Without Prejudice

CLIENTS AND CONDUCT

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The recent ILP forum was addressed by (left to right) Mark Richardson, CEO, Law Society of NSW, the Hon Justice Shaw and Legal Services Commissioner, Steve Mark.

Trends and developments keep us busy

The OLSC is becoming more and more adept at noticing trends and monitoring change relating to complaints we receive as well as in our performance – see story below on the overall findings of the customer satisfaction survey we undertook in December last year.

Recently for example, we've noticed an increase in the number of solicitors acting in conveyancing matters who are not adhering to mandatory costs disclosure – see page 2 story.

We also aim to be at the forefront of legislative reform that supports high ethical compliance and an improved consumer focus amongst the profession at the same time as promoting more realistic expectations among the general community about the legal system.

We have been working with the NSW Bar Association, the Law Society of NSW and the Attorney General's Department on compiling the essential recommendations of previous reviews of the *Legal Profession Act 1987* in order to put these forward as suggested amendments.

Staff have been presenting workshops to university law students about the co-regulatory system and the complaint-handling process. Plans are also afoot for community sector consultations.

We've also been busy absorbing some of the complexities raised at the forum on incorporated legal practices (ILPs) held earlier in the year and attended by over 30 stakeholders. Most debate focussed on the definition of "appropriate management systems" and the ramifications of applying audit powers to legal practices in relation to such systems.

Resolution and negotiation of issues relating to incorporated legal practices will be an ongoing process and I will continue to update you through *Without Prejudice.*

Steve Mark
Legal Services Commissioner

Complaint-handling improves over last two years

Clearer communication from the OLSC, better understanding among consumers about the reasons for complaint results and complaints being handled in a timelier manner are among the overall findings of an OLSC customer satisfaction survey undertaken late last year.

Other improved complaint-handling processes since the previous survey of 2000 include better understanding of complaints by staff and increased professionalism among OLSC staff.

More practitioners reported making improvements to their practice management after involvement in the complaint process than was the case in the 2000 survey, with about 60 per cent indicating improvements to such things as documentation.

Drawn from 550 complainants and 542 practitioners randomly selected from among 2758 complaints completed in 2001-2002, Joanne Treacy, the OLSC's Manager of Information Services and Systems, says the survey provides much valuable information and suggestions for further improvements.

"Despite the OLSC recommending over the inquiry line and on the complaint forms that complainants always contact the practitioner first before formalising a complaint, practitioners identified that most people don't first do this so we will be looking at ways to encourage complainants to contact their practitioner first.

"The most frequent answer to questions about where improvements were needed, was that none were required – which is pleasing. Practitioners made specific suggestions to improve timeliness and for staff to be clearer about what the complaint is before sending it to the lawyer," Mrs Treacy says.

Complainants whose complaints were dismissed were unhappy with the reasons given for the dismissal, suggesting that satisfaction is linked to outcome. Reasons for dismissals are based on the *Legal Profession Act 1987.* Respondents believe they will "get justice" and are confused when they don't get the outcome they consider to be just, but an outcome based on law nonetheless.

Complainants indicated they received the most help in dealing with their complaint from the OLSC, friends, family and the Law Society and they indicated they

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wanted more by way of results than they did in the previous survey. Specifically, complainants wanted to improve the service from their lawyer, they wanted their lawyer reprimanded and they wanted their problem with the lawyer solved.

Most respondents had been informed about the complaints process by the Law Society, Bar Association and other lawyers and more people first complained to the OLSC than was the case in the 2000 survey. Respondents were also less likely to use other complaint sources – such as the Ombudsman's Office, the Attorney General's Department and Members of Parliament – than in the previous survey.

Consumers identified in both the 2000 and the 2002 survey that OLSC staff were courteous and professional but both practitioners and complainants identified the need for improved communication from the OLSC.

Practitioner respondents were mostly male with more than 20 years experience in litigation, followed by those mostly involved in family law, generalist practice, conveyancing and personal injury law.

Survey findings likely to be acted on in the short term include better explanations from OLSC staff to practitioners about what can and can't be done by the OLSC, further clarification of complaints before they are forwarded to practitioners, and advising practitioners that they cannot charge for work undertaken in response to a complaint.

Even though timeliness has improved since the 2000 survey, consumers still suggest room for further improvement.

The OLSC will investigate strategies to better inform complainants whose complaints are dismissed about the reasons for the dismissal and will direct more effort to increasing the number of consumers who approach the practitioner for resolution prior to formalising a complaint with the OLSC.

Mrs Treacy says the survey format will be improved to elicit better information and a better response rate than the 28.6 per cent achieved for the 2002 survey.

Manager, Information Services and Systems, Joanne Treacy

Communication can avoid surprises

Despite mandatory costs disclosure provisions for all legal work undertaken by lawyers over the $750 allowed for under Rule 1.2 of the Solicitors' Rules, the OLSC is receiving an increasing number of complaints relating to conveyancing matters where written costs disclosure has not occurred.

Additionally, conveyancing related complaints about practitioners who deduct costs from settlement monies without previously advising clients, have led to complaints from clients who've felt their lawyer has 'helped themselves' to the monies without providing a proper bill.

The reasons for this increase in complaints are unclear.

One possibility, according to OLSC Mediation and Investigation Officers (MIOs), is that clients who return to the same practitioner for their conveyancing needs may be quite familiar with the solicitor's costs structure and neither side thinks disclosure is necessary.

Alternatively, the solicitor might perceive that his or her clients don't want to get bogged down in talking about conveyancing costs. Either way, solicitors and licensed conveyancers must remember that written costs disclosure is not optional – it is a mandatory requirement as specified in Part 11 of the *Legal Profession Act 1987*.

Mainly occurring in smaller sized firms or with sole practitioners, such complaints could be avoided if costs were disclosed in writing at the outset. Clients who are informed about the solicitor's billing arrangements, what is involved in the matter and are made aware of who is doing the work, are much happier clients and more likely to return to the legal practice next time. They also have less reason to complain.

It is also possible that many solicitors see conveyancing as such 'bread and butter' legal work that they have come to think mandatory disclosure provisions do not apply.

Despite it being a common practice, the OSLC believes the practitioner should 'go the extra mile' to ensure that the client understands the solicitor's costs will be deducted at settlement.

It can be especially alarming for clients who – in the absence of a written costs disclosure – don't know what costs they are incurring. They can even feel cheated when they discover that costs have been taken out of their settlement or loan without them having had the chance to agree to it or to challenge it.

Part 11 of the *Legal Profession Act 1987* requiring mandatory disclosure also applies to the fees charged by a licensed conveyancer.

Knowing the rules and providing the right information helps solicitors and clients in victims compensation claims

Mark Oakman, Registrar, Victims Services

Statutory compensation schemes for victims of crime have operated in NSW since 1967. Under the *Victims Support and Rehabilitation Act 1996,* the current scheme provides victims of violent crime in NSW with an eligibility-based avenue for compensation and counselling. But confusion about eligibility amongst some lawyers and victims of crime has contributed to the high dismissal rate for applications for compensation to the Victims Compensation Tribunal (VCT).

Although the OLSC has received only nine complaints related to victims compensation matters since July last year, these are likely to be reduced if both lawyers and clients understand the eligibility criteria and the documentation required for an application to the Tribunal.

Mark Oakman, Registrar of the VCT, says unless this is understood solicitors and applicants may in fact be wasting their time in making an application that falls short of the criteria, doesn't fit it at all or because there is no supporting evidence.

"If solicitors provide a good application it makes it easier for the client, it makes it easier for us and it is more likely to lead to a positive result," Mr Oakman says.

The VCT has three primary functions which are to approve counselling, provide monetary compensation to the eligible applicants who have been victims of a criminal act of violence committed in NSW, and pursue restitution from offenders.

There are certain issues clearly outside the Tribunal's jurisdiction as outlined in the Act such as injuries sustained where a motor vehicle has been involved, where only property damage has occurred or where the crime involves no violent conduct between the alleged offender and the victim.

Examples of inappropriate applications to the VCT, says Mr Oakman, include people who apply for compensation for a window broken during a burglary or someone bitten by a stray dog.

The injuries sustained must be valued at least at $7,500 according to the Act's Schedule of Injuries. Once past the threshold an applicant can be awarded up to $10,000 in other costs such as loss of wages and medical expenses. The maximum award for a single act of violence is $50,000.

The Schedule of Injuries can be accessed on-line at www.lawlink.nsw.gov.au/vs/vs.nsf/pages/vctsched

"There is often some confusion amongst people who suffer a relatively minor injury, for example, someone may have been knocked to the ground during a bag snatch and dislocated a thumb.

"That injury is compensable at $3,000 on the Schedule, but with all the associated costs like doctors' expenses and loss of wages which might come to $5,000, they will apply for compensation thinking the total is $8,000 and above the $7,500 threshold.

"But this type of claim will be dismissed because those additional costs cannot be considered under the Act unless the injury itself exceeds the $7,500 threshold," Mr Oakman explains.

Even when the injury does meet this threshold, applications can still be dismissed because the quality of the application is lacking and the claim itself is not supported by material to back it up - something that's essential given the applicant bears the onus of establishing their claim on the balance of probabilities. This is particularly the case where practitioners fail to provide any medical evidence of injury. The OLSC has received complaints about such failures, which, as medical evidence is essential, can amount to unsatisfactory professional conduct.

The VCT also considers the applicant's conduct and their cooperation with the subsequent criminal investigation process when assessing an application.

"For example, when considering an application for injuries sustained in a brawl, the VCT will take into account that you were involved in a fight before you suffered the compensable injury or that you refused to assist the police afterwards and may have to reduce the amount awarded," says Mr Oakman.

Legal costs for preparing an application to the Tribunal are set by the Act at $825 ($750 plus GST).

The Tribunal seeks restitution from convicted offenders for compensation awards. Solicitors should be aware that a "no conviction recorded" result in Court is considered a conviction under the Act for restitution claims.

Approved counselling is also available to eligible victims of violent crime. However, unlike a claim for compensation, the victim does not need to meet any threshold test in relation to the injuries suffered.

The VCT is part of the Victims Services Division of the Attorney General's Department. Further information on compensation, approved counselling and general assistance to victims of crime can be accessed at:

www.lawlink.nsw.gov.au/vs and
www.lawlink.nsw.gov.au/voc

Jury members must never be contacted

Most practitioners know they are prohibited from approaching juries for information but a recent complaint to the OLSC highlights that some don't realise jury members and their deliberations remain protected long after the case is finished and the jury has been dismissed.

The OLSC recently received a complaint from a judge about a practitioner who had written to a former juror asking for information about the case for which he had been empanelled.

The practitioner, who had made the approach on behalf of a client who was researching a legal issue, was unaware that he was breaching section 68A of the *Jury Act 1977.* This provision prohibits any person from approaching a member of a jury, past or present, in order to obtain information about the deliberations of that jury.

The Legal Services Commissioner issued the practitioner with a reprimand.

NAVIGATING THE DEBT COLLECTION MINEFIELD

Solicitors acting on behalf of debt collection companies can sometimes be construed by debtors as having a conjunction of interests.

The OLSC knows of solicitors acting on behalf of debt collection companies who have fuelled perception of a close and perhaps unhealthy relationship between the solicitor and the debt collection company by sending letters of demand using their firm's letterhead but providing as contact details only the debt collection company's BPAY facilities and phone number.

Perceived conflicts of interests and breaches of ethical standards and rules can also occur in incorporated legal practices where, contrary to many years of accepted behaviour, receipt sharing now takes place in practices that might comprise a debt collection arm. Here, where profits are shared and derived from the common business, questions could be asked about the potential erosion of ethical standards and the impartiality of the profession.

The 'Statement of Principles' in the subdivision of the Rules relating to a solicitor's relations with third parties, is prefaced with the following:
"Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest."

Rule 34 requires a solicitor to be truthful in their dealings with third parties on behalf of a client. It also emphasises that a solicitor should act with professional independence and avoid surrendering their own integrity in pursuit of a client's cause. A solicitor acting on behalf of a debt collection company who exaggerates the consequences of non-payment, or states that criminal proceedings are imminent, or says that property will be seized to satisfy a debt when they know this isn't the case, is engaging in misrepresentation.

A solicitor who provides correspondence to debtors on their own letterhead but provides only the debt collection company contact details, is breaching Rule 35, which says a practitioner must not allow their business name or stationery to be used by a debt collection or mercantile agent in a manner that could mislead the public.

Rule 41 states that the author's name should be shown to enable clients to direct their correspondence to the right person.

Clarity between the role of lawyer and debt collector would lead to less confusion and fewer complaints.

Reprimands increasingly issued by Commissioner

The Legal Services Commissioner has issued 26 reprimands since last July compared to a total of six issued in the previous financial year.

Empowered by section 155(3)(a) of the *Legal Profession Act 1987*, the Commissioner can reprimand a practitioner only in circumstances where he is satisfied there is a reasonable likelihood the practitioner will be found guilty by the Administrative Decisions Tribunal (the Tribunal) of unsatisfactory professional conduct, he is satisfied that there is no reasonable likelihood the practitioner will be found guilty of professional misconduct, and the practitioner consents to the reprimand.

A reprimand is not a public record and, although it remains permanently on the practitioner's record, that record is not published on the disciplinary register maintained by the OLSC.

Lynda Muston, Assistant Commissioner (Legal), says the issue of a reprimand is a quick and efficient sanction and it saves Tribunal time, costs and staff time.

"Additionally, reprimands are effective because they can be accompanied by the payment of compensation in circumstances where that is appropriate", Ms Muston says.

Conduct relating to delay was the substance of most of the reprimands issued and in nearly half of these cases the practitioner had failed to progress the clients' matters diligently.

Impacts of the delay upon the clients varied; matters for three clients languished in the court lists, another's was not commenced within the limitation period while the delay led to another client not obtaining a refund from the Office of State Revenue. The Commissioner negotiated payment of compensation by the practitioner in two of these matters.

Three reprimands were issued because a practitioner had failed to advise and/or communicate with the client, leading to disgruntled clients who were unaware of the progress of their matters. In one case however, the practitioner's failure to bring specifically to the attention of a client an easement on property she was purchasing, led to the client having to sell the property because the easement precluded her from developing the property the way she had wanted.

The remaining reprimands were issued for witnessing an affidavit which knowingly contained a false statement (with mitigating circumstances), acting without instructions and communicating with a juror.

A reprimand remains permanently on the practitioner's record and can be considered in the event that another complaint is received about the practitioner.

Assistant Commissioner (Legal) Lynda Muston

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