

**A Queensland Perspective On The Regulation Of
Ethics In The Legal Profession**

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1. Introduction

The Legal Services Commission (LSC) in Queensland is an independent statutory body established under the *Legal Profession Act 2007* to receive and deal with complaints against legal practitioners; to initiate and prosecute discipline applications as appropriate; and to undertake compliance audits of the management of the provision of legal services by incorporated legal practices (ILPs). The LSC's primary purpose is to promote and protect the rights of legal consumers in their dealings with legal practitioners and law practice employees in Queensland.

1.1 Background

There were two major catalysts for the establishment of the LSC in Queensland. The first was the development of National Model Laws aimed at placing the legal profession on a national footing and so harmonizing admission requirements, professional rules and systems for complaints and discipline across states. Increasing disquiet over conflicts inherent in a system where professional bodies deal with complaints against their members provided a second major catalyst, fuelled by media descriptions of the professional bodies' handling of the case of Michael Baker, solicitor, as "Caesar judging Caesar".

Queensland was the first state to enact the National Model Laws, establishing the Legal Services Commission as an independent statutory body under the *Legal Profession Act 2004* to receive and deal with complaints about solicitors, barristers and law practice employees and to bring a new transparency and accountability to the process. In the glare of publicity around the Baker case, the profession and public had confidence that the new arrangements would get rid of the "bad apples" in the profession.

On the one hand, the subsequent investigation, court case and striking off of Michael Baker and dealings with similar cases brought to public attention that Caesar was no longer judging Caesar. On the other hand, the Commissioner took the approach early on that deterrence was never well proven to follow discipline and the best way to protect consumers was not just to punish the "bad apples" but to ensure that equal attention was paid to improving standards of conduct in the legal profession. (Briton, J, 2006). Further, this was a task not only for the regulator but for professional associations and the legal community as a whole.

This approach to delivering regulation was taken and is upheld because in the Queensland LSC perspective any focus solely on discipline equates to a focus solely on maintaining minimum standards. It does not promote aspiration toward best practice or necessarily improve the standards of service that all consumers have the right to expect. (Briton, J. 2008)

1.2 Putting the LSC's strategic approach into practice

In foregrounding the opportunity to be more than be punitive and to promote high standards of conduct in the legal profession as a focus for consumer protection the LSC seeks opportunities through the larger context for regulation and through placing an emphasis on ethics as providing a stronger foundation for improving standards of conduct than mandating compliance alone.

The topographical landscape which the LSC has constructed to support this approach features opportunities found in the *Legal Profession Act 2007*, productive

cooperative relationships with the professional bodies, research collaborations and jointly held forums with Law Schools, productive cooperative relationships with its counterparts in other States in Australia, and linkages to the infrastructure for making legislation at state and national level. This paper will provide a brief exploration of that landscape.

2. The Statutory Framework and cooperative relationships with professional and other statutory bodies

2.1 Opportunities found in the Legal Profession Act (2007)

The main purposes of the Act are 'to promote and enforce the professional standards, competence and honesty of the profession' and 'to provide a means of redress for complaints about lawyers'. The LSC pursues those purposes in several main ways:-

- by investigating complaints received and assessed as falling within its jurisdiction (see Appendix 1 for a flowchart description of complaint handling)
- by initiating investigation into conduct that appears to be widespread or to put vulnerable consumers at risk and
- by learning from complaint handling and compliance auditing to make a practical contribution to improving standards of conduct in the legal profession
- by conducting compliance audits of Incorporated Legal Practices

The jurisdiction for complaint handling includes conduct that may be professional misconduct (for example theft) and that is dealt with following investigation in the traditional manner by disciplinary bodies if warranted, and unsatisfactory professional conduct, which is a new concept introduced by the Act. It says the meaning of unsatisfactory professional conduct includes

Conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. (*Legal Profession Act 2007*, section 418 (previously section 244 of the *Legal Profession Act 2004*)

It is immediately apparent that the new concept of unsatisfactory professional conduct broadens the scope for scrutiny of conduct to include poor standards of service, bringing a change from assessment by peers only with regard to the practitioner as fit for membership of the profession, to including public expectations of the standards of service that a professional should provide.

While the new concept introduces a fuller spectrum of professional conduct for assessment, the statutory framework gives no way of dealing with poor standards of service other than through the disciplinary process, by prosecuting practitioners before the disciplinary bodies – a response that can be overly harsh and does not always provide adequate redress to a consumer who may simply want the practitioner to do what he was engaged to do.

See Appendix 2 for examples of conduct assessed through the LSC's complaint handling process as unsatisfactory professional conduct.

The statutory framework however does provide opportunities for dealing with this conduct in such a way as to meet the purposes of the Act, which include promoting improved standards of conduct in the profession. The opportunity is found where the

LSC has the capacity to dismiss matters in the public interest. This can happen when the Commissioner assesses the conduct as unsatisfactory professional conduct that cannot be expected to be resolved as a consumer dispute or rightfully be taken down a more severe disciplinary path; he takes the option of asking the practitioner for submissions detailing the responses he/she will make to the complaint. If the submissions show that the consumer will get redress and the practitioner will improve his/her service standards, the Commissioner is then able to dismiss in the public interest. As the Commissioner writes in a paper presented to the LSC Symposium on Unsatisfactory Professional Conduct

I note in this regard that we finalised 405 (about 2 in 3) of the 600 conduct complaints we finalised in 2006-07 on the ground that the evidence after investigation failed to establish any reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct, and that we finalised 114 (about 1 in 5) of them on public interest grounds of precisely the kind I've been describing - and that we initiated disciplinary proceedings in relation to only 42 (about 1 in 14) of them. (Briton, J, 2007)

The Commissioner has sought legislative amendment to give the Commission summary powers, in which case there would be similarities with the UK system under the *Legal Services Act 2007* (LSA 2007) where determinations can be made through the Ombudsman scheme under the Legal Complaints Office, including directions that the respondent make an apology, provide compensation, rectify errors and so on. (LSA 2007 section 137). Such summary powers would be considered by the Queensland LSC to be a very effective way of dealing with complaints at the minor end of unsatisfactory professional conduct, which, as detailed at present can only be dealt with through opportunities given in the *LPA 2007* for dismissals in the public interest.

2.2 Productive cooperative relationships with the professional bodies

Professional bodies have an important presence linking with and supporting their membership with information on guidelines regarding expected conduct in relation, for example, to billing practices, advice and assistance when complaints have been made, as well as being one of the main contact points for their membership's clients who are having problems with their solicitors and for solicitors who find themselves subject to complaint. For instance, the Queensland Law Society provides a service to its members where those requesting assistance in responding to an LSC investigation can avail themselves of several hours of free legal advice from senior practitioners.

The Professional bodies continue, under the direction of the LSC, to be involved in investigations of complaints, although only the Legal Services Commissioner can make decisions on the outcome of complaints.

Professor Leslie Levin conducted interviews with the legal community in Queensland in late 2006, when as she observed, the new lawyer discipline system was a work in progress. She raised the question of the role that lawyers' professional associations, in this case, the Queensland Law Society and the Bar Association of Queensland, should continue to play in regulation when an independent system was being established. She pointed to a number of potential obstacles such as

...possible information asymmetries if the professional associations are unwilling to share all available information, duplication of investigative efforts, the current effectiveness of

trust account oversight, and the willingness of the professional associations to make “hard” decisions about practising certificates. (Levin, 2007)

In the context of the new system, the Legal Services Commissioner has worked closely with the professional bodies to develop highly productive and cooperative relationships. A means for sharing information has been a major work in progress and is well advanced, with the development of a database that is of interest to statutory bodies in other states. As well as retaining an investigatory role under direction, the professional bodies are important conduits for information to the professions regarding the LSC’s perspective on regulating ethics, with the Commissioner giving speeches to their annual conferences, to their compulsory professional development and other training courses and circulating information about the initiatives the LSC takes to bring the legal community together to examine and question “normal practice”. In some cases, the guidelines developed for the profession are developed as collaborations between the LSC and professional bodies, for example, the guidelines to outlays and disbursements.

Professor Levin observed the cooperative relationships and efforts to avoid possible obstacles in delivering an effective regulatory system, writing

Moreover, the many individuals who have come together to make the system work are dedicated people, who are making good judgments and who share a common interest in protecting the public. If the progress and choices made to date are any indication, the signs are hopeful that these questions will be addressed soon and that Queensland’s lawyer discipline system will come to be viewed as a model for best practices in Australia and throughout the world. (Levin, 2007)

2.3 Cooperative relationships with LSC counterparts in other states

In the absence of national regulation, national level reforms focus on the development of instruments such as National Model Laws and Legal Profession Rules. Those Laws have been developed by the professional bodies through their peak body, the Law Council of Australia, in consultation with the Standing Committee of Commonwealth, State and Territory Attorneys-General.

The states utilize such instruments developed at the national level in ways that differ between states. Some states have chosen also to transfer some regulatory functions from the professional bodies to newly created statutory bodies – how many and which functions varies from state to state – and so the structural arrangements for the regulation of the profession have changed significantly over recent years, still differing from state to state.

Whilst national instruments may be aimed at harmonisation and coordination, the differing state frameworks can mean that instruments such as the National Model Laws have not fulfilled the promise of delivering “harmonisation” to the regulation of the profession across the country, not least when the multiplicity of complaints and disciplinary regimes are considered. A major example of lack of coordination is where we now have a ‘core uniform’ national definition of the meaning of the two key terms *unsatisfactory professional conduct* and *professional misconduct*, but those terms are interpreted and applied very differently from state to state because no two regulators have the same powers in relation to complaints.

There may never be full harmonisation possible in a federal framework as aimed for by the development of the National Model Laws. However the state regulatory bodies are developing their own form of cooperation and harmonisation.

One of the formal methods for bringing the state based statutory bodies together is through an annual forum for professional bodies and statutory regulators - the Conference of Regulatory Officers (CORO). This forum has achieved some harmonization, for instance, the array of compulsory professional development schemes across the country, and more will be achieved as the statutory bodies themselves are developing productive and cooperative relationships, with a view to sharing innovations and developing national benchmarks.

Incorporated legal practices regulation

There are Legal Services Commissioners in 3 out of 7 states in Australia, in Queensland, New South Wales and Victoria, and they are engaging in discussion to ensure that consistent regulatory practice is taking place across the states in relation to Incorporated Legal Practices. Consistency is sought for instance in the capture of data for benchmarking and risk assessment so that databases in the separate states can be drawn on for analysis and comparison. This is in marked contrast to the differing arrangements regarding complaints databases.

The recent addition to the Queensland LSC's role of regulating incorporated legal practices (*LPA 2007*) demonstrates the will to cooperation between states. In its regulation of ILPs New South Wales has taken an education toward compliance approach in its 10 years of operation, and Queensland has agreed to adopt that concept. In its "education toward compliance", achieved in NSW with self-assessment audits, Queensland is developing ways of using its audit powers to engage legal practitioner directors with problem-solving how they might best develop and continually improve their management systems and processes and workplace cultures to better support and sustain high standards of legal services delivery. Queensland is drawing on the NSW instruments of self-assessment audits, with some augmentation. A key component of the Queensland approach is to engage the firms in a continuing conversation with the LSC about their progress in better supporting and sustaining high standards of legal services delivery.

The regulation of ILPs gives new opportunities to regulation and to coordination across states because it differs from the current complaints regime in the very critical point that ILPs are regulated as firms, whereas the current complaint regime focuses on individuals. The Queensland LSC in particular considers that the regulatory approach it develops for ILPs should also be applicable to firms, so that all law firms and not just ILPs should have access to the tools and instruments developed to enable firms to reflect on and strengthen not just their legal practices but the cultures of their firms that underpin practices and that support good professional conduct within the firm. This approach will be described fully in a paper to the International Legal Ethics Conference 2008 to be held in Queensland in July (Briton, J. and McLean, S. 2008)

3. Research including collaborations and jointly held fora with Law Schools

As noted under the section discussing opportunities provided by the *LPA 2007*, in order to meet the requirements of the Act the LSC also sets itself the goal of learning from dealing with complaints and investigation matters and undertaking projects and research often in partnership with professional bodies and law schools and other

stakeholders to make a practical contribution to improving standards of conduct in the legal profession. The remainder of the paper describes those initiatives.

The LSC does not see itself as having a training and formal educative role because that is well filled of course by the professional bodies that provide membership services and by tertiary institutions. The LSC however places great importance on working closely with tertiary institutions and a range of others in the legal community including professional bodies, specialist tribunals and law firms to conduct research or provide forums to explore critical issues that arise from complaint handling experience. This is seen as important to the LSC approach of gaining a greater understanding of the complaint and regulatory context, and of communicating what has been learnt back to the legal community.

Research and other initiatives include analysis of the Commission's database and initiation of research into interesting statistics that emerge, utilizing interactive technology, undertaking online surveys and holding symposia with University collaborators to explore critical issues that arise in complaint handling. These will be briefly described.

3.1 Analysis of the LSC database

The Commission routinely subjects its complaints database to analysis in order among other things to identify the practices and practitioners most at risk of complaint and it publishes that information in monthly reports of statistics circulated to stakeholders, and in its annual reports. The data base continues to be developed to collect needed data and to enable extraction of that data.

The Commission is in the almost unique position of having all our complaints data entered on the same server as all the data kept about practitioners and law firms by the professional bodies and admitting authorities. This means we can cross reference all information and it also complements analysis of Incorporated Legal Practices.

The database gives us the capacity to see that half of all the investigations concerning solicitors arise from the practice of family law (1 in 5), conveyances (1 in 5) and personal injuries law (1 in 10) and that women solicitors are three times less likely than men solicitors to find themselves subject to investigation and that solicitors whatever their gender become increasingly more likely to find themselves subject to investigation as they get older.

We are also able to see our statistics in the context that the majority of complaints largely come from individual clients of modest means using the services of small law firms for conveyancing or family law or deceased estate matters or through seeking compensation for personal injury. They make complaints because they are less able to look after themselves when things go wrong, unlike the wealthier and typically corporate repeat clients who use the services of larger firms. The introduction of Incorporated Legal Practice regulation provides an opportunity to reach further to the profession, with a range of self-assessment audit tools under development being made available not only to ILPs, but to all law firms, including large law firms, as discussed by John Briton in his paper to the International Legal Ethics Conference July 2008. (Briton.J, and McLean, S 2008 forthcoming)

Such information is communicated back to the profession through various means and in some cases research projects are initiated. As we gain greater access to the database, we will have the capacity to identify major trends and conduct further

research that will enable us to share our knowledge gained from complaint handling and compliance auditing with the profession and others, as a contribution to improving standards of practice in the legal profession.

3.2 Women lawyers project

One current example of research being undertaken to further explore a question that arises from analysis of the LSC database is the LSC project we are conducting in collaboration with Dr Francesca Bartlett of the University of Queensland on why women solicitors are less than a third likely to have complaints made about them than are male solicitors. A literature review has been undertaken and shows that while these lower figures are seen consistently in other countries, there has been very little research on the topic (Bartlett, F. 2008). In the course of our research and questions of potential contextual factors, we have found there are gaps in demographic data for women solicitors, for example, area of law worked in, size of firm and so a brief survey has been circulated to fill those knowledge gaps and help in the understanding of this anomaly. Around a quarter of women lawyers in Queensland answered the survey with around half expressing interest in being involved in focus groups to further explore the research questions.

The theoretical basis of the research considered the work on care and rights perspectives and whether women lawyers were more likely to take a care approach than men lawyers. The literature tells us that that is not the case and so we must search elsewhere for other factors to consider in answering our question. We note that the majority of complaints against women lawyers are against those who have held practicing certificates for less than 5 years. We are exploring with women lawyers through focus groups a number of contextual and experiential possibilities for the lower complaint figure rate.

At the broadest level, it will be interesting to know if there is something that women lawyers are doing that is perceived as satisfactory conduct by legal consumers and if so, what that is, so that we can communicate that to the rest of the profession. At the broadest level this demonstrates our commitment to learning from our complaint handling, to collaborating with external researchers and developing knowledge to contribute to improved standards of conduct in the legal profession.

If it is not that women are doing something right but that there are other factors, such as whether the area of law that more women are working in attracts fewer complaints, level of seniority (or lack of) and therefore lower accountability for complaints, or an attrition from the profession before seniority is reached and so on. We do know that many women leave the profession but we don't know why. Other possible factors are hinted at in the literature, for example, focusing on interaction with clients – women lawyers often say that they must emphasize their professionalism to clients who mistake them, for example, for social workers or administration staff, sheerly because of gender. Is there something in the need to emphasize professionalism that works in favor of avoiding complaint? There are many interesting avenues to explore, and very little focus on this phenomenon despite it being observable in statistics internationally.

Of course, developing this knowledge through a relatively small scale project and providing it to the profession for complaint avoidance is not quite that straightforward, and we do not expect to come up with pat answers to the interesting statistics. However, at the very least, we are raising the issues of lower complaints, contextual factors and differential experiences to the consciousness of lawyers, scoping for the

firms the sorts of factors that may impact on conduct and so providing a framework for the firms to consider their own practice and seek their own improvements.

3.3 Unsatisfactory professional conduct survey

An early project that we developed in collaboration with Griffith University's Socio-Legal Research Centre is a survey on unsatisfactory professional conduct. The *Legal Profession Act 2004* does not give an exhaustive definition of the concept of unsatisfactory professional conduct but says only that it 'includes conduct... happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner'.

The definition invites an obvious question: What standard of competence and diligence is a member of the public entitled to expect of a reasonably competent Australian legal practitioner? The question might be obvious but the answer—as we are reminded almost every day—is not.

We thought it might be interesting and useful to find a way of putting that very question to lawyers, law students, members of the public and regulators to see what they have to say—and to see if they give the same answer. We designed a survey in conjunction with the Griffith Law School that describes sixteen fact situations or scenarios that are typical of the complaints about lawyers the Commission receives every day. The survey is very simple—it asks people who fill out the survey simply to tell us with a 'yes' or a 'no' for each scenario whether the practitioner's conduct falls short of the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

The survey had been completed by 542 respondents as at 31 October 2006—by 238 lawyers; 212 final year law students at Griffith University and the University of Queensland; 58 members of the public and 34 staff of the regulatory authorities.

All the scenarios used in the survey are examples from complaints received. For example, one of the 16 scenarios described how a sole practitioner accepts a retainer to act for a client in a family law dispute about where his client's son should live. Numerous obstacles appear for the practitioner, including his becoming ill and result in him missing the date to sign documents returnable to the Court. The client lost, as he believed, all possibility of obtaining a residence order in his favour, and submitted a complaint to the LSC.

In answer to the question of whether the practitioner's conduct falls short of the standard of competence that (the survey respondent) is entitled to expect of a reasonably competent Australian legal practitioner the groups with majority responses that the conduct does fall short are the regulators and the public, whereas lawyers and law students were evenly divided as to whether the scenario described unacceptable conduct or not.

3.4 Interactive scenario based problem solving

The scenario described above was used for the first of our interactive scenarios developed in conjunction with a research centre at the University of Queensland, and in collaboration with Law School academics at Queensland University of Technology.

Our work on developing interactive scenarios is in the same frame of raising issues that come to our attention through complaint handling experience so as to bring them to the consciousness and discussion tables of law firms and others in the legal community. We collaborate with a research centre at the University of Queensland that has developed scenario based interactive software and we create scenarios to allow lawyers to engage with ethical dilemmas that arise in everyday or specialist areas of practice and to consider the actions they would take from a safe place where feedback and resources are available for their consideration.

Our first scenario was developed with the Queensland University of Technology Law School staff who were wrestling with how they might teach professional responsibility and ethics to law students in ways that engage them with ethical problems not only cognitively but also affectively, and that met also with our interests in providing platforms for practitioners to consider everyday ethical dilemmas and best practice for dealing with them.

The interactive scenarios provided that potential, the first tracking a few weeks in the life of a suburban solicitor and exploring his decision-making as he encountered obstacles in following through commitments with clients. The substance of the scenario was taken from an actual conduct complaint that we received and that was ultimately dismissed in the public interest with the solicitor initiating a range of performance management solutions to his practice, so it had a very realistic basis.

The second scenario consisted of a suite of scenarios in Elder Law, and we collaborated with statutory agencies and law firm staff who specialized in the area and provided some resources that they had themselves developed. We invited the Guardianship and Administration Tribunal and representatives of the Elder Law sub-committee of the Queensland Law Society to help us develop a scenario that will sensitize practitioners to some common but difficult 'real world' ethical dilemmas that arise in the course of providing legal services to older people and people who may have cognitive impairments—and to reflect on and engage with those problems by attempting to find solutions.

The story for the scenario simply followed the case of a solicitor's long term client bringing her mother to him to discuss selling her house in order to fund the building of a granny flat as an extension to the daughter's house – a very common situation that arises but one that is highly complex when issues such as capacity for decision-making arise.

The scenario is in 3 parts. The first part explores capacity issues and the result is that the mother is assessed as having capacity and so her decision-making, with advice from her solicitor, steers the course of events. The second part of the scenario deals with property issues the end result being that the mother decides not to sell her house, not to fund a granny flat and instead goes to live "up the Coast" – that is, to the coastal resort type areas in Queensland – with her boyfriend. The third part of the scenario deals with the complaint that the daughter lodges with the Legal Services Commission about the conduct of the solicitor and presents 4 paths of destiny that the solicitor can follow, depending on how he responds to the LSC's communications and investigation of the complaint. It also includes some context in one of the paths of destiny where the solicitor has actually become very depressed by other events in his life and fatalistic about the complaint. Scenario resources let him know that he can access a number of hours of free legal advice and support from his professional association.

We believe that this third part of the scenario, and the experience of dealing with a complaint that those who follow the scenario through will have will be very informative and waylay some misconceptions. It will be of great use to complainants as well, and there will be a link to it in the section when we have our complaint form on the site where it can be completed online and where the data can be captured in our developing database. Not least, the Commissioner himself, like Alfred Hitchcock in his movies, makes a cameo appearance as one of the voices in a dialogue.

We presented parts one and two of the Elder Law scenario to a conference on Elder Law and they attracted considerable interest—including from academics at the Bond University Law School who plan to use them for teaching purposes in a tutorial environment and also for assessment purposes and from service providers including the Adult Guardian who flagged their intention to use them for in-house staff training purposes. We collected some web statistics as a snapshot over a period of a month, and during that time had an average of 7 new visitors per day to the Elder Law scenario after the Elder Law Conference and after the professional body advertised it in their weekly newsletter to the profession. Part three will be released in May (2008).

3.5 Ethical culture check

The Legal Services Commissioner writes in a paper for the International Legal Ethics Conference to be held on the Gold Coast in Queensland in July, 2008 that

Traditional complaints based regimes for monitoring and enforcing standards of conduct have some significant limitations, including.....they confine our gaze as regulators solely to the conduct of individual lawyers, and ignore the reality that their conduct is impacted for better or worse by the workplace cultures of the law firms within which they work (Briton, J. and McLean, S, 2008)

The LSC has developed an online "ethical culture check" for law firms which we have "road-tested" in earlier versions with a number of Brisbane based law firms. The development of this culture check is partly based on a range of literature in Organizational Studies that deals with ethical culture and ethical climate, for example, the work by Linda Trevino (Trevino, L. 1999). Completing the on-line survey helps firms to think about their ethical culture and how well it supports the people who work within the firm to aspire to and sustain high standards of professional practice. In particular, it enables law firms to compare how people at different levels within their organization respond to the same questions that go to the heart of their ethical culture and hence potentially to identify ways in which it might be strengthened and improved.

There are many reasons why it is important for firms to have a strong ethical culture. It is important not only because strong ethical cultures nurture and sustain high standards of professional practice but also because that makes good business sense. Good ethical practice makes for good professional practice which makes for good risk management. All the evidence suggests that firms with strong ethical cultures are best able to recruit and retain skilled and committed staff and to withstand business challenges and setbacks. Last but certainly not least, having a good ethical culture is integral in protecting the rights and interests of legal services consumers.

The ethical culture check was advertised to lawyers in Queensland through the professional body's newsletter and within the first two days around 100 staff from

firms completed the check. The slim majority of those responding were from sole practices, were male and were based in regional cities. This profile is of interest, as those categories describe the legal practitioners who our database tells us are most at risk of complaint. The culture check asks about such things as common ethical dilemmas, about those dilemmas the practitioner has most confidence in dealing with and presents brief scenarios asking what actions would be taken. Legal staff including barristers at the LSC helped to develop the scenarios and the questions regarding responses to such situations, many taken from direct experience in private practice or from complaints.

The law firms participating in our pilot study ensured that responses were given by associates as well as partners, and we analyzed their results to show the differences in the responses and suggested the major issues that arose in regard to the culture of their firms for their further consideration. One firm wants to use their pilot results as a benchmark and redo the culture check every year after basing in house training on the results, to see if there are any changes in responses from their firm. Another intended to develop an in-house training program around the major issues and advised making it available to all law firms, as we have since done.

This instrument will be useful for all law firms but also becomes one of potentially many means by which the LSC can audit the effectiveness of an ILP's management systems and supervisory arrangements.

3.6 Symposia

The Commission and the Griffith Law School held the Lawyer's Work, Lawyer's Conduct Symposium on 11 November 2005 as one of the first activities in this area of project and research collaboration. Our aim was simple—to bring legal practitioners together with legal academics and regulators to establish linkages between people who have mutual interests but rarely meet and talk with each other; to identify research topics relevant to our shared interest in improving standards of conduct within the profession; and to explore potential partnerships in furthering that research.

The participants affirmed the need for the process to be ongoing—hence the idea of an ongoing series of symposia which enable practitioners, academics and regulators to discuss ethical and conduct issues arising in the course of contemporary legal practice in Queensland and identify potential research collaborations. The Commission and the Griffith Law School agreed to conduct two to three symposia annually under the broad heading *Lawyers, Clients and the Business of law*.

The first symposium of the Lawyers, Clients and the Business of Law Series was held under the title *Creative Practice or Profiteering?* It focused on billing practices for charging outlays and issues surrounding litigation lending and the 50/50 rule in the context of personal injuries proceedings.

The second symposium of the Lawyers, Clients and the Business of Law Series was held under the title *Conflicts of Interests: perspectives from diverse legal settings*. It focused on the importance of conflicts of interest as an ethical issue and the challenges it has long posed for practitioners.

The third symposium of the Lawyers, Clients and the Business of Law Series was held under the title *Unsatisfactory Professional Conduct*. It provided an opportunity

for the legal community to reflect on and discuss the important concept of "unsatisfactory professional conduct" as it appears in the Legal Profession Act 2007.

In all symposia held, a cross-section of the legal community have attended, including private practice firms, regulators, professional bodies, tertiary institutions, NGOs, community legal centers and Legal Aid staff and department of Justice and Attorney-General staff. The format has usually been presentation by panelists, followed by working groups to discuss and report on issues, and then general discussion, with a report published on the LSC and Griffith University Socio-legal Research Centre websites.

The first symposium for 2008 is held in May, titled "Ethics and Creativity in Billing Practices" and includes a presentation by a partner of a large law firm as well as a document of billing practices that have come to the attention of the LSC through complaints and investigations, as a resource for working groups.

3.7 Other initiatives: the Client Service Charter; fact sheets, accessibility of services

There are a range of other initiatives that the LSC has taken to reach out to the legal profession and legal consumers as an integral part of its regulatory action for consumer protection.

A simple instrument, a Client Service Charter, has been developed with the Queensland Law Society and it includes a range of commitments by practitioners and sets out what expectations the clients can have of their solicitors and that their solicitors have of their clients. It also includes a recommended process to follow if complaints arise, with the recommendation that the client first talk with their lawyer. It includes information that the Queensland Law Society has a Client Service Centre to advise clients who may be experiencing problems with their solicitor and it also publicizes the details for the Legal Services Commission if clients wish to lodge a formal written complaint. This simple document makes a complex process easier for clients and the Queensland Law Society is making it available to all law firms to provide to their clients at first interview.

Other means of providing information intended to help clients and lawyers avoid the need to make complaint but also be fully informed if a complaint is made are through a series of fact sheets, all developed in close consultation with the legal staff of the LSC. The information is provided to all inquirers, complainants, for example, "How to make a complaint" and "Communicating with your lawyer" and often accompanies notices to lawyers about complaints against them for example "Responding to a Complaint" and, in a pre-emptive way "Avoiding complaints".

We commissioned and received a report from a researcher at Griffith Law School about how we might go about collecting information that will enable us to know more about complainants to complement the very detailed information we have about respondents. We want among other things to be able to monitor the accessibility of our services to all Queenslanders and to craft any targeted 'outreach' strategies that might be appropriate. The research report made a series of recommendations and we have redesigned our complaint form accordingly and enhanced our data base to store, analyse and report the additional information. We expect to have the new form available in hard copy over coming months and to make it (and our other forms) available on-line by mid-2008. This way of collecting data about our complainants will enable us to have more information as a basis for analysing our accessibility.

3.8 Large scale project proposals

We have committed along with our counterpart commissions in New South Wales and Victoria to be industry partners in a significant national research project about the ethical policies, management practices, structures, attitudes and behaviours of the large law firms currently being prepared by a consortium of legal academics from Melbourne and Monash Universities and the University of Queensland by way of funding application to the Australian Research Council.

We are also in discussion with other Universities about potential ARC Linkage projects for next funding rounds.

4. Conclusion

By way of knowledge gained through complaint handling, compliance audits and by engaging the legal community (including legal consumers) as integral to the regulatory role, we are raising practice issues associated with complaints, contextual factors and differential experiences to the consciousness of lawyers. In doing so, we are contributing to improved standards of conduct by scoping for the firms the sorts of factors that may impact on conduct and so providing a framework for the firms to consider their own practice and seek their own improvements.

With some exceptions, we are engaging in relatively small scale projects and largely taking creative approaches to utilize scarce resources in ways that are most effective in developing regulatory approaches that are aimed at fulfilling our purposes under the Act and protecting consumers. We do not expect to deliver the ultimate answers to consumer protection; we see our activities, including aspects of day to day processing of complaints, as providing resources to the profession and to consumers for their active participation in shaping good professional conduct and maintaining high service standards.

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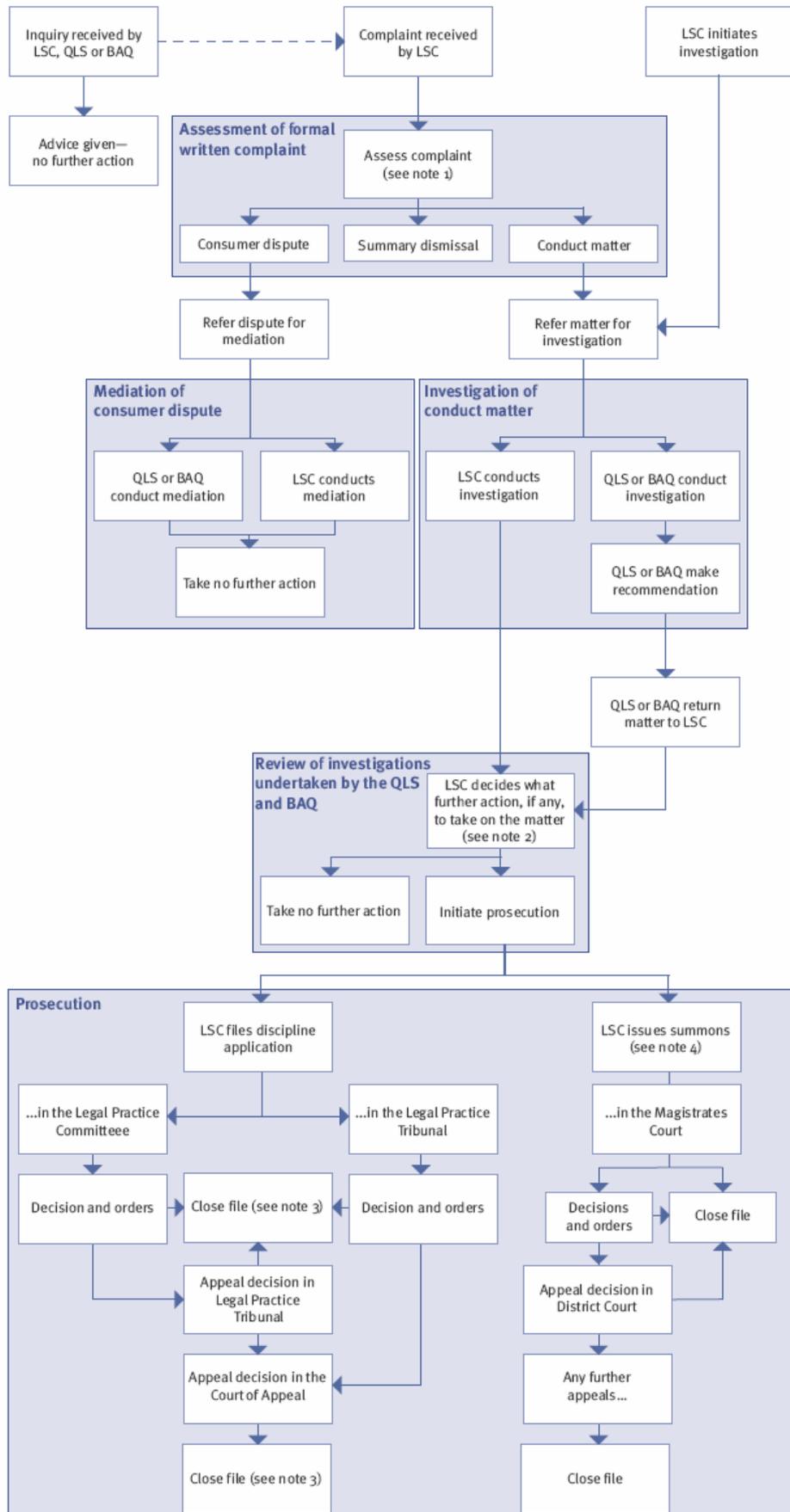
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Appendix 1 Complaint handling process for LSC (Queensland)



Notes:

1. The Commission is the sole body authorised under the *Legal Profession Act 2004* (the Act) to receive complaints about the conduct of legal practitioners and law practice employees. We assess complaints against a series of criteria set out in the Act. The assessment leads to one of three possible outcomes:

- the complaint is classified as a conduct matter if the conduct complained of would, if established, fall short of the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent Australian legal practitioner or would justify a finding that the practitioner is not a fit and proper person to engage in legal practice (see sections 244 and 245 of the Act)
- the complaint is assessed as a consumer dispute if the conduct complained of does not meet those criteria but is nonetheless conduct to which the act applies (see section 262 of the Act)
- the complaint is summarily dismissed if the conduct complained of is not conduct to which the Act applies (see sections 248-259 of the Act).

The Act gives us the option to try to mediate consumer disputes or to refer them to the Law Society or Bar Association for mediation. It requires us to investigate conduct matters or alternatively to refer them to the Law Society or Bar Association for investigation—in which case the investigation remains subject to the Commission's direction and control and the Society and the Association are obliged after the investigation to report their recommendations to the Commission.

2. The Commission is the sole body authorised to decide what action, if any, to take on a conduct matter after investigation. The Act requires us to assess whether the evidence establishes a reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct and whether it is in the public interest to initiate disciplinary proceedings. We initiate disciplinary proceedings if the answer to both questions is 'yes'—in the Legal Practice Tribunal in relation to more serious matters or in the Legal Practice Committee in relation to less serious matters. We dismiss complaints if the answer to either question is 'no' (see sections 273 and 274 of the Act).

3. The Commission is obliged to keep a discipline register of all disciplinary action taken under the Act (see section 296 of the Act).

4. The Commission is responsible for prosecuting alleged offences under the Act—for example, the offences pursuant to sections 24 and 25 of engaging in legal practice or holding oneself out to engage in legal practice when not entitled. The Commission is also responsible for prosecuting alleged offences under the *Personal Injuries Proceedings Act 2002*—for example, the offence of breaching the restrictions on the advertising of personal injury services pursuant to section 66.

Appendix 2 Examples of Unsatisfactory Professional Conduct

The following examples of unsatisfactory professional conduct involve solicitors, and most are in relation to family law and conveyances. Those two areas of law between them make up about 40% of all the complaints we receive. The final two examples involve barristers, both of them raising issues of competence and diligence. These are all drawn from complaints received and assessed as conduct matters:

Acting for the buyer in a conveyance but forgetting for five months despite reminders to send the client a copy of the contract and settlement details - preventing the client from applying for a first home owner's grant;

Acting for the buyer in a conveyance, and failing to send on the results of a search that revealed a building defect before the contract became unconditional – leaving the buyer to pay the cost of the repairs;

Acting for a vendor in a conveyance, and inadvertently depositing the settlement proceeds into the client's Australian account in Australian dollars rather than, as instructed in writing, into a British account in pounds sterling – given fluctuations in the exchange rates, costing the client several thousand dollars;

Acting for the executors of a deceased estate and holding the estate money in the law practice trust account pending resolution of the estate's taxation liabilities rather than, as instructed, investing the money in an interest bearing account – costing the estate the interest;

Acting in an estate matter, and wrongfully exercising a lien by refusing to hand over a copy of the will to the executor;

Acting for the wife [Clare, say] in a property settlement following divorce and, when the matter settled, after Clare expressed some anxiety about doing so herself, volunteering to go to the ex-husband's home to collect some of her personal belongings – and getting into a heated argument with him and saying 'you are a grotesquely ugly man. I can't believe Clare was with someone as ugly as you';

Acting for the distraught wife in a family law matter and causing her great distress by saying to her, to put her at her ease, apparently, that her best revenge would be to live well and that she should shave her legs, wear high heels, and get a new wardrobe and hairdo, all of which would also help her in court - and refusing to apologise because, so we're told, no offence was intended, and that anyway it was good advice;

Taking instructions from the husband in a family law matter to obtain orders to enable his children to live with him 6 days a fortnight, not 4 days a fortnight as per his informal arrangement with his estranged wife and, after running up \$17,000 in legal fees arguing the toss, being informed by the client after he received the sealed consent orders they eventually entered into on his behalf to settle the matter said that the children would live with him not 6 days a fortnight but 4 days a fortnight, just as per the previous informal arrangement – and, having admitted making a mistake, declining to remedy the mistake unless the client put further funds into his trust account and, when that was refused, terminating the retainer on the basis that the client had lost confidence in him.

. Bringing a judicial review application that was doomed to fail and found as such by the Court following an application by the other parties, and finding himself subject to an indemnity costs order amounting to \$40,000;

Failing to explain the law of self defence, failing to take detailed instructions, and running a defence that was doomed to fail, all in his first criminal trial - with the result being that his client was found guilty and put at risk of going to prison.