

The office of the Legal Services Commissioner – consumer protection

By Steve Mark

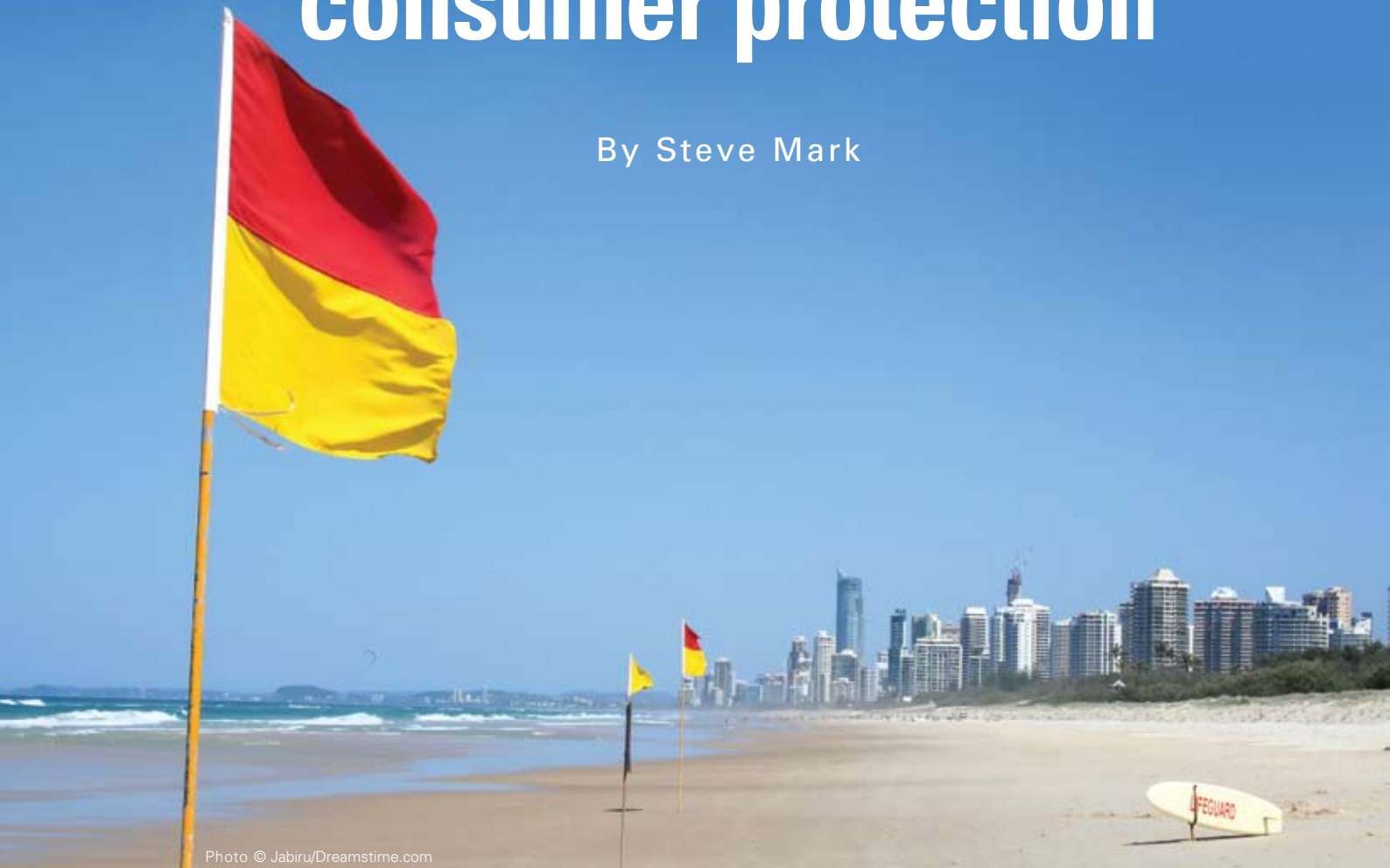


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In today's current financial climate, the protection of consumers has become a hot topic.

Over the past few weeks, we have seen the introduction of an array of new regulations, both in Australia and overseas, designed to protect consumers who have been adversely affected by the global financial crisis. On 3 October, for example, the Rudd government announced an overhaul of the consumer credit laws, as a result of which mortgages, margin lending and other financial advisory services will be regulated at the Commonwealth level. The government said the move was aimed at forcing deferred deposit lenders to lend responsibly, including assessing borrowers' capacity to repay loans. A stronger regulation of consumer credit will, it is hoped, improve protection to consumers by having one set of laws and rules. It was as

if someone had switched on a light and discovered a cure – protecting consumers through regulation. A cure that the legal profession has known about for at least 15 years.

In 1993, the NSW Law Reform Commission published a report entitled 'Scrutiny of the Legal Profession: Complaints Against Lawyers'. The Commission examined whether the complaints-handling system in NSW in relation to legal practitioners was adequate, or whether an alternative system was needed. At that time, the complaint-handling system, administered by the Councils of the NSW Bar Association and the Law Society of NSW, was primarily concerned with upholding high ethical and practice standards within the profession. In other words, the Councils established the standard expected of practitioners, and when that

standard was not reached, the practitioner was disciplined or removed. This was the 'get rid of the bad apples' approach to professional improvement. While this approach is essential to any professional regulation programme, on its own, it has two fatal flaws: first, it is too static and, second, it gives pitifully little value directly to the consumer.

After an extensive investigation, the Commission concluded that the existing system of handling complaints against lawyers did not serve the needs of complainants, the practising profession, or the community at large. Because the current regulatory system was discipline-based and not consumer-focused, more than 90 per cent of complaints were being dismissed. The Commission recommended that major changes needed to be made to the system – specifically, that it be more consumer-oriented. An independent regulatory body should be established to oversee the complaints regime and a new category of complaints referred to as 'consumer disputes' should be created.

On 1 July 1994, the Office of the Legal Services Commissioner (OLSC) began operations. The OLSC was established as part of a co-regulatory system with the Law Society of NSW and the NSW Bar Association to resolve disputes and investigate complaints about professional conduct. The OLSC's ultimate objective was to reduce the number of complaints made about legal professionals.

The function and role of the OLSC is set out in Part 7.3 of the *Legal Profession Act 2004* (LPA 2004). Section 688 of the Act provides my office with a wide range of powers.¹

A major underlying conceptual issue, which forms part of our philosophical base, is found in the dichotomy between the perception of law and justice held by consumers of legal services and that understood by the profession. Stated simply, consumers of legal services are almost always seeking justice. The difficulty arises when what they receive from their legal practitioner (or the legal process) is not justice, as they perceive it, but law. Members of the community who seek justice almost exclusively consider justice in terms of outcome, while the profession, when confronting the concept of justice, almost always discuss it in terms of process. This dichotomy inevitably leads to lawyers and clients not only speaking different languages, but having totally different mindsets.

The OLSC has sought to address this dichotomy by developing and maintaining effective complaint-handling processes; promoting compliance with high professional and ethical standards; encouraging an improved client focus within the profession to reduce causes for complaint; and promoting realistic community expectations of the legal system.


By adopting these measures we have, in fact, seen a marked reduction in the number of complaints being made about legal practitioners since the OLSC was established. In the first year of operation the OLSC received 2,801 written complaints and 6,700 enquiry line calls. In 2008, the OLSC received a total of 2,653 formal written complaints and 9,078 enquiry line calls. This decrease is particularly impressive when we consider the increase in the number of

legal practitioners in NSW, from about 12,000 in 1994 to over 20,000 today.

MAKING A COMPLAINT

The OLSC receives all complaints about barristers and solicitors in NSW. The complaints process usually starts when a complainant telephones the OLSC's enquiry line to discuss their complaint on an informal basis with trained OLSC staff. During the telephone call, an OLSC enquiry line officer will discuss the nature of the complaint. Enquiry line staff cannot give legal advice, but they can assist the complainants by clarifying the points in dispute, explaining their rights, helping them to consider their options and mediating simple matters.

The OLSC encourages complainants first to try and resolve their complaint with their solicitor or barrister by talking, or writing to them, before making a formal complaint. If complainants do not wish to resolve their complaint in the first instance with their barrister or solicitor, the enquiry line officer will notify them that they can make a formal complaint. A complaint is formally made when a complainant lodges a complaint form or forwards a letter of complaint to the OLSC. The complaint form can be downloaded from the OLSC's website.² Section 506 of the LPA 2004 provides that a complaint must be made within three years of the conduct that is the subject of the complaint. >>



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TYPES OF COMPLAINTS

Once a complaint is received at the OLSC, it is examined to see whether it is a 'consumer dispute' or whether the complaint raises allegations of misconduct against a practitioner.

'Consumer disputes' are disputes between legal practitioners and users of legal services and do not involve misconduct. Examples of consumer disputes are complaints about poor communication, costs, mistakes, delays, handling of documents and poor service. More than 50 per cent of the complaints we receive can be classed as consumer disputes. In 2007/2008, the OLSC resolved 1,335 such consumer disputes.

Any complaint that raises a question of misconduct on the part of the practitioner will be investigated. Such conduct can amount to either unsatisfactory professional conduct, or professional misconduct.

'Unsatisfactory professional conduct' is defined by the LPA 2004 as conduct occurring in connection with the practise of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.³

'Professional misconduct' is defined in the LPA 2004 to include unsatisfactory professional conduct that involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence and

conduct, whether occurring in connection with the practise of law or otherwise, which would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.⁴

The OLSC deals with a complaint as efficiently and expeditiously as possible. Under the LPA 2004, practitioners are notified of a complaint and kept informed about the progress of the complaint.

RESOLVING A CONSUMER DISPUTE

One of the core functions of the OLSC is to attempt to facilitate resolutions of consumer disputes, including costs disputes, between legal practitioners and their clients, through the use of mediation. Most consumer disputes are handled by OLSC 'Mediation & Investigation Officers' (MIOs) at the request of either complainants or practitioners. Some disputes are referred to the Law Society of NSW, or to the NSW Bar Association.

Mediation by the OLSC involves an MIO attempting to resolve an issue by establishing contact with each party by telephone and hearing each party's version of events, with a view towards resolution. The process can take anything from a couple of days to a number of weeks. In some cases, there may be a formal face-to-face mediation. The OLSC takes the view that practitioners and clients should be encouraged to resolve their problems together. The outcomes of the mediation can include agreement on the

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bill of costs, an apology or explanation, or work performed by the practitioner at no charge to fix a mistake.

COSTS ASSESSMENT

Costs assessment is an alternative course of action that is available to both complainants and practitioners. The costs assessment scheme is run by the Supreme Court of NSW. Under the scheme, an independent, court-appointed costs assessor will consider the bill and the client's objections to it, and decide a fair and reasonable amount of costs for the legal services provided. This is a service that the OLSC cannot provide. There is no court hearing because the decision is based on the written material that the lawyer and the client submit. The OLSC does not have the power to determine/assess whether costs are 'fair and reasonable'; it can deal with complaints only in relation to gross overcharging.

There is an application fee of \$100, or 1 per cent of the amount of costs remaining unpaid or in dispute at the time of making the application, whichever is the greater.⁵ If the practitioner did not disclose costs before undertaking the work, s/he pays the assessment fee; otherwise, it is paid by the person who applied for the costs assessment. The client should apply for costs assessment within 12 months of receiving the bill. However, an assessor may deal with an application made out of time, if s/he considers it to be just and fair to do so.

On completion of the assessment, the costs assessor will issue a Certificate of Determination, which is binding on all the parties.⁶ The costs assessor may also refer the complaint to the OLSC. A person who is not satisfied with a costs assessor's determination may apply for a review of the determination by a panel of two costs assessors. There are also limited rights of appeal to the Supreme Court.

INVESTIGATING ALLEGED MISCONDUCT

My office may refer complaints that raise a question of misconduct to the Law Society of NSW or the NSW Bar Association (the professional associations) for investigation, or handle the complaint itself. Investigations that raise a conflict of interest with either of these bodies, or important policy issues, are conducted by the OLSC. Approximately 75 per cent of investigations are handled by the OLSC and 25 per cent are handled by the professional associations. We monitor investigations by the professional associations and occasionally intervene to re-examine matters. Complainants who are unhappy with the outcome of their investigation have the right under the LPA 2004 to ask the Commissioner to review the decision. Investigations conducted by the OLSC cannot be reviewed.

Complaints as to a practitioner's conduct may be dismissed, or disciplinary action may be taken. Disciplinary action can include a caution or formal reprimand that remains on the practitioner's record. In the event that the Commissioner is satisfied that there is a reasonable likelihood that the practitioner will be found guilty of professional misconduct by the Administrative Decisions

Tribunal (ADT), the OLSC or the professional associations, must initiate proceedings in the Tribunal.

The OLSC is required under s577 of the LPA 2004 to keep a register of disciplinary action taken against barristers and solicitors. The main aim of the register is to provide consumers with access to information that can help them to choose a legal practitioner. In addition to the consumer benefits, the register also acts as an incentive to the profession to develop mechanisms that reduce complaints and improve and better market their services.

The register contains information about disciplinary action by the Legal Services Commissioner, the Law Society of NSW, the NSW Bar Association, the Legal Services Division of the ADT and superior courts. At present, the information contained in the register pertains only to practitioners in receipt of disciplinary action from 4 October 2002.⁷

RESPONDING TO A COMPLAINT

Section 660 of the LPA 2004 requires a practitioner to respond to a request by me for any information relevant to a complaint. Failure on the part of a practitioner to provide information or documents or otherwise assist my office, without reasonable excuse, is declared by s671(1) of the LPA 2004 to be professional misconduct. A large number of the prosecutions brought against practitioners are due to failure to respond to a s660 notice. A failure to respond can >>



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ultimately result in a practitioner being struck off the roll of practitioners.

Practitioners who respond to such a request for information promptly and constructively will avoid a prosecution. In some cases, we can even assist in restoring the relationship with the client. We recommend that practitioners take the following measures if they receive a request for information from the OLSC:

- Prioritise the response;
- Be aware of the timeframe for responding;
- If in doubt about what is needed in the response, contact the relevant OLSC officer;
- If unable to respond to the letter of request within the timeframe stipulated, let the OLSC know and ask for an appropriate extension;
- Answer all of the questions set out in the letter of request and, if unable to answer the question(s), provide the best response possible and reasons as to why the questions cannot be answered;
- Provide all relevant details in relation to the request for information, even if they are not requested; and
- If concerned, obtain legal advice, but legal advice cannot be used as an excuse to delay the response.

COMPENSATION FOR COMPLAINANTS

Clients who complain to the OLSC about legal practitioners usually do not receive compensation, even when disciplinary action is taken against the practitioner in the ADT. Under the *Legal Profession Act* the Commissioner and the Tribunal can order compensation, but only in cases where:

- there is a reasonable likelihood that the practitioner will be found guilty of unsatisfactory professional conduct or professional misconduct;
- the complainant has suffered a loss as a result of that conduct;
- it is in the interests of justice; and
- the complainant has not received, and is not entitled to receive, compensation from the Fidelity Fund or compensation under an order made by a court (including compensation as a result of negligence proceedings against the lawyer).

The ADT can also make compensation orders if it finds the practitioner guilty of professional misconduct or unsatisfactory professional conduct and the complainant has suffered financial loss – costs incurred, income foregone, rights or entitlements now lost or payments actually made. The amount of compensation awarded by the ADT is limited to \$25,000, and the maximum compensation by the Commissioner is \$10,000, unless the practitioner consents to a higher amount.⁸

Complainants who want compensation from a legal practitioner usually have to take private legal action against the practitioner for professional negligence. Legal action can be taken in the courts or in the Consumer, Trader and Tenancy Tribunal (for claims of under \$25,000). The OLSC does not play any part in private court actions for professional negligence.

PROTECTIVE JURISDICTION

The role of the OLSC is often misunderstood, our main responsibility being to protect the community from unscrupulous lawyers rather than providing civil remedies to individual complainants. We do this by imposing restrictions on practice or striking off solicitors and barristers from their respective professional rolls. While this protects the community from future transgressions, complainants themselves rarely receive any form of damages or compensation. Dealing with this difference in expected outcome is a challenge, as it requires that my office ensures that the complainant understands exactly what results are possible. ■

Notes: **1** '(a) to receive complaints about unsatisfactory professional conduct or professional misconduct of Australian lawyers or Australian-registered foreign lawyers, (b) to assist and advise complainants and potential complainants in making and pursuing complaints (including assisting complainants to clarify their complaints and to put their complaints in writing), (c) to initiate a complaint against an Australian lawyer or an Australian-registered foreign lawyer, (d) to investigate, or take over the investigation of, a complaint if the Commissioner considers it appropriate, (e) to refer complaints to the appropriate Council for investigation or mediation in appropriate cases, (f) to monitor investigations and give directions and assistance to Councils in connection with the investigation of complaints, (g) to review the decisions of Councils to dismiss complaints or to reprimand Australian lawyers or Australian-registered foreign lawyers in connection with complaints, (h) to take over investigations or to institute proceedings in the Tribunal against Australian lawyers or Australian-registered foreign lawyers following a review by the Commissioner, (i) to conduct regular surveys of, and report on, the views and levels of satisfaction of complainants and respondent Australian lawyers with the complaints handling and disciplinary system, (j) to monitor the refusal to grant, cancellation and suspension of practising certificates under Part 2.4 on grounds relating to fitness to practise (for example, in connection with acts of bankruptcy, the commission of indictable offences or tax offences or failures to give required notifications), (k) functions conferred on the Commissioner under Division 7 of Part 2.4 and Part 4.7 of Chapter 4, (l) to review the provisions and operations of Chapter 4 in accordance with section 494 (4), (m) to monitor generally the exercise of regulatory functions by the Councils (other than the imposition of conditions on practising certificates), (n) to review legal profession rules, (o) to assist the Councils to promote community education about the regulation and discipline of the legal profession, (p) to assist the Councils in the enhancement of professional ethics and standards, for example, through liaison with legal educators or directly through research, publications or educational seminars, (q) to report on the Commissioner's activities under this Act.' **2** http://infolink/lawlink/olsc/ll_olsc.nsf/pages/OLSC_complaintform. **3** *Legal Profession Act 2004* (NSW) s496. **4** *Ibid*, s497. **5** Supreme Court of New South Wales, Schedule of Fees for Costs Assessment Applications, available at http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_costforms#Sch accessed on 27 January 2009. **6** Section 368 of the *Legal Profession Act 2004*. **7** The register can be accessed <http://infolink/olsc/nswdr.nsf/pages/index> **8** Section 571 of the *Legal Profession Act 2004*.

Steven Mark was appointed as the first Legal Services Commissioner for NSW in 1994. He has lectured and consulted widely throughout Australia on human rights issues and sound management practices in both the public and private sectors. He also serves as Chairman of the Australian Section of the International Commission of Jurists (ASICJ). **OLSC PHONE** (02) 9377 1800 **EMAIL** olsc@agd.nsw.gov.au.