

Regulatory Guides - An Overview

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What are Regulatory Guides?

The Legal Services Commission has committed to publishing regulatory guides or practice notes to set out the factors we take into account in exercising our regulatory responsibilities when there appears to be some uncertainty about how a lawyer's professional obligations apply to the facts at hand, most relevantly our responsibilities:

- to mediate consumer disputes including costs disputes between lawyers and their clients; and
- to investigate and to decide what action, if any, to take on complaints which involve a disciplinary issue - and more specifically to decide if there is a reasonable likelihood a disciplinary body will find the conduct subject to complaint to be unsatisfactory professional conduct or professional misconduct and whether it is in the public interest to commence disciplinary proceedings.

This is no more than lawyers and users of legal services are entitled to expect of a transparent and accountable regulator. We hope and intend that the guides will help lawyers to avoid complaints, help promote adherence to high professional standards and help prevent non-compliance, especially inadvertent non-compliance by that vast majority of lawyers who want to do the right thing.

We will write the guides in plain English, with as little technicality as possible, so that they can be readily understood by lawyers and users of legal services alike.¹

Why publish Regulatory Guides?

We have two fundamental and overlapping purposes at the Legal Services Commission:

- to provide users of legal services an independent, timely, fair and reasonable means of redress for complaints; and
- to promote, monitor and enforce high standards of conduct in the provision of legal services, including when it is justified by the evidence after investigation and the public interest by commencing disciplinary proceedings.

We believe we have a role as a regulator of leadership and guidance, not just of policing and punishing.² We are not shy about commencing disciplinary proceedings but we believe we best achieve our purposes by taking an educative and preventative approach whenever we reasonably can in preference to a punitive or 'gotcha' approach. We undertake our regulatory responsibilities accordingly. The guides reflect these beliefs.

Furthermore the regulation of the provision of legal services consistent with trends in regulation more generally is becoming increasingly 'firm about outcomes, flexible about means'. It is putting

¹ Publishing regulatory guides of this kind is a new idea in the legal services context but our counterpart regulators in other industry sectors have been doing it for years. The Australian Securities and Investment Commission (www.asic.gov.au), the Financial Ombudsman Service (www.fos.org.au) and the Telecommunications Industry Ombudsman (www.tio.com.au), for example, all publish guidance in the form of Regulatory Guides (ASIC), Practice Notes and Guidelines (FOS) or Position Statements (TIO).

² We agree with Lord Hunt's comments to this effect in his recent and comprehensive review of the regulation of legal services in England and Wales, *The Hunt Review of the Regulation of Legal Services*, October 2009, at pp.77-78.

increasing emphasis on broadly stated, high level principles which spell out the policy outcomes legislators and regulators are seeking to achieve and less on detailed prescriptive rules.

There is nothing entirely new about this. Many of a lawyer's most fundamental professional obligations have always been expressed as broadly stated principles, whether in legislation, the common law or the conduct rules that are promulgated by lawyers' professional bodies.³

Principles-based (or outcomes-based) regulation has some distinct advantages, not least that it gives lawyers more flexibility than they have had in the past to decide how best to achieve any given broadly stated outcome in the many and varied circumstances of their own particular law practices.

But it has a downside also, not least that it is not always obvious how a broadly stated principle applies in any given factual circumstance. The greater flexibility comes at the price of greater uncertainty, not least from a lawyer's point of view uncertainty whether we as regulators understand and apply a broadly stated principle in the same way they do. The guides set out for the benefit of lawyers and users of legal services alike the factors we will take into account in exercising our responsibilities in such circumstances.

How will we go about it?

We will develop the guides in consultation with the professional bodies and in close and direct consultation with the lawyers whose conduct we seek to influence. Similarly, and having regard to the resources we have available to us from time to time, we will consult with users of legal services also.

We want in particular to consult the users of legal services who are least able to give voice to their legitimate interests themselves: the typically one-off users of legal services who go to lawyers to help them buy or sell their family home or about family law, deceased estate and personal injury matters at often critical moments in their lives. We want to learn from what they tell us and develop an informed capacity to analyse issues from their point of view.⁴

³ The High Court observed many years ago now, in *Clyne v NSW Bar Association (1960) CLR 186* at 200, that 'the rules which govern the conduct of members of a body of professional men [sic]... may... be divided roughly into two classes. In the one class stand those rules which are mainly conventional in character [and which] are designed primarily to regulate the conduct of members of the profession in their relations with one another. Many of these rules are reduced to writing, and they are from time to time interpreted, and perhaps modified... by resolutions of the governing body of the profession... Rules of the other class are not merely conventional in character. They are fundamental. They are for the most part not to be found in writing. It is not necessary that they be reduced to writing, because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness.' The Queensland Court of Appeal commented to similar effect in *Council of Queensland Law Society v Roche [2003] QCA 469*, including at paragraph 32, for example, that the 'major criteria which ultimately inform the professionalism of the law are integrity, and as concomitants, honesty and reasonableness.' This is as it should be. Ken Crispin QC quotes Sir Gerard Brennan as saying, wisely, that 'if ethics were reduced to rules, a spiritless compliance would soon be replaced by skilful evasion' (in Stephen Parker and Charles Sampford, *Legal Ethics and Legal Practice*, Oxford, 1995, at p.176).

⁴ It will not be easy to consult meaningfully with users of legal services given the absence in the legal services sector of any counterparts to the consumer advocacy organisations such as Consumer Credit Legal Services or the Australian Communications Consumer Action Network which exist in other industry sectors. It can be done, however – see note 5, below.

We will use traditional consultation techniques such as seeking comments on consultation drafts and discussion papers. We will also use survey techniques to help us identify issues and test out ideas. We will use both quantitative and qualitative methods including on-line surveys and facilitated focus groups.⁵ We will be methodologically sound, and engage experts as appropriate to help us design our survey methods and interpret and analyse the results.

What is the status of the Regulatory Guides?

We hope and intend that the guides will be persuasive but they are not, nor can they ever be binding. The Commission is responsible for promoting, monitoring and enforcing standards of conduct in the provision of legal services, not for setting them. The standards are set in laws enacted by parliaments, in the judgments of the disciplinary bodies and the courts and in the conduct rules promulgated by the professional bodies.⁶

The guides are neither 'rules' nor an attempt to 'codify' the rules which establish a lawyer's professional obligations much less a misguided attempt to 'make law'. They simply articulate the factors we take into account in exercising our responsibilities in circumstances where it is unclear how an obligation applies.

The guides by their very nature deal with uncertainties and sometimes matters that are untested and yet to be judicially determined. The inherent uncertainty hardly relieves us however of our responsibility to decide what action to take, if any, on matters of these kinds. We can't duck the issue. Our responsibilities require us to take a view, and lawyers and users of legal services alike are entitled to know what it is.

We will do our very best to get it right but it is always possible that the disciplinary bodies and the courts will tell us in due course that we have got it wrong. So be it. We will amend those guides accordingly.

⁵ The Legal Services Consumer Panel for England and Wales has commissioned research including facilitated focus groups of legal consumers – go to www.legalservicesconsumerpanel.org.uk for further information.

⁶ The 'conduct rules' (the Solicitors and the Barristers Rules) are made by the Queensland Law Society and the Bar Association of Queensland respectively and come into effect when they are 'signed off' by the Attorney-General - the *Legal Profession Act 2007*, Part 3.2 Divisions 2-5.

Version	Notes	Version date
1		26 October 2011
2	Minor formatting	19 October 2012
3	Minor editing	20 May 2012
4	Minor editing	16 September 2013
5	Minor editing	12 March 2014