



Griffith University Socio-Legal Research Centre and the Legal Services Commission Symposium

Lawyers' Work, Lawyers' Conduct

Friday 11th November
Auditorium, Ground Floor
80 George St, Brisbane

Acknowledgements

The Symposium was developed by a steering committee consisting of Richard Johnstone, Michael Robertson and Jeff Giddings of Griffith University's Socio-Legal Research Centre and John Britton and Lyn Aitken of the Legal Services Commission.

Practitioners, researchers, teachers, policy-makers and service-providers participated in the Symposium, both beforehand by identifying key issues that the working groups would be based on, and on the day, through their valuable contributions to the discussions. We acknowledge those who gave their time to facilitate the working groups—Kay Lauchland, Zoe Rathus, Sally Kift, Mike Robertson and Jeff Giddings—and we are grateful to The Honourable Linda Lavarch, Attorney-General and Minister for Justice, who provided an opening address to the Symposium.

April 2006

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1. INTRODUCTION

Overview

The *Lawyers' Work, Lawyers' Conduct* Forum was held on 11 November, 2005, hosted by the Legal Services Commission and Griffith University Socio-Legal Research Centre, with participants from law schools, professional associations, private legal practices and government agencies.

The focus of the forum was on improving standards of conduct to reduce cause for consumer complaint, and the purpose of the forum was to explore research and collaboration possibilities arising from discussion of the topic.

Prior to the forum, a series of questions was sent to participants for their responses, with the intention that answers would help the steering committee to identify key issues and themes on improving standards of conduct, and so structure the working groups that were a main part of the forum.

Following introductions by the hosts, by the Attorney-General and Minister for Justice, the Hon. Linda Lavarch, and by the participants, the forum broke into 5 working groups to explore key issues and to identify project areas and initiatives to address those key issues.

This document presents key points in the reports presented by the 5 working groups at the end of the forum including each group's suggestions for initiatives to pursue the topic, and a summary of potential areas for research, activities and potential training products. This report also provides background information in the appendices, including the program, and a listing of the participants.

The report is "a conversation in progress", as further seminars, workshops and discussions will build on these topics. Those reading this report are invited to join the conversation by commenting on or adding to those key points and suggestions for initiatives.

Questions circulated to structure the working groups

Extract from email to participants:

"We are asking participants to answer some questions before the forum, to help us ensure that the program is relevant in addressing interests and issues and includes some prior scoping of possibilities.

For your consideration:

Our first premise is that all participants at the workshop have an interest in reducing cause for complaint about the conduct of legal practitioners. Our second premise is that efforts to reduce complaints about legal practitioners will require legal service providers and related professionals to closely consider means of raising legal practice standards.

The level of complaint may reflect public/client dissatisfaction with the ethical conduct of lawyers or the perception of the level of ethical conduct by lawyers. We note also that complaints received refer not only to ethics but also to the

efficiencies or otherwise of legal business practice, subsumed as "legal practice standards", for this exercise.

Within that context, we ask participants to answer the following questions to enable us to identify main streams of issues and interests.

Question 1: To what extent is your current work concerned to address this problem? If so, in what ways? (Alternately, to what extent do your interests lie in this area?)

Question 2: In your opinion, what are the issues that most need to be addressed in order to:

—reduce any negative perceptions of lawyers' conduct by clients/members of the community

—improve the standards of legal practice?

Question 3: Is it possible to identify specific projects (perhaps involving research), collaborative or otherwise, that will assist in meeting the challenges posed in the underlying problem?"

Themes for the Working Groups

On the basis of responses to those three questions, 5 themed working groups were identified for the forum:

Working group 1: understanding lawyers better?

Working group 2: understanding ethical decision-making better?

Working group 3: improving lawyers' support systems?

Working group 4: grappling with the effects of the adversary system?

Working group 5: understanding clients better?

The next section presents the questions posed to the working groups for their discussion, and key points as well as potential project areas that arose from their discussion.

2. WORKING GROUP QUESTIONS AND REPORTS

WORKING GROUP 1: UNDERSTANDING LAWYERS BETTER?

Questions: Under this topic the group was asked:

Please will you consider whether, and to what extent, lawyers' clients (and the community at large) need to understand lawyers and their work better? What can clients (and the community) *reasonably* expect from lawyers? Is there a need to recognise the pressures faced by lawyers in the daily conduct of their

work? Is it the case that clients and the community are assailed by unrealistic images of what it means to be a lawyer in a society like this? What role does the media have in the latter, and how damaging are these images? Are lawyers' roles changing, and to what extent do these changes make it more difficult for clients and the community to understand the context and the demands of their work? How can we get lawyers and clients working together?

Reporting back

The group reported key points from their discussion back to the forum as well as potential projects. These included a mix of research areas and service products. The group considered that the question on understanding lawyers better breaks down into 5 areas for focus:

- Who has a role in improving public expectations and perceptions?
- What are realistic and unrealistic images (of lawyers, legal practice)?
- What is the role of the media?
- Where do roles need changing, and how?
- How is working together encouraged?

The group identified an area of controversy around community education in general with factors involved including level of community interest, the existence of glamorous media images, and the need to draw a distinction between law and lawyers. For the group, this begins to provide the context for understanding lawyers better. Some specific points include:

- the "public" become "clients", however the group felt that the public can't be changed by changing clients' individual perceptions
- clients sometimes go to lawyers with unrealistic expectations so there is a need to manage client expectations, to clarify what the lawyer will and won't do. The role of communication skills and assertiveness is important
- other important skills needed by the lawyer include empathy and listening skills (interview skills) and managing expectations
- collectively all stakeholders have an obligation to be involved in promoting community awareness. This includes key industry groups and business groups in the legal system.

Focus areas arising from identification of those key issues:

1. Community education (questioning how best to convey messages and what message is communicated?). Potential messages and focus are:

Message: there are differences between the Law and lawyering

Focus: the need to promote greater understanding of the role of lawyers.

Examples of educational activities and focus through the media could include:

- Infotainment (possibly has most potential, according to the group) for example, a “Streetlaw” program
- Legal talk-back (although hard to use popular media to achieve relatively subtle changes in public’s understanding)
- Popular culture (however it is difficult to control unrealistic images).

2. Research

- Community expectations and perceptions—subtleties rather than broad brush
- Types of complaints—feeding into targeting media eg ad showing lawyer providing schedule of fees

3. Legal Education (*tertiary and continuing*)

- For example managing client expectations as part of client interviewing skills
- Practice management
- Clarifying nature and causes of problems
- Continuing legal education (CLE) courses to include practice management and business management

4. Partnering with key client groups, such as:

- Small business associations
- Institute of Directors

Potential projects/project topic areas

- Based on need to know exactly what the community perception is—research that is community based, followed by a targeted campaign
- Utility of independent consultants providing a training program to assist lawyers from the inception of their practice.

WORKING GROUP 2: UNDERSTANDING ETHICAL DECISION-MAKING BETTER

Questions: Under this topic the group was asked:

Please will you consider whether lawyers generally should become better equipped to handle their professional ethical responsibilities, and what this might mean? To what extent is “unethical” practice a real problem, and to what extent is it a perceived problem (exploited, perhaps by segments of the media)? Do law schools take their educational responsibilities in legal ethics seriously enough (and how would we begin to evaluate law schools’ efforts in this regard)? Does the legal profession itself have a role in the development of quality learning in this area, and do we know whether current “continuing legal education” initiatives are having a positive impact? Are current

professional responsibility rules effective, and do they go far enough (or are they adequate) in encouraging ethical legal practice?

Reporting back

The group reported key points from their discussion back to the forum as well as potential projects:

Key points

- There was a divergence of opinion in the group on the capacity of legal education to respond to the challenge of teaching ethics. Some members thought the Universities were providing good training in ethics, whilst others were less familiar with what Universities are doing for ethical training. One group member brought into the discussion an opinion that individuals can only be trained in rules, not values, so the focus of teaching is primarily on rules.
- Important to have a coordinated approach, involving Universities, practitioners and regulators
- Teaching ethics or entrenching the underlying issues—explore communication courses, and techniques such as role play
- The study of Law can be contradictory as there is teaching of positivism and values at the same time, and these are separate “phenomena”
- Self-regulation is not working, there is no collectivity in the legal profession—nowhere where the profession can meet and talk about issues etc.
- How to develop
 - Keep teaching ethics
 - Better coordination between ethical teachers and professional associations etc (eg establish a national taskforce)
- While Universities should continue to teach ethics, we should expand Clinics and the use of Continuing Professional Development courses (CPD) to teach ethics to ensure there is a base of practical experience being included.
- Regulators have set up a National Task Force to look at Continuing Professional Development and to explore making practical ethics a required subject.
- We also need more/better/and better coordinated research.

Potential projects/project topic areas/initiatives

- Multidisciplinary and Incorporated Legal Practices—improving communications
- Developing projects for business ethics

- Better coordination—communication between educators, regulatory authorities and professional bodies, education and information
- Work out objectives and ensure going in complementary ways despite competition

WORKING GROUP 3: IMPROVING LAWYERS' SUPPORT SYSTEMS?

Questions: Under this topic the group was asked:

Please will you consider the question of whether lawyers have access to adequate support structures such as those that provide advice about professional and ethical standards when such assistance is needed? Is the professional body sufficiently proactive in providing this kind of support? Might enhanced or additional forms of support, tailored to the particular circumstances of practitioners in small, medium and large firms, assist in improving practice standards and therefore help to reduce some of the negative perceptions held of lawyers? What form might or should support systems or structures take, and how might access to these resources assist lawyers to avoid decision-making or conduct that attract criticism or even disciplinary proceedings?

Reporting back

The group reported key points from their discussion back to the forum as well as potential projects:-

Key Points

- Need to understand that the different types of lawyers need different types of support—in two bands, roughly—barristers, solo barristers, and those operating from home; solicitors and solo solicitors. The question is how to support both solicitors and barristers.
- There is a distinction between influence and interference—the latter is possible if there is a lack of understanding of the process
- Big firms' clients are not spending their own money, so outcomes are not affecting them personally
- Lawyers may have been taught ethics at University, but it is different in practice, so support mechanisms are important
- The market model works for corporate clients, however it is difficult for general public clients
- Different models are required. Eg, direct access is the largest complaint area (direct access to barristers). Getting rid of direct access is important because direct access means that barristers are doing solicitors' work when they are not trained for that work.

- Comment that if 40 year old males are most subject to complaint—that is because at that age they are at the stage of their career “where the buck stops”.
- Not all lawyers are in their profession of choice
- Not all have retained their commitment—the group felt for some lawyers the key point was that they need to be helped to regain an interest in servicing their clients and not just their own interests
- Note that students on placement are being discouraged by practitioners, told it is hard work for not much reward, emphasising it is actually a service industry
- It is important in developing support systems to understand the factors that are personal to lawyers and the factors that are generic to the profession
- Systems for support will rely on where issues are personal and where endemic to the profession (eg dishonesty vs ethical professional rules)
- Further, the profession can be supported, but practitioners are competitive
- With regard to ethical discussions, there is a focus in continuing legal education (CLE) on technical aspects of lawyering, on risk management, etc.
- Government sends mixed messages to Universities on the importance of collaboration, yet funds on the basis of competition

Potential projects/project topic areas

These included a mix of research questions and service products (eg questioning support systems of sole practitioners, and suggesting a publication of examples of excellence, with descriptions of their support systems)

- Best practice in supporting practitioners in small, medium and large firms to act ethically
- Best practice for certain areas of law
- Practice management focus
- Systems audit that can be conducted at the same time as a trust account audit
- Professional indemnity insurance—tap into that to identify areas of high risk
- Provide 4-5 examples of excellence (a publication) and suggested support systems to help others achieve the same level

- Pilot study then larger project with links to other organizations and other states
- Explore—why do practitioners practice alone, what support systems do they have in place?
- Continuing professional development—analysis of the effectiveness of those processes
- Supervision practices—identify what practices are good and which need improvement.
- Links with insurers

WORKING GROUP 4: GRAPPLING WITH THE EFFECTS OF THE ADVERSARY SYSTEM?

Questions: Under this topic the group was asked:

Please will you consider whether, and to what extent, the adversary system places impositions on lawyers and their clients; and how these impositions might impact negatively upon (a) practice standards and/or (b) the perceptions held of lawyers by members of the community. Do members of the community appear to understand sufficiently the nature of the adversarial system, and what this implies for the lawyer's role – at least in litigious work? Nevertheless, does an overly "adversarial mindset" continue to bedevil some practitioners' approaches to their practice of law, and what implications, if any, does this have for their clients or for the expectations that clients have of their lawyers in representing them effectively?

Reporting back

Key Points

- The adversarial system impacts on the design of professional rules
- There is a culture of blaming lawyers for not meeting expectations
- There is a need for communication and empathy

Potential projects/project topic areas

- Examining the role of communication skills in lawyer/client relationships across different levels
- How to cut complaints down
- The role of client care personnel in law firms
- Analysis of complaint handling processes and procedures
- Why are there complaint "hot spots"

- What are client expectations?

WORKING GROUP 5: UNDERSTANDING CLIENTS BETTER?

Questions: Under this topic the group was asked:

Please will you consider the question of whether lawyers generally pay sufficient and ongoing attention to effective *communication* with their clients? What might it mean to communicate effectively with a client, and what are the advantages of doing so? What are the likely or possible effects of poor communications with clients? Do lawyers always listen to their clients carefully enough; do they routinely pay them the courtesies and respect that clients have come to expect from professionals? Do some segments of the legal profession lack what might simply be called a service “ethic”—both in respect of their clients and the community at large? If so, is there any basis to suppose that lawyers might learn to work more effectively with their clients, and learn to communicate better?

Reporting back

Key Points

- It is important to look at client perceptions of the issue as well as lawyer perceptions of the issue
- There is a need for both client and lawyer education
- Service to the profession, there is a need for improvements in service to lawyers and to their clients
- Areas of communication that need improving
 - Cost of the services
 - About the contract
 - Variations through life of a client file—can break down
 - Managing expectations
 - Overlaps with practice management and management strategies

Potential projects/project topic areas

- Research on what causes client concerns (that doesn't come through as a complaint)
- What information exists
 - Legal aid surveys of clients
 - Queensland Public Interest Law Clearing House (QPILCH)
 - Firms
- Developing greater understanding of the different types of clients and of lawyers

- A research note—there is difficulty in accessing client information from small firms (and also from large firms)
- Exit survey to provide useful feedback to the firms. Also enhances client awareness of good things. However, getting information back to the researcher is the problem—who will feed it back, and who is non-competitive, safe.

3. WHERE TO NEXT?

Participants were keen to continue clarifying key issues, activities and potential for research, beyond the Symposium.

As a contribution to that clarification of focus areas, and to help answer the “where to next?” questions, this section presents a framework of research and seminar topics, drawn from key points identified in the Symposium, and so building on the outcomes of the Symposium.

Discussions have also continued on some areas identified on the day, resulting in collaborations developed to address areas of interest. These include:

- Griffith University’s Socio-Legal Research Centre and the Legal Services Commission are planning to host a series of seminars or workshops.
- Another funding proposal is being lodged for research and development of activities that may support improvements in solicitor—client interactions, a collaboration that the Legal Services Commission is also involved in.

We suggest that the framework presented below will further support follow-up to the Symposium—for example, the framework can be used:

- a) As a basis for collaborative research
- b) As a basis for developing other activities to explore raised themes and issues

FRAMEWORK OF THEMES AND TOPICS

1. *Discussion area: Better understanding of lawyers*

Community based research on public perceptions of legal services and lawyers, such as:

- Identification of key issues and how to address
- Social shaping of the legal profession
- Public perceptions of lawyers and major influences in shaping those perceptions
- Lawyers’ perceptions of how they are seen by the community, and major influences in shaping those perceptions

Communication needs and possible solutions for greater exchange of information between lawyers and public, such as:

- Content and media formats that will provide greatest accessibility, for example, possible trialling of formats such as an “infotainment” program.

- Identification of information needs to underpin effective communication between lawyers and publics/potential clients/clients

2. Discussion area: Better understanding of ethical decision making

Focus areas drawn from topics recorded on the day may include:

- Self-regulation and ethical challenges.
- Communication in multidisciplinary and Incorporated Legal Practices and influence on ethical practices.
- Systems for supporting ethical practice and linkages between educators, regulatory authorities and professional bodies.
- Extent to which linkages between educators, regulatory authorities and professional bodies effectively influence levels of professional ethical conduct.
- Best management practice for coordinated approaches to supporting ethical systems

3. Discussion area- Improving lawyers' support systems

Focus areas drawn from topics recorded on the day may include:

- What support systems do lawyers need (under differing institutional arrangements, such as small, medium and large firms?)
- What support systems do sole practitioners need? Or, why do practitioners practice alone, what support systems do they have in place and/or need?
- How effective is continuing professional development as a support mechanism for lawyers?
- What mechanisms and structures in small, medium and large firms provide lawyers with support in acting ethically? Focus can include:
 - Best practice in supporting practitioners in small, medium and large firms to act ethically
 - Best practice for specific areas of law
- Supervision as a support mechanism: what practices are good, and which need improvement?

4. Discussion area: Grappling with the effects of the adversary system

- What is the role of communication skills in lawyer/client relationships across different levels
- The role of client care personnel in law firms and influences on lawyer/client relationships

- To what extent can differing complaint handling processes and procedures influence the adversary system
- Why are there complaint “hot spots”
- What are client expectations of the legal system as an adversarial system?

5. Discussion area: Better understanding of clients

- What aspects of legal practice concern clients the most?
- Developing greater understanding of the different types of clients and of lawyers
- Exit survey to provide useful feedback to the firms. Also enhances client awareness of good things. However, getting information back to the researcher is the problem—who will feed it back, and who is non-competitive, safe.
 - A research note—there is difficulty in accessing client information from small firms (and also from large firms)

Appendix 1: Program



PROGRAM

Forum: Lawyers' Work, Lawyers' Conduct

Date: 11 November 2005

Venue: Level 3 80 George St, Brisbane

8:45 – 9:15 **Registration (coffee and tea available)**

9:15- 10:00 **Introductions and Welcome**

Professor Jeff Giddings—Griffith University Socio-Legal Research Centre

John Briton—Legal Services Commissioner

The Honourable Linda Lavarch MP—Attorney-General and Minister for Justice

Participant Introductions

10:00-11.00 **Facilitated working groups**

- Addressing key issues emerging from responses to questions circulated prior to the forum.

11.00 -11.20 **Morning tea**

11.20-12.10 **Facilitated working groups**

- Identifying and developing potential collaborative projects or activities in key issues areas.

12:10-12:50 **Brief report back and follow-up**

- Key points from working groups.
- Suggestions sought on further events or initiatives to progress these areas

12:50-1:00 **Closing remarks**

Associate Professor Mike Robertson—Griffith University Socio-Legal Research Centre

John Briton—Legal Services Commissioner

1:00 – 1:30 **Lunch**

Appendix 2: Participants

NAME	Position	AGENCY
AIRO-FARULLA Geoff	Assistant Ombudsman	Commonwealth Ombudsman
AITKEN Lyn	Policy and research coordinator	LSC
BANKS Cate	Lecturer	Griffith Law School - Nathan
BARTLEY Brian	Partner	Brian Bartley & Associates
BRADLEY Imelda	Principal Legal Consultant	JAG
BRITON John	Commissioner	LSC
BRITTAN Robert	Manager, Complaints	LSC
CAMPBELL Darielle	Principal Legal Officer	LSC
CORONES Stephen	Professor	QUT Law School
CLEARY Simon	Youth Advocate	Legal Aid
COLBRAN Stephen	Professor	Uni of New England
CORBIN Lillian	Lecturer	Griffith Law School
DIXON Nicolee	Parliamentary Library	Parliament House
FISHER Douglas	Professor	QUT Law School
FRANKLIN David	Director Corporate Services	Queensland Law Society
FOOTE Ian	Dir Professional Standards	
SMILEY Craig	Investigator	
GIDDINGS Jeff	Professor	Griffith Law School
HALLER Linda	Lecturer	TC Beirne School of Law - UQ
HUNTER Rachel	Director-General	JAG
JOHNSTON Richard	Professor	GU
KENNY Elizabeth	Senior Legal Officer	LSC
KIFT Sally	Assoc Prof	QUT Law School
LAMONT Julian	Dr (Philosophy)	UQ
LAUHLAND Kay	School of Law	Bond University Law School
LAVARCH Michael H	Hon Prof	Executive Dean - QUT
MARK Steve	Commissioner	LSC NSW
McMASTER-KIRKWOOD Janine	Senior Lecturer	Griffith Law School - Southbank
MARKHAM Michelle	Lecturer	QUT Law School
McLEAN Scott	Principal Legal Officer	LSC
MORTENSEN Reid	Reader	TC Beirne School of Law - UQ
NEWMAN Terri	Executive assistant	LSC
O'CONNOR Dan	CEO	BAQ
PERRETT Ross	Partner	Clayton Utz
PICKERING Stephen	Consultant	Genesys Software
QUINN Michael	Partner	Gilshenan & Luton
RATHUS Zoe	Director, Legal Ethics	Griffith Law School - Nathan
ROBERTSON Mike	Associate Professor	GU
RYAN Mark	Partner	Ryan Kruger Lawyers
RYAN Terry	Exec Dir	JAG
SHEARER Elizabeth	Senior Legal Consultant	Legal Aid
SMITH Anne	Lecturer	QUT
STOBBS Nigel	Lecturer	QUT
THOMAS Mark	Lecturer	QUT
WOODYATT Tony	Coordinator	QPILCH
WORTHY Peter	Principal legal officer	LSC