

Regulation refresh

LSC seeks a better approach



Since being appointed acting Legal Services Commissioner in May this year, Robert Brittan has not simply been 'holding the fort'.

Given his long experience as a legal practitioner (admitted in 1983) and principal, and his roles as the commission's principal legal officer (since its inception in 2004) and complaints manager (since 2005) and subsequently director of investigations, Mr Brittan has been in an ideal position to refine and refresh aspects of the commission's operation.

"I believe that in the recent past the commission had lost focus and was going in a direction which I felt was unhelpful and did not accurately reflect the commissioner's core responsibilities in supporting the statutory objectives," he said.

"The key pillar of our strategic plan for 2014-16 is to be an effective regulator. With that in mind we have reviewed our strategic plan.

"In my view, ultimately effective regulation not only helps consumers but also lawyers in providing competent legal services, improved professionalism and ethical decision making. The commission's approach now is to seek better regulation, not more regulation."

The core responsibilities of the Legal Services Commissioner in supporting the statutory objectives of the *Legal Profession Act 2007* (the Act) are to:

- assist consumers with inquiries and informally resolve disputes with lawyers or law practices about their legal services
- receive complaints and undertake investigations about lawyers, law practice employees and unlawful operators
- undertake its own investigations in the public interest
- pursue disciplinary or other litigation arising from investigations
- supervise the compliance of law practices with the Act and professional obligations, so far as they relate to incorporated legal practices generally and multi-disciplinary practices.

Acting Legal Services Commissioner Robert Brittan speaks to John Teerds about refinements to the operation of the commission.

"During the period of time that I remain in this position, I will concentrate on these core responsibilities and, in particular, we will continue to focus on improving billing practices within the profession as this still looms as one of the major categories of complaint," Mr Brittan said.

"Given the change in the environment in which we operate, we cannot continue to simply rely on doing things the same way as we did before and, accordingly, that is the reason why I have reviewed the strategic plan."

He said the 2014-16 plan (available at lsc.qld.gov.au) included some new and refreshing approaches to regulation.

"In particular we are exploring ways with our stakeholders in which we can secure good outcomes, but with less regulatory burden on practitioners," Mr Brittan said.

The commission has launched new information brochures for both respondents and complainants. The brochures explain the complaints process clearly, including what is required from practitioners.

Another innovation is a 'ramped-up' version of the commission's inquiry service.

"When an inquiry is received which suggests that it can be addressed promptly and informally without the need for written complaint, it is handled by the commission's dispute resolution team (DRT)," Mr Brittan said. "The DRT uses direct discussions with the lawyer and the consumer over the phone, in person or by email, to resolve the dispute. For example, in August alone we handled 305 of this type of inquiry, made up of 196 first-contact inquiries, 101 DRT inquiries and eight PIPA inquiries.

"We believe that there is nothing to be gained by asking people who ring or contact us online or by email to complain about a lawyer to go to the trouble of opening a complaint file and commencing a formal investigation if we are able to

resolve them informally and perhaps with a few quick telephone calls.

"This saves costs, limits inconvenience to all parties to that process, and lessens anxiety."

Mr Brittan said that the absence of hearings of legal disciplinary matters in the Queensland Civil and Administrative Tribunal (QCAT) since September last year – now being rectified through the appointment of QCAT members – had led to both a backlog of matters and increased anxiety for practitioners who have had matters pending.

"Consumers of legal services and practitioners have an expectation, not unreasonably, that in any disciplinary process matters must be dealt with as efficiently and expeditiously as possible," he said.

"Unfortunately it has also meant that we have been unable to highlight matters of concern and of interest to the profession on ethical issues by way of current decisions. Therefore there has been no guidance to practitioners in relation to many areas of law where standards may well have fallen below that expected of their peers, or below that which members of the public are entitled to expect of a reasonable, competent and diligent legal practitioner."

During the 2013-14 year, 480 solicitors and 33 barristers were the subject of an investigation by the commission, the Queensland Law Society or Bar Association of Queensland. Of the solicitors, 84 had two or more complaints.

"The majority of those investigations revolved around costs, quality of service and poor communication," Mr Brittan said (*see next page*). "However, the fact remains that billing practices and costs are still the most complained about category. In particular we are seeing an emerging trend of practitioners failing to continue to give ongoing cost disclosure."

He reminded practitioners of the QLS service which provides members who receive a letter from the commission with up to six free hours of confidential consultation.

"We would encourage all members who are subject to complaint to avail themselves of that service, as we are of the view that many matters can be resolved or indeed resolved on a basis whereby there may be a satisfactory outcome to all parties concerned without the need for a disciplinary response," he said.

"If agreed outcomes can be reached by the parties to this process, then I see no need to seek a disciplinary response, but of course that depends on the seriousness of the conduct."

Mr Brittan said that he wanted to ensure that the commission regulated in accordance with best regulatory practice and principles.

"I want to explore ways with practitioners in which we can secure good outcomes with less regulatory burden on legal practitioners," he said.

"As a practitioner of many years, I recognise that regulation needs to consider that all clients are not the same and have different needs and demands. Legal practices are different sizes and require different management tools/mechanisms to achieve best practice. We need to work with the profession and engage in discussion to understand the complexities that they face in an ever-changing environment.

"While in the past primarily regulatory models have been designed to be reactive as opposed to proactive, as a regulator we should engage with lawyers to advise them of what we do that we expect compliance but are prepared to listen to them.

"Once that discussion has developed we hope to improve the effectiveness of regulation and the efficiency with which we perform our core business."

At the time of going to print, no official announcement had been made in regard to the appointment of the Legal Services Commissioner.

John Teerds is the editor of Proctor.

The nature of complaints

In August, acting Legal Services Commissioner Robert Brittan addressed a session at the QLS Family Law Residential and discussed, among other things, the nature of the complaints received by the Legal Services Commission. He said:

The majority of matters dealt with at the commission relate to complaints concerning quality of service, costs and communication. These areas of concern are not unique to family law and are common to all areas of law.

While some areas of law have unique issues which trigger complaints, such as the use of independent children's lawyers in family law, the practice of law across the board could be improved by concentrating on these key areas.

Quality of service

Complaints received relating to quality of service encompass competence and diligence complaints. This is where it is alleged the conduct of the practitioner fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

A failure to maintain a level of competence and diligence differs from a complaint that alleges negligence by a practitioner. The commissioner does not have the power to determine whether a practitioner is negligent as that is a civil claim and must be considered by the relevant court or tribunal. However, if a court or tribunal finds in a civil proceeding that the practitioner was negligent then the commissioner may consider this information in assessing whether their conduct fell short of the standard of competence and diligence as prescribed in the Act.

In family law the most common complaints arising from quality of service are that a practitioner has failed to include important information in court documents, has made multiple or obvious mistakes on documents and has not corrected them, or has failed to consider and/or advise on the client's options.

Costs

Across all areas of law, the commission receives more complaints about lawyers' bills and billing practices than any other single issue.

Not all complaints about costs are avoidable, but the majority are. To assist practitioners to avoid or manage complaints, we strongly encourage investing in your business management practices and being familiar with the principles that relate to costs.

The key principles are established in both legislation, most relevantly in the *Legal Profession Act* and the *Australian Consumer Law* (the ACL), as well as in the common law. The commission recently published a regulatory guide entitled, *Billing Practices – Key Principles*, which can be found on our website.

Some key principles are:

1. Lawyers should give their clients valid costs disclosure.
2. Lawyers should ensure that their cost agreements with clients are fair and reasonable.
3. Lawyers should not charge excessive legal costs.
4. Lawyers should charge no more than reasonable costs.
5. Lawyers should comply with a valid request for an itemised bill and cooperate with a court-appointed cost assessor.

Importantly lawyers do not satisfy their obligation to give ongoing costs disclosure simply by giving clients interim bills which add up to a figure that approaches or exceeds their earlier estimate(s). They should give a revised estimate of their total legal costs and/or likely future costs.

Communication

Lawyers, like other professionals, are expected to be effective communicators. The commission regularly receives complaints about lawyers that could have easily been avoided if the lawyer had communicated more effectively and/or courteously with the complainant, in most cases their client.

Effective communication is a two-way process and it is useful to be aware of some common communication barriers that lawyers may put up, such as:

- failing to direct conversations to a required outcome in a timely manner
- taking their knowledge and the client's for granted
- delegating activities to other individuals within the firm without informing clients
- forgetting to provide the client with feedback and regular updates.

Effective communication skills include:

- clarifying expectations both verbally and in writing on case commencement
- continuing to keep the client informed throughout the legal matter
- communicating professionally in writing to the client and other professionals.

The commission often receives complaints by clients who feel inadequately informed of the progress of their matter or who feel that what actually happened in their case was very different from what they felt they were led to expect.

In the commission's experience, a client invariably wants answers to the following questions (both at the outset, and at regular intervals along the way):

- What are my options?
- What are my chances?
- What will it cost?
- What is the process?
- How long will it take?

It is imperative to understand what outcomes the client believes can be delivered as well as their expectations. It is also imperative the client understands what expectations their lawyer may have of them, and what they will be required to do to ensure their matter progresses satisfactorily.