

Without Prejudice

CLIENTS AND CONDUCT

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

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REGULATION FOR PROFESSIONALISM

By Steve Mark, Legal Services Commissioner (NSW)

During my recent discussions with a number of regulators and academics in the United States, Canada and the United Kingdom it has come to my attention that there is a common belief that regulation and professionalism are concepts that threaten rather than support each other. It was expressed to me on more than one occasion that increases in regulation are an unnecessary burden and unduly compromise professionalism. I was more than astounded by this view. I am well aware that many practitioners complain about the amount of regulation they are subjected to, but hearing the view that regulation thwarts professionalism was indeed a first. This is not a view I am accustomed to and one that I feel I ought to say a few words about, because in Australia we are about to be subjected to a change in the manner of regulation of the legal profession.

It is my strong belief that regulation and professionalism can coexist symbiotically. In my view regulation can and often does actually complement professionalism. This is particularly true in relation to the regulation of the legal profession as we have experienced in NSW. It is also particularly true where there is a stated purpose for the introduction of regulatory measures.

At the Office of the Legal Services Commissioner, for example, we have, on a number of occasions, made a very clear statement that our primary purpose is to reduce complaints against legal practitioners within a context of client

protection and support for the rule of law. The way in which we have proceeded to achieve this purpose has been through effective and responsive regulation that seeks to encourage practitioners to adopt more ethical work practices. When our Office deals with a complaint against a legal practitioner, for example, my first instinct, where possible and appropriate, is not to prosecute that practitioner but to work with him/her in trying to determine the underlying basis of the complaint. I have always viewed that a major role of the OLSC is to assist legal practitioners and work with them in entrenching an ethical culture and as a result

improving professionalism (and reducing complaints).

Similarly, in the regulation of incorporated legal practices, I have actively promoted cooperation with the profession. The OLSC worked together with the profession to determine what would satisfy the requirement that incorporated legal practices establish and maintain appropriate management systems and we work together with incorporated legal practices when they are completing their self-assessment forms. We know that this arrangement has been working very well as we have received numerous letters from the incorporated legal practices

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whom we have assisted thanking us for helping them through the process. We also know that the arrangement has been working well because incorporated legal practices who have gone through the self-assessment process have seen complaints against them fall significantly. So, despite the “*additional regulatory burden*” (emphasis added) of incorporated legal practices having to go through the self-assessment process there has been an improvement in ethical practices and a reduction in complaints. These outcomes facilitate an improvement in professionalism.

The two examples I have used demonstrate that, at least in NSW, regulation and professionalism can peacefully coexist. These two examples are not however the only instances where regulation and professionalism in NSW coexists. There are a litany of other examples experienced in my office on a daily basis. This is largely because I have always emphasised that the role of my office is to work together with the profession to achieve better practice and professionalism.

Legal professional regulation is presently undergoing significant changes in Australia. We have a draft new model law that is

remarkably different from the current legislation used to regulate the legal profession. This draft model law uses an outcomes-based approach rather than a proscriptive approach to regulation and establishes a new regulatory structure that if implemented will result in new regulatory bodies, a National Legal Services Board and a National Legal Services Ombudsman.

The new regulatory regime, if implemented in its current form will more than likely establish a regime in which the purpose of regulation is clearly directed at reducing complaints against lawyers and facilitating enhanced ethical practice.

DISCUSSIONS WITH LEGAL REGULATORS IN THE UNITED KINGDOM

Over the last month the Commissioner has had a number of discussions with legal regulators in the United Kingdom about a range of issues including outcomes-focused regulation, alternative business structures and risk management. The Commissioner has spoken to the President and Chief Executive of the Law Society of England and Wales, the Directors of the Solicitors Regulation Authority (SRA) and staff at the SRA, the Legal Services Board, the College of Law in London and the Ministry of Justice.

As we have written in a previous issue of *Without Prejudice* (February 2008) the United Kingdom is currently in the process of revising its regulatory regime and is interested in Australia's approach toward how we regulate the legal services market. The Commissioner spoke to regulators in the United Kingdom about the role and function of the OLSC and the professional associations, the regulatory framework in relation to incorporated legal practices and the philosophical purposes behind regulation. The SRA found the discussions to be so beneficial that they are sending their staff to spend a few days at our office to observe what we do. We will report on their visit in the next edition of *Without Prejudice*.

ISO RE-CERTIFICATION

The OLSC achieved re-certification to *ISO 9001: 2000* in April 2009 with the support of all management and staff. This is the fourth year in a row that the OLSC has gained certification to *ISO 9001: 2000*.

SAI Global conducted a Triennial Recertification Audit of the OLSC's Quality Management System on 12 April 2010. SAI Global found that there is a satisfactory level of input and support from top management at the OLSC to ensure the quality management system provides the intended controls, customer satisfaction and improvement opportunities. SAI Global also found that the OLSC is implementing an effective process for the management of customer complaints, including the implementation of appropriate corrective action measures.

The OLSC is proud of its continued efforts to maintain ISO Accreditation. ISO Accreditation provides numerous benefits, not only internally but also externally to our clients as well as the general community.

DISTINGUISHED VISITING MENTOR DISCUSSION FORUM ON “ETHICS, PSYCHOLOGY & LAWYERS” AT THE AUSTRALIAN NATIONAL UNIVERSITY

On Wednesday 5 May and Thursday 6 May the Legal Services Commissioner and the Research & Projects Coordinator were invited by ANU to attend two discussion forums. The first forum concerned ethics, psychology and lawyer behaviour in large law firms and the second concerned regulation of the legal profession across jurisdictions. Professor Mitt Regan, Co-Director of the Center for the Study of the Legal Profession at Georgetown University in the United States presided over the two forums.

In the first forum concerning ethics, psychology and lawyer behaviour Professor Regan discussed a recent paper he had written about a large U.S. law firm, *Jenkins & Gilchrist*, that had effectively ignored the unethical and ultimately criminal practices of three partners in its tax department. These three tax partners had developed and marketed fraudulent tax shelters for their clients. The law firm, after a lengthy investigation, admitted that it had “failed to exercise oversight and control” over its tax shelter practice. The three partners involved have been indicted and are due to stand trial later this year. Professor Regan led the forum discussion about a concord declining ethics in law firm practice and how an emphasis on business considerations rather than professionalism has weakened lawyer’s commitment to ethical behaviour.

The forum, which included legal ethics academics from a number of universities in Australia, as well as partners of several

large law firms discussed the nature of behavioural patterns in organizational settings and the importance of establishing and implementing an effective ethical culture. The forum recognized that the development of ethics should commence at the tertiary level and continue throughout practice. The forum also recognized that the responsibility for creating an effective ethical culture in practice lies with both the legal profession itself, academics and the regulators of the legal profession.

In the second forum, we discussed the status of legal regulation in Australia, the United States and the United Kingdom. The forum noted that each of these jurisdictions and going through unprecedented changes in legal regulation at present. The forum discussed various issues including outcomes-focused regulation, alternative business structures, including incorporated legal practices and multidisciplinary practices, complaints against firms, risk profiling and legal education.

The forums were extremely beneficial and interesting. There was much discussion during and after each forum about the regulatory and ethical issues raised. The OLSC will be working together with the forum attendees to develop and research these regulatory and ethical issues.

Keep an eye on our website for future papers on these issues.

RECENT PAPERS/ ARTICLES/ SEMINARS

ETHICS SEMINARS IN FULFILLMENT OF RULE 42 OF THE *LEGAL PROFESSION ACT 2004 (NSW)*.

Over the last few months the Commissioner and the Assistant Commissioner (Legal) have presented numerous ethics and professional responsibility seminars to practitioners in fulfilment of the requirements under Rule 42 of the *Legal Profession Act 2004 (NSW)*. Seminars were delivered to a range of organisations including law firms, community legal centres, government organisations and regional law societies.

HYPOTHETICAL, NSW BAR ASSOCIATION

On Wednesday 24 March the Legal Services Commissioner and the Research & Projects Coordinator conducted a hypothetical seminar for barristers at the NSW Bar Association. The hypothetical raised a number of ethical issues for barristers such as dealing with direct access briefs, cases that lack legal merit, looking behind client’s instructions and conflicts of interest.

On 27 May, the Assistant Commissioner (Legal) conducted a hypothetical seminar for barristers completing their reading program.

RECENT PAPERS/ARTICLES/SEMINARS *continued*

ETHICS FOR LAWYERS, CENTRE FOR CONTINUING LEGAL EDUCATION, FACULTY OF LAW, UNSW.

On Thursday 18 March the Legal Services Commissioner presented a CLE seminar on "Ethics For Lawyers." The Commissioner discussed a number of issues including the ethical considerations for costs, identifying and dealing with ethical dilemmas and conflicts of interests. The Commissioner also discussed emerging ethical dilemmas for legal practitioners such as determining when it is appropriate to look behind a client's instructions and secondly, billing practices and the principle of proportionality.

NEW RULE 42 FOR IN-HOUSE COUNSEL, LEGALWISE SEMINARS PTY LTD, SYDNEY.

On Friday 19 March the Legal Services Commissioner presented a seminar for in-house counsel entitled "*Walking the Ethical Tightrope: Balancing the Responsibilities of In-House Counsel to Key Stakeholders.*" The Commissioner discussed the changing role of the in-house counsel from moral compass to moral conscience and beyond and argued that the recently assumed role by in-house counsel of being the moral conscience of the corporation for whom they are employed and gatekeeper is clearly anchored in the public interest and is thus very much in tune with the overriding purpose of the legal profession – to protect the individual from the injustices of the state.

AUSTRALIAN CORPORATE LAWYERS ASSOCIATION (ACLA), SYDNEY.

On Wednesday 3 March the Commissioner presented a seminar for government in-house counsel. The Commissioner focused on the specific work of the government in-house counsel and the role of lawyers in the global financial crisis. The Commissioner also spoke about the obligations of in-house counsel to advise their employers of their fiduciary duties.

Copies of the Commissioners papers are available on the OLSC website at <http://www.lawlink.nsw.gov.au/olsc>

WITHOUT PREJUDICE VIA EMAIL

As indicated in previous issues the OLSC can send out future issues of *Without Prejudice* via email. If you would like to receive *Without Prejudice* via email please contact us at OLSC@agd.nsw.gov.au

Comments ? Suggestions ? Something you'd like to know more about ? Write to the editor Tahlia Gordon at Tahlia_Gordon@agd.nsw.gov.au



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