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THE LEGAL SERVICES COMMISSION – AN UPDATE

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Thank you for giving me the opportunity to talk at your annual conference once again. I spoke last year about the system established under the *Legal Profession Act 2004* for dealing with complaints and disciplinary matters, the Commission's powers in that regard and the thought processes we bring to bear in exercising those powers and applying them to the realities that confront us. This year I will speak about how we think we're travelling and the sorts of matters we find ourselves dealing with, and in the process no doubt reveal some more about our thought processes.

SOME RECENT HISTORY

The Commission had some obvious hurdles to overcome when we commenced on 1 July 2004. The first of them was that public confidence in the system for dealing with complaints about solicitors had been shattered by the adverse media publicity about the law firm Baker Johnson in 2002-03 which, as everyone knows, was one of the main drivers for the creation of the Commission in the first place. I can only assume that the public confidence would have eroded even further if the publicity had extended to the fact that there was no system at all for dealing with complaints about barristers, or none worthy of the name, not even a system that had fallen into disrepair.¹ Now of course there is.

Even more fundamentally the Commission inherited almost 1000 complaints on its inception, many of which had been in the system for a year or more and some for more than two years or more when the Commission commenced. Timeliness is one of the hallmarks of any well-functioning system for dealing with complaints and complainants and respondents alike deserved better than that.

Our most significant achievement thus far is the very basic one of having all but fully resolved that backlog of complaints - and at the same time to have dealt with the new 'post-Act' complaints at the same rate or better than the rate of which we have received them, thus avoiding simply replacing one backlog with another.

This is no small achievement. It completes the transition from the old system for dealing with complaints to the new, and will enable us as we go forward to get out from under the weight of numbers and to be smarter and more proactive about what we do. It gives us room to move, and in particular to deal with complaints in future in a more timely way than we've been able to deal with them thus far and to be much less confined than we have been in the past simply to react, or to respond to complaints.

I note in relation to timeliness that there has been a steady decrease in the time it takes the Commission to bring complaints to completion now that the backlog is effectively resolved. We assessed 87% of the new complaints we received during the financial year to the end of February within a month of receiving them compared to 74% at the beginning of the year, and most of them in less than 3 weeks. We finalised 95% of consumer disputes within 2 months of receiving them compared with 80% at the beginning of the year, and most of them in 2 weeks. We finalised 73% of conduct matters - that is to say, complaints that allege either unsatisfactory professional conduct or professional misconduct and that require investigation - within 7 months of receiving them compared to 58% at the beginning of the year, most of them in less than 4 months.

I should add that while those encouraging statistics are true of complaints generally they are not true of complaints about barristers. This is explained in the main I expect by the fact that the Bar Association has asked us and we have readily agreed to refer complaints about barristers to the Association for investigation (except where the public interest suggests otherwise), and that means of course that they are dealt with pro bono by the members of the Professional Conduct Committee, all of them busy people with a lot on their plate. My guess is however that we'll find a way to speed things up if we get our heads together and we will, in the not too distant future.

The Commission is not only responding in a more timely way to complaints but becoming increasingly pro-active. We have initiated an average of 22 investigation matters or ‘own motion investigations’ a month over the year to date, or 21% of all new matters, compared to 7 a month or 7% of all new matters in 2005-06 and 3 a month or 2% of all new matters in 2004-05.

The investigation matter power is an important power to have given our fundamental goal to protect the rights of legal consumers and to improve standards of conduct in the profession. It is important for the obvious reason that it would be silly to assume that consumers, even sophisticated repeat users of legal services will always be able to recognize unsatisfactory professional conduct or professional misconduct when they see it, or be able and willing to complain about it if they do, let alone when their lawyers have taken pains to disguise it.

We initiate some investigation matters into conduct (or more accurately, suspected conduct) that comes to our attention incidentally, in the course of investigating complaints, including unsubstantiated complaints about other matters. We initiate others by reason of our obligation under recent amendments to the *Personal Injuries Proceedings Act 2002* to enforce the restrictions on the advertising of personal injury services. We initiate many of them however by way of a deliberate effort to target practices and especially apparently widespread practices that appear to put consumers and especially vulnerable consumers at risk.

We are currently targeting two practices in particular. One is the way an indeterminate but a seemingly large number of practitioners have been billing their clients for disbursements, often but not only in conveyances - they have been promoting their services for a fixed price fee plus costs, but then billing their clients for undisclosed mark-ups on the amounts they’ve actually disbursed in search fees and the like.

The other is the way some practitioners appear to be billing clients in speculative personal injury matters, including but not only in ways that appear to contradict both the letter and the spirit of the 50/50 rule (section 481C of the *Queensland Law Society Act 1952*). The rule is simple, at least in concept – it’s that a solicitor can bill a client no

more than half the amount to which the client is entitled under a judgment or settlement less any refunds the client is required to pay and ‘the total amount of disbursements the client must pay, or reimburse, to the practitioner or firm’.

You all know how traditional speculative personal injury actions proceed – solicitors agree to forgo their professional fees for the time being and in the meantime to pay the clients’ disbursements themselves and take the risk the claim will ultimately prove successful - in which case the client agrees to pay the solicitor’s professional fees (usually given that the solicitor carried the risk at a higher than usual charge out rate) and to reimburse the disbursements.

These arrangements are ripe for rorting, of course - hence the 50/50 rule. Some clients found themselves winning their case only to win very little or even nothing at all - they had little and sometimes nothing to show for it once they paid their solicitor’s professional fees and reimbursed them the disbursements. Even now I have so say some practitioners appear to regard the 50% cap not as a ceiling but a floor.

There is a new and it seems increasingly common variant in which solicitors either enter into loan agreements with clients or arrange loans for clients with a lender, sometimes an entity in which the solicitor or one or more of the partners of the firm has an interest. The loan of course enables the clients to pay their disbursements themselves, and up-front. The deal is that they repay the loan with interest and pay the solicitors’ professional fees from the proceeds if and when their case is successful.

The newer variant is just as effective in giving injured workers and others access to justice they mightn’t otherwise have but seems equally ripe for rorting. Some solicitors appear to be structuring the loans so that the repayments, the interest and even the GST component of their fees count not as disbursements that ‘the client must pay, or reimburse, to the practitioner or firm’ but simply as repayments the client must pay to a third party – and so subtract them from the client’s minimum half-share of the nett proceeds after refunds and disbursements, not from the gross proceeds.

That's a neat trick when the lender is an entity in which the solicitor or a partner of the firm has an interest, and arguably little more than a contrivance to claw back for the solicitors more than the maximum half share to which they're entitled under the 50/50 rule. The practice raises some obvious questions:

- are solicitors entitled to take the maximum amount of fees to which they are entitled under the 50/50 rule and then charge an additional sum by way of GST on those fees?
- how does the 50/50 rule apply to these sorts of litigation lending arrangements? What costs do, or should the term 'disbursements' be taken to include and what are the tax, including GST implications?
- how do these litigation lending arrangements impact the practitioners' fiduciary duties to their clients, given that they have a direct or indirect interest in maximizing their profit and hence in preferring their own interests to those of their clients?

There is potential for barristers to get in on the act, too, given that barristers' fees count as disbursements and so aren't capped in the way that solicitors' fees are. It means in theory at least that barristers can charge any fee they like, the spirit and intent of the 50/50 rule notwithstanding. We're aware of at least one matter in which a barrister charged an apparently exorbitant fee, and we need to rule out the possibility that the barrister and solicitor colluded to share the proceeds.

We're aware of another matter which settled for less than expected and in which it appears, after the client reimbursed the solicitor for his disbursements, that the solicitor suggested to the barrister and the barrister agreed to reduce his fee in exchange for repeat business. That might have been a perfectly acceptable commercial arrangement but the problem, so it appears, is that the solicitor kept the difference. That solicitor has some explaining to do - and maybe there is an explanation - but so will the barrister if there is any suggestion of collusion.

I note incidentally that this scenario illustrates the importance of the investigation matter power: how would conduct of this kind ever become subject to consumer

complaint? How would the consumer ever get to find out that he paid more in barrister's fees than the barrister actually charged?

SOME KEY FACTS ABOUT COMPLAINTS MADE TO THE COMMISSION

Interestingly and encouragingly, the number of complaints about lawyers has reduced dramatically since the new system for dealing with complaints commenced on 1 July 2004. The Law Society received 1602 and 1621 complaints in 2002-03 and 2003-04 respectively, the last two years it had responsibility under the old system, but the number fell to 1450 in 2004-05 and to 1074 in 2005-06 – a reduction from more than 130 new complaints a month to fewer than 90.

Most likely the number of complaints previously was artificially high by reason of the Baker Johnson brouhaha in the media in 2002 and 2003 but the reduction suggests nonetheless that public confidence in the system for dealing with complaints has been largely restored - good news, if indeed the inference is warranted.

That aside, the reduction reflects also both the Commission's and the Law Society's success in pre-empting complaints by dealing with consumer concerns informally in the first instance wherever possible, as inquiries, without requiring the aggrieved parties to 'up the ante' by making formal written complaint.

We can tell you a lot about the complaints we receive. We publish comprehensive complaints data in our annual reports which are available on our website at www.lsc.qld.gov.au and in hard copy by request. I can tell you for example that of the 978 conduct matters we finalised during 2005-06:

- about 7 in 10 originated in complaints by clients or former clients about the practitioners subject to complaint (about 1 in 10 of them by solicitors on the clients' behalf) and about 1 in 10 by other practitioners;

- about 1 in 5 had their origins in family law matters, almost 1 in 6 in conveyancing matters and just more than 1 in 10 in both deceased estate and personal injuries matters;
- about 4 in 10 alleged unethical conduct (breaches of undertakings, for example, or conflicts of interest), roughly 1 in 5 were about poor quality of service (missing statutory time limits, for example, or failing to advise of the outcomes of hearings or the effect of orders), roughly 1 in 6 were about costs (alleged overcharging, for example, of sending a bill vastly in excess of estimates); and roughly were about 1 in 10 were about poor communication (failure to communicate offers of settlement, for example, or to reply to correspondence);
- about 7 in 10 were finalised after investigation on the basis that there was no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct;
- importantly, and this is another measure of the Commission’s pro-activity, roughly 1 in 7 were finalised after investigation on the basis that while it was possible a disciplinary body might make a finding of unsatisfactory professional conduct or professional misconduct, no public interest would be served by initiating disciplinary proceedings - some because, for example, the practitioners subject to complaint had ceased to practise but the vast majority because they were relatively minor matters and the practitioners concerned had apologised to the complainant or re-done the work or waived some or all of their fees or fixed their office systems or undertaken some training and the like: that is to say, they had either made good their mistake and / or taken steps to prevent similar mistakes in future;
- about 8 in 100 were finalised with a decision to initiate disciplinary proceedings - about 6 in 100 in the Legal Practice Tribunal and about 2 in 100 in the Legal Practice Committee.

We can tell you a lot, too, about the solicitors who were subject to complaint. Our complaints data base links with the law Society’s practitioner data base and so we can

profile respondent solicitors by their age and gender for example but also how long they've been practising, what type of practising certificate they've got, where they're practising, and the size of the law firm with whom they're practising.

I can tell you for example that the 978 conduct matters we finalised during 2005-06:

- involved a total of 543 solicitors or 9% of all solicitors in Queensland, 425 of whom were subject to one complaint only, 75 to 2 complaints; 21 to 3 complaints, 9 to 4 complaints and 13 to 5 or more complaints;
- 459 law firms or 36% of all law firms in Queensland, 294 of which were involved in 1 complaint only; 85 of which were involved in 2 complaints; 43 in 3 complaints; 14 in 4 complaints and 23 in 5 or more complaints. They were small firms in the main - 258 were sole practitioner firms - roughly 1 in 5 of all sole practitioner firms; 76 were 2 partner firms - roughly 4 in 10 of all firms of that size; and 20 were 3 partner firms - roughly 1 in 3 of all firms of that size.

I can tell you because we're here that it's true that solicitors on the Gold Coast were more likely last year at least to be subject to complaint than solicitors anywhere else in Queensland - but only just. More interestingly I can also tell you that women solicitors even having regard to their relative representation in the profession are only just more than a third as likely as their male counterparts to be subject to complaint, and that solicitors in their thirties are only just more than half as likely as solicitors in their forties. I will leave you to wonder why, and no doubt to speculate about emotional intelligence and grumpy old men.

And importantly, I can tell you that most complaints can easily be avoided. We review every complaint file on closure with a view to establishing whether and if so how the respondent practitioner could have avoided becoming subject to complaint, whatever the merits of the complaint, and in our opinion - this might add weight to what some of you might be speculating at this very moment - most, roughly 80% of complaints can be avoided if only practitioners communicate more effectively and courteously with their clients and colleagues.

The simple fact is that most complainants lodge their complaints because they believe they were not kept adequately informed of the progress of their matter and / or because their expectations of what would happen were different and sometimes radically different from what actually happened and / or because they didn't understand what happened.

The lesson is a simple one: most complaints can be avoided if only lawyers communicate clearly with their clients in language they understand, both at the time they enter into the retainer and regularly along the way. There are five questions in particular that clients need to have answered, and they need to be regularly updated, too, especially if and when things change:

- what are my options?
- what are my chances?
- how much will it cost?
- what's the process?
- how long will it take?

SOME KEY FACTS ABOUT COMPLAINTS ABOUT BARRISTERS

Regrettably we can't profile barristers subject to complaint in the same way we can profile the solicitors - our data base doesn't link with the Bar Association's - but with the Association's cooperation and assistance we'll make that link, hopefully some time later this year.

We can tell you however that barristers are significantly under-represented in complaints to the Commission given their numbers in the profession overall. I note for example that:

- we received 1026 complaints about solicitors in 2005-06, roughly 1 complaint for every 6 of the 6152 solicitors with a local practising certificate, but only 57

complaints about barristers, roughly 1 complaint for every 13 of the 773 barristers with a local practising certificate;

- we assessed 522 of the 1026 complaints about solicitors to be conduct matters (that is to say, to allege either unsatisfactory professional conduct or professional misconduct), roughly 1 for every 12 solicitors, but only 25 of the 57 complaints about barristers, or roughly 1 for every 31 barristers. The ratio would be better, incidentally, but for the multiple complaints about a small number of barristers - but then the ratio in relation to solicitors suffers similarly (there were 13 solicitors, remember, who were subject to 5 or more of the conduct matters we finalised during 2005-06).

The numbers are small so we should extrapolate only with caution, but interestingly they are very similar to the numbers in New South Wales. Our counterpart there assessed 62 of the complaints it received about barristers last year to be conduct matters, roughly 1 for every 34 barristers (and presumably some of them were subject to multiple complaints also).

I wouldn't read too much into the under-representation of barristers. The simple fact is that solicitors are more vulnerable to complaint than barristers simply because they are more likely than barristers to deal directly with consumers and hence prospective complainants. Certainly barristers who accept direct briefs appear to be over-represented in the complaints against barristers, at least on the basis of the small numbers of complaints we have received thus far.

We can tell you a lot about the complaints we receive about barristers, however, if not about the barristers subject to complaint. You might be interested in the following facts about the complaints we've received since we commenced, and also and by way of comparison the corresponding facts about complaints about barristers in New South Wales (drawn from New South Wales Bar Association Annual Report 2006). You should regard the comparison as indicative rather than precise, because we collect our data under slightly different categories and I've had to do some translation, but it shows a notable consistency nonetheless.

▪ **conduct matters involving barristers – the complainants:**

the complainants	conduct matters re Qld barristers received over the period July 2004 – Dec 2006	conduct matters re NSW barristers received over the period July 2005- June 2006
client / client's solicitor	49% (48 of 98)	37% (23 of 62)
other barrister	7% (7 of 98)	2% (1 of 62)
other solicitor	8% (8 of 98)	19% (12 of 62)
regulators (eg, the LSC)	15% (15 of 98)	13% (8 of 62)
opposing clients	15% (15 of 98)	18% (11 of 62)
all others combined	5% (5 of 98)	11% (7 of 62)

▪ **conduct matters involving barristers - the (alleged) conduct:**

the (alleged) conduct	conduct matters re Qld barristers received over the period July 2004 - Dec 2006	conduct matters re NSW barristers received over the period July 2005- June 2006
misleading conduct / dishonesty	15% (15 of 98)	18% (11 of 62)
conflict of interest	8% (8 of 98)	2% (1 of 62)
other unethical conduct	23% (23 of 98)	35% (22 of 62)
acting without or contrary to instructions	9% (9 of 98)	6% (4 of 62)
failure to communicate / rude or abusive conduct	9% (9 of 98)	8% (5 of 62)
overcharging	7% (7 of 98)	10% (6 of 62)
delay	4% (4 of 98)	3% (2 of 62)
all other conduct combined	23% (23 of 98)	18% (11 of 62)

▪ **conduct matters involving barristers - the outcomes after investigation:**

the outcomes	conduct matters re Qld barristers finalised over the period July 2005 – June 2006	conduct matters re NSW barristers finalised over the period July 2005- June 2006
withdrawn	5% (2 of 39)	10% (7 of 72)
dismissed - 'no reasonable likelihood'	67% (26 of 39)	65% (47 of 72)
dismissed - other (eg. no public interest')	20% (8 of 39)	8% (6 of 72)
initiate disciplinary proceedings	8% (3 of 39)	11% (8 of 72)
administrative sanction (reprimand or caution)	not an option in Qld	6% (4 of 72)

Notably neither the Commission nor the Bar Association has the powers the New South Wales Bar Association has to caution or reprimand practitioners for minor disciplinary infractions. Our only options are to initiate disciplinary proceedings before a disciplinary body or simply to dismiss the matter.

I suspect this explains why the 'dismissed-other' category in the last of the tables I've just shown you is higher in Queensland than in New South Wales. We've chosen to dismiss rather than prosecute matters involving only minor infractions, albeit with a stern but entirely informal warning to the effect that we have long memories and that similar infractions in future would very unlikely be treated so leniently.

The numbers here are too small thus far to draw any morals particular to barristers beyond the lessons I described earlier about the importance in relation to complaints generally of effective communication. The Professional Conduct Committee of the New South Wales Bar Association comments to identical effect in the Association's 2006 annual report under the heading the 'educative value of the committee's [complaints investigation] work.'

It says ‘as always, clear communication and the provision of quality service in all matters... is likely to lead to fewer misunderstandings and ultimately to fewer complaints. One area of particular concern is failure to ensure terms of settlement accurately reflect the agreement reached between the parties. Another is failure to ensure that the effect of the terms at settlement is properly explained to clients.’

The Committee warned barristers who accept direct access briefs to take particular care - and spells out the traps - and felt the need to make the point also that ‘barristers should remain courteous at all times in their dealings with others including clients, other barristers, solicitors, mediators, arbitrators and judicial officers’.

THE RECENT PROSECUTIONS

You will note from the statistics I’ve just shown you that I initiated disciplinary proceedings against 3 barristers in 2005-06. All 3 matters have now concluded, successfully from the Commission’s point of view, 2 of them only late last year. I presume both matters are well known to you and if not you can find the details and access the judgements on the discipline register we maintain on the Commission’s website. Again I commend the website to you and that page in particular.

One of one of those matters - the Mullins matter - has been much discussed as I understand it and I understand also that Ian Hanger QC and Professor John Wade will discuss it further in tomorrow morning’s session about mediation. I don’t want to add to that discussion here but I do want to say a few things of a tangential kind.

The first is that the essential facts of the matter were never in dispute – the question at issue was what to make of them or, to put it another way, how best to characterise the conduct at issue.

The second is it was clear to me from very early in the piece that the conduct was not only unacceptable, it was seriously and fundamentally unacceptable, in fact as the

Tribunal ultimately decided fraudulent, and as such could properly be characterised only as professional misconduct.

The third is that it was equally clear on all the facts there was no reason to doubt that Mr Mullins was a fundamentally honest and honourable man, or to question his character much less whether he was a fit and proper person to continue to practise. It was urged upon me for this reason that his conduct amounted not to professional misconduct but to the lesser category of misconduct – unprofessional, or unsatisfactory professional conduct.

It seemed (and seems) to me however that argument puts the cart before the horse and only goes to mitigate the penalty, not to diminish the gravity of the conduct itself. I make the point only because the sub-text seemed to be a neatly linear assumption to the effect that the more serious the conduct, the more serious the penalty - and because a penalty at the more serious end of the spectrum seemed on all the facts excessive, so too must the conduct fall into the lesser category.

But that doesn't follow, certainly in this jurisdiction where the purpose of disciplinary proceedings is not to punish or (as the Court of Appeal put it in the Baker matter) to exact retribution but to protect the public and the reputation of the profession. It seemed to me that the best way to protect the public and the reputation of the profession given all the facts of this particular matter was to name the conduct for what it was, seriously and fundamentally wrong, and thereby to send the very clear message to the profession and the public that it was unacceptable, but at the same time to deal with Mr Mullins in a way that had proper regard to the fact there was no reason to believe he had in the past or would again in the future put the public or the reputation of the profession at risk.

There was another sub-text, I suspect, and that is that many at the Bar no doubt hoped the new system for dealing with complaints would sort out the bad apples, as it were, and yet one of the very first people to be prosecuted was no bad apple but instead a well respected colleague.

What can I say? The Commission can only play the cards it's dealt. I am reminded in this context of what Gary Crooke QC had to say at last year's conference. He told you that the English Bar had recently introduced an ethical guideline requiring members to report unsatisfactory conduct by colleagues. He argued that 'a truly ethical environment at the Bar is one where unacceptable conduct will not be tolerated and the unworthy will be spurned' and he urged you to think 'very squarely... before you decide to do nothing about it.'

I can only say in the same vein that if you have evidence that any of your colleagues have conducted themselves inappropriately, tell us about it and we'll deal with it, and we'll deal with it on its merits and objectively, given the facts as we discover them after investigation.ⁱⁱ

Finally let me describe an incident that occurred the day of the hearing. Towards the end of the day, just as the Tribunal adjourned to consider its decision and when, in my opinion, the die was cast, a well-dressed older gentleman who'd been sitting behind me for most of the day leaned towards me and said with palpable hostility words to the effect 'you're going to be a very busy person if this is the sort of thing you're going to do' – meaning, presumably, prosecute barristers in circumstances like these. Later, I was returning to the courtroom just as he was leaving and rather than pass me in the corridor in the normal way he took a very wide berth around me, pointedly so.

I've puzzled since about what exactly he might have meant. I doubt that he meant there's a lot of conduct of the kind in question going on out there among barristers, and that we're going to be very busy people if we prosecute it all. My response if that was his meaning would be to say simply 'so be it: bring it on, that's our job.' More likely of course he meant we were going to be very busy people if we continue to prosecute decent and honourable barristers rather than bad apples. But if that's what he meant, he fundamentally missed the point. I didn't have the wit to say so at the time, but if I had I would have told him that we prosecute conduct, not character.



POSTSCRIPTS

ⁱ A member of the audience when the paper was delivered appeared to take umbrage at and to challenge the accuracy of this sentence and he referred to his experiences as a member of both the Professional Conduct Committee of the Bar Association and the Barrister's Board. I certainly do not mean to be critical of the efforts of either body. I simply want to make the point that there was no statutory system for dealing with complaints and disciplinary matters involving barristers and the Bar Association had no powers in this regard more than any voluntary association has over its members by reason of their contract of membership, and no powers at all in relation to barristers who were not members. The Association's powers were entirely consensual, in other words, and applicable only over barristers who chose to be and remain members. The absence of a system based in statute also meant that the Association had none of the usual powers of investigation - powers to require co-operation and to produce information and appear as witnesses and the like - and that neither the Association nor witnesses had any immunity from suit. The 'system', if that is indeed a correct description, lacked transparency and was even more vulnerable than the statutory scheme administered by the Law Society in relation to solicitors to criticism of a 'Caesar judging Caesar' kind. The only other available response to alleged misconduct by barristers was by way of application to the Supreme Court in its inherent jurisdiction, but the range of orders available to the court was limited and more inflexible than the range of orders available to a disciplinary tribunal such as the tribunal which was established in statute to hear disciplinary matters involving solicitors. No doubt that explains why the Association had been urging the introduction of more effective arrangements for professional discipline for a decade or more by the time the *Legal Profession Act 2004* came into effect. These matters are discussed at length in Linda Haller's (I believe unpublished) 2006 doctoral thesis, *Discipline of the Queensland Legal Profession*.

ⁱⁱ This is no minor point. It is not at all unusual for members of the Bar when they are introduced to me to tell me anecdotes about wrongdoing by anonymous colleagues that would, if they were reported and proved, almost certainly result in disciplinary action. In fact, I had just such a conversation at this very conference. Disturbingly, some of the anecdotes I'm told describe not one-off conduct by individuals but practices said to be, if not widespread, then at least not uncommon.