission. I **recommend**, therefore, that, once the backlog of the Committee has been cleared, the staff taken on to deal with that backlog should move to start taking on complaints on behalf of the Committee and investigating them. At that point, the LSK could begin to take on new complaints while the Commission deals with its backlog. If that gets down to a manageable size the rump of the remaining cases could be transferred.

201. I should add further that taking on such a system will be a major management task for the LSK, particularly given the ambitious proposal for continuing education. It is likely to result in at least a doubling of the existing staff and require new accommodation. This needs careful planning and I recommend that the LSK work out a timetable for this to be taken on, if this recommendation is accepted. I suggest such a plan at Annex E.

Accountability

202. If this were to be accepted, then the Attorney-General should, in addition to his powers in respect of lay representatives, have an overall task of keeping the system under review. It seems to me that that task should include:

- The setting of targets in terms of time-scales and case management for the various functions carried out by the agency;
- Approval of rules governing the system;
- The power to establish an alternative system if it is clear that the existing one is failing and to charge the profession for its administration.

I believe that this should provide the system with sufficient accountability and give the Attorney-General sufficient influence over the system.

203. I have considered whether some form of Ombudsman system is appropriate. I am not convinced that it is. First, such a system will be expensive and I would rather that scarce resources were spent on getting the actual system right. Secondly, complainants are, as I understand it, able to take advantage of the appeal procedure and should, therefore, use it. There is no need at this stage to give them an alternative. This view may need to be reviewed if concerns arise over how the LSK and the Committee exercise its functions.

204. The LSK should provide an annual report to the Attorney-General setting out how it has met its duties under this area.

An Alternative

205. If the LSK is unwilling or unable to take on this task, then an alternative will be needed, given that I regard the existing system as untenable in the long run. Such an option could be to take the system outside Government and the profession altogether. For this, legislation could establish an independent body with responsibility for running an investigation and prosecution body and a Disciplinary body. In my view, the body should have as its Directors, the Attorney-General, the Chief Justice, the Chairman of the LSK and a distinguished lay person. This body would employ the necessary staff and oversee the procedures.

206. The question of funding, however, would remain. Whoever runs the system, it will need substantially increased funding. I gained no impression that such an increase would be available from Government. While one-off funding for set-up costs or individual projects may be available from abroad, the main burden will be the continuing running costs. If Government cannot fund this, then I see no alternative but, at least, a co-funding arrangement with the profession.

207. I regard this as a second-best option and one that should be adopted only if the LSK proves unwilling or unable to take on the full burden of regulation itself. It would lose many of the advantages that the first option would have – most notably that of a profession taking responsibility itself for its own standards and for the integrity of its members.

Conclusions

208. The existing system is failing to regulate advocates and has lost support through under-funding and fragmentation. The system needs overhauling and, in my view, the LSK should take responsibility for its members and set up appropriate systems for the protection of the public.

209. I recognise that this will place a considerable burden on them and that this will not be welcomed by many members. I was heartened, however, by the evident concern in the leadership to improve standards and the reputation of the profession. Ultimately, the profession cannot absolve itself from responsibility for its own members and I urge the leadership to undertake a substantial campaign to persuade members that the investment in their own regulation can only, in the long term, benefit them.

210. This should not, however, be undertaken at once. The existing problems must be resolved before any structural change can take place. It may be some years before the new system can be brought fully into effect. That time should be taken in planning the funding and management changes that are needed to bring the new system into effect.

211. Finally, I should thank all who have helped me in this report and in reaching my conclusions. I should make it clear that I will be happy to assist in advising on other issues that arise and on any rule changes or other amendments that are needed.

MARK STOBBS
Head of the Professional Standards and Legal Services Department
General Council of the Bar

IBA Consultant on Kenyan Disciplinary Systems.

May 2002

Annex A

TERMS OF REFERENCE FOR IMPROVING THE EFFECTIVENESS OF THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA AND THE COMPLAINTS COMMISSION

BACKGROUND

During the clamour for multiparty democracy in Kenya in the 1980's – a process in which the Law Society of Kenya (LSK) was an active player, the Government of Kenya created the Complaints Commission (the Commission) under the aegis of the Attorney General to enquire into the complaints against advocates. Previously complaints against advocates were virtually handled solely by the LSK, which through its Boards of Inquiries investigated complaints and punished advocates found guilty, all without external intervention. In certain circumstances the Chief Justice and Judges would mete out punishment in cases of misconduct committed before them.

The Government not only established an investigation arm in the form of the Commission but it also established a Disciplinary Committee (DC) to be chaired by the Attorney General or his nominee. The system established required the Commission to investigate complaints and to refer unresolved cases to the DC for hearing and disposal. Thus the legal profession was deprived of control over itself. Co–regulation was imposed on the profession, with the State as the stronger partner and player. The Judiciary retained its punishment role, too, albeit only in the statute books.

Though these measures by the Government were seen as oppressive and interventionist, and geared to silence the voice of the legal profession in matters of democracy and good governance, the profession was unable to rally public support against them because cases of malpractice and defalcation were on the increase within the profession. This unhappy situation still obtains to date,

Since its inception in 1989 the Commission has been inundated with a large volume of complaints against advocates which it has not been able to cope. At the DC the established machinery for disposal of complaints was clearly inadequate. Indeed, the system is now virtually clogged up. The substantive law itself is far from clear or effective and the process is not taken seriously by advocates and complainants alike. To many Kenyans, the DC and the Commission are toothless and ineffective bull dogs. Complainants prefer to seek police intervention to for the expeditious resolution of complaints, sometimes with disastrous consequences to our members.

CURRENT SITUATION:

Today there is an increasing backlog of causes piling up before the DC. The number of unresolved complaints referred to the DC by the Commission since October 1991 stands at 1,205 out which only 259 have been determined or finalised to date. Pubic confidence in these systems and in the legal profession in Kenya is at an all time low. This is sorry state of affairs is further compounded by the absence of client compensation fund and by the fact that advocates are not compelled to take out compulsory professional indemnity insurance.

There is currently an urgent need to unclog the entire disciplinary machinery. As a matter of priority, a case management plan must be put into place to speed up the disposal of causes before the DC. Along with this it will also be necessary to consider the current *institutional structures, the enabling legislation and even the kind of disciplinary regime* that is suitable for us. The last issue is pre-eminent. Ours is a unique and unhappy form of co- regulation which distributes authority to regulate to multiple bodies but with no one to take full responsibility. Sooner rather than later the entire legal fraternity must decide whether jurisprudentially or philosophically it is desirable to adopt and exercise self-regulation over itself or whether it will suffer continued State control. The answer depends on many factors the most prominent of which must be the level of individual and collective responsibility within the profession. This responsibility must extend to the control of its own members and the protection of clients, as well as the sheer capacity and capability of the profession to regulate itself.

As to the institutional framework, the greatest draw back is the absence of an enforcement unit within the whole disciplinary set-up. Often orders from the DC are ignored, or indefinitely suspended by orders of stay issued by the High Court. Hence, in many instances errant advocates continue to practice even though they have been struck off the Roll or suspended. Millions of shillings in fines and costs remain unpaid and uncollected.

The DC as an institution is no longer efficient. It is overwhelmed with causes it cannot hope to conclude under the current arrangements. Primarily, the DC is comprised of the Attorney General or his representative, and two LSK members. There are only 3 LSK members elected to serve on the DC, which means that only one panel can sit at any given time. Furthermore the panels only sit thrice a month and their proceedings are persistently hampered by the absence of the Attorney General or his nominee.

The Commission is by extension, chronically under-funded and understaffed. It also lacks basic tools and equipment to undertake any of the tasks it is mandated to discharge.

There is therefore a need to examine all the players in the disciplinary process including the DC, the Commission and the Prosecution Department of the Attorney General's Office, the LSK, the Judiciary and even the Police. However, currently the most visible performers here are the DC and the Commission. Any serious scrutiny must start with the

two institutions. Inevitably contributions from others will come up for consideration to varying degrees.

TERMS OF REFERENCE

The entire legal profession would benefit from technical assistance which would enquire into the following:

1. All Existing Disciplinary Institutions

a. Examine all existing institutions mandated to deal with matters of legal professional discipline in Kenya
b. Consider the adequacy or otherwise of the legislative framework
c. Consider organisational structures
d. Consider available resources including human, financial and physical resources at their disposal
e. Consider the general contributions of the existing institutions to the general enhancement of professional standards and ethics, as well as the promotion of competence and honesty in service delivery
f. Consider the pros and cons of setting up external agencies to ensure accountability and effectiveness

2. Procedures

a. Enquire into existing mechanisms for receiving and handling complaints against advocates especially by the Commission and the DC
b. Advise on the legislative provisions relating to complaints handling procedures and report on whether or not they serve the disciplinary regime adequately.
c. Advice on complaints handling policies, procedures and guidelines. Under this consider time taken for processing complaints, the demography of complaints, the nature and quality of investigations, speed of disposition of complaints as well as feed back to the profession
d. Consider the independence and impartiality of complaints handling, procedural fairness, openness and accountability as well as public accessibility to institutions
e. Consider the backlog of complaints in both the Commission and DC and advice on case management methods to clear or reduce the same.
f. ***Review the draft proposals made the LSK for the establishment of the following schemes: a client compensation fund and a compulsory professional indemnity scheme, and to advise on the structure, effectiveness and sustainability of these schemes and the enabling legislative provisions and resource requirements.***

3. Funding And Other Resources

a. Consider the provisions that will have to be made for adequate resources to facilitate the operation of a comprehensive system of professional regulation.
b. Consider the provisions that will have to be made for resources to cater for appropriate staff levels, adequate remuneration, suitable office infrastructure and equipment, and operational expenses to sustain a system which will ensure thorough investigations, complaint processing etc.

4. Philosophy

a. Consider self-regulation –vs- co-regulation in the legal profession
b. Consider in whom the control of the bar should reside: the LSK, the Attorney General or the Judiciary.
c. Consider whether it is sustainable in the perception of the LSK to exercise both a disciplinary role and promote the interest of LSK membership

* ***There may be an overlap here with a client protection project that has been suggested by Mr. John Moorhouse – Chair of SPL Committee No. 23 (Client Protection) of the IBA. He had invited the LSK's interest in participating in a project intended to establish both these schemes and to review our client protection regime. We agreed to participate but have been very slow off the mark. Of late my e-mail messages to Mr. Moorhouse have not been answered and I fear that he is rather fed-up with us or has abandoned the project altogether. It may be a good idea to get in touch with him, if you could, to ascertain whether project is still ongoing. If so, it may make sense to have it proceed within the context of this initiative.***

Annex B

DISCIPLINARY COMMITTEE

DIRECTIONS OFFICER

PERSON SPECIFICATION

The role of the Directions Officer is set out in the report and a job description can be adapted from that. It seems to me, however, that the following characteristics are required for the holder of such a post.

- Either a qualified advocate or an individual with judicial experience;
- At least 12 years experience which must involve acting either as a judge or an arbitrator;
- Demonstrable experience in handling or administering a heavy caseload efficiently and fairly;
- Demonstrable experience in reaching judicial decisions and providing reasons for those decisions.
- No findings of professional misconduct, criminal convictions or history or bankruptcy.

LEGISLATIVE AND RULE CHANGES REQUIRED

This Annex identifies the main areas in which changes to the law are required to implement these proposals. In each case I indicate whether they are urgent or longer term and, at the end, I provide drafts for certain changes. I should make it clear that I am not a Parliamentary Draftsman and have no skill or training in such drafting. These are my attempts to suggest improvements and changes to the system. They should be checked carefully to ensure that they do not conflict or cause difficulties with other parts of the Act and, indeed, that they actually have the effect intended.

The Advocates Act

The following sections seem to me to need consideration and amendment.

Sections 13 and 32 - to deal with my recommendations concerning "sheltered practice".

Section 35: Failure to endorse a document with an address seems a trivial offence to justify criminal sanctions: it might be preferable for the issue to be left to the court for argument as to admissibility and then negligence actions against the lawyer.

Section 36: This provision, as I have indicated seems draconian and is rarely enforced. They may well be other ways of achieving a similar result.

Section 38: For the reasons given in this report, touting need not of itself be an evil and it would be sensible to look at this provision and whether it would not be preferable to regulate the activities rather than to ban them outright.

Section 53: This section and the amendments to it seem to me to need some reconsideration. In particular, powers to require advocates to pay money to third parties, if they are appropriate for the Commission, need to be exercised in accordance with proper procedures which give the advocate concerned the opportunity to make representations. This applies particularly to subsection (6), but equal problems arise with the amendments.

New subsection (6B)

As I understand it, this power aims to compel advocates to restore property which is the property of the client. As I have indicated, I believe that there is a general issue of principle as to whether it is right for the Commission to have such powers which, really, are more suited to a civil court. I believe that it is necessary to set out a proper procedure exercising it. I propose the following.

6B (a) This section applies where:

(i) the Commission is considering a complaint in which it is alleged that an advocate has failed to surrender funds of property belonging to a client;
(ii) where the client (or other person acting on the client's behalf) has not filed a civil suit against the advocate in respect of the same funds or property; and
(iii) where the client has consented to the Commission taking action under this section.

(b) If the Commission is considering making an order under subsection (c) or (d) below it shall serve notice on the advocate stating:

(i) that it is considering making such an order;
(ii) the funds or property that it considers to be due to the client;
(iii) that the advocate should reply to the Commission within 30 days stating whether he agrees that the funds or property are due to the client, whether he agrees that some part of the funds or property is due to the client (and, if so, which) or whether he disputes that any part of the funds or property is due to the client and making any submissions in relation to the matter which he wishes the Commission to consider;
(iv) that failure to reply within the set time will be treated as an agreement that the full amount is due to the client; and
(v) that, in the event of a dispute, the matter may be referred to the Disciplinary Committee.

(c) If the advocate does not reply or accepts that the whole amount is due to the complainant, the Commission may order the advocate to surrender some or all of the funds or property it has identified under subsection (b)(ii) above.

(d) If the advocate agrees that some amount is due to the client, but disputes that the whole amount is due, the Commission may:

(i) order the advocate to surrender such funds or property as he accepts are due to the client; *or*
(ii) allow the advocate 30 days to surrender the funds or property voluntarily; *or*
(iii) refer the matter to the Disciplinary Committee; or

any combination of these as it sees fit.

(e) If the advocate disputes that any amount is due *or, fails to surrender the funds or property under subsection (d)(ii) above* , the Commission may, having considered the matter:

(i) dismiss the complaint and take no further action; *or*
(ii) refer the matter to the Disciplinary Committee.

(f) For the purposes of this sub-section, a notice is deemed to be served on the advocate if it has actually been served or if it has been sent by [registered?] post or by receipted hand delivery to:

(i) the address notified by the advocate to the Society, or
(ii) an address to which the advocate may request in writing that such documents be sent, or
(iii) in absence of such a request to his last known address

and such service shall be deemed to have been made on the fifth working day after the date of posting or on the next working day after receipted hand delivery.

(g) For the purposes of sub-section (g) above, "receipted hand delivery" means a delivery by hand which is acknowledged by a receipt signed by the advocate or any employee of the advocate.

(h) A client in whose favour an award has been made under this sub-section may not bring any action in the courts in respect of the funds or property which are the subject of the order unless the order is overturned on appeal, save that nothing shall prevent such a client taking steps to enforce the order through the courts.

I am aware of difficulties whereby advocates have sought stays of decisions of the Disciplinary Committee by way of judicial review rather than appeal. This seems to me to be inappropriate and I suggest that the following could be included in the Act. Some amendments to the Rules of Court may also, I understand, be necessary.

6(F) The Court shall have no power to review a decision of the Commission made under this section except under its powers to review decisions of the Disciplinary Committee.

It has also been suggested that subsection (9) may require reports to be produced too often, thus wasting resources at the Commission. I suggest an amendment might read as follows.

(9) The Commission shall make an annual report as to the complaints dealt with it in that year to the Attorney-General, the Society and the Committee.

Sections 57 and 58:
I have proposed substantial changes for the Disciplinary Committee, the aim of which are to enable urgent recommendations that I am likely to make to be adopted without further legislation. These should be treated as a stop-gap until a major overhaul is possible. I have explained each provision with footnotes. Further amendments will be needed to achieve the wider recommendations.

57(1) (c) six advocates of not less than five years standing (and of whom at least two must not be of more than ten years standing[21]), one of whom shall be an advocate who does not ordinarily practise in Nairobi, all of whom shall be elected and shall hold office for three years and be eligible for re-election, provided that no such advocate may sit for more than three consecutive terms[22].

(d) such number of other persons, not being advocates, appointed under the procedure in subsection (5) below, as the Committee considers necessary for the expeditious conduct of business[23];

(e) such number of other advocates, appointed by the Committee, as the Committee considers necessary for the expeditious conduct of business, provided that no such advocate may sit for more than five consecutive years.

Repeal sub-section (2)[24]. It can be replaced by the proposed (1A).

(5)[25] Persons who are members of the Committee by virtue of sub-section (1)(b) above shall be appointed in the manner prescribed by this section.

(a) Each year, the Committee shall consider how many such people are necessary for the expeditious conduct of business in the light of:

(i) the requirements of this Act and of the Advocates (Disciplinary Committee) Rules; and

(ii) the need to make such appointments at regular intervals so that the respective expiry dates of their terms of office shall fall at different times.

(b) Following its consideration under sub-section (a) above, the Committee shall advise the Society and the Attorney-General of the number of such people that it considers necessary to be appointed.

(c) On receipt of the Committee's advice, the Society shall select the relevant number of individuals in such manner as it sees fit but having regard to:

---

[21] The aim of this proposal is to reserve two spaces for junior advocates.

[22] This provides a limit of, in effect, 9 years' consecutive service and would, I believe be desirable to prevent the danger of advocates becoming stale. There would be nothing to prevent an advocate serving many non-consecutive terms.

[23] I would prefer to avoid specifying numbers in this section as the need may vary (see the proposed new subsection (5) below).

[24] If the amendments proposed to sub-section(1) are agreed, this sub-section becomes redundant.

[25] The aim of this new sub-section is to provide a procedure for choosing lay representatives. The aim which, I believe, follows the spirit of the originally proposed (1)(d) requires the Committee to decide how many new lay members it needs each year, the Law Society to recruit such members having regard to specified criteria and for these to be submitted to the Attorney-General. If the Attorney-General is not satisfied that they have been recruited according to the criteria, he can ask for further names and he can then make a choice from all the names submitted.

(i) the need to ensure that such people possess an appropriate level of education and experience to play a proper role in the Committee;
(ii) the need to ensure that the individuals reflect, so far as possible, a diversity of interests and facets of Kenyan society; and
(iii) the desirability of a transparent selection procedure.

(d) The Society shall provide the Attorney-General with the names of the individuals whom it proposes should be appointed to the Committee.

(e) The Attorney-General shall appoint to the Committee the individuals submitted by the Society unless he considers that regard has not been paid to the criteria set out in subsection (c) above.

(f) If the Attorney-General does not consider that regard has been paid to the criteria set out above he may ask the Society to propose other individuals to replace one or more of those named under subsection (d) above.

(g) On receipt of a request under sub-section (f) above, the Society shall provide the Attorney-General with the names of such additional individuals whom it considers to be suitable, having regard to the criteria in sub-section (c) above.

(h) On receipt of the additional names, the Attorney-General shall appoint to the Committee whichever of the individuals whose names have been received under sub-sections (e) and (g) above as he considers most appropriate to fill the vacancies notified by the Committee

(i) Individuals appointed under this procedure shall hold office for three years and shall be eligible for re-appointment, provided that no such person may hold office for more than 3 consecutive terms.

58(1) The purpose of the Committee shall be to consider and determine:

(a) such complaints against advocates as are referred to it;

(b) applications by advocates for removal from or restoration to the Roll; and

(c) appeals by advocates from decisions of the Complaints Commission.

(2) The Committee shall make such Rules as it considers appropriate for the fair and expeditious conduct of its work[26].

[26] This replaces the old 58(6). My aim in this section is to provide for a flexible rule-making power to enable the Committee to make a number of changes to its practice and procedure without needing statutory assistance. I thought of making such rules subject to the approval of the Attorney-General but, since he is a member of the Committee in any case, this will be unnecessary.

(3) Without prejudice to the generality of sub-section (2) above, rules made under that sub-section shall provide for:

(a) Tribunals or other panels composed of members of the Committee to consider and determine complaints referred to the Committee and with powers delegated by the Committee[27];

(b) the composition[28] of such Tribunals or panels, provided that each panel or tribunal shall include:

(i) at least one advocate elected under section 57(1)(c) above,
(ii) at least one person appointed under section 57(1)(d) above and

that such panels shall contain a majority of advocates;

(c) the persons from whom complaints may be considered by the Committee, provided that nothing shall prevent complaints being made to the Committee by

(i) the Commission,
(ii) the Society.

(d) the procedure for considering such complaints which procedure shall require that, if the Committee considers that there is a case to answer, the advocate

(i) be furnished with a copy of the complaint,
(ii) have the opportunity to make submissions to the Committee either in writing, in person or by representation,
(iii) be informed of the date of any hearing not less than 21 days before the date of such hearing, and
(iv) have the opportunity to inspect any relevant document at any time before the hearing[29];

(e) the procedures for considering appeals from the Commission; and

(f) the procedures for considering applications for removal from and restoration to the Roll.

---

[27] It is likely that I shall be recommending that the Committee divide its work into different types of panel and Tribunal with varying powers so that, in particular, relatively minor matters can be dealt with summarily by panels with lesser powers.

[28] It is desirable that the Committee should have flexibility in deciding the size and composition of each panel or Tribunal. The basic principles are set out below. I have suggested the abolition of the automatic requirement that the Attorney-General or his representative chair the committee and would propose that the rules set out the method of identifying the chairman of each panel.

[29] This contains the provisions of the existing 60(3).

(4) In addition to the requirements under sub-section (3) above, the Rules may also provide for:

(a) the delegation of the Committee's powers to one or more individuals appointed by the Committee who need not be a member of the Committee and whose remuneration, if any, shall be paid by the Society, provided that

(i) such an individual may not make any findings of professional misconduct or impose any sentence which requires such a finding and

(ii) there shall be an appeal from any decision of such an individual to a panel or Tribunal of the Committee;

(b) the form in which any complaint must be made to the Committee and any fees that may be payable, provided that no fees may be charged to the people and bodies named in sub- section (3)(c) above;[30]

(c) the Committee or any of its panels and Tribunals to sit outside Nairobi;

(d) such other matters as the Committee may consider appropriate.

Repeal subsections (1) and (2). Renumber subsections (3) – (5). Repeal (6).

Section 60

60.(1)[31] At any stage in its consideration of a complaint, the Committee may dismiss the complaint if it considers that:

(a) the complaint does not disclose a case to answer; or
(b) because of delay or for any other reason it would not be possible to decide the complaint fairly; or
(c) on the evidence before it the advocate is not guilty of professional misconduct and it is satisfied that the circumstances set out in section 60A(2) do not apply.

(2) If, after hearing the complaint and having provided the advocate complained against with an opportunity to be heard or make submissions in writing, the Committee decides that a case of professional misconduct on the part of the advocate has been made out, the Committee may order –

---

[30] If the Committee does decide to accept complaints from people other than those specified, I think it should be able to charge a fee to deter frivolous complaints.

[31] I have limited this section to the findings that the Committee can make. This sub-section deals with the occasions on which the Committee may dismiss a complaint and includes additional powers to deal with delay or want of prosecution and to take account of the proposed 60A.

(a) that such advocate be admonished; or
(b) that such advocate be suspended from practice for a specified period not exceeding five years; or
(c) that the name of such advocate be struck off the Roll; or
(d) that such advocate do pay a fine not exceeding one million shillings;
(e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or
(f) that such advocate be permitted to practise only if he fulfils such conditions with regard to areas of practise or environment or others as the Committee sees fit and for such time as the Committee may prescribe; or
(g) that such advocate undertake such further training as the Committee sees fit and within such period as the Committee may prescribe; or
(h) that such advocate may not supervise a pupil for such time as the Committee may prescribe,[32]

or such combination of the above orders as the Committee thinks fit.

(3) *Insert old subsection (5) and add at the end* "save that no such order shall be made against the advocate where the Committee has made no order against him."[33]

Renumber the new sub-sections inserted by the Bill (ie they become (4) – (9)). Then add:

(10) A client in whose favour an order has been made under sub-sections (4), (5) or (7) above may not bring any action in the courts in respect of the matters giving rise to the order unless the order is overturned on appeal, save that nothing shall prevent such a client taking such steps to enforce the order as are contemplated by sub-sections (8) and (9) above.[34]

Renumber old subsection (6) as subsection (11).

In addition the provisions of (5) need amendment to limit the power to award costs.

Later on further amendments will be needed to deal with the secretary-ship, the position of the Attorney-General and any changes that are needed to allow judges to sit on the Committee, if this is thought desirable.

Section 60A

---

[32] I have included a number of additional sanctions which I think the Committee would find useful. I am not entirely happy with the drafting of (f) – there are probably many more elegant ways of putting it.
[33] This seems to me to be a matter of basic fairness – I cannot see why an advocate should pay any costs if no order has been made against him.
[34] This prohibits complainants getting a double remedy from the Committee and from the court, but see my comments with respect to the proposed amendments to section 53

I repeat my concerns that this has the effect of turning the Committee into an alternative court and wonder if there are the resources to handle this.

Section 61

Some amendment here is needed to avoid the Courts making orders other than in the context of an appeal. Rule changes may also be necessary.

(4) The Court shall have no power to set aside or stay an order of the Committee save in the context of the Appeal procedures set out in this Act.

Section 62

I am concerned that the requirement that a sentence be carried out irrespective of any appeal is draconian and likely to justify JR proceedings. The amendment below aims to provide time-limits and incentives for advocates to prosecute an appeal by providing, in effect, that serious sentences will be stayed unless he breaches the time-limit. I also propose a fee for an appeal and that the appellant should pay for the transcript – thus to discourage frivolous appeals.

62 (1) Any advocate aggrieved by an order of the Committee made under section 60 or 60A may, within fourteen days of service on him of the notice to be given to him pursuant to section 61(2), appeal against the order to the Court by giving notice of appeal to the Registrar, such notice must be accompanied by a such sum as the Commission, with the consent of the Attorney-General may prescribe, such sum to be payable to the Commission and refundable, at the court's discretion, in the event of a successful appeal.

(2) The advocate shall file with the Registrar a memorandum setting out his grounds of appeal, together with a transcript of the hearing of the Committee, within thirty days of the date on which he gave notice of the appeal.

(3) The transcript referred to in subsection (2) above may be obtained either from the Committee or another approved transcribing service at the advocate's expense, the cost of which may, at the court's discretion, be refunded by the Commission in the event of a successful appeal.

(4) For purposes of sub-section (3), an approved transcribing service means such provider of transcription services as the Committee shall designate and the Committee shall designate not less than 2 such services.

(5) The Court shall set down for hearing any appeal filed under subsection (1) and shall give to the Commission and the Council of the Society and to the advocate not less than twenty-one day's notice of the date of the hearing.

(6) An appeal under this section shall not suspend the effect or stay the execution of any order appealed against notwithstanding that the order is not a final order unless that

order is that the advocate pay a fine exceeding twenty thousand shillings, be suspended or struck off the Roll

(7) If the order appealed against is that the advocate pay a fine exceeding 20,000 shillings, be suspended or struck off the Roll, that order shall come into effect if the appellant does not lodge any notice of appeal within the time scale set out under subsection (1) above or if he does not comply with the requirements of subsection (2) above.

Sections 64 - 67: In the light of the comments above, some attention needs to be paid the provisions concerning costs in 64(4). I also question whether it is necessary for two judges to hear every appeal. It would be satisfactory if it could be limited to one unless the sentence appealed against was one of suspension or striking off. I doubt whether a further appeal to the Court of Appeal is necessary.

Section 81: Powers are needed here or elsewhere to allow the LSK to intervene in practices and to employ an accountant to inspect records at short notice.

The Advocates (Disciplinary Committee) Rules

The rules will need to be adjusted in the light of the amendments to the Act. In particular, I recommend that they should cover:

- the appointment of the Directions Officer,
- the powers of the Directions Officer,
- the powers of Summary Panels and of Full Tribunals.
- the procedures for allocating cases to such panels
- the timescales for each panel.

The rules may well need wholesale re-drafting in the light of this, but I would particularly recommend further changes to:

- Rule 11: to require reasons to be given for dismissing a complaint;
- Rule 24: to limit the occasions on which the Committee may award costs.

Annex D

COSTS TO THE LSK

As I have indicated, the costs associated with these proposals are likely to be substantial.

It seems to me that the following recommendations can be achieved with relatively minimal costs to the LSK:

- the recommendations dealing with the provision of guidance to the profession;
- the proposals that the Committee should be more willing to avoid adjournments and should give its decisions and deal with mitigation and sentence on the day of the hearing.

Immediate Costs to the LSK

In order to deal with the level of work properly, I recommend that a Directions Officer and additional staff be recruited. It may be possible that a retired judge or other might be willing to undertake the post of Directions Officer at a nominal fee, so these figures are, necessarily speculative. The likely costs appear to me to be:

Directions Officer:	20,000 - 50,000 shillings/month
1 Additional Clerk to the Committee:	20,000 - 30, 000 shillings/month

In addition, I have recommended that a computerised case-management system be designed. This seems to me to be likely to cost in the region of 2m - 4m shillings, depending on the tenders received.

Longer Term Costs

If the LSK is to take over the task of regulating the profession, then the staffing will need to be increased. It seems to me that the costs of this will total something like:

2 - 3 managers (current Commissioner/Deputies):	50,000 shillings/month =	100,000
8 investigators	30- 40,000 shillings/month = say	300,000
5 prosecutors	30 - 40,000 shillings/month = say	180,000
10 support staff	20,000 shillings/month =	200,000
1 accountant	40,000 shillings/month =	40,000

In short, it would appear that running the system could add up to 900,000 shillings per month onto the LSK's costs. This does not include the costs of accommodation.

Annex E

ACTION PLAN FOR IMPLEMENTATION

This Annex sets out a plan to assist the LSK in implementing the recommendations set out in the report. It assumes that the basic powers to appoint a Directions Officer and for him to carry out the functions exist.

Months 1 - 4: Draft amendments to the Rules to adapt the procedures;
Recruit the Directions Officer and Lay Representatives;
Discuss computer system with Commission
Elect and appoint additional advocates to the Committee.
Recruit the additional staff to support the Directions Officer
Begin work to identify the backlog cases before the Committee;
Other Committees in the LSK to begin work on the Code and other guidance.

Months 5 - 6: Gain approval for the rules.
Directions Officer to begin sifting backlog and making Directions;
Work to begin on specification of the computer system.
Work to continue on Code and Guidance

Months 6 - 12: Summary and Disciplinary Committee to sit weekly to deal with backlog.
New Code to be completed and Guidance issued as ready.
Identification of firm to supply computer system and commencement of work.

Months 12 - 18: Work on backlog continues.
Approval to new Code to be gained.
Work to commence on further amendments to the Advocates Act to implement longer term recommendations.

Months 19 - As backlog reduces, Disciplinary Committee to look at taking on investigation of complaints;
Amendments to Advocates Act to be made;
Accountant to be appointed to investigate accounts;
Powers of intervention to be used.