DISCIPLINE WITHIN THE NEW ZEALAND LEGAL PROFESSION

> "Nowadays it is fashionable to throw off at compulsory trade unionism, yet the Law Society is sacrosanct as far as this criticism is concerned. What impresses me . . . is that the Law Society is probably the most effective trade union of all, both compulsory and disciplinary, and has within it autonomous power — the right to terminate a member's entire future within the profession."[1]

INTRODUCTION

While there is no one precise definition of a "profession", callings which are said to have professional status display many similar and significant characteristics. The McRuer Report[2] says a professional calling will tend to be:

> ". . . one which depends for its pursuit on confidence of two kinds — the personal confidence of the patient or client in the technical competence of the practitioner, and the confidence of the public at large in the integrity and ethical conduct of the profession as a whole; it requires a high standard of technical skill and achievement; it provides a service to members of the public; practitioners are usually employed under a contract for service rather than a contract of service, i.e. they operate as independent practitioners and are not subject to detailed control by those whom they serve; the

1. Mr E. E. Isbey, M.P., reported in [1972] N.Z L J. 226.
2. Royal Commission — *Inquiry Into Civil Rights.* Ontario Report No. 1, Volume 3, at p. 1161.

> calling is one in which more than mere technical competence is required for the service of patients or clients and for the protection of the public, i.e. standards of ethical conduct must prevail; confidence is reposed in the practitioner requiring that he does not exploit the intimate details of his patient's or client's life and affairs which are divulged to him."

Depending on the particular "profession" concerned, there will often be other characteristics relevant to their status — for example, the practice of law requires continual dealings with other members of the profession, this calling for assurance that individual practitioners will maintain the standard of conduct which such a relationship demands.

The listing of the general and more specific defining characteristics of a "profession" shows clearly that a group which is to operate with plausible professional status must be subject to high requirements as to conduct and competence and that provision must be made for these standards to be enforced reliably and consistently. As the standards must relate both to technical competence and to ethical standards of behaviour, it follows that control must be exercised over both entry to the profession and conduct within it. It also follows that by virtue of their membership of a profession, practitioners may be subject to sanctions for acts or omissions which do not violate the criminal or civil law, and that, depending on the professional calling concerned, these sanctions will need to be applied in differing ways by different institutions and their procedures. It is in this regard that, in particular cases, the need for disciplinary power arises.

Whoever exercises disciplinary powers over a profession exercises very strong and important powers so far as both the practitioners and the community as a whole are concerned, for several interests are involved. The power to decide who may earn his living (and how he might go about it) by the pursuit of a particular calling concerns *all* practitioners because they must be guaranteed that their fellow practitioners will not be permitted to threaten the corporate image of the profession by their behaviour and that, in the legal profession, they will respect the sensitive relationship between them necessary to the effective functioning of the profession. The individual practitioner facing overt disciplinary measures must be assured of just treatment and the public must be able to rely with justifiable confidence on the competence and ethics of the profession.

Dependent on the satisfaction of these interests is the reliability of the total service to which the particular profession contributes; speaking of the legal profession the Hon. J. R. Hanan pointed out[3] ". . . the quality of our legal system and the confidence of the public in the law are determined by the quality and reputation of its practitioners."

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3. Speech delivered to the New Zealand Law Society Centennial Conference 1969 [1969] N.Z.L.J. 367.

There are numerous ways in which controls are exercised over members of the legal profession: practitioners are always subject to the personal remedies which aggrieved members of the public (and their clients in particular) may seek against them e.g. suits in tort for professional negligence;[4] should a practitioner's conduct be criminal then the private individual may lay a complaint with the Police or, if sufficiently persistent, lay a private information. Further there are strict requirements as to the educational standard to be achieved before entering practice,[5] there are procedural and substantive requirements to be satisfied before gaining admission to the bar,[6] restrictions as to the right of entry into private practice,[7] requirements (procedural and substantive) to be satisfied before any otherwise qualified person may practice by being issued with a practising certificate,[8] continuing requirements as to physical and mental fitness of a practitioner,[9] provision for taxation of bills of costs issued by practitioners,[10] provision for strict control over trust accounts to ensure their correct operation,[11] requirements that practitioners be members of and adhere to the rules of the District and New Zealand Law Societies[12] and that they be subject to the disciplinary procedures and sanctions applicable to all members of the profession. This paper is primarily concerned with the last matter and will touch on the others only so far as is necessary to assist in a discussion on discipline within the legal profession.

Discipline in the Legal Profession

To ensure that all those interested in the maintenance of professional conduct at the highest possible standard by the best possible means are to be satisfied, one must look to the system currently operating in disciplinary matters and compare it with a theoretical but attainable ideal as to how the disciplinary system of the profession should be designed; who should exercise its powers and by what procedures; what powers should be conferred and how should the conditions for the exercise of the powers be defined.

Following the essentially pragmatic groping of the profession on disciplinary matters in its formative years in the New Zealand colony, the structuring of disciplinary procedures has fallen quite easily into two periods: before and after the passing of the Law Practitioners

4. The salutary effect of successful negligence suits may be mitigated somewhat by the financial protection practitioners may have under insurance policies for this purpose but this does not make the potential harm to their professional reputation any less damaging.
5. Law Practitioners Act 1955, ss. 6-8.
6. Ibid., s. 6.
7. Ibid., s. 22.
8. Ibid., ss. 23-25.
9. Ibid., s. 25A.
10. Ibid., ss. 62-69.
11. Ibid., Part V.
12. Ibid., Part VII.

Amendment Act 1935. While the pre-1935 period would readily require a work devoted to it alone to do it justice, the exigencies of this article permit discussion only in the briefest of terms and then only so far as it sheds light on more recent developments in disciplinary matters.

The Formative Years

The need for controls over the membership and conduct of the profession in New Zealand gained early recognition,[13] the major difficulties being confusion as to any basis for the courts' authority in the matter and the lack of a recognised, co-ordinated group of lawyers.

An Ordinance of the Supreme Court[14] laid down the requirements for admission to the profession; the spate of subsequent provisions[15] being rationalised finally by the Law Practitioners Act 1861.

Members of the bar were recognised by the recording of their names on the Roll of Barristers and Solicitors admitted to practice but frequent omissions in the listings, and the subsequent lack of co-ordination in the profession revealed by the incomplete lists, was further reflected in the equally significant lack of any organised body of lawyers. The only effective supervision of the profession was, therefore, that resulting from the authority of the courts[16] to remove the names of practitioners from the Rolls "upon reasonable cause"[17] (and to exact lighter penalties where appropriate).

At common law in New Zealand, then, there were two recognisable bases of disciplinary power exercisable by the court: solicitors were officers of the court and therefore subject to its control; barristers were of practical necessity controlled and able to be dismissed by those responsible for their admission.[18]

The problem of supervision was further compounded by the lack of any general responsibility on particular persons to notify the courts of cases prima facie requiring disciplinary attention (although it was accepted that an individual practitioner could do so). In one important case[19] the Judge noted that this was an unpleasant task for private

13. *Portrait of a Profession* (1969) ed. R. B. Cooke Q.C. at 142.
14. Supreme Court Ordinance 1841 which allowed for separate branches of the profession based on designated qualifications gained in the British Isles. An 1844 Ordinance allowed further for the recognition of a qualification applicable to standards of eligibility acquired in New Zealand.
15. The Rules annexed to the Supreme Court Rules Act 1846; the Supreme Court Act 1860.
16. Provided in the 1841 and 1844 Ordinances.
17. A phrase given no definition.
18. The Privy Council was constrained to say of the colonial situation in this regard that insofar as the due administration of justice demanded that someone should have authority to determine who was fit to practise and that since the advocates and attorneys were admitted in the Colonial Courts only by the Judges, "The power of suspending from practice must . . . be incidental to admitting to practice . . ." *In re the Justices of the Court of Common Pleas at Antigua* (1830) 1 Knapp 267, 268.
    The Court of Appeal Act 1862 later removed the power of dismissal to the Court of Appeal although the Supreme Court retained the power of interim suspension.

members to take upon themselves and at their own risk and observed that there was a need for an incorporated law society to raise such matters, rather than for individual practitioners to have to protect the honour of the bar.

In 1869 "An Act to incorporate the Barristers and Solicitors of New Zealand under the style of 'The New Zealand Law Society'" was passed providing some machinery for the profession to act as a body.[20] "The conduct of disciplinary proceedings clearly predominated among the reasons for the society's foundation and that function alone is indicated in the surviving records of the first thirty years".[21] It was another nine years before provision was made for the formation of district societies.[22]

The Law Practitioners Act of 1908 and 1931[23]

(a) *The Courts.* To ensure that the courts' control over barristers[24] should be as clearly defined as that over solicitors,[25] s. 8 made specific provision that any "barrister shall be removeable from the roll by the Court[26] for reasonable cause whensoever and wheresoever the same arises . . ."[27]

The major sections of the Act relating to *striking* practitioners off the rolls apply to solicitors *and* barristers[28] and are directly relevant as providing for disciplinary measures. By s. 48 applications to strike a practitioner off the roll were to be made by motion to the Court for a decree nisi, the wording making no restriction as to who was eligible to bring such a matter before the court.

While s. 48 provided essentially for bringing the matter before the court rather than for creating a dispute, s. 49 seemed to demand that the 'accused' be given notice and sufficient information to answer the charge upon a rule nisi being granted, because he was then called upon "to show cause why he should not be struck off the roll". If he could show cause, the rule was discharged, but if the court thought

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19. *In re Henry Smythies* (1869) Mac. 702.
20. In Auckland (1861) and Christchurch (1868) there had been shortlived voluntary associations of lawyers.
21. Supra, n. 13, 146.
22. District Law Societies Act 1878.
23. As these Acts are really consolidations of the position immediately prior to 1935, a brief consideration of the 1931 Act provides a sufficient indication of the workings of the system; the courts holding the sole prescribed disciplinary power.
24. The *Antigua Case* (supra, n. 18) hitherto filling the gap at common law.
25. H. F. Von Haast, *Professional Discipline* [1929] N.Z.L.J. 297.
26. Section 2 of the Act defines 'Court' as the Supreme Court.
27. There being no similar statutory provision for solicitors.
28. As distinct from s. 8 which is perhaps best viewed as an *ex abundanti cautela* version of the *Antigua* decision rather than an essentially disciplinary section. Physical and mental inability as well as voluntary application to the court for removal from the roll of barristers could provide other than disciplinary relevance to s. 8.

it should be made absolute or maintained doubts, it had then to reserve the case to the Court of Appeal for final ruling.[29]

Section 50 provided that only ss. 48-49 should affect ". . . the summary jurisdiction of the Court . . ." over practitioners ". . . but such Court shall have full power to suspend from practice or attach any barrister or solicitor, or to make such order as it thinks fit respecting the practice of such barrister or solicitor on reasonable cause being shown." This "summary jurisdiction" was not mentioned elsewhere in the Act and reserved to the Supreme Court a final power of decision in the matters raised under it (even although subs. (2) allowed the Court a discretion to reserve any question arising from any *application* for the exercise of this jurisdiction for final decision to the Court of Appeal upon a case stated). It was clearly a power different from that contemplated in s. 8 or ss. 48-49 and must have been a reference to a common law power[30] exercisable over all practitioners at the Court's discretion (but able to be invoked upon application to the Court) but going only so far as suspending them (not removing them from the roll). The exercise of this power required a situation where[31] ". . . something has been established showing either that . . . [the practitioner's] . . . conduct in the management of the professional business intrusted to him has been fraudulent, or that he has neglected some positive duty to his client or clients, or if the conduct complained of be something dehors his professional behaviour — that it be of such a character as that if he had been guilty of it before applying to be admitted it would properly be deemed sufficient to warrant the refusal to admit him . . ."[32]

While following the disciplinary sections in the Act s. 50 was of wider scope, overlapping to some degree the Court's common law powers in contempt (by which the Court has jurisdiction to secure the efficiency and purity of the administration of public justice by dealing summarily with conduct amounting to criminal contempt of the Court), although of more restricted application in that it was primarily related to the Court's need to protect both itself and the profession as a whole by providing constraints against continued practice by admitted, but unsuitable, members of the profession.

It is a fault of the legislation itself rather than of any attempted analysis of it that such an unsatisfactory listing of the various controls

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29. The Court of Appeal was to be supplied with all affidavits made for or against the rule and all other proceedings referred to in it. (s. 49(c)). In the meantime the Supreme Court could suspend the practitioner from practice, and the advantages of his status, until this final ruling could be made.
30. Perhaps that mentioned by Von Haast, supra n. 25.
31. *Re Moore* (1909) XI G.L.R. 678, 681 (approving *In re Four Solicitors* 7 T.L.R. 672).
32. By ss. 6 and 14 of the Law Practitioners Act 1931 an applicant for admission as a barrister or solicitor must satisfy the Court that he is ". . . of good character and a fit and proper person to be admitted . . ."

over practitioners must be settled for.[33] The legislation no longer applies so suffice it to say that it is both strange and undesirable that in a matter so important and so analogous to criminal powers there was such confusion in the Act as to who could and should act against practitioners, what procedures should apply, what should be the criteria for acting and what powers could be exercised.

(b) *The Law Societies*

Despite the major responsibility for disciplinary action lying formally with the courts, in fact the New Zealand and District Law Societies played the dominant role in this sphere.

Section 63 laid down the functions and powers of the New Zealand Law Society[34] and, together with a power to make rules conferred by s. 69, the Act placed an active duty on the New Zealand Law Society to ensure that the standards of the profession were maintained.[35] In a ruling in 1921[36] the New Zealand Law Society made it clear that it would investigate complaints against solicitors only in exceptional cases and then only at the instance of a District Society.[37] The District Society thus exercised a gatekeeping role at the stage when complaints were made concerning individual practitioners (the starting point for disciplinary proceedings); the accused practitioner being given the opportunity to satisfy the Society that there was no prima facie case against him and that further action on the matter was unwarranted. In appropriate cases, however, the District Society could then bring the matter to the court for disciplinary consideration.

However in effect the New Zealand and District Law Societies developed their own de facto jurisdiction in dealing with cases short of placing them before the court.[38] The key to this role was that the Societies filled the space between the courts' formal powers and the day-to-day need to deal with complaints against practitioners, whatever the source; what might certainly have been reprehensible behaviour

33. Section 18 of the Act allowed the Court to "strike off or suspend a solicitor acting as agent for an unqualified person or employing without the leave of the Court a person suspended from practice and struck off the rolls". This further provision for disciplinary control is odd in that it *specifies* the conduct, confers the power to 'strike off' on the Supreme Court and is not expressly tied to the other disciplinary procedures of the Act.
34. Section 57 giving the District Societies the same functions and powers, subject to the rules of the New Zealand Law Society (s. 62).
35. Effectively this duty was on all the members of the profession itself, as those holding practising certificates were deemed members of a District Law Society (s. 105) and as such were deemed members of the New Zealand Law Society.
36. As reported in Annual Report of the New Zealand Law Society, 1921, 2.
37. Difficulties of travel and early regional allegiance ensured the weakness of the national body; the District Society was initially more relevant for practitioners. The acquiescence of the New Zealand Law Society in this was apparently quite consistent with its actual influence.
38. Viz. note in Annual Report of the New Zealand Law Society, 1919, 17, where of two cases it was reported ". . . the complaints have been investigated and adjudicated on by the District Society. This Council [N.Z. Law Society] . . . agreeing with the decisions arrived at in both cases, no action was taken."

by a practitioner might not fall within the jurisdiction of the court. The Societies administered 'informal' sanctions[39] or, if possible, satisfied the original complainant (e.g. by ensuring that unnecessarily delayed correspondence or transactions were dealt with), where the attention of the court was not warranted.[40] The power to interfere with the right to practice, however, lay with the court.

Beginning with the first national legal conference, significantly enough not held until 1928, moves were initiated which culminated in the establishment of the Solicitor's Fidelity Guarantee Fund,[41] a fund established by compulsory subscription by every practising solicitor out of which trust fund defalcations might be made good.

The year 1933 saw the beginning of moves by the District Societies to seek legislation to give ". . . the [N.Z.] Law Society itself disciplinary powers without the necessity of invoking the aid of the Court".[42] In 1935 an amendment to the Law Practitioners Act gave the Council of the New Zealand Law Society ". . . power to institute a Disciplinary Committee to hear complaints against practitioners and to make orders as to striking off or otherwise, without the necessity of court proceedings, the practitioner to have the right to appeal to the Supreme Court."

The Law Practitioners Act after 1935

The new Act marked an extremely important stage in the development of the New Zealand legal profession, several factors playing parts in the move. The court-based disciplinary proceeding had been cumbersome, unwieldy and expensive.[43] In reality the District Societies played the major active role in supervising the activities of practitioners and developed their own minor disciplinary powers. The medical and accountancy professions already had their own statutory disciplinary powers and Prime Minister Forbes observed in the Parliamentary debate on the committal of the Bill[44] that the legal profession was

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39. Including, it would seem, a type of final jurisdiction in some cases, e.g. "Several minor complaints were referred back [by the N.Z.L.S.] to be laid before the local District Society to be dealt with" (Annual Report of the New Zealand Law Society, 1920, 15).
40. Annual Report of the New Zealand Law Society, 1925, 7, notes an N.Z.L.S. ruling that while a District Society could not force a practitioner to apologise to a person complaining, "the proper course is for the District Society to determine whether the solicitor complained of has been guilty of any misconduct or breach of professional etiquette, and if so, to determine whether such act ought fittingly to be censured and if it should to pass a resolution censuring the offending practitioner".
41. Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act 1929.
42. Annual Report of the New Zealand Law Society, 1933, 11. The statement indicates that the Societies regarded the courts as an aid to governing the profession's conduct rather than seeing themselves as assisting the courts.
43. At 243 N.Z.P.D. 479 the Hon. Mr Barnard is reported as saying ". . . the Bill will simplify the very involved and expensive procedure now required . . ."
44. Ibid.

seeking those same rights, modelled on the prevailing British law for the legal profession in that regard.[45]

That the legal profession had taken far-reaching practical steps to guarantee fidelity in establishing the 1929 fund was seen by Mr Forbes as furnishing convincing proof that . . . [the profession] . . . is not selfishly concerned for its own interest but has regard also for that of the public. In so doing it showed itself worthy of the increased power of domestic discipline which the Act has conferred upon it.[46]

Another reason for the viability — and therefore acceptability of the proposal would stem from the fact that all members would be covered by the Society's new powers as membership of the Societies was already compulsory. A further reason for the apparent ease with which the recommendations were approved by the Government seems to stem from the respect and influence which the profession enjoyed in its relations with Parliament. The President of the N.Z. Law Society saw fit to say that in his opinion "the Society should have no fear of approaching Parliament for anything reasonable which might be required" as the various proposals made had been received very sympathetically by the House.[47] The Bill was fortunate in receiving extensive consideration at the hands of the Statutes Revision Committee (all of whose members were lawyers) and was ushered through Parliament ultimately with very little searching debate, the Legislature being satisfied that the public's interest in the standard of the profession would in no way be threatened, and, overall, would be improved, in having a legal profession with sufficient status to be deemed fit to hold its own disciplinary powers.

This outline goes only some way towards explaining *why* the profession sought self-government in matters of discipline. There were the limitations of the involved procedures for getting cases before the courts.[48] The publicity given court hearings on such matters and the weight with which an apparent need for the severity of court action might be viewed by the public, because of its own view of the role of the courts in the public sector, probably provide the main reasons for seeking the change. A leader in the New Zealand Law Journal[49] said: "It is to be hoped that the day is near when the Law Society will itself have full disciplinary jurisdiction over solicitors in matters of professional misconduct. These applications to the Court . . . involve a measure of publicity which is quite unnecessary; the Press gives them prominence in its columns; the public is thus induced to view

45. He was rather simplifying the British law where only the position of solicitors approached that sought for the whole profession here; British barristers were subject to a more complex disciplinary procedure involving their Inns of Court.
46. Letter to N.Z. Law Society reported in its Annual Report, 1935, 5. Further, the Hon. Mr Broadfoot congratulated the profession on its performance in "taking steps to see that the ethics of the profession are lived up to in every way." (243 N.Z.P.D. 48)
47. As reported in the Annual Report of the N.Z. Law Society, 1935, 4.
48. Although there has been no significant change in the numbers of those subjected to disciplinary proceedings after the 1935 amendment.
49. 'Professional Misconduct' (1930) 6 N.Z.L.J. 313.

them in a false perspective; and in the result the profession as a whole quite unfairly suffers because it, of its own initiative, puts the law in motion against its delinquent member". This takes the issue of disciplinary procedures further; into the question of how openly the proceedings should be conducted. While a closed hearing could be equally as well conducted before a court, the publicity factor definitely carried weight with the N.Z. Law Society in pressing for the changes.[50]

The reasons for seeking the new powers and procedures on the part of the N.Z. Law Society and their being granted by the Government does not, of course, necessarily give plausible testimony to their merits and efficacy. One must look to the provisions and their working to arrive at a fair assessment of the new system.

The Position of the Court after 1935

The Court's jurisdiction over the profession was substantially unaltered by the 1935 amendment[51] in its overall effect. Section 8 (which might have continued as a separate head of jurisdiction) was combined with s. 28 of the 1931 Act in s. 28 which said:

> "Upon application made to the Court in that behalf the name of any practitioner may be struck off the roll of barristers or the roll of solicitors, or both, for reasonable cause, whensoever and wheresoever the same arises . . ."

The procedure for dealing with applications is set out in ss. 29-30, differing little from the old provisions (although the rule nisi/rule absolute procedure is abandoned in favour of the normal provisions for bringing matters to the Court under the Code of Civil Procedure).

Section 18 of the 1931 Act is replaced by s. 20 which retains those offences but does not provide procedures or powers related specifically to them but rather deems them to be specific instances of professional misconduct (which are dealt with under Part III of the Act — "Discipline Within the Legal Profession"). Section 31 of the Act is on all fours with s. 50 of the 1931 Act in expressly reserving the Court's summary power; beyond this section no other references to common law powers of the courts in matters of control over the profession are made [52] (or expressly omitted). Presumably these remain but are not regarded as calling for mention in the context of the Act.

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50. Mrs D. J. Gledhill, Secretary of the N.Z. Law Society at the time, observed that the fact that tribunal method permitted hearings to be held in the absence of the public and press, weighed heavily with the N.Z. Law Society seeking the new legislation. (Observation in thesis submitted for the degree of LL.M. at V.U.W. (1958) by G. R. Lee: *'The Medical Practitioners Disciplinary Committee'* at p. 285.)
51. Reference hereon will be made to the sections as they appear in the Law Practitioners Act 1955 as amended to 1st April 1969 unless otherwise indicated.
52. Although e.g. by s. 13 barristers are afforded "all the powers, privileges, duties and responsibilities that barristers have in England."

Any further discussion of the court's disciplinary function is not necessary for this paper, for in practical terms the 1935 legislation moved the main burden in this respect effectively on to the profession itself.

Discipline within the Legal Profession after 1935

The Law Practitioners Act 1955[53] sees the major part of the profession's disciplinary activities internalised by providing for, in the barest explicit terms, a system operated by the profession to be constituted, some machinery to establish the procedures to be followed, a vague statement of the criteria justifying the invoking of disciplinary powers and a system for appeals from decisions made at first instance.

A Self-Governing Profession?

While the court retains its disciplinary power, the new legislation quite clearly reduced it to fulfilling only a minor part of this role; by the enactment, the legislature formalised the position of the legal profession itself as effectively self-governing. The McRuer Report puts forward the view that to grant a profession the power of self-government is to delegate to it legislative and judicial functions. While professional status provide the reason for having a system for supervising the conduct of practitioners, it does not per se provide a reason for that function to be exercised by the profession itself. The Report argues that self-government can be justified only as a safeguard to the public interest, for to delegate such power to a profession is to recognise that the profession has a general duty to protect the public, rather than to use its power simply as strengthening the body as a union for protecting solely professional interests. While in practice the new legislation may largely provide recognition of a power already recognised de facto by the profession, the simple fact of recognition does not provide justification for that power in the first place. The duties to protect the public, the accused practitioner and the profession as a whole (and therefore the trust placed in the working of a legal system by the public as a whole) are heavy. However the fact that the initial de facto power arose from largely historical factors does prevent a realistic analysis of why the legal profession should be self-governing; it is only in describing and assessing the working of the internalised system that one can see whether or not the primary interests in its effective functioning are endangered in theory and in practice.

Why a Tribunal?

In form, if not in practice, the primary disciplinary function lies with a tribunal: the Disciplinary Committee of the New Zealand Law Society. Neither the McRuer Report nor the report of the Franks

53. Itself consolidating the 1935 Act and amendments.

Committee[54] come to grips with the peculiar problems raised by the use of tribunals other than the courts for resolving the hearing of delicate issues such as professional disciplinary matters. The report of the Franks Committee provides a superficially useful background for deciding on the suitability of tribunals rather than courts in particular matters. Noting in paragraph 38 that as a matter of general principle a decision should be entrusted to a court rather than to a tribunal, in the absence of special considerations which make a tribunal more suitable, the report states that the advantages which tribunals do have over courts are "cheapness, accessibility, freedom from technicality, expedition and knowledge of their particular subject." Furthermore to send all decisions to the courts is to risk their becoming grossly overburdened, the necessary increase in the number of judges perhaps threatening the administration of justice as a whole, as the Bench should be of the highest quality and any proposals for dilution should be jealously regarded (paragraph 39).

Lee[55] considered that in matters of professional discipline tribunals had further 'advantages'; they allowed for hearing in private and for a closer identity of interest to develop between a profession and its own tribunal (this being desirable because a tribunal functions more smoothly and effectively with the support of the members of the profession it is appointed to supervise) and that they made it possible for tasks additional to that of judging complaints to be carried out by the body.

Compared with those of the Franks Committee, these suggestions have a subjective quality and, in their entirety, all of the 'advantages' of a tribunal must be viewed in the light of the historical grounding for the legal profession's drives for formal self-government in disciplinary methods, the suitability of a tribunal being seen in this practical context: of greater importance than the theoretical advantages of a tribunal, many of which are truisms (cheapness, accessibility, etc.) are the facts that the general move was *towards* self-government rather than primarily *away* from the courts as a result of specific failings of the capacity of the courts to handle professional disciplinary matters (except for the publicity problem and the "expensive and cumbersome" procedures involved). For the legal profession then, the Disciplinary Committee must be viewed not in terms of its merits by virtue of being a tribunal but rather in terms of the suitability of its *particular* composition, powers and procedures as a means of fulfilling the task set it in its position in the legal profession's disciplinary procedures as a whole.

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54. *Report of the Committee on Administrative Tribunals and Enquiries* (1957), Cmnd. 218.

55. Supra, n. 50.

Constitution and Powers of the Disciplinary System

(i) *The District Law Societies*[56,57]

Complaints against a practitioner are made at the first instance to the District Law Society of which he is a member by members of the public or fellow practitioners. A 1968 Amendment to the Act, now s. 108(3), provides that in investigating such a complaint, the Council of the District Society ". . . after affording . . . [the accused] . . . a reasonable opportunity of being heard"[58] may adjudge the case and if it finds the practitioner guilty of professional misconduct or conduct unbecoming . . . "but decides that the case is not of sufficient gravity to warrant the making of a charge to the Disciplinary Committee under section 34" . . . it may if it thinks fit impose a fine (not exceeding $200.00), censure the practitioner or order him to pay a sum towards the costs and expenses incidental to the investigation. Any sums ordered to be paid enjoy the same status as those imposed by the Disciplinary Committee (s. 108(4)).[59]

This amendment to the Act was regarded as making little practical difference to the disciplinary system other than to save the superior Disciplinary Committee from having to deal with minor matters; prior to the amendment the District Law Society already had the initial investigating responsibility to decide whether a case was important enough to go forward to the Committee (this amounting in practice to an informal disciplinary power).

(ii) *The Disciplinary Committee*

Compared with the legislature's granting a statutory power to an already existing body in the case of District Societies, the Act created a specific body as its mainstay in supervision of professional conduct. Section 33(1) of the Act provides that "There shall be a Committee (to be known as the Disciplinary Committee of the New Zealand Law Society) appointed in accordance with this section to exercise the powers and functions by this Act conferred on it." By s. 33(2) the Council of the N.Z. Law Society appoints the Committee of "not less than five nor more than eight members" of the Society and by

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56. A discussion with Miss F. Parker, Secretary of the Wellington District Law Society on 4th August 1972 ,helped elaborate points made in the discussion — critical assessments are, however, attributable only to the writer.
57. While many of the powers exercisable by the D.L.S. are traceable directly to those held by the Disciplinary Committee it is thought best to deal with the institutions in ascending order despite the problems of reference which inevitably will arise in that the District Society power to adjudge disciplinary matters was not formalised by statute until 1968.
58. Cf. s. 36, relating to the Disciplinary Committee, which gives the accused the right to ". . . a reasonable opportunity of being heard in his own defence." The differing wording is not of significant effect; there is no reason for s. 108 to differ in its wording from s. 36 in this case.
59. Section 42 of the Act provides that penalties or orders as to costs under Part III of the Act are "deemed to be a debt due by the person ordered to pay it to the person to whom it is ordered to be paid, and shall be recoverable accordingly in any Court of competent jurisdiction".

s. 33(3) the Council may remove any member of the Committee from office[60] "or fill any vacancy in its membership or appoint any additional member or members to it" within the limits prescribed. Three members form a quorum unless the Act otherwise provides.[61]

The Committee has power and a duty to investigate charges of professional wrongdoing[62] where charges have been made against a practitioner. If the Committee finds subsequently that the practitioner is guilty of the charge it may do one or more of the following (s. 34(2)): order that his name be struck off one or both of the rolls: order that he be suspended from practice (for a period of not more than three years) as the Committee sees fit[63] (or order that he shall not practice as a solicitor on his own account, whether in partnership or otherwise, until authorised by the Committee to do so);[64] fine him such sum as the Committee thinks fit (not to exceed $1,000.00); censure him; order him to pay to the N.Z. Law Society or to any District Society such sum as may be thought fit in respect of any costs and expenses (relating to the inquiry).[65]

Section 41 allows the Committee to order such payment of costs as it thinks fit after hearing any application or inquiry under Part III of the Act by the N.Z. Society or any District Society to any practitioner who has been subject to inquiry, (presumably in cases where the practitioner is cleared, but on its wording the section gives the Committee a wider discretion); or, if not finding the practitioner guilty, but considering a Society was justified in bringing the matter forward, the Committee may order him to pay the Society a sum (as the Committee thinks fit) in respect of any costs and expenses (relating to the proceedings or incidental to the inquiry).

Two further important powers are given the Committee by s. 43 of the Act. Section 43(1) allows it "in any case it thinks fit" to authorise the Council of any District Society to conduct wholly or

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60. No provision is made for the grounds for such removal nor even for the length of a member's service on the Committee.
61. While there is scope for extensive discussion as to whether the Committee is not a Law Society body but rather a statutory one, the issue is of esoteric interest only, the outcome having no discernible effect on the indisputable fact that the profession is, via this Committee, effectively self-governing in disciplinary matters which are not taken before the Court as such at first instance.
62. This phrase is used here provisionally; the specific charges receive further discussion below.
63. Such orders in fact being put into effect by the officers of the Supreme Court, the order to be filed in the Wellington Office of the Court and thereupon taking effect "as if it were an order of the Supreme Court to the like effect made within the jurisdiction of that Court" — s. 49.
64. This provision (s. 34)(2)(bb)) was added by s. 4 of the Law Practitioners Amendment Act 1967 to give greater flexibility to the Committee's power to alter a practitioner's right to practice where complete removal from professional activity might be too harsh but where some controls on his practice are necessary. At the same time s. 16A was added making it an offence for a solicitor to practise in contravention of such an order.
65. See n. 59.

in part any application or inquiry made to it (under Part III) and s. 43(2) requires the Society to furnish the Committee with a full report and its recommendations on the matter; the Committee may make any order in the matter regardless of whether or not the matter is further heard before it or before the District Council, as if it had heard the application or made the inquiry itself.

By s. 38 any practitioner may apply to the Committee for the removal of his name from the roll and the Committee may order this removal. This is not solely a disciplinary function (for, as shown in the appendix, such applications have been made by practitioners wishing to be admitted to the English or Irish bars or wishing to appear before the Arbitration Court, from whose hearings barristers and solicitors are normally excluded). Broadly s. 38 can relate to professional behaviour in allowing a practitioner to avoid the ignominy of being struck off; such voluntary application perhaps mitigates the influence on his future of his wrongdoing, by showing that he recognises his error or his unfitness to practice.[66] To ensure, however, that s. 38 cannot be used to avoid disciplinary action, the Committee observed in 1937 that it desired to draw the attention of the profession to the fact that where any practitioner applies for the removal of his name at his own request, the Committee will require the District Society to supply all information in its possession concerning the matter — "In any case where serious misconduct is shown, the application for removal should be made by the Society and not by the practitioner."[67]

The Committee has the concomitant power, under s. 39, to order the restoration to the rolls of the name of any person earlier struck off or removed, upon application to it. Section 39(3) provides that this is the only section under which application for restoration may be made, this excluding even the Court (s. 5(2) supports this exclusion).[68] Further, s. 5 of the Law Practitioners Amendment Act 1967 added subs. 2A to s. 39, giving the Committee the power to order restoration on condition that the applicant "shall not practise as a solicitor on his own account . . . until authorised by the Disciplinary Committee to do so".

Section 36A (inserted by s. 30(1) of the Law Practitioners Amendment Act 1961) gives the Committee power to order that a practitioner cease to employ, or not employ so long as an order under the section is in force, or employ only with the written consent of the Committee and subject to such conditions as the Committee may enforce for the duration of the order, any person (not a practitioner) who has been guilty of such conduct as would bring a practitioner before the Committee to be disciplined. The Committee has power

66. For example in 1964 an application by a practitioner for removal under s. 38 because of a criminal conviction was granted — Annual Report of N.Z.L.S., 1964, 3.
67. As reported in the Annual Report of the N.Z.L.S., 1937, 4.
68. Section 5(2) also treats the power of such restoration as lying solely with the Committee.

to enquire into charges against the person and, having given him a reasonable opportunity to be heard in his own defence, discharge him from guilt or make any of the above orders concerning him. A practitioner who acts in breach of such an order is guilty of "professional misconduct"; a person in respect of whom such an order is made is given right to seek revocation of the order, as if he were a practitioner.

The Committee may of its own motion and without the necessity of giving any notice to a practitioner charged with professional misconduct before it order that he be suspended from practice in the interim until the charge is disposed of; the practitioner has the right at any time to apply to the Committee for the revocation of the order, which application the Committee may grant or refuse as it thinks fit: s. 37.

As a necessary adjunct to its power to inquire into disciplinary matters the Committee or any District Society may, by notice in writing, require any person to attend and give evidence before it at the hearing of any application or inquiry under Part III of the Act and to produce all books and documents in that person's custody or under his control relating to the subject matter of any such application or enquiry: s. 44(1).

Evidence is to be given on oath (s. 44(2)), and it is an offence against the section, liable on summary conviction to a fine not exceeding $200, for any person to refuse to comply.[69] The Committee[70] has a discretion to award the witness a sum by way of expenses and loss of time as it may determine, such sum to be paid by the N.Z. Law Society.

By s. 52 the Committee (and N.Z. and District Societies) are relieved of any criminal or civil liability for their actions and statements in carrying out their functions under Part III of the Act (and s. 108) "unless it is proved to the satisfaction of the Court" that they acted in bad faith.

Finally, s. 53 protects the jurisdiction of the Court saying "Except as expressly provided in this Part of this Act,[71] nothing herein shall be construed to limit the jurisdiction of the Court."

Criteria for the Exercise of Disciplinary Powers

When a practitioner is accused of having breached the standards of honesty and reliability which he must observe as a member of the profession, the disciplinary system may be called upon to ensure that the profession is protected against the continuation of such behaviour.

The Act empowers the Committee to discipline a practitioner for many things which are not criminal offences nor breaches of any other

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69. By s. 45 witnesses have such immunity and privilege as they would enjoy in proceedings in a court of law.
70. No similar mention is made of the District Society Council; this must be an unintentional omission in the drafting.
71. E.g. s. 39(3).

statute or regulation. The Disciplinary Committee's power of inquiry may be invoked "where a charge of professional misconduct [or of conduct unbecoming a barrister or solicitor]" is made against any practitioner by the N.Z. Society or any District Society: s. 34. A practitioner may be struck off the roll only on the grounds set out in s. 35:[72]

> "(a) That he has been convicted of a crime involving dishonesty [within the meaning of s. 2 of the Crimes Act 1961];[73] or
>
> (b) That in the opinion of the Disciplinary Committee he has been guilty of misconduct in his professional capacity[74] [or of conduct unbecoming a barrister or a solicitor][75] and by reason thereof is not a fit and proper person to practise as a barrister or solicitor; or
>
> (c) That in the opinion of the Disciplinary Committee he has otherwise been guilty of grave impropriety or infamous conduct and by reason thereof is not a fit and proper person to practise as a barrister or solicitor."

Section 35(3) provides that except by consent, no order shall be made to strike a practitioner off or suspend him from practice unless at least five members of the Committee are present and vote in favour of the order.[76]

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72. Clearly he may be otherwise disciplined for these offences, depending on the gravity of the particular case but striking off is reserved to these offences alone. The wording of the section leaves room for disciplinary action for other 'offences' but almost invariably the phrasing used to describe the s. 35 offences is used when charges are made — most often s. 35(b) charges.
73. The bracketed provision was inserted as an amendment consequent on s. 411(1) of the Crimes Act 1961. A "Crime involving Dishonesty" is defined in s. 2 of that Act to be "any crime described in Part X of this Act, except the crimes described in sections 293 to 305 (which relate to criminal damage)". Part X is headed "Crimes Against Rights of Property".
74. i.e. 'professional misconduct'.
75. This category was added by s. 4 of the Law Practitioners Amendment Act 1962 (and to s. 34 by the 1961 Amendment). The debate in Parliament on the 1961 amendment throws little light on its meaning or the reason for the addition. In 1961 N.Z.P.D. 2568 the Hon. J. R. Hanan observed that the clause enlarges the power of disciplinary committees. On p. 2994 he said it "gives the Law Society power to deal with cases where a practitioner has been guilty of conduct unbecoming a barrister and solicitor. At present a practitioner can be disciplined for professional misconduct. There is however conduct which falls short of professional misconduct but for which some minor disciplinary action may be required" — a rather odd statement when this charge now becomes one for which a practitioner might be removed from practice by virtue of the 1962 amendment. C. N. Irvine, "The Law Practitioners' Amendment Bill" [1962] 22 N.Z.L.J. 505 at p. 506 observes that its inclusion in s. 35 arises from either ". . . an omission from or an anomaly created by . . ." the 1961 amendment and the new amendment brings s. 35 into line with s. 34. He adds: "Unbecoming conduct is not a defined phrase; indeed it is hardly capable of definition without a risk of excessive limitation. Each case will require to be dealt with on its own facts and no doubt in course of time the meaning of the phrase will be clarified"!
76. Normally 3 is enough for a quorum of the Committee. The severity of striking off or suspending a practitioner is clearly one of the cases envisaged when s. 33(4) mentions that this will be the quorum "Except as otherwise provided by the Act."

Whether or not a case will fall into category (a) is easily established as a matter of fact — this is not so with (b) and (c). The factor unifying the (b) and (c) offences is that the practitioner's actions must in some way have revealed him "by reason thereof" not to be "a fit and proper person to practice as a barrister and solicitor." Clearly the offences are not regarded as the same (although they may overlap); in fact it was seen fit to add the new category to (b) to fill a gap.

The two categories may be distinguished loosely as those charges arising from a practitioner's conduct of professional matters (either in such a way as to jeopardise a client's interest through the trust placed in him or to damage the trust between practitioners, and the corporate image of the profession) and those arising from the practitioner's personal conduct, his moral behaviour being so infamous or gravely improper as to render him unsuitable to continue as a member of the profession.[77]

The distinction between the two limbs of paragraph (b), both of which relate to the practitioner's conduct in practice, i.e. between "professional misconduct" and "conduct unbecoming", is shown in a 1963 decision of the Committee where a solicitor was found guilty of *professional misconduct* "in borrowing money from clients without taking precautions that the clients would be properly protected or advised and *conduct unbecoming* . . . in that he practised his profession in a state of addiction to liquor".[78]

The power to discipline is clearly a judicial power.[79] In reaching the decision to make an order, the body exercising that function determines conclusively, on the basis of evidence and argument submitted to it, a person's rights and duties with respect to his acts or omissions; these rights and duties ideally being regulated by pre-existing standards; in making an order the disciplinary body imposes obligations on, or affects the rights of, individuals.[80]

If a function is described correctly as 'judicial', then it must be exercised in accordance with the requirements of natural justice,[81] the accused practitioner being told the nature of the charges against him and being given an opportunity to be heard in his own defence before a tribunal which will assuredly act without bias. Further, to be exercisable as a judicial function, the power must exist in a framework providing for the creation both of *substantive* rules on which to base any judgment made, and of *procedural* rules to govern the process by which the decision is to be reached, together with pre-

77. 1943 saw the only case of 'infamous conduct' brought so far under the new system — reported in the Annual Report of the N.Z.L.S. 1943, 3.
78. Reported in the Annual Report of the N.Z.L.S. 1963, 2-3.
79. McRuer Report, supra, n. 2, 1181.
80. These definitional requirements are espoused more fully in S. A. de Smith's *Judicial Review of Administrative Action* 3rd Edition 37-47.
81. As recognised in the case of the disciplinary function for the legal profession in *Re Wiseman* [1970] N.Z.L.R. 286, 288.

determined powers as to what obligations or effects on the rights of individuals may be embodied in any order made as a result of the decision reached.

A primary requirement for the observation of the rules of natural justice in the exercise of a judicial power is that the substantive and procedural rules to which the practitioner must adhere and be subject must be available to him or to anyone interested in knowing them; to allow this they must surely be formulated in a manner which will ensure that their publication is possible.

The Act, as shown, lays down only the vaguest of guidelines for the criteria upon which the Committee (and the Council of any District Society) may exercise their disciplinary function. There are necessarily several other sources of substantive rules.

While the N.Z. Law Society has no express power to make rules in respect of performance by members of their professional duties, its Council has a general power of:

> "Making any provision that may be desirable or necessary for the effective exercise and performance of the powers and function of the Society" (s. 121(f)).

It may, then, make its own rulings as to what shall be regarded as professional misconduct should it see this as necessary to fulfil its functions under s. 114(1), which are principally to promote and encourage proper conduct amongst the members of the legal profession, to suppress illegal, dishonourable or improper practices and to preserve and maintain the integrity and status of the legal profession. The Council adopts many of the Committee's rulings on particular cases of wrong-doing as its own rules for future conduct, as well as occasionally itself formulating rules it sees necessary.

These rules receive some publication to practitioners as they are made (via N.Z. or District Society newsletters). The first consolidation was published in 1931, this being superseded in 1946,[82] with subsequent additions being made available for this booklet. In 1962 a start was made on compiling a revision of this publication; the compilation was adopted by the Council in 1969 to take effect in 1970. Entitled "Rules Governing the Conduct of Practitioners", the introduction states that its contents are "not exhaustive" and that they have "arisen from specific cases which had led to general rulings and other rulings will be made from time to time as occasion requires."[83]

82. "Decisions, Rulings and Interpretations of the Council of the New Zealand Law Society".

83. The District Law Societies have power to make Rules (subject only to the rules of the N.Z.L.S.) — s. 108(1). The only rule as to 'Standard of Conduct' made by the Wellington Society is its Rule 31. "Every member of the Society shall conduct himself and his practice in accordance with the best traditions of the legal profession and shall not do anything of an illegal, dishonourable and improper or unprofessional nature. He shall at all times to the best of his ability render faithful service to his clients and be fair and just in all his professional dealings." There is no chance of conflict with N.Z.L.S. rules there.

The Solicitors Trust Account Rules 1969 and the Solicitors Audit Regulations 1969 made under the Act represent the only attempt within a specific area of professional activity to lay down specific guidelines of required professional conduct.

A further source of definite rulings could, of course, be the courts but it is difficult to find substantive rulings as to conduct made by them since the 1935 Act effectively reduced their role in such matters; most cases now relate to appeals from decisions of the Disciplinary Committee. The courts thus provide no consistent primary source of rules of conduct.

A practitioner can clearly be expected to be familiar with the stated rules from the above sources as firm guidelines for required conduct yet these by no means cover the whole field of possible disciplinary action. An accused appearing before the Committee charged with one of the recognised but vague forms of 'improper' conduct may well find that the set of facts to which the charges against him relate have not arisen before. This does not, however, prevent the Committee from hearing the case and making a ruling and order, provided only that it considers on the facts that he is not a "fit and proper person to act as a barrister or solicitor."

In effect, then, the Committee execises a legislative power in some circumstances, which is subject only to the very broad limitations on its own function under the Act. The Committee could probably apply one of the lesser penalties under s. 34 (b) to (e), should it decide that the facts show reprehensible conduct, as the Act provides no guidelines for those types of conduct for which the penalty is not striking off or suspension. Nor are the types of conduct which may in fact fall within s. 35 closed. The result must be that in this area, where the intuition and opinions of the members of the Committee provide the substantial grounding for a particular decision, the Committee may in many instances make its decisions in terms of what amounts to retroactive legislation as a case comes before it. In fact the (b) and (c) limbs of misconduct in many cases simply cannot be reconciled with the exercise of a judicial power — a power consisting of the impartial application of *predetermined* rules and standards.[84]

It is extremely difficult to justify this anomalous position, if, indeed, it can be justified at all. There seems to be a pervasive view in the legal profession[85] that to define strictly the criteria for disciplinary action is to risk limiting them excessively.[86] In effect this is an approach

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84. McRuer Report, supra, n. 2, 1181.
85. And supported by many Court judgments, e.g. the early case of *In re Lundon* (reported in note to *In re Baillie* (1915) 34 N.Z.L.R. 705 at 709) "It is of the highest importance that the exercise of that [disciplinary] jurisdiction [of the courts] should not be fettered by any attempts to define its bounds. Nor can the fact that the bounds of that jurisdiction remain undefined injuriously affect the profession over which it extends. Every legal practitioner knows intuitively or ought to know intuitively whether or not his acts can justly be regarded as constituting serious misconduct . . ."
86. Viz. C. N. Irvine, supra, n. 75.

which assures the profession that it can always control those who are not "fit and proper" persons to practice; yet of necessity any test as to fitness to practice (and the activities which will indicate this in particular cases) must be accepted as involving equally elusive precise definitions of those terms. In assuring that there will be no 'loop-holes', this accepted position is perhaps consistent with the issues raised by the basic questions of what characteristics a profession and a member of a profession should display. The situation does not however lend itself easily to providing standards by which conduct might be measured and adjudged, yet this is the very thing which disciplinary procedures are attempting to do.

If a system purports to involve the exercise of judicial powers, then the rules must be known; to suggest that they are known 'intuitively' by members of the profession, while perhaps true in many instances, must be seen only as a rationalisation for the failure to have foreseeable rules strictu sensu. The argument that a deviation is necessary and therefore acceptable because it is impossible to stipulate in advance all the types of activity which will be regarded as professional wrongdoing and that the standards of professional conduct change as time passes[87] is to use an argument which by direct analogy would allow for an open-ended criminal law in the legal system[88] (an argument unmitigated by any distinction between penal powers exercised as punishment and those exercised as sanctions to ensure proper conduct in the profession).

The main reason for this unsatisfactory situation as to specified rules of conduct is that the profession has adopted a "quasi-common law" approach, deciding individual cases as they arise rather than putting emphasis on using the powers it has to make rules to draft specific and enforceable "legislation" into a comprehensive code of conduct. Admittedly, in the field of ethics, to do the latter would be a difficult task; it is, however, necessary if justice is to be done, by allowing the impartial application of predetermined rules and standards. Such rules should be made, published and be available not only to

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87. E.g. Lund, *Professional Conduct and Etiquette of Solicitors* (1960) 1: "What is entirely proper for one generation may be slightly irregular for the succeeding generation and highly improper for the next."

88. Sir Ivor Jennings, *The Law and the Constitution* (5th Ed.) 52 "English lawyers would repudiate, and would rouse a vast public opinion against such a rule as is enshrined in the German law of the 28th June 1935: 'Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering such an act it shall be punished under the law of which the fundamental conception applies most nearly to the said Act.'" A similar and much criticised statement of law was enunciated in the House of Lords case *Shaw v. D.P.P.* [1962] A.C. 220, 268; Viscount Simonds: ". . . there is in . . . [the] . . . Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare . . . gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society."

those who might be subject to them but also to the wider public who have strong interest in their content.[89] A similar practice should be adopted for rules made by District Societies (but their activity in making substantive rules would be curtailed by the adoption of the above system of comprehensive rule-making).[90] Just as rules relating to criminal law may be expressly altered from time to time by the legislature or through judicial interpretation, so may the rules governing the conduct of law practitioners be altered regularly to meet the changing standards required.

Currently the responsibility for making these rules is the exclusive preserve of the profession. The traditional justification for this is that the members of the profession are best qualified to ensure that proper standards of ethics and competence are set. However the McRuer Report at 1166 noted further that "there is a clear public interest in the creation and observance of such standards but there is a real risk that the power may be exercised in the interests of the profession or occupation rather than in that of the public. This risk requires adequate safeguards to ensure that injury to the public does not arise." Giffen[91] argues that the "adoption of policies in the public interest is most likely to result when the situation in which the organised profession must act is such that meeting or anticipating the higher levels of public expectations become conditions for safeguarding or attaining important interests of the profession." The key to assuring that the balance will continue to favour the public interest is to guarantee that its views may be expressed in the substantive rule-making process. This could perhaps be done by a control, e.g. requiring that the rules made by the profession should receive the consent of the court before coming into effect.[92]

Procedure for the Exercise of Disciplinary Powers

Aside from its legislative power to make substantive rules as to

89. Pertinent to this is the need to consider whether or not new categories for removal from the rolls or other restrictive action are called for, e.g. C. N. Irvine [1962] 22 N.Z.L.J. 505, 506-7 suggested that perhaps there was a need to include "professional incompetence" as a category since the statute was for the protection of the public who would be interested in cases where a practitioner was shown to be not a fit and proper person to retain his qualification because of his ineptitude. No further action was taken on this suggestion.
90. See n. 83.
91. Giffen, *'Social Control and Professional Self-Government: A Study of the Legal Profession in Canada'* (essay in *'Urbanism and the Changing Canadian Society'*. (Clark Ed.) 117.
92. In Ontario the consent of the Cabinet of the Provincial Government must be obtained to any Code of Ethics promulgated by the profession. In New Zealand one Minister of Justice has said "We rightly set our faces against any form of Government control or supervision of the legal profession" (Hon. J. R. Hanan [1969] N.Z.L.J. 365, 367) but an appeal from the Disciplinary Committee lies to the Supreme Court which is potentially an effective external control of what the profession decides upon as grounds for disciplinary action (and its procedural rules).

conduct requirements, the disciplinary bodies of the profession also have powers to make procedural rules to ensure the proper administration of the substantive rules. The Act itself provides only the barest specifically stated procedures and it is within an extremely flexible framework of these rule-making powers (and informal rules of procedures which have developed) that the overall disciplinary system operates.

The Disciplinary Committee has the major power in the regulation of procedure. By s. 33(5) it may regulate its own procedure and by s. 47 may make rules in respect of the making, hearing and determination of applications and inquiries under Part III of the Act. Further rules may be made by District Societies for their disciplinary activities,[93] by the Council of the N.Z. Law Society (which may become involved directly in disciplinary matters as an appeal body)[94] and some procedural qualifications may be made in cases which have gone before the Courts with regard to proceedings conducted before the Disciplinary Committee.

The Disciplinary Committee has made three sets of rules,[95] the Law Practitioners Act (Disciplinary) Rules.[96] The approach to the publication of these rules has been less stringent than one might expect of rules made by lawyers and relating to quasi-criminal matters.[97] The Regulations Act 1936 defines "regulations" as including "Regulations, *rules* or bylaws *made under the authority of any Act* by the Governor-General in Council or by any Minister of the Crown *or by any other authority empowered in that behalf.*"[98] In making its rules the Disciplinary Committee has acted as an "authority empowered in that behalf" and the rules are therefore within the definition of 'regulations' in the Act. Section 3 of the Regulations Act requires that they be forwarded to the Government Printer for numbering, printing and sale (the Attorney-General being able to waive this requirement where "in his opinion it is unnecessary or undesirable" that they should be printed).

The currently accepted form of publication is notice in the

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93. This power arising under s. 108(1).
94. Appeals from District decisions are at first instance to the Council of the N.Z. Society.
95. *1936:* published 1936 Gazette 734 (Vol. 1); 1935-36 S.R. 67 amendment No. 1 published S.R. 1938/102. *1958:* published only in Sim, *Practice and Procedure* 10th Ed. at 759; amended 1959 (Rule 13), published in 'Sim' op. cit. *1967:* published 1968 Gazette Vol 1, 66.
96. A note to s. 47 of the Act as reprinted in 1969 says "As to disciplinary rules, see the Law Practitioners Act (Disciplinary) Rules 1968 (Gaz. 1969, Vol. 1, p. 66)." Should there be a dispute as to the prevailing rules this rare lapse by the draftsman is of little help as the rules were made in 1967 and gazetted in 1968.
97. Careless drafting has led to more faults in the rules. Rule 30 of the 1958 Rules was intended to repeal the 1936 Rules and Amendment No. 1 but in fact its wording refers to an "Amendment No. 2" (no such amendment ever being made). The rules gazetted in 1969 do not expressly revoke the 1958 ones; the revocation is by implication only.
98. Section 2; emphasis added.

Gazette but the 1936 rules (and amendment) also received publication as Statutory Regulations while the 1958 rules received no official publication at all.[99] Even if the failure to publish the rules consistently as statutory regulations stems from an exemption under s. 3[1] such lack of uniformity in publication should not continue. As Irvine noted[2] "No doubt the Disciplinary Committee is careful to see that a person who is the subject of complaint is acquainted with the existence and contents of the rules, but this, in my submission, is not sufficient. The rules are part of the law and should be available to anyone through official publications." Given the requirements of the Regulations Act 1936, a return to publication of the rules in the Statutory Regulations series is definitely called for.

It should be noted that the failure to publish the rules as 'required' is probably not fatal to their validity.[3] However in so far as the 1968 Rules are almost identical with those of 1958[4] the N.Z. Law Society rationalised the whole situation by passing new rules impliedly revoking the 1958 rules, and receiving wider publication in the Gazette.

The question of procedure for the conduct of the District Law Societies' disciplinary functions is even worse. Different Societies adopt differing methods and the actual processes are very rarely predicted in written form. Clearly, for the system to apply uniformly to practitioners throughout New Zealand, procedures at *all* levels should be standardised and the rules governing them should be started in a uniform code which should be subject to the same prior approval as those of the N.Z. Law Society to ensure that all interests are protected. This code should similarly receive uniform publication.

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99. In 1964 the 1936 Rules and Amendment were still being published unrevoked in the annual table of statutory regulations — "presumably because the Law Draftsman had never been informed of their revocation" C. N. Irvine "The Law Practitioners Act (Disciplinary) Rules 1958" [1965] N.Z.L.J. 434, 435.
1. Either the Committee is failing to comply with s. 3 or the Attorney-General has given an exemption; the writer is unable to establish the latter. The substance of n. 99 seems to indicate that there is really no particular policy being followed; perhaps the Government Printer himself has exercised a discretion to print or not or has simply failed to print the 1967 rules.
2. Note 99, supra.
3. *R. v. Sheer Metalcraft Ltd* [1954] 1 Q.B. 586 — in this case of a prosecution for contravention of a statutory instrument the schedules to the instrument had not been printed (even although no certificate of exemption was granted). The Court held that the instrument was nevertheless valid; it is valid and effective as soon as it is made, but it must be shown that reasonable steps have been taken to bring it to the notice of the persons likely to be affected by it (p. 590). It could probably be argued that publication in the Gazette would discharge this onus by virtue of its bringing the rules sufficiently to the notice of those likely to be affected even although publication in the Gazette per se does not give the 'rules' added status.
4. Rules 1 and 3 differ a little. In rule 1 the difference is an insubstantial alteration in wording. Rule 3 however in the new rules gives the Committee greater flexibility to proceed with the hearing of a case. In 1958 it was required that the Committee be of the opinion that a prima facie case is shown "before fixing a date to proceed". In the later rules they need only be "of the opinion that the charges should be heard".

The Procedure of a District Law Society

The practice of the Wellington District Law Society is as follows:[5] complaints are received in writing by the Secretary;[6] by domestic arrangement the Secretary is bound to refer *all* such complaints to the President[7] who may at this stage satisfy himself that the practitioner's actions complained of have been in order and end the matter there, informing the complainant of his decision. In arriving at this decision he may first instruct the Secretary to get a letter of explanation from the practitioner and in these cases a simple form letter is usually sent to the practitioner enclosing a copy of the complainant's letter and asking the practitioner to provide his "comments thereon as soon as convenient". The complainant is informed by letter that the matter is receiving attention and he will be contacted as soon as possible.

Should a complaint not be so clearly groundless, the President refers it to the Society's Complaints Committee (in fact the Standing Committee of the Society, consisting of the President, Vice-President and Treasurer) to decide on further action. Although there is not a hearing at this stage, further information is sought on the matter. Effectively, in delegating its powers of initial investigation into complaints to this Committee the Council of the Society has created a second gatekeeper in the complaints process (the President acting as the first in his initial role of scrutiny of complaints).

By rule 32 if the Council (on the evidence of the Complaints Committee) "is of the opinion that the case is one that requires to be answered, then full particulars of the complaint shall be furnished to the person against whom the complaint has been made not less than ten days before the date appointed for the investigation thereof and such person shall be required to furnish an explanation in writing[8] or to attend before the Council at the time appointed and to make such explanation as he may think fit."

Rule 33 says that if the Council considers a prima facie case of

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5. The relevant powers and functions of this Society are "to investigate charges of professional misconduct against a practitioner" and "to institute prosecutions against practitioners or other persons for the breach of any statute, rules or regulation relating to the practice of law" Rule 2(d) and (e) of the Wellington District Law Society Rules 1957, which are allowed by s. 109 of the Act (the rule-making power, and s. 108(1), defining the functions of a District Law Society). No additions were made here or to any other Wellington rules at the passing of s. 108(3) in 1968 (this perhaps further indicating that this section merely formalised a system already operating).
6. Rule 32 of the Wellington Society's rules empowers the Council to enquire into the conduct of a practitioner "of its own motion or on the complaint in writing of any person".
7. Compared with the Auckland Society where an Assistant Secretary deals almost entirely with complaints, either settling them to the satisfaction of the complainant or recommending further action.
8. Should the Council merely call for a written explanation this would not satisfy s. 108(3) which requires "a reasonable opportunity of [the accused] being heard".

misconduct is established it is empowered to initiate proceedings before the Disciplinary Committee "or appropriate tribunal".[9] However by s. 108(3) the Council may deal with the matter, either considering the charges made to be satisfactorily answered, or, if not, then imposing its own sanctions or deciding to send the case forward to the Disciplinary Committee.[10] If the Council settles the matter then no publicity is given to particular cases, only figures as to complaints dealt with appearing in the Society's annual report.

The Procedure of the Disciplinary Committee

Only the Law Societies have standing to bring disciplinary cases before the Committee.[11] The public have access to the profession's disciplinary procedures as a whole only at the level of making complaints to the District Law Society[12] and they play no formal part thereafter (except perhaps as witnesses or in assisting in the investigation by providing information if it is requested of them).[13] The profession's

9. This 'appropriate tribunal' may be the Courts or perhaps the institutions of another Society if the practitioner involved is not a member of the local one (r. 34); the courts, perhaps, if the "practitioner" is not a member of the profession.
10. In 1971, 65 complaints were received, two-thirds being settled or regarded as being of no substance by the President, the rest being considered by the Complaints Committee, from which two went before the Council and two were sent forward to the Disciplinary Committee. By mid-November 1972, 100 complaints had already been received, the Wellington and Canterbury Secretaries agreeing that this was due to the greater publicity the profession as a whole was receiving (Legal Aid Bureau, public discussion of legal issues by members of the profession etc.).

    Neither the annual reports of the N.Z. Law Society nor the New Zealand Gazette, is particularly helpful in arriving at a detailed list of disciplinary steps taken; the Gazette reports only removals and suspensions from, and restorations, to the rolls; the annual reports of the N.Z. Law Society lack uniformity in detail and content from year to year; frequently the Gazette and Annual Report citations do not correspond in any one year. However, figures culled from these two sources show that the Committee's cases represent only the tip of the iceberg of complaints initially lodged against practitioners at the lower levels. 1968 saw 7 Disciplinary Committee decisions; 1969: 6; 1970: 7; and 1971: 11. There are no reports available to the writer as to actual disciplinary measures taken at District Society level.
11. Section 34(1) — the Committee shall have power to act in disciplinary matters "where a charge . . . has been made against any practitioner by the New Zealand Law Society or by any District Law Society . . ." No provision is made for raising such matters before the Committee by any other person (except s. 38 where applications for removal from the roll and s. 39 where applications for restoration may be made by the practitioner concerned to the Committee as the body empowered to deal with these matters).
12. Access to the courts for the exercise of disciplinary powers under s. 28 is not as restricted — it says merely "Upon application made to the Court . . ." However this power is not used, probably because the public is not aware of it and would need legal advice as to how to use it. A practitioner would almost certainly refer a complainant to the profession's disciplinary system. Also the public may exercise the essentially non-disciplinary remedies in tort or institute a criminal prosecution.
13. That the public is directly involved as of right only at District level reinforces the view that (should public involvement continue to be so limited) the local Rules of Procedure should be available in published form to the layman. Further consideration is given to public involvement at the end of this paper.

"view" seems to be that every effort should be made to satisfy the complainant. If he has suffered through a practitioner's defalcation he may be reimbursed from the Solicitor's Fidelity Guarantee Fund; in other cases the practitioner may be constrained to act to satisfy his client; in effect the complainant is not regarded as having a direct personal interest in seeing the practitioner disciplined once his reasons for dissatisfaction have been removed or the position adequately explained to him. From there he is 'assured' that any necessary disciplinary action resulting from the complaint will be taken by the profession itself.

The Committee has two important discretionary powers as to procedure. By rule 26 of the Law Practitioners Act (Disciplinary) Rules 1968 it may dispense with any requirements of the rules as to "notices, affidavits, documents, service or time or any other matter in any case where it appears just to the Committee so to do". Rule 27 says the Committee may extend the time for doing anything under the rules. These reflect at once the informality of the proceedings and the assurance that unless justice requires a deviation, pre-ordained procedure will be adhered to.

(a) *Before the Hearing*

The matter must be placed before the Committee, in writing, by the Society concerned (Rule 1). The Committee then decides if the matter is to be heard, being empowered to require further information from the Society and any documents it thinks fit. If the Committee is of the opinion that no prima facie case is shown it may, without requiring the accused to answer the charge, dismiss it.[14]

Rule 2 gives the Committee a role additional to its substantive one under s. 34: that of establishing that a prima facie case is made out.[15] This role duplicates that of the Councils of the Societies, which will themselves have considered that a prima facie case has been made out.[16] In effect it is a fourth gatekeeping role (the District Society President, the Complaints Committee and the Council are the other three); at any of these four points it may be decided that a case go no further. It might be said that the more 'gates' there are, the more chance the accused has of not being subjected to the rigours of a hearing in full, but it may be to his distinct disadvantage to enter a hearing with a prima facie case made out against him. While this might be acceptable in that an actual decision to prosecute must be made and the availability of sufficient evidence to make out a prima facie case will provide strong reason to proceed with a hearing, the fact that such a decision may well have been made by the very body which will conduct the hearing is difficult to justify. Any

14. The Society and accused practitioner having the right to require the Committee to make this a formal order dismissing the charge — Rule 2.
15. A prima facie case is not a *requirement* for further action (Rule 3 merely says that the hearing goes ahead "If the Committee is of the opinion that the charges should be heard . . .").
16. E.g. rule 33 of the Wellington Society's rules.

criticism of this situation is not so much because the accused may be prejudiced by the fact that his case has reached the hearing stage at all, but because it is virtually impossible, no matter how well defined is his procedural protection during the hearing, to ensure that there is no bias (however involuntary) against him at his hearing. In effect, full reliance must be placed on factors which are essentially imponderable, viz, the integrity and ability of the tribunal concerned to accord the accused the benefit of the rules of natural justice in exercising their judicial powers.[17] Some more recent disciplinary statutes on professional discipline have avoided this problem by deliberately separating the two functions — those of deciding to proceed with a hearing, and the conduct of the hearing.[18] In the light of this criticism the legal profession should emulate these professions in this practice.

If the Committee decides that the charge should be heard, details as to date, time and place of the hearing are set and both parties are informed of this and given copies of the charges and all affidavits in support of the charge — such notice is to be served at least 21 days before the hearing. (Rule 3)[19] The notice requires both parties to furnish the Committee's Clerk and each other with lists of the documents and copies of all affidavits on which they intend to rely, normally this to be done at least 10 clear days before the date of the hearing (rule 4). The parties may inspect the documents included

17. See also the following discussion of onus on the parties to disciplinary proceedings to establish their cases.
18. The Medical Practitioners Act 1968 (as amended in 1970) provides a procedure under s. 55 whereby complaints in respect of practitioners are considered first by the "Penal Cases Committee" who decide that the complaint discloses no case to answer (s. 55(c)) or that it should be sent to the Disciplinary Committee to be dealt with as if it were a complaint alleging "misconduct" (s. 55(b)) or, if neither course is immediately appropriate, "investigate the complaint and decide whether or not any further action should be taken in respect of it" (s. 56(1)). The two Committees are separate, one determining whether a prima facie case is made out, the other hearing its details only when it is sent forward to it for prosecution. The amendment to the Act stemmed from the case of *Beaumont v. The Medical Council of New Zealand* (not reported, May 14, 1956) in which allegations of bias were made arising out of two circumstances (i) that the Medical Council was required to hold a preliminary meeting to decide whether there was a prima facie case to warrant calling on Dr Beaumont to answer the charge. This was regarded by Barrowclough C.J. as a sufficient prejudging to transfer the onus of proof from the prosecution to the respondent; (ii) that evidence may have come before the preliminary hearing which would not, or could not, be presented at the formal hearing. Either circumstance seemed to create an impression of bias in the mind of the Chief Justice who found that the proceedings were saved by the statutory provision which directed the Medical Council to act in this manner, and he did not decide the question of bias.
19. The form of the notices are set out as Form 1 (Notice to the Society) and Form 2 (Notice to the Practitioner) in the Schedule to the Rules. By Rule 24 'Service' may be effected either personally or by registered letter to the last known place of abode or business of the person to be served and proof that such letter was so addressed and posted shall be proof of service. Service is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

in the lists and, should a party require a copy of a document listed, the other must furnish it, at the application and expense of the party requiring it, within 3 days of receiving the application (rule 5).

Once an application is lodged before the Committee it may be withdrawn only with the Committee's leave (rule 20) and once proceedings are under way, the Committee may upon its own motion or at the application of either party adjourn the hearing upon such terms as may appear just to it (including any order as to costs).

The overriding tests of the validity of any of the rules (which have been made under s. 47 by the proper procedures) or their application on a particular occasion are that they should not be ultra vires the powers granted by the Act and that they should not infringe s. 36 of the Act:

> "Except when making an interim suspension order . . . the Disciplinary Committee shall not exercise with respect to any practitioner any of the disciplinary functions conferred on it by . . . [Part III] . . . of this Act without giving him a reasonable opportunity of being heard in his own defence."

(b) *During the Hearing*

The Committee may proceed to hear and determine a charge whether or not either party actually appears at the hearing, provided proof of service is given (rule 6) and all evidence is given by affidavit unless otherwise permitted by the Committee (rule 7). Both the applicant and practitioner are entitled to counsel at the hearing and the Committee may at any stage of the proceedings, if it thinks fit, appoint counsel to represent a party (rule 19).[20]

As discussed there will already have been extensive inquiry into the case before this hearing; in practice at the hearing itself the Committee insists that all applications must be argued in full[21] (all applications being heard in private (rule 18). The Committee is a statutory tribunal before which statements made will be privileged).[22] Natural justice would seem to require this effort inasmuch as the Committee (or a District Society) may already have determined that

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20. ". . . the costs of such counsel to be paid out of the funds of the New Zealand Law Society." (r. 19). It may be argued that the Committee has acted ultra vires in making rule 19 for the disposition of N.Z.L.S. funds is with the Council alone (s. 119). However s. 114(2)(h) authorises the N.Z.L.S. to pay ". . . all costs, witnesses' expenses, and other payments incidental to or connected with any application to the Disciplinary Committee". This provision does not seem to *bind* the N.Z.L.S. to pay witnesses' expenses whenever the Committee orders them and unless it can be shown that the N.Z.L.S. has delegated such a power to the Committee, the rule is tenuous.
21. There is no formal rule to this effect.
22. Section 45 protects witnesses and counsel, s. 52 protects comprehensively the Societies, their members (which would include the accused) and their servants as well as the Committee. (The Law Practitioners Amendment Act 1968, s. 5, extended the s. 52 protection to s. 108(3) and (4) proceedings and s. 4 of that Amendment similarly extends s. 45.)

there is a prima facie case[23] to be answered, and as showing that the case has not been predetermined. The Society appearing must establish its case by argument[24] from the facts; (even although the practitioner may have admitted the facts, this does not, of course, establish into which, if any, category of wrongdoing they fall).

The accused has a corresponding duty to assist the Committee in reaching its conclusions, possibly because the Committee is not inherently only an adversary court but rather an amalgam of that and a forum for establishing the true facts of a case. In *In Re C (A Solicitor)*[25] the Court rejected a claim that a case before the Committee should be dealt with on the same basis as a criminal trial. Hutchison J. said at p. 259 "When a practitioner is charged before the Disciplinary Committee with professional misconduct and a prima facie case is made against him, in my opinion the practitioner is not justified in simply saying the charge is not proved beyond reasonable doubt but must be prepared to answer the charges against him."[26] In its effect, this view differs from the normal criminal law, whereby an accused is entitled to wait, without comment, for the prosecution to discharge its onus of proving his guilt "beyond a reasonable doubt". It may well be that this case indicates that a charge need not be proved "beyond reasonable doubt" before the Committee; but to place a *legal duty* on an accused to answer a charge when a prima facie case is made goes further than allowing an accused in court the option of not answering the charge once a prima facie case has been made, at the risk of the court proceeding to find him guilty. That the Committee, where both the penalties and charges are so closely analogous to criminal cases, should have more stringent requirements than a criminal court is undesirable and inexplicable. The practitioner's livelihood is endangered and the situation is far closer to an adversay proceeding than might be thought at first on viewing the procedural rules. A more satisfactory approach to the onus of proof should be that taken by a criminal court.[27]

Even although under s. 44 the Committee has the power to call witnesses to appear before a hearing, the parties to the hearing have no such right per se.[28] It seems that the giving of evidence by affi-

23. Note 5.
24. As the writer was informed by Mr W. M. Rodgers, Secretary of the N.Z.L.S., June, 1972.
25. [1963] N.Z.L.R. 259; an appeal to the Supreme Court from an order by the Disciplinary Committee.
26. It could be argued that, where the Committee has proceeded to a hearing without first having satisfied itself that there is a prima facie case to answer, as is within its powers under rule 3 (rather than accepting the fact that the case has come forward as sufficiently establishing such a case) Hutchison J's. opinion is not directly applicable. See also note 5 of this series.
27. Perhaps the accused's willingness to assist the Committee in its enquiries might work to mitigate the penalty which he might otherwise suffer, by indicating that he realises his professional responsibilities.
28. Despite the observation of Tompkins J., apparently incorrect, that "the practitioner has a right . . . to call witnesses" by virtue of s. 44 — *Robinson v. C.I.R.* [1965] N.Z.L.R. 246, 250.

davit together with the Committee's discretion as to other forms of presentation (which would include producing witnesses) under rule 7 is regarded as sufficient guarantee that all relevant evidence is produced at the hearing. The disturbing case of *Re Wiseman*[29] shows that the Committee, with the concurrence of the court, may take a narrow view in deciding whether or not to call witnesses on behalf of one of the parties should that party request them. In this case the accused wished to cross-examine those who had made affidavits in the case against him. The Committee decided that as the affidavits did nothing more than exhibit documents (as well as one affidavit of service) no purpose would be served by requiring any of the deponents to attend and give evidence. When asked to rule on this on appeal, the Court saw the question as one of whether or not the appellant was denied a fair hearing and having regard to the nature of the affidavits and the fact that the accused was in no way disputing their authenticity or authorship, decided that there was no matter relevant to the issue before the Committee on which the deponents could have been cross-examined.

It could be argued that it would be in breach of s. 37 (giving the practitioner as a right "reasonable opportunity of being heard in his own defence") to refuse to allow the calling of witnesses whose evidence was relevant to the defence. The 'fair hearing' test in *Re Wiseman*, if given more general application, rather begs the question: how could one be assured that the accused had received a fair hearing without knowing what he would have adduced from the witnesses? Rather than hope that the *Wiseman* case is not given wider application, it must be argued that the accused (and complainant) should have an unqualified right to call witnesses, as only this could guarantee that in this respect the rules of natural justice will be observed.[30]

Thus while the rules and s. 36 largely ensure that the Committee will act according to the principles of natural justice in exercising its judicial function, there is a clear need for change; the Committee is hardly the appropriate body to decide whether or not there is a prima facie case to be answered; and the Committee's discretion as to the calling of witnesses seems too wide.

(c) *After the Hearing*

Upon completion of the hearing[31] the Committee may find the charge proved (the practitioner being guilty), answered (the prac-

29. *Re Wiseman* [1970] N.Z.L.R. 286.
30. *Re Wiseman* at 288 at least does recognise that lack of adherence to the principles of natural justice (in particular the right to a fair hearing) might be grounds for attacking a decision of the Committee.
31. Not all cases before the Committee are completed, e.g. rules 21 and 23 allow the Committee to adjourn hearings, in the latter case if there is to be an alteration to the charge which "in the opinion of the Committee . . . [is] . . . such as to take the practitioner by surprise or prejudice the conduct of his case". Rule 20 says the Committee may allow the withdrawal of an application.

titioner having explained his conduct as not reprehensible, to the satisfaction of the Committee; similar to a 'not guilty' finding) or simply not proved (where the case has not been established either for or against the practitioner). While the Committee will dismiss the charges in the latter instances, in the first it must then decide what sort of sanction should be applied (i.e. what disciplinary action is warranted on the basis of its finding) and make an order to that effect.

The Committee must serve copies of any order it makes under s. 34 of the Act on both parties (rule 8). If the order is to strike off or suspend the practitioner[32] the Committee must file it with the Supreme Court at Wellington whereupon it takes effect as if it were an order of the Supreme Court "to the like effect made within the jurisdiction of that Court" (s. 49). This filing does not take effect until the time limit for appeals has passed or until an appeal has been determined — until then it is effective only to suspend the practitioner (s. 49(2)). This is where the Committee's and Court's powers meet, for in filing its order under s. 49, the Committee is using the officers and power of the Court to put its orders into effect by its own statutory authority.

By rule 32 record of the proceedings may be by way of short-hand notes or otherwise and the Chairman of the Committee must ensure that a note of the proceedings is taken (to be available only to any person entitled to be heard upon appeal against an order and to the Society concerned). All affidavits, records and other books, papers or exhibits produced or used at the hearing are retained by the Committee clerk until the time for appeal has expired or the appeal is heard (rule 28).

Orders filed under s. 49 and not reversed on appeal are by s. 51 to be notified in the Gazette by notice giving only the date and effect of the order.[33]

Appeals from Disciplinary Decisions

Appeals from District Law Societies

Any practitioner "aggrieved by the decision of . . . [District Society] . . . in any matter affecting himself may appeal from the decision to the Council of the New Zealand Law Society" (s. 112(1)). By s. 112(2) "The Council may either consider and hear the appeal in such manner as it directs or *may, in its discretion*[34] having regard to the subject-matter of the decision appealed from, refer the appeal to the Disciplinary Committee for hearing and decision". The decision of either, as the case may be, is final and conclusive. s. 112(3).

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32. Or for his restoration or removal if the Committee has been acting under ss. 38 and 39 (not a primary concern of this paper). The provision does not apply to an interim suspension order under s. 37.
33. Publicity is discussed further below in the text.
34. Emphasis added.

This section was enacted before s. 108(3) was passed in 1968 and is not aimed directly at disciplinary matters but is certainly wide enough to include them. While the N.Z. Society will almost always refer disciplinary matters to the Committee, it is not *required* to. The situation is untidy and anomalous, for while the Committee is the only body of the N.Z. Society empowered to hear charges *and* penalise practitioners for reprehensible conduct[35] the appeal goes to a body the N.Z. Society not so empowered, which has a discretion as to whether or not it should pass it on. Furthermore, as a specialised body, the Committee should be the functionary to hear such appeals. Certainty as to appeals procedure would call for the legislation to be altered so that such appeals go directly to the Disciplinary Committee. The rules of the Committee should also include specific procedures for the handling of appeals; currently there is no such provision.

Appeals from the Disciplinary Committee

Section 50 provides for appeals to the Supreme Court against any order or decision of the Committee made under Part III of the Act[36] "at the instance of the practitioner [or person][37] to whom the order or decision relates" or at the instance of the party other than the practitioner (i.e. the Society).[38] The Supreme Court is to sit with at least three judges[39] and appeal is to be by way of rehearing.[40] In both cases reported as having gone to the Court on appeal, the Court has gone into the substance of the subject matter of the case before the Committee although neither case saw the Committee overruled in full.

Overall the Court's powers to hear and determine appeals are extremely broad and flexible providing the opportunity for full hearing of the appeal and for virtually any decision to be made on the merits of and tailored to the needs of a particular case, the Court's discretion being restricted only by the substantive rules as to professional wrongdoing as discussed earlier.[41]

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35. Even although it is appointed by the N.Z. Law Society Council its powers are not delegated to it by the Council but provided by the legislation.
36. Or s. 25 relating to withholding of a practising certificate. These appeals may be made as of right and do not require the leave of any other body before being filed.
37. Added by s. 30(2) of the Law Practitioners Amendment Act 1961 to supplement the addition, also in 1961, of s. 36A.
38. The appeal rules appear in 1936 Gazette, Vol. 1, 682. They are in usual form and it is not necessary to deal with them fully here.
39. Contrary to normal sittings of the Supreme Court where only one Judge would preside, this is a hearing by the Full Court as allowed for by s. 19 of the Judicature Act 1908.
40. *In Re C (A Solicitor)* and *Re Wiseman* are apparently the only cases of appeal to the Court reported in N.Z.L.R.
41. In acting as the appeal authority, the court is exercising powers additional to those discussed earlier in relation to its control over practitioners.

The Prosecutions Advisory Committee[42]

The Prosecutions Advisory Committee is a body of the N.Z. Law Society[43] established by resolution of the Council[44] to carry out the functions ascribed to it although its guidelines for activity are vague. It is composed of three senior and experienced members of the profession, none of whom is serving concurrently on the Disciplinary Committee.

As a creation of the N.Z. Law Society, the Prosecutions Advisory Committee's powers may not exceed those which the N.Z. Society has itself under the Act; the functioning of the Committee is in effect an extension of the profession's disciplinary responsibility; an attempt to link the information which its disciplinary enquiries accumulate with the interest of the legal system as a whole. The aim is to protect further those who are directly concerned that there should be proper control of the profession by the responsible exercise of its powers over its members. The Committee acts to assist the Council in separating those cases of misconduct which are not actionable in court from those which are. It performs a function which the governing bodies of the profession had regarded as their responsibility for some time: that of assisting the Police in bringing prosecutions in appropriate cases.[45] The Committee's job is to establish the facts of a case of misconduct with a view to advising the N.Z. Law Society Council whether prosecution is justified. The Council may then determine that the Police should be advised of the situation.

This task had previously been performed by the Standing Committee of the N.Z. Law Society or by the District Councils but it became clear that the District Councils did not want this responsibility with regard to their own members nor were they nor the N.Z. Law Society Council well suited or appropriate to perform this function. Further, the older system lacked uniformity in that varying standards were applied and the procedure itself could entail long delays between disciplinary activity and decisions as to prosecution. For these reasons, the Committee was set up as the main body to exercise this function of establishing the facts of the case and of advising the N.Z. Law Society Council. It is not, however, the sole body empowered to act in this sphere. In urgent matters, the District Society might forward

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42. A discussion with Mr A. E. Hurley, Convenor of this Committee, on 9th August 1972 was of great assistance in elaborating some of the points of fact in the working of this body. The conclusions drawn, however, are the writer's.
43. Compared with the Disciplinary Committee which, although appointed by the N.Z. Society, is a creature of statute from which it draws its powers and designated function.
44. The earliest reference to this body which the writer was able to locate is in the Annual Report of the N.Z. Law Society, 1966.
45. E.g. The Annual Report of the N.Z. Law Society 1944 records that in that year in 3 instances where trust money had been stolen, information was given to the Minister in Charge of Police.

the appropriate information to the Police, but this would be the exception rather than the rule.[46]

In practice the Committee meets infrequently.[47] Normally the convenor puts the information available before the other members by correspondence and they advise him of their views. The convenor prepares a recommendation on the basis of the Committee's joint finding and this is forwarded to the N.Z. Law Society Council. The Committee does not consider only the information on the matter for which the practitioner is disciplined. It will consult those parties whose views and knowledge of the particular case will help establish all the facts relevant to it; these parties will almost certainly include the District Society concerned and the Committee of Management of the Fidelity Guarantee Fund.[48] Further the Committee's ultimate recommendation will be made within the broader context of the profession as a whole. Publicity of the matter is a concern of the Committee which will weigh the effect of the publicity which will inevitably arise from a prosecution, both on the profession as a whole and on the individual charged, prior to making a recommendation. A final consideration is that in almost all cases persons outside the profession may lay a complaint to the Police against the practitioner.[49]

The Council does not automatically forward the files on to the Police if a criminal offence has been committed for the Committee's recommendation is based on consideration of complex matters. If the disciplinary action already taken against the practitioner is, in all the circumstances regarded as punishment enough, further action is seen as unwarranted. A true case outline puts some light on the Committee's course of reasoning: a practitioner had gained no personal

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46. Thus in 1970 it was noted in the Annual Report of the N.Z. Law Society that "During the year the Committee viewed with concern the inevitable delay which arises because matters may not be referred to the Committee as at present constituted until they have been the subject of proceedings before the Disciplinary Committee. For this reason the Council accepted the Committee's recommendation that the Council of the District Law Societies have the discretion of laying complaints with the Police in cases where defalcations are suspected and the District Council considers that urgent action is required." This was seen as necessary because in two cases that year it was suspected that the practitioners might try to leave the country and extreme urgency was necessary. In one instance the practitioner was already in prison before the Law Society's disciplinary powers could be invoked.
47. Its current members are in Christchurch, Wellington and Auckland.
48. Which has apparently not yet chosen to make a comment as it is most often not involved in the situation in a way relevant to the background enquiry. Mr Hurley could not recall the Committee dealing with matters other than defalcation where a practitioner has been struck off for professional misconduct; conceivably there could be other matters worthy of prosecution.
49. Although it should be noted that in defalcation cases a client will probably have been reimbursed from the Fidelity Guarantee Fund and may be less inclined to take the matter further voluntarily.

benefit from his defalcation;[50] there had been no call on the Fidelity Guarantee Fund as he had promised to repay the amount himself; he had been punished already by being struck off; his defalcation had in part arisen from his own personal problems leading to alcoholism but he was now making strenuous efforts at rehabilitation with a strong likelihood of success.

This was decided as an inappropriate instance in which to recommend forwarding the file to the Police for prosecution even although his actions were liable to sanctions under the criminal law.

While it may be administratively useful to have the Committee ascertain whether or not a case warrants criminal prosecution, it is also incumbent on a self-governing profession to ensure that the information available to it alone at the first instance is used responsibly to protect those interests which must be guaranteed by the disciplinary system and its resources. The fact that the N.Z. Law Society Council has the power to decide whether or not a file which contains information sufficient to sustain or assist the criminal prosecution of a practitioner should be forwarded to the Police is simply not in keeping with the overall principles relating to bodies which are essentially self-governing in disciplinary matters. To accept that a profession is competent to deal in full with matters of discipline does not also necessarily entail acceptance of the proposition that it is competent to decide what cases do, and what cases do not warrant criminal prosecution. In deciding whether a case warrants criminal prosecution, the profession must not assume, as the legal profession's reasoning allows it to do, that its determination may be based not only on the reprehensible actions of the practitioner but also on the background of the offence. It should not lie with the profession to decide that the offender has been punished enough, for the disciplinary action taken against him was not to punish him (even although that will invariably be its effect) but rather to protect the profession and the public from a practitioner who is no longer fitted to enjoy his professional status.

The disciplinary measures already taken and the background to the offence are surely matters which a court or the prosecutor, in deciding whether or not to proceed, is best equipped to assess when determining how to deal with a criminal offence by a practitioner. The commission of a crime is of concern to the public as a whole, not merely to the profession. The profession's stance in this area is understandable yet unjustifiable; while this activity attaches to the very root of the profession's privilege of having autonomy in

50. Mr W. M. Rodgers in a discussion with the writer in June 1972 observed that in an increasing number of disciplinary cases the practitioner charged with professional misconduct has himself not gained personally from his actions; there is a strong trend that lawyers charged have been under undue pressure and where for example practitioners have settled transactions with other clients' money in trust accounts because the required money has not been available through the practitioner's inaction.

disciplinary matters, it is arguably unnecessary and undesirable that existing regular public sanctions should be in any way undermined. In its practical effect this screening is not consistent with the terms of the Act; there is certainly no express provision for the N.Z. Law Society to exercise this power nor does a reading of s. 114 allow for it, yet one would expect such an important function to be provided for expressly if it is to be permitted at all.

In this area the N.Z. Law Society Council with assistance from the Prosecutions Advisory Committee should restrict itself to its administrative function of discovering those files which reveal action warranting criminal prosecution. Such a screening device is acceptable in this respect for there are many matters which constitute misconduct within a profession but which would not be illegal in the public sphere. A possible and acceptable solution would be that all files of cases where a practitioner has been ordered removed from practice should, by virtue of that fact, be forwarded to the Police accompanied with a recommendation as to the appropriate legal action; and where lesser disciplinary sanctions have been administered, those files which reveal a criminal offence should also be forwarded to the Police, the Prosecutions Advisory Committee making no recommendation in this regard but perhaps advising the Council to recommend appropriate legal action. The final decision must, however, to guarantee the protection of the public interest, rest with the prosecutors and the court.

Professional Discipline and the Public

The whole of the legal profession's internal disciplinary system (and the Prosecutions Advisory Committee) reveal its lack of enthusiasm for public involvement in these matters or even for publicity of them. It is not difficult to understand why this situation has developed but it is difficult to justify its being taken for granted, for *self*-government per se does not demand *private* government.

As already noted, the wide interest of practitioners in having the corporate image of their profession preserved is well assured in the strong powers already utilised in maintaining professional standards of conduct. Also some indications have been given as to where the disciplinary system fails to guarantee just treatment for a practitioner charged and some suggestions have been made for improvement in this respect. The involvement of the public in the system has received little concentrated attention. The potential for outside influence on the internal system of discipline exists at several points; further, the public's interests will be largely protected if the two interests above are adequately guaranteed and "so long as the . . . [profession] . . . [is] . . . reasonably responsive to public needs, it is unlikely that there will be strong external pressures for . . . constitutional change".[51]

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51. H. W. Arthurs, *"Authority, Accountability and Democracy in the Government of the Ontario Legal Profession"* 49 Can. Bar Rev. 1, 23.

This is not a reason, however, for accepting that positive steps need not be taken to guarantee the public's interest.

Guarantees of protection of this interest are few, the public taking little part in hearings and no part in setting the standards required of practitioners or how they will be enforced. Rather the public depends for its protection on the integrity and competence of those who administer all aspects of the system and on their sensitivity to the public's expectations. There are no firm, precise, preordained guarantees for protection of the public interest.

Not only is the public given little opportunity to protect its interests by its own involvement in disciplinary proceedings[52] but, further, it has little reason even to know that the profession operates a comprehensive disciplinary system. Aside from the member of the public who lays a complaint, unless a practitioner is actually prosecuted in Court and the matter receives normal, possibly sensational coverage by the media, the public has only the notice in the Gazette, required under the Act, to look to. This publicises only those cases where a practitioner is removed from (or restored to) the roll and given the very limited circulation of that journal and the limited 'everyday' interest of its contents, this could hardly be classified as publicity such as will assure the public that professional standards are being maintained.

It can be argued that a practitioner's clients have a right to know that he has been found guilty of reprehensible conduct even if he is not removed from practice; this argument may be mitigated if it is considered that disciplinary action will ensure that no further misconduct will occur but serious thought should be given to the formalised publication through 'everyday' channels of 'guilty' findings at both District Society and Disciplinary Committee levels, for the current failure to allow wider publicity of findings leaves the credibility of the system as a whole suspect to the public and press.[53]

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52. There is little reason other than administrative efficiency why the public should be denied status before the Disciplinary Committee. To restrict the right to bring cases to hearing on the grounds of administrative expediency and confidence in the operation of complaints procedures is to interfere drastically with the apparent status of that body — that it should be an impartial 'Court' — even although in practice the public is unlikely to avail itself of a right to bring cases directly to the Committee just as it has so far failed to take such matters directly to the Court under s. 28 which gives it such access.

53. Infrequently information of disciplinary action does reach the press as there is no bar to the publication of facts discovered on their own initiative. The *New Zealand Truth* 29th August 1972, 56 reports the suspension of a named Wellington practitioner. The paper reports: reasons for his suspension are understood to be related to the conduct of his practice. But Truth has been assured there are no financial matters involved in . . . [the practitioner's] . . . suspension. The society has declined to comment in the meantime." This newspaper also took up cudgels on behalf of Mr Wiseman in 1970 when it suggested he had been treated too harshly. The *Dominion Sunday Times* 6th August 1972, gave extensive coverage to a disciplinary matter in the Medical profession. A doctor had

Hon. J. R. Hanan suggested[54] that "many citizens undoubtedly feel that in dealing with complaints of . . . [less glaring blunders and negligence] . . . the creation in New Zealand of something like . . . a lawyer's ombudsman could do more . . . to raise . . . [the profession's] . . . image and to satisfy the public that they are receiving justice from the legal profession, than almost anything else." The suggestion seems to reflect less a view of failings in the profession's complaints and disciplinary procedures or that there was on the public's part a suspected increase of complaints resulting from declining standards of disciplinary enforcement than that the public was genuinely cynical as to whether complaints were properly investigated and that the profession exercised its full responsibility in this area. The fact that only two cases[55] are reported to have gone on appeal to the Court (both unsuccessful) and that even fewer are cleared of charges before the Disciplinary Committee and that the myriad of minor cases dealt with at District Society level will have received no publicity at all (with only the complainant being informed of the outcome), must exacerbate this position.

While not adopting the specific proposal[56] the profession saw the problem as one of its not assuring the public sufficiently that problems were properly investigated; in effect it admitted that greater publicity should be given to the procedures available. Little of continuing effect was done to put any of the 'answers' into practice[57]

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prescribed 720 descamphetamine tablets to a man who was then convicted in Court of obtaining them by false prescription. The man had arranged with the unnamed doctor for other people to obtain prescriptions in their own and fictitious names. The Health Department was investigating the doctor and the reporter asked what form the inquiry was taking? Would the findings be made public? Would the doctor's name be released? Why wasn't the doctor prosecuted in Court? The answer was "No comment", as the doctor's offence was regarded as "ethical, not criminal". The newspaper article revealed both public confusion and uneasiness as to just how the conclusion would be reached. The reporter himself was unable to provide an answer or present any justification for this closed approach to professional disciplinary matters and prosecutions in court.

54. [1969] N.Z.L.J. 365, 367.
55. *In re C. (A Solicitor)* [1963] N.Z.L.R. 259 and *Re Wiseman* [1970] N.Z.L.R. 286.
56. Whether or not this was because of the profession's satisfaction with existing procedures, a reluctance to see its own controls diminished or simply an honest belief that such a change was inappropriate, the profession continuing to be confident in its own competence, may never be clearly established. In 1962 the N.Z.L.S. did find little difficulty in appointing a full time Audit Inspector and it is hard to see any significant difference between the problems involved in that and in having an 'ombudsman' to deal with complaints from the public, acting independently of the profession.
57. Annual Report of the N.Z.L.S., 15 reports the Canterbury D.L.S. President as outlining the procedure followed by his district in dealing with complaints and the N.Z.L.S. President issuing a statement on the subject which was widely published in the press. The report continues: "The attendant publicity resulted in a number of further complaints from the public, many of which had previously been considered. These were addressed to the President and were duly passed to Districts for investigation. Many proved to be without foundation or concerned matters which it was outside the province of the

— the 'reluctance' to do anything more practical underlining the professions' bashful approach to publicity.[58]

Many practitioners feel that undue publicity for disciplinary matters adversely affects the profession's image as a whole and as noted earlier, a desire for less publicity was one of the reasons for the profession seeking its own disciplinary system. The McRuer Report however, notes[59] that "the main emphasis should be on the protection of the public and for that purpose it is misbehaviour in the conduct of professional matters which is important." The profession's corporate image is a secondary consideration in matters of discipline. Any justification for continued secrecy, then, is to be found rather in balancing the need to protect an individual practitioner while charges are being heard against him, against that need for the public to be given more information. The McRuer Report found the balance in favour of the individual practitioner, saying:[60] "The fact that a member of a profession . . . is charged and tried publicly before a disciplinary committee is sufficient to destroy his professional career, no matter what the outcome of the trial may be. No one who has built up a professional practice can ever be anonymous to his . . . clients. We think that such cases are very different from a trial of civil or criminal cases where a public trial is a safeguard to the accused. However . . . the person against whom a charge is made should have the right to a public hearing if he so requests". The argument seems sound, given the need to protect a practitioner who is charged from being 'punished' even although he is cleared of the charge; it provides no justification, however, for secrecy after a 'guilty' finding has been made.[61]

Aside from the advantages to the public of more publicity and a right to standing before the Disciplinary Committee rather than being restricted to access at the complaints stage, the public's interest

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Society to investigate. On the other hand, the discussion at the Conference and subsequent reaction clearly highlights the importance of informing the public that complaints are properly investigated and that the profession accepts its full responsibilities in this sphere. There is the need for constant attention to ensure that complaints are investigated without delay and that complainants are advised promptly of the outcome. It is understood that one District, at least, is considering whether, in appropriate cases, complainants should be afforded the opportunity to discuss their grievances with members of their Council or complaints committee."

58. Or, perhaps, a rather less excusable failure of the profession's internal organisation to make resolution into effective provision.
59. Supra, n. 2, 1190.
60. Ibid., 1198.
61. It is ironic that one of the reasons why the profession sought its own control of disciplinary matters in 1935 is now seen by the profession itself as to some degree undermining the public's confidence in the profession; secrecy is viewed now not as being the answer to protecting the profession's image but as having to be compromised to ensure public confidence that disciplinary powers are being carried out responsibly. The weight, however, is still with the profession's view that publicity of disciplinary measures taken may undermine public confidence in the profession.

could receive further protection without the hearing itself being conducted in public. The public could be involved as members of the disciplinary bodies. The McRuer Report rejected the idea of a single tribunal to hear disciplinary cases for all self-governing professions,[62] seeing this as undermining the basic rationale for self-government, i.e. that the best knowledge of the practice and standards of the profession resides in its members. However, the report did argue that the risk of disciplinary power being exercised in the interests of the profession rather than the public could be minimised; ". . . lay members should be appointed . . . to the governing bodies of all self-governing professions . . ."[63] The suggestion is adaptable to the New Zealand profession's disciplinary system; just as the Ontario profession has seen fit to appoint lay members to a body with a statutory mandate "to consider the manner in which members of the Society are discharging their obligations to the public and generally matters affecting the legal profession as a whole" (see footnote 60) so the New Zealand disciplinary system should be opened to defined and required lay participation[64] with individuals other than members of the profession also being appointed to the disciplinary bodies at both District and N.Z. Law Society levels.

Conclusion

The McRuer Report[65] insisted that private disciplinary justice could be justified only if all the interests concerned are better protected by that method than by any other. In practice, however, one must not overlook the fact that in New Zealand the legal profession's self-government is firmly entrenched and jealously regarded; in reality its

62. Supra, n. 2, 1186.
63. Ibid., 1166. The legal profession in Ontario has taken far reaching steps to implement this suggestion; under the Law Society Act 1970, s. 26, a body known as the "Law Society Council" was established. As noted by H. W. Arthurs, "Authority, Accountability, and Democracy in the Government of the Ontario Legal Profession" 49 Can. Bar Rev. 1, 14: "It is . . . fairly heavily weighted with members of the profession's elite: the treasurer and the chairman of the benchers' standing committees, and the head of the Ontario section of the Canadian Bar Association . . . However there are a number of other constituencies within the profession which may provide a diversity of informed opinion in the debates of the Council: representatives of local law associations, the law schools, law students, and three lawyers of less than ten years' seniority. Finally, perhaps most importantly, nine lay members are to be appointed by the provincial government."
64. It should be open to participation of junior members of the profession. The N.Z.L.S. Disciplinary Committee's membership is for an undetermined length of time and seems to be restricted in practice to senior members of the profession. Given the changing nature of the standards imposed on the profession, even if suggestions for a comprehensive code of conduct are adopted, a frequent and regular turn-over in membership of the Committee is warranted. As noted the McRuer Report view that senior members of the profession are perhaps best suited to define the standards of conduct required does not mean that they are ipso facto the best suited to determine when they have been breached.
65. Supra ,n. 2, 1182.

self-government is assailable only if it is unworkable; its justification for continuing cannot be viewed only in terms of such a bold theoretical framework as the McRuer Report provides but is more likely to be found in the fact that, like democracy,[66] it can work.

However, it is inescapable that the means employed can seldom, if ever, be entirely divorced from the results which actually occur or are intended. The current disciplinary system is capable of operating with varying degrees of efficiency; in fact the ideal for the exercise of the legislative and judicial powers which it carries is not on all fours with its practice nor even as close as is feasible. Compared with the protection which the profession is able to give itself, there is a lamentable lack of firm guarantees for the accused practitioner and for the public whose role is also less well defined than it might be.

Axiomatically, the initial justification for a system exercising the powers which so impressed Mr Isbey must stem from the validity of a strong definition of the ends to be achieved by their use and the means for arriving at those ends. To a disturbing degree, particularly with regard to the principle of deciding for itself whether or not to forward a file to the Police, the profession has failed to separate the use of these powers to assure the maintenance of professional standards from their effect as punitive sanction: in short a confusion of the ends with the means for their achievement. That particular punitive sanctions exist to ensure the achievement of the ends is rather a matter qualifying the means.

The fact that the means of gaining these ends in disciplinary matters[67] involves powers to interfere with a practitioner's right to continue to make his living at his chosen calling, requires that a fully stated set of criteria for the exercise of those powers be made available to those likely to be interested.[68] The legal profession has not fulfilled this requirement.[69].

Furthermore the potential for change in these criteria has no real practical definition other than as each decision is made[70] in

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66. H. B. Mayo, *An Introduction to Democratic Theory* (1965) 213 "A political system cannot be justified entirely by its constituent principles; its social performance must also be considered. Institutions are always judged by what is accomplished through them."
67. Where the initial 'preventive' standards of admission have failed to ensure continuing 'proper' conduct.
68. I.e. if a person is to be 'punished' for activity which is prohibited, he must have the means of knowing what activity is prohibited. The public also has an interest in what standards of conduct are required by legal practitioners.
64. Perhaps a further failing is the lack of scope for including 'incompetence' displayed by a practitioner as a ground for quasi-disciplinary action, the pervasive concern of the empowered bodies of the Law Societies being with matters of ethics. Often incompetence will be reflected in failure to observe required standards of conduct but not always; there are good grounds for adding this additional category for continual supervision.
70. Although some criteria are inherent in the very rule making powers and sources of rules outlined earlier, those outside the Disciplinary Committee's findings which are ratified as general rulings of the N.Z.L.S., are rarely used.

disciplinary hearings. In the Ontario context Arthurs[71] looked to "the growth of a body of appellate judgments", such decisions providing "a corpus of knowledge about the basis of discipline which is presently lacking." The New Zealand appeal provisions are so rarely used and with such little challenge to the initial findings that this hope is simply unrealised in this country. The Ontario legislation also calls for "a reasoned decision" by the disciplinary body[72] making possible, in theory, "a more sophisticated analysis of the issues by those who decide cases, and by outside observers" and facilitating "the growth of a jurisprudence of professional conduct".[73] With no such requirement in New Zealand this hope is unrealisable and a change in the provisions may well be necessary to allow this, together with the furnishing of a comprehensive code of conduct capable of being altered regularly to meet changing standards required.

Furthermore, it is vital that procedural safeguards to ensure fairness in the application of these disciplinary powers should be clearly established and rigorously observed; such procedural rules as have been made in general fulfil these requirements but by no means do they provide complete safeguards in their content or in their chequered history of publication. While the rules reflect a concern for natural justice, complaints of breach of natural justice should be necessary only as a last resort; it is desirable that there should be specific rules made embodying the principles of natural justice as far as is possible to ensure that those principles be observed.[74]

The accountability of the profession to other groups with interests to be safeguarded is by no means assured. Further steps to assure the accountability of the profession in the making of its rules, both substantive and procedural, should be taken. There is little room, however, for criticising the provisions made for appeals from the Disciplinary Committee, as these already guarantee that the Courts have ultimate control over adjudication[75] (even although this procedure is little used). The lack of precise detail on appeals from the District Societies is, however, inexcusable, there being no extra provision made in s. 112 after the passing of s. 108(3). The further assurance of accountability by the addition of lay members to those bodies conducting hearings should also be implemented as should a positive relaxation of current practice as to publicity given to disciplinary action.

The structure of the disciplinary system does not provide for the strict separation of function which should be made where judicial

71. 49 Can. Bar Rev. 1, 6.
72. Law Society Act 1970, s. 33(12).
73. Supra, n. 71, 6.
74. E.g. perhaps a written statement that no member of any disciplinary bodies should sit on appeals from their decisions.
75. Although there is no access to the courts provided for appeals from District decisions, the final power for their resolution lies with the N.Z.L.S. or its Disciplinary Committee.

powers are exercised; the situation is complicated further by the multiplicity of levels at which decisions as to whether or not further disciplinary action is warranted can be made. The gatekeeping, investigatory and judicial functions must be allocated far more carefully than they are. The District Societies exercise all three functions, a situation necessitated by the volume of complaints dealt with at that level and mitigated, so far as the practitioner charged is concerned, by the fact that he can appeal to the Disciplinary Committee. This goes some way in achieving a uniform standard which is otherwise difficult to discern in comparing the various societies. However, the public's interest is not so concerned with uniformity as to *strictness* of enforcement of standards at this level, as with the dangers of varying degrees of *leniency* which may prevent cases warranting the Disciplinary Committee's attention going forward. An acceptable disciplinary system should avoid this danger as it should also avoid the problem of possible prejudgment where the same body may find a prima facie case and then proceed to give it a full hearing. A suitable solution to the difficulty raised on both counts would be the creation of one body to investigate complaints and to determine what procedural action is necessary.[76]

The possibility of bias by predetermination where one's peers exercise judicial and penal powers cannot be entirely eliminated. Few practitioners will not at one time or other have expressed views on matters coming before them. In the case of the legal profession the matter has not arisen in practice. The possibility that bias can be present cannot, however, be regarded as entirely satisfactory, although it arises from an inherent defect in the principle of allocating such powers of self-government to any profession. The problem is, however, somewhat alleviated by allowing an appeal as of right to the court where the matter in a particular instance of grievance could be raised.

This paper has considered only the disciplinary system of the currently structured legal profession; how it fails in its guarantees and how it might be improved within the profession's overall existing organisation. This is not to say that a review is not justified of other aspects of the profession, e.g. the degree to which democratic values are enshrined in the structure of the profession itself; how the ordinary member of the legal profession might exert his influence on matters of concern to the profession as a whole (including

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76. Perhaps the District Society President should retain his function (as in Wellington) of determining whether or not a complaint discloses wrongdoing rather than misunderstanding on the part of the complainant. Complaints disclosing wrongdoing should then pass immediately to the investigating authority to determine whether or not a prima facie case is established and whether a District Council or the Disciplinary Committee should hear it, depending on the gravity of the offence. If it is to be referred to a District Council, perhaps a more appropriate practice would be for a Council other than that of the practitioner's District Society to hear the matter. This would reduce both the dangers of prejudgment and of parochialism in dealing with practitioners known well to the adjudicating body.

disciplinary matters). Such a study would raise many issues of internal politics and viability outside the scope of this paper but one should not overlook the fact that if basic changes in the structure of the profession are seen as desirable, a wholly new approach, with entirely different systems in disciplinary matters, might be required.

One factor of general concern has, however, been revealed; elements of mutual trust are strong in the legal profession; so strong that lawyers have tended to rely on them as sufficiently assuring the maintenance of standards of conduct. Lawyers show marked reluctance to submit to the stringent 'legal' form which a guaranteed assurance of all the interests to be protected demands, even although they tend to insist that other bodies with judicial powers operate according to just such stringent forms. Are lawyers so different that they should be excepted?

W. R. FLAUS.