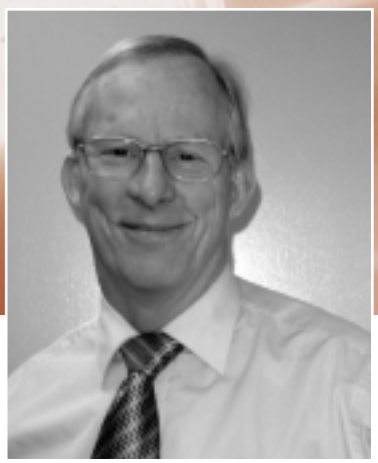
Without Prejudice

CLIENTS AND CONDUCT

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER ISSUE 30 • DECEMBER 2003

Regulation: an international issue



In August 2003 I had the great privilege of attending the American Bar Association Annual General Meeting in San Francisco where I participated in a panel discussion of the question: "Is federal regulation of the legal profession inevitable?"

As I had spoken at previous conferences in America and elsewhere, many of the organisers were familiar with my role as co-regulator with the Law Society and Bar Association of the legal profession here in New South Wales, and in particular my position as head of an independent statutory office and not, as in all American jurisdictions, a part of the court structure or the legal profession.

Of acute interest at this conference were developments that flowed from the passing of the *Sarbanes-Oxley Act 2002* in the United States. This Act requires employees of publicly listed companies to disclose any knowledge of corruption or other unlawful activity that they are aware of within the corporation to their superiors and if their superiors fail to act in relation to their disclosure, to continue to disclose it "up the ladder" within the corporation until action is taken.

The *Sarbanes-Oxley Act* also requires the Securities and Exchange Commission (similar to our ASIC) to issue rules which require lawyers who appear and practise before the Commission to disclose or report evidence of breaches of ethics or fiduciary duty by their employer company. Failure to do so can amount to professional misconduct.

Not only did this create concern in America that an external body, the Securities and Exchange Commission, was making conduct rules for the legal profession, but that the rule could also force a lawyer to act in a way that might undermine legal professional privilege.

In effect, a lawyer could be placed in the unenviable position of being required by the Securities and Exchange Commission to disclose information, the disclosure of which could render that lawyer liable under legal professional conduct rules for breaching client confidentiality.

An intriguing debate in the House of Delegates of the American Bar Association ensued. One side argued that legal professional privilege is a cornerstone of the legal profession, and any erosion of it could lead to the diminution of the profession as a whole. The other argument was that a lawyer's first duty is to the court and through the court to the general community, and as such, disclosure of information that could be of great benefit to the community (for example the Enron collapse) should be considered acceptable to a profession that is duty bound to the court. In addition, this argument also suggested that the

continued on page 2

IN THIS ISSUE

Complaints about communication and costs remain high

The annual report of the OLSC for 2002-2003 was tabled in State Parliament in November 2003.

This year's statistics show a decrease in the number of complaints received in relation to the conduct of legal practitioners. This is encouraging for the profession although it is clear that certain areas of client services have room for improvement. Complaints about communication remain high (15.8%) as do complaints about costs (10%).

It is our view that improved communication between lawyers and their clients would help to reduce complaints bout both issues since complaints about overcharging are often made because clients feel that costs have not been adequately explained.

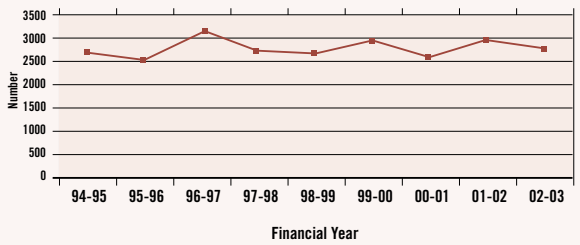
Full statistical information is available in the 2002-2003 Annual Report of the Office of the Legal Services Commissioner. In addition to statistics, the Report provides an overview of the operations of the Office and the range of disciplinary, mediatory and educational functions we perform.

The Commissioner acts as a co-regulator with the Law Society and the Bar Association. All complaints are assessed by the OLSC and a portion are referred to the Councils of the professional bodies. This year the OLSC retained approximately 80% of all complaints received.

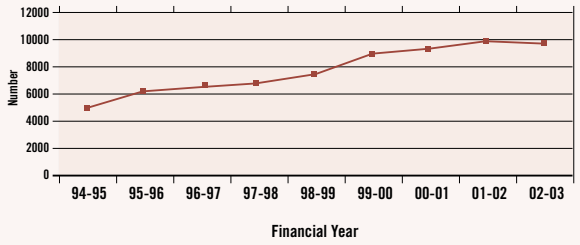
The Commissioner issued 27 reprimands during 2002-2003 for conduct ranging from delay, failure to prepare cases for trial, acting without instructions and inappropriate communication with another practitioner.

Copies of the annual report are available in hard copy and online at www.lawlink.nsw.gov.au/olsc

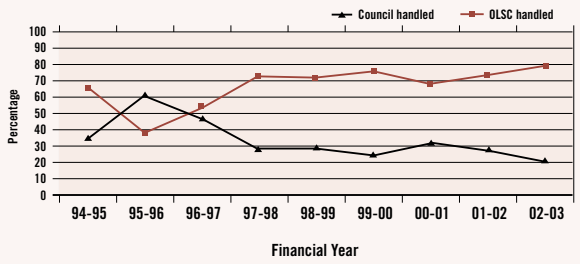
Complaints received each year



Telephone enquiries received each year



Proportion of complaints handled by OLSC and Council



continued from page 1

legal profession would not necessarily receive general public support for arguments that lawyers needed to retain client legal professional privilege in order to be allowed to stay in the boardrooms of companies who were intending to act corruptly.

After an extremely lively debate, the House of Delegates decided on a very narrow vote to pass a motion which would allow legal profession conduct rules to be relaxed so as to allow a lawyer the discretion to disclose any information concerning the corruption of their employer company (or client) without facing prosecution for breaching the rule in relation to client confidentiality.

I believe this is a positive outcome for the legal profession as well as for the community and suspect that the debate in Australia on this matter is not far away.

Conflict of Interests: a central issue for current legal practice

A Working Party on conflict of interests has been established under the auspices of the Attorney General, the Honourable Robert Debus MP, at the suggestion of Steve Mark, the Legal Services Commissioner.

At the first meeting of the working party held in September 2003, twenty-two participants attended, along with four representatives from the Office of the Legal Services Commissioner ("OLSC"), including the Legal Service Commissioner.

Relevant stakeholders were invited including the Director General of the Attorney General's Department, representatives from the Law Society, the Bar Association, the Law Reform Commission, Law Cover, the Legal Profession Advisory Council, New South Wales law schools, consultants to legal practices and a range of legal practitioners from sole practitioners to large law firms.

The inspiration for the Working Party came from the HIH Royal Commissioner Neville Owen in the HIH Royal Commission Report who criticised the actions of two major law firms acting in potential conflict of interests situations. Following from these comments, Mr Mark expressed his concern that public perception that legal practitioners are acting in situations of conflict is damaging the reputation of the legal profession.

The objective of the Working Party is to enquire into and review the law and practice relating to conflict of interests. It will also explore the mechanisms for resolution of such conflicts as they arise in the legal profession.

While the OLSC, the Law Society and the Bar Association can seek to persuade a legal practitioner to cease acting in a conflict situation, the *Legal Profession Act, 1987* does not empower regulators to require a legal practitioner to cease acting. Only a court is able to make such a determination. The Commissioner is conscious that current conflict principles may be outdated and need review to accommodate changes in the commercial environment and the cognate requirements of providing legal services.

The working party will develop recommendations for review and reform of the area of conflict of interests as a result of its considerations of the terms of reference set out below. It has been divided into three separate groups. One will explore the issues relating to perceived conflict of interests, the second will examine potential conflict of interests, and the third group will examine issues relating to actual conflict of interests.

The following terms of reference have been defined to direct the groups.

1. To consider the definitions of conflict of interests both perceived and actual and to consider whether the definitions are sufficiently clear and complete.
2. To explore the existing obligations and duties (specifically fiduciary duty, confidentiality and disclosure principle) of legal practitioners with respect to conflict of interests.
3. To explore more transparent and effective ways of identifying and remedying perceived and actual conflict of interests in both litigious and non litigious matters.
4. To address the concern that existing rules and law relating to conflict of interests have developed without addressing commercial reality.
5. To consider the role of the regulators in relation to conflict of interests.

The team leader of each group will co-ordinate the activities of their group. The OLSC will provide assistance to each group and facilitate any requirements such as venues for meetings, co-ordinating group activities, research assistance and typing services if required.

It is hoped that a final report and recommendations may be made available to the Attorney by March 2004.

Confusion about trust fund procedures

Complaints involving allegations that a practitioner has mishandled monies held in trust are received with some regularity.

These complaints can indicate that the practitioner is unsure of his or her obligations in relation to these funds. They can also indicate a lack of understanding among clients about what information they should obtain about funds held in trust and how to go about getting that information.

We were pleased to have John Mitchell, Chief Trust Account Inspector of the Law Society, visit the Office earlier this year to deliver a talk on a practitioner's duties, and their client's rights, regarding trust accounts.

Mr Mitchell advised that practitioners often forget that authorisation is needed from the person on whose behalf the money is held. Confusion often arises when that person is not the client. Similarly, people whose money is held in trust by a practitioner often do not fully understand their rights to information about their funds.

Practitioners must note carefully on whose behalf they receive money into a trust account. Money can be released only pursuant to that person's instructions (for example be paid into the office account to pay fees). Where the client is not the payer, the client's instructions are not sufficient authority to release the money. For example, if the client's parent deposits money into the trust account, the parent's authority must be received before those funds are released.

Similarly, if the money is held in the name of more than one person, the authority of all of those persons must be given before the funds can be released.

Partners must be aware that they are ultimately responsible for the operation of the trust account. While the demands upon partners' time are many, they should not be satisfied merely with summaries of the operation of the office trust accounts. They must continually take steps to be satisfied that a proper accounting system is in place.

Under the *Legal Profession Act, 1987* clients have a right to be provided with a trust account statement upon sending a written request for such a statement. Further, they should be provided with such a statement upon finalisation of their matter.

Where a trust account remains active, they should be provided with a statement at the end of each financial year.

Complaints are often received from people who have retained a solicitor to assist with a conveyance and are concerned that the solicitor's fees were taken from the settlement amount without notification. Many legal practitioners argue that this is standard practice and therefore acceptable. Practitioners should remember that unless there is sufficient authority and full compliance with regulations, removal of funds from trust is not acceptable.

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