Without Prejudice
CLIENTS AND CONDUCT
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On 1 July 1994, the Office of the Legal Services Commissioner (OLSC) opened its doors to the public for the first time. That morning, the Legal Services Commissioner, Steve Mark, and a staff of one, met their first complainant waiting eagerly to speak to someone that would listen. That day marked the start of a journey for both the OLSC and Steve Mark into the uncharted waters of complaint handling. Nineteen years later, that journey is still continuing for the OLSC but for it's first Legal Services Commissioner, Steve Mark, the journey has now come to an end.

Steve, this is your last issue of Without Prejudice, how are you feeling about leaving the OLSC after such a long time?

Excited but sad. The OLSC is so much a part of who I am. It has grown with me and I am sad to say goodbye but excited to move to a new world.

When you opened the doors on 1 July 1994 what was the biggest challenge you faced?

In my view, the biggest challenge would have to have been the fact that on the same day that we opened our doors the legislation establishing my office commenced! I was not afforded the luxury of a "start-up period" where I could experiment with different complaint-handling processes and systems. It was all hands on deck, as they say.

In the first week of opening I not only had to set up the office infrastructure, hire staff, buy stationery and set up administrative and complaint handling systems and complaint forms, I also had to build relationships with the professional associations and work out what I was supposed to do with complainants who walked through the front door.

We were the first. There was no precedent office in Australia or the rest of the world to emulate. The model of co-regulation adopted by NSW, that is, an independent regulator working in a relationship with the professional associations in providing both the disciplinary regime and the setting of ethical practice standards was unique. Consequently I had to decide the purpose, vision and mission of the OLSC and how a co-regulatory relationship would in fact work.

What is the purpose, vision and mission of the OLSC and has it changed over the 19 years?

The purpose of the OLSC is to reduce complaints against lawyers within a context of consumer promotion and protection of the rule of law and improving the professionalism of the legal profession. This purpose has remained unchanged since 1994.

The purpose statement I developed was, by and large, predicated on the findings and recommendations of the NSW Law Reform Commission's Report, *"Scrutiny of the Legal Profession – Complaints Against Lawyers"*, published in 1993. In that Report, the NSW Law Reform Commission opined that the system for dealing with complaints before the OLSC came into existence did not serve the needs of complainants, the practising profession or the general public. The Law Reform Commission found that the way in which complaints were then handled took too long, investigations were inadequate and complainants felt isolated from the process. This was because of the manner within which complaints were dealt – the professional associations set ethical standards, lawyers who did not meet those ethical standards were disciplined and angry complainant's concerns were often left uncompensated for and thus unaddressed.

Noting the Law Reform Commission's findings, I decided to move away from only disciplining the "bad apples" to a regulatory model that focused on education, mediation of consumer disputes and discipline where appropriate. As I stated above, the purpose of the OLSC is to reduce complaints against practitioners within a context of consumer promotion and protection of the rule of law and improving the professionalism of the legal profession. That purpose is clearly reflected in the vision and mission statement I drafted all those years ago – to "lead in the development of an ethical legal services market which is fairer, more accessible and responsive", and reduce complaints by:

- "Developing and maintaining appropriate complaints handling processes
- Promoting compliance with high ethical standards
- Encouraging an improved consumer focus in the profession;
- Developing realistic expectations by the community of the legal system."

I wanted the OLSC to recognise that there are multiple aims to an effective regulatory system. These aims include a consumer dimension, with the consequent need to redress the complaints of dissatisfied users of legal services, a practitioner dimension, ensuring the diligence and competence of individual practitioners and a profession dimension, maintaining high standards of ethics and practice for the profession generally. The philosophy behind this approach is formulated on ensuring that the OLSC will make a lasting and significant contribution to raising standards in the legal services industry – to put the profession in better order so to speak – and ultimately to improve the satisfaction with the services delivered by legal practitioners to the community.

What mechanisms and processes did you initially put in place to establish your stated purpose?

One the first things I did when I commenced as Legal Services Commissioner was to develop a comprehensive education campaign to publicise the purpose, role and function of the OLSC which was also directed at improving the ethics of the profession. I then developed a community education campaign that was directed at informing consumers of legal services about the functions and directions of the OLSC.

To aid us in our education program I developed a series of brochures outlining the functions of the OLSC as well as two videos directed at improving communication between lawyers and their clients. The first video was aimed at informing clients of their rights and responsibilities within their relationship with their lawyer. The video provided clients with assistance on how to ensure that good communication between themselves and their lawyer occurs. The video defined the various roles of members of the legal profession and how the legal process works using a personal injury/workers compensation case as an example. The second video, produced for the profession, dealt with common communication problems between a lawyer and their client that often gives rise to complaints. The videos are lighthearted, and are I believe, still used by some universities today.

I also created a series of "Fact Sheets" for consumers of legal services on a range of different topics. The purpose of the Fact Sheets, which still exist today, are to provide information and address the most commonly asked questions about issues relating to costs, costs disclosure, negligence, liens, conflicts of interests etc. The educational program was further augmented by the publication of many discussion papers on a wide range of topics relating to regulation, ethics and legal practice. We have also, over the years, participated in a number of research projects and used the results to guide policies and processes in regulation.

In addition to developing a strong educational program I also established a mediation framework to mediate consumer disputes. At the time my office was established, the legislation gave the OLSC the power to mediate consumer disputes between legal practitioners and clients. The provisions attempted to address the situation where a complainant makes a complaint, but the substance of the complaint might not involve a disciplinary offence.

The power to mediate consumer disputes was a key recommendation of the NSW Law Reform Commission Report and was an attempt to answer consumer criticism that historically over 90 % of all complaints lodged against lawyers in NSW failed to result in disciplinary action against the lawyer, and were therefore dismissed. The model I implemented for mediating consumer disputes shifted the complaints handling paradigm away from an exclusively discipline-based model to one which also recognises the need to address the dissatisfaction experienced by the consumer which is often not resolved by simply disciplining the legal practitioner.

The mediation model I instituted has been a great success. Over the years we have formally and informally mediated many thousands of consumer disputes. This is because the mediation process, which still exists today, is flexible and accessible. The process commences with a call by a complainant to our Telephone Inquiry Line. An OLSC Inquiry Line Officer answers the call and assesses whether a complainant has a conduct complaint and should therefore be sent a complaint form, or whether the complaint is a consumer dispute that can be resolved either informally or formally.

The success of the mediation process is premised on the fact that the process empowers complainants to tell their stories. Many complainants tell my Office that they are intimidated by their lawyer's special knowledge and are unable to question bills or the conduct of their lawyer. The first question our Inquiry Line Officer will ask the complainant is whether the s/he has raised their concern with their lawyer. If not, the Inquiry Line Officer will assist the complainant in raising it with the lawyer on their own or with assistance. The purpose of the mediation process is to initiate a conversation about the issue(s) of concern first between the complainant and the lawyer before a complaint is formally made.

The mediation process effectively allows each party to learn from the other about their concerns. It is an effective educational tool. The practical impact of mediation is a better informed client and a lawyer who not only understand's the client's needs, but also may not have lost a customer.

What have been the major success during your 19 years as Legal Services Commissioner?

Following on from the last question, the mediation process I put in place to deal with consumer disputes has been one of the major successes of the OLSC. The process is not only cost effective, in that we use university students to staff the OLSC Telephone Inquiry Line together with OLSC officers, but the mediation process has also stopped complainants from lodging a formal written complaint.

In the latest OLSC Annual Report, the Office received 7,920 calls on our Inquiry Line and only 2,758 of those calls resulted in a written complaint. These statistics have remained fairly constant over the years. That is, the OLSC receives a considerable number of Telephone Inquiry Line calls and many do not eventuate in a formal written complaint.

My stated purpose in setting up the Inquiry Line as an element of our education towards compliance strategies was to ultimately reduce the number of written complaints to the OLSC. I am proud to state that this has occurred. Since commencing in 1994

complaints against legal practitioners has remained static at approximately 3,000 complaints per year against a rapidly growing legal profession. In the first year of operation the OLSC received 2,801 written complaints and 6,700 inquiry calls. In 2011-2012 the OLSC received 2758 written complaints and 7920 inquiry calls. During that 18-year period the legal profession has grown from about 12,000 legal practitioners to almost 30,000 legal practitioners.

Another major success has been our approach to regulating the legal profession. Unlike most regulators that regulate on a 'reactive' basis, I decided to adopt a regulatory model that is 'proactive'. I decided that the foundation of the OLSC's regulatory regime should be a 'conversation'. That is, the OLSC should regularly engage with the profession and consumers of the legal profession to ensure that we are aware of, and understand the paradigm within which lawyers practise. I am proud to say that we have been participating in those conversations for the past 19 years.

I strongly believed when I first commenced as Legal Services Commissioner that the OLSC's role as a regulator should be to work with the profession in entrenching an ethical culture and promoting professionalism in legal practice, while reducing complaints. Early on I used the term 'education towards compliance' and this framework is today the dominant paradigm of the OLSC and sits well within our philosophical approach of reducing complaints against lawyers and regulating for professionalism.

The OLSC's 'conversations' are not just limited to legal practitioners or complainants however. We also engage with a range of organisational stakeholders, including the professional associations, legal profession indemnity insurers and other legal regulators in Australia and overseas on a regular basis about a wide range of issues affecting legal practice. These conversations allow us to better understand the dynamics of the domestic and global legal services marketplace and to be kept abreast of practice developments and behaviour.

Our ability to design a proactive regulatory model and have conversations has been enhanced by amendments to the legal profession regulations imposing an outcomes-based framework. In relation to incorporated legal practices (including multidisciplinary practices), for example, this framework requires incorporated legal practices (ILPs), irrespective of their size, to assess their practice against ten principles governing good office conduct and ethical behaviour. The purpose of requiring an ILP to undergo this process is to ensure that they have considered and implemented an "ethical infrastructure" that supports and encourages ethical and client–focused behavior. From a regulatory perspective, these requirements are intended to preserve the ethics and integrity of law firms and increase professionalism. The implementation of such an ethical infrastructure also provides better protection for consumers of legal services. This is because the management systems that ILPs are required to maintain act as a quasi-educative mechanism encouraging practitioners to adopt best practice in order to achieve compliance with the requirements of the legislation and the ethical duties of a legal practitioner.

The ethical infrastructure requirement imposed on ILPs has proven to be a great success. We are seeing, by and large, better and more ethically managed legal practices. We are also seeing a fall in the number of complaints. According to the results of a research study we conducted in 2008, together with Dr Christine Parker, of the University of Melbourne, on average the complaint rate (average number of complaints per practitioner per years) for ILPs after self-assessment against our ten objectives was two-thirds of the complaint rate before self-assessment. This is a huge drop in complaints. The study involved analysing 620 initial self-assessment forms from ILPs. In addition to the complaints data the study also found that the majority of ILPs assess themselves to be in compliance on all ten objectives from their initial self-assessment (62%). Of the remaining 38%, about half have become compliant within three months of the initial self-assessment. The study further revealed that ILPs have the highest rates of self-assessed compliance with trust accounting obligations and the lowest rates of self-assessed compliance with management systems to ensure good communication and good supervision of practice.

Following this study in 2012, the OLSC participated in a research study with Dr Susan Saab Fortney, Howard Lichtenstein Distinguished Professor of Legal Ethics and Director of the Institute for the Study of Legal Ethics, Hofstra Law School, Hofstra University to evaluate the relationship between the self-assessment process and the ethics norms, systems, conduct, and culture in firms. The study revealed that the framework for regulating ILPs had the greatest impact on firm management and risk management issues. The study also revealed that regardless of the size of the firm, the regulatory framework utilised, assisted in shaping the attitudes of many directors and serves as a valuable learning exercise that enabled firms to improve client service.

Another major success has been in the area of education. I spoke about the education campaign I developed in the early years above but there is more to be said.

From the moment the OLSC first opened it's doors we have worked tirelessly to ensure that the profession and the public are educated about the role of the OLSC, issues affecting legal practice, professional misconduct, legal and policy development and what is happening overseas with legal practice. The OLSC's education campaign is delivered through our core functions of complaint handling but also through the numerous lectures, seminars, ethical hypotheticals and conferences, staff at the OLSC deliver each year. In some years it is not unusual for the OLSC to present between 70 and 100 lectures to university students, law graduates at the College of Law, law firms and Continuing Professional Development (CPD) seminars and conferences.

The educational model we instituted has also been supplemented by a strong publications portfolio. The OLSC has over the years produced an abundance of written material for consumers of legal services as well as the profession on a range of issues relating to legal practice. This material consists of our bi-monthly newsletter, *Without Prejudice*, our fact sheets (which now total seventeen), our Annual Report, our OLSC brochures, our educational videos and the many papers we publish on legal practice. We aim to provide material, which helps lawyers gain a better understanding of the issues, which often lead to complaints. In these publications we offer practical tips on avoiding complaints and often include information for consumers on how to get the most from their relationship with their lawyer. These publications can be found on our website at **http://www.olsc.nsw.gov.au**

I am proud to state that in furthering our educational campaign. The OLSC has developed dynamic relationships with university law schools in NSW, interstate and overseas. Universities play a vital role in influencing the future of the profession. The OLSC recognises this fact and we regularly meet with academics to discuss issues affecting legal practice and common research interests. We have collaborated with a number of universities on major research projects and have published the results of these projects in well-known international academic journals. Our involvement with the universities enables us to support lecturers educating future lawyers to develop high ethical and quality of services standards.

What have been the major failures during your 19 years as Legal Services Commissioner?

I believe that there have been three major failures over the past 19 years.

The failure to achieve a national legal profession stands at the top of my list.

I, like many other regulators in Australia, have worked tirelessly to achieve a national legal profession. I have always strongly supported a national legal profession. It has been my view that lawyers and law practices would benefit from significantly streamlined legislation and one set of uniform regulatory rules across the country whilst consumers of legal services would enjoy consistent rights and remedies across Australia.

Despite a number of attempts of the past 19 years, uniformity in legal profession regulation has not yet been achieved. We came close in 2004 with the adoption of the *Legal Profession Model Bill,* adopted in all jurisdictions but South Australia but jurisdictions have since made certain variations in implementing aspects of the model provisions and there is little uniformity. In 2009 further attempts were made to achieve a national legal profession when the Council of Australian Governments (COAG) embarked on developing draft uniform legislation to regulate the legal profession. The draft National Law created a national regulatory scheme for the legal profession through an applied laws scheme. Despite numerous consultations on the draft national law, consensus has not yet been reached.

The OLSC has played a major role in the discussions concerning a national legal profession. I am proud of the OLSC's contributions to those discussions and remain optimistic that one day Australia will have a uniform national law for the legal profession.

A second significant failure would have to be, in my view, the restrictions in advertising for lawyers that came into force in 2002 in NSW. The 2002 amendments to the legislation which restricted the way in which a solicitor or barrister could advertise for personal injury services has caused much angst for both the profession and the OLSC.

The effect of the amendments has resulted in the inability of lawyers to advertise in a way which induces or encourages clients to make personal [work] injury claims. The restrictions were part of the Government's package of responses put together to combat escalating public indemnity premium prices. Further amendments restricting advertising of personal-injury services by non-lawyer third parties, came into effect in June 2005. A breach of the legislation is an offence and constitutes professional misconduct.

There has been significant opposition from the profession about the restrictions and that opposition has unfortunately flowed on to my Office. A small but determined group of legal practitioners has continuously sought to circumvent the advertising restrictions. These practitioners have used a variety of words and mediums to advertise their work. Since the amendments were enacted the OLSC has dealt with many queries and complaints about potential breaches of the Regulation relating to print media, website and television and radio advertising. Interestingly, most of those complaints were from legal practitioners, not the general public!

It has been is very difficult to monitor lawyer advertising. The difficulties have been enhanced with the advent of technology enabling lawyers to find new ways to advertise. Social media, for example, has provided a new and uncharted opportunity for lawyers to advertise, and major problems for regulators forced to monitor such conduct.

The last major failure, in my view, would have to be the difficulty experienced in successfully prosecuting complaints about gross overcharging.

These difficulties arise from the effects of two decisions of the Tribunal and the Court of Appeal, which in my view virtually eliminate my ability to conduct such prosecutions successfully. In the first matter, *Nikolaidis v Legal Services Commissioner [2007] NSWCA 130,* Mr Nikolaidis was a sole principal, whose bill in the matter the subject of complaint was reduced on assessment from approximately $30,000 to $5,000. The Court of Appeal determined that, despite Mr Nikolaidis having signed both the bill and the covering letter to the client which enclosed it, he did not have the requisite personal knowledge to be guilty of deliberately overcharging the client. This decision was based on the facts that the bill had actually been prepared by a costs consultant and the work done by a junior solicitor.

The circumstances of the *Nikolaidis* case are commonplace. In most firms, the principals send out letters enclosing bills of costs for matters not personally handled by the principal. In many firms, bills are actually prepared by internal or external costs consultants who are not themselves lawyers and are therefore outside my jurisdiction. While *Nikolaidis* remains the law, I cannot therefore be confident that any prosecution for gross overcharging would be likely to succeed in the Tribunal.

In the matter of *Galitsky v Legal Services Commissioner [2008] NSWADT 48*, allegations of "multiple-dipping" were made against a barrister who ran three personal injury actions concurrently and charged each of the three plaintiffs the full cost of every step taken in the matter, including the hearing. Our evidence was accorded little weight by the Administrative Decisions Tribunal, which also significantly made a finding that a costs assessor would not be treated as an expert in costs matters.

Noting the difficulties brought about by these decisions, I have made numerous representations to the government about seeking legislative amendments to ensure that gross overcharging can be successfully prosecuted. I have suggested a number of legislative amendments. For example, I have suggested that the difficulties arising from the Galitsky decision could be addressed by inserted into the Legal Profession Act 2004 a provision deeming any properly appointed costs assessor to be an expert for the purposes of giving evidence in relation to any point involving the quantification of costs charged by a legal practitioner. I have also suggested that the legislation be amended to allow complaints to be lodged against firms. In Victoria, complaints can be made against law firms rather than individual practitioners where the complaint relates to a costs dispute up to the value of $25,000. Legislation permitting complaints against law firms has also been enacted in jurisdictions overseas. I have also suggested that the legislation be amended to require a principal to sign each bill or covering letter, and making that individual responsible for the bill's content. Such an amendment would avoid the impact of the Nikolaidis decision and could be introduced comparatively quickly.

To date the legislation has not yet been amended. I am hopeful that the legislation will be amended accordingly some time soon.

What's next?

After more than 25 years in public service I have decided to take a break from government and pursue a career in consulting and advising. My new consultancy, Creative Consequences Pty Ltd, will allow me to apply the knowledge and expertise I have gained over the years to advise on regulatory design, complaints and ethics.

WITHOUT PREJUDICE VIA EMAIL

As indicated in previous issues the OLSC can send out future issues of *Without Prejudice* to you via email. If you would like to receive *Without Prejudice* electronically 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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