QLS Family Law Residential
FAMILY LAW COMPLAINT TRENDS

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INTRODUCTION

Approximately one in five matters that come through the doors of the Commission relates to family law and comprise the largest percentage of matters handled by us. However, when we consider the issues to which the matters relate, they are the same issues that are common across all areas of law – quality of service, costs and communication.

The purpose of this paper is to provide an overview of the Legal Services Commission, the complaints we receive in relation to family law matters and to provide guidance on how to prevent and/or address such complaints.

More information on our role, the complaints we receive and information for practitioners including regulatory guides can be found on our website at www.lsc.qld.gov.au.

ROLE OF THE LEGAL SERVICES COMMISSION

The *Legal Profession Act 2007* (the Act) establishes the Legal Services Commission (the LSC, or the Commission) primarily to receive and deal with complaints under the Act.

It authorises the Commission to deal with complaints about:

- lawyers (people who are appropriately legally qualified and who have been admitted to the legal profession in accordance with the Act);
- unlawful operators (people who engage in legal practice or represent themselves to be entitled to engage in legal practice but who do not hold a current practising certificate);
- law practice employees; and
- anyone who is suspected of contravening the restrictions on the advertising of personal injury services and the prohibition of touting under chapter 3, part 1 of the *Personal Injuries Proceedings Act 2002.*

The Act requires the Commission to produce information about the making of complaints and the procedure for dealing with complaints; to ensure that information is available to members of the public on request; to give help to members of the public in making complaints; and to deal with complaints 'as efficiently and expeditiously as is practicable'.

Simply put, the Commission's activities in relation to complaints generally fall within the three categories below.

1. Enquiries

Enquiries are queries or enquiries in the ordinary sense of the word. They are made by telephone in the main instance but sometimes in writing, by email or in person. Enquires generally tend to fall into the following two categories:

a) Queries by legal consumers, other members of the public and sometimes legal practitioners about how to make a complaint; queries about how the complaints and disciplinary process works; whether something a legal practitioner has said or done is proper or what it means, and so on; and

b) Concerns or informal 'complaints'. These are usually made by telephone or in person but not in writing (as the Act requires of a formal complaint), and the 'complainant' requests or agrees for the issue to be dealt with informally. This may occur at least in the first instance on the understanding that they remain entitled to make a formal written complaint if their concerns can not be resolved informally.

2. Complaints

Complaints comprise formal written complaints that are made pursuant to Chapter 4 of the Act. Complaints also include investigation matters (or 'own motion' investigations) commenced pursuant to section 451(1)(c) of the Act.

The Act requires complaints to be made in writing and made to the Commission (and only to the Commission). Complaints are logged on the Data Management System in the first instance simply as complaints.

It is then determined whether the complaint should be dealt with informally, which may include discussions with both parties in an attempt to resolve the issue, or more formally with the investigation being assigned to one of the Commission's legal Officers or one of the professional bodies.

3. Prosecutions

The Act provides the Commissioner sole authority to decide what action, if any, to take on a conduct complaint or own motion investigation after the matter has been investigated and wide discretion in the exercise of that authority.

The Act authorises the Commissioner to dismiss or take no further action on a complaint or own motion investigation if

a) there is no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct; or

b) there is a reasonable likelihood but it is in the public interest to take no further action.

Alternatively, if there is reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct and (b) does not apply, the Commission may make a discipline application to a disciplinary body as the Commissioner considers appropriate.

NATURE OF COMPLAINTS

As noted above the underlying issues in the majority of matters dealt with at the Commission relate to complaints concerning quality of service, costs and communication. These areas of concern are not unique to family law and are common to all areas of law.

Whilst some areas of law have unique issues which trigger complaints, such as the use of Independent Children's Lawyers in family law, the practice of law across the board could be improved be concentrating on these key areas.

Quality of Service

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

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

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

Costs

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

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

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

Some key principles are:

1. lawyers should give their clients valid costs disclosure.
2. lawyers should ensure that their cost agreements with clients are fair and reasonable.
3. lawyers should not charge excessive legal costs.
4. lawyers should charge no more than reasonable costs.

5. lawyers should comply with a valid request for an itemised bill and cooperate with a court appointed cost assessor.

Importantly lawyers do not satisfy their obligation to give ongoing costs disclosure simply by giving clients interim bills which add up to a figure that approaches or exceeds their earlier estimate(s). They should give a revised estimate of their total legal costs and/or likely future costs[1].

Communication

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

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

Communication barriers:

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

Effective communication skills include:

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

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

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

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

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

[1] See *Franklin v Barry and Nilsson Lawyers* [2011] QDC 55 at [98-101]. The obligation to disclose legal costs is prospective whereas interim bills are retrospective and advise clients of the amounts they have been charged for past legal services.

LESSONS AND TIPS

Listed below are a few guidance points that stem from complaints we have had and in some circumstances prosecutions we have commenced.

Whilst some points may seem like common sense, there is a reason the points are listed.

- Treat your clients professionally, courteously and with respect. Ensure your employees do the same.
- Be reasonable and meet commonly accepted standards of fairness and decency - treat your clients as you expect to be treated.
- You are the lawyer. Not the counsellor or social worker.
- Do not over identify with your client. Keep your objectivity.
- Be clear about who in the firm will do what work, and who the client should contact if they have a concern or complaint.
- Do not do pro-bono work without talking to your manager or the principal of the practice.
- Think very carefully before taking on work for family members, friends and next door neighbours.
- Never witness a signature unless the signature is applied in your presence.
- Never witness a document unless you are confident that the person who is signing the document is the person who should be signing the document.
- Do not make undertakings in the name of clients or without instructions.

If you are the subject of a complaint made to the Commission, here are some simple tips to assist you:

- If you have made a mistake, acknowledge it, apologise and fix it sooner rather than later - and at your expense, not the client.
- If you happen to find yourself the subject of a complaint, deal with it. It will not go away just because you put it in the drawer. Pursuant to section 443(4) of the Act a repeated failure to respond to the Commission is deemed professional misconduct.
- If you have anything to confess, confess early.
- Consider taking advice. The Queensland Law Society provides their members who are subject to complaints with six (6) hours of free legal advice.

A cautionary tale and effective regulation for the future

How matters can go pear shaped and at a significant cost to all parties to a disciplinary process can be seen from the Court of Appeal decision in Bone. Indeed a very recent decision handed down by the Court of Appeal on 1 August 2014.

In that particular case the Queensland Civil and Administrative Tribunal, ordered that the Commissioner pay the respondent's costs as it had found that special circumstances existed and that such costs be paid on an indemnity basis.

In the opinion of His Honour Justice Morrison with whom Justices Gotterson and Fraser agreed, the Tribunal erred in finding that there were special circumstances.

The Court of Appeal also found that the circumstances surrounding the withdrawal of certain charges did not come anywhere near the conduct required to warrant an order of indemnity costs. Accordingly, the Tribunal erred in so finding. The Court of Appeal further found that the Tribunal's conclusion that special circumstances existed was an error of law on its part. The errors of law and fact meant that the Commissioner could show relevant error on the part of the Tribunal within the meaning of the decision House v The King. Those errors substantially affected the conclusion reached by the Tribunal and in those circumstances the Tribunal's decision was set aside. Accordingly there was no order as to costs in respect of charges 3 to 8 and there was no order as to costs of the appeal.

Why do I mention this decision?

I mention it as there are valuable lessons to be learned for all of us. As I said earlier it is important that you cooperate if we contact you. It highlights the necessity to provide a fulsome response and all evidence before a decision has to be made by the Commissioner as to whether a discipline application should be filed. That response should contain a full explanation of the matters which are sought and material should not be raised for the first time after a discipline application is filed as that may adversely affect the way the proceedings are conducted. Significant cost and inconvenience to all parties could have been avoided in this matter.

I will let you read the decision and no doubt you will come to your own conclusions in respect of the particular circumstances of that case.

The other matters that I want to touch upon relate to my appointment as the Acting Commissioner and how I believe that the Commission's approach should change.

As you know the Commission plays an integral role in the regulation of the provision of legal services in Queensland along with the Legal Practitioner's Admissions Board, the Queensland Law Society, the Bar Association of Queensland and of course the disciplinary bodies and the Court. One of the objectives I sought to achieve relatively early on in my position was to review the strategic plan of the Commission to determine what indeed is effective regulation. I have copies of the strategic plan here available for you today and it is also available on our website.

The Commission will of course concentrate on its core responsibilities and although our role remains unchanged from what we set out in previous strategic plans, we recognise that we should always seek to improve.

The appointment of a new Commissioner, albeit acting, is an opportunity to refine and refresh our approach to regulation. The key pillar of our strategic plan for 2014-16 is to be an effective regulator. The Commission's approach will be to seek better regulation not more regulation. Ultimately effective regulation not only helps consumers but also lawyers in providing competent legal services, improved professionalism and effective decision making.

In order to improve the effectiveness of regulation and the efficiency with which we perform our core business we need to continue to find better ways of doing things.

Given the changing environment in which you operate and in which we operate we cannot continue to simply rely on doing things the same way as we did before. So we will review our operations to identify any improvements that can be made to the standard of regulation and how the current regulatory framework can promote the statutory objectives in the public interest.

We want to make sure that the way we regulate is in accordance with the best regulatory practice and principles. In particular we are exploring ways in which we can secure good outcomes but with less regulatory burden on legal practitioners.

Now how will we set about attempting to achieve this? Firstly, we need as a group, and that is the Queensland Law Society, the Bar Association of Queensland and our other stakeholders, to review our current model of regulation. Therefore, with that in mind, I have engaged in discussions with the Queensland Law Society, the Ethics Centre and some representatives of the Ethics Committees to discuss our current model of regulation and how it might look for the future and what changes may be prudent.

As a practitioner of some many years I recognise that regulation needs to consider that all clients are not the same and have different needs and demands. Legal practices are different sizes and require different mechanisms to achieve best practice. One thing that is of significant importance now is that the impact of technology on legal services delivery is significantly different than when I commenced practice in 1983 and it is an ever changing environment.

Therefore, one of my goals will be to change the way in which I converse with members of the profession and how the Commission proposes to converse with members of the profession. In the past primarily regulatory models have been designed to be reactive as opposed to proactive.

I believe that as a regulator we should engage with lawyers to advise them of what we do, that we expect compliance but are prepared to listen to them.

We therefore propose to look at new initiatives as to how we can work with lawyers to engage in discussion about how they can improve their practice management systems or relationships with the Commission. Obviously the QLS and BAQ play an integral role in the entire regulatory framework. Therefore, in my view, we need to be proactive rather than reactive and we will look at initiatives of how we can achieve that. We invite your feedback and we will continue to engage in conversation with your representative bodies, the Queensland Law Society and the Bar Association of Queensland. We also believe that it is important that you are aware that we should in my opinion view regulation as principle based and not prescription. We hope in the future that we can create a cooperative and collaborative relationship with you and will look at ways of how we can achieve that.

One of the first initiatives that we will roll out shortly will evolve as a result of a significant amount of data that we collect internally on law firms and lawyers generally. We receive a significant number of inquiries about lawyers and although those matters may not translate into a complaint we see that there is an opportunity to use that data to inform lawyers of issues that may assist them to improve their relationships with their clients. We will be careful how we use this information.

Accordingly, we propose to make contact with the lawyers involved initially by sending a risk alert letter, as simple as that, to alert you that information has come to our attention which does not warrant any formal contact or response from you or any disciplinary response but to make you aware of matters that you can reflect upon and to consider whether any improvements can be made to your processes. As I said this is only one initiative that we are looking at exploring and we will discuss those matters further with our stakeholders.

I also note that in the past there have been various theories or points of views expressed that lay persons as professional regulators can do the job better.

I strongly disagree. I note in a recent paper delivered by Darryl Pink the Executive Director of the Nova Scotia Barristers Society delivered 5th June 2014 where he said:

"The theory is that it is not lawyers who need to regulate lawyers other than when it comes to adjudication but rather it is the professional regulators who can do that job best." In contrast he says *"the radical transformation of regulation in Australia has been largely led by creative, innovative and brave lawyers who were empowered by government to facilitate radical change and they carried out that mandate".*

In my view I am encouraged by the fact that authors in other jurisdictions recognise that lawyers who are empowered by government can indeed be somewhat creative and innovative in facilitating radical change for the future of regulation.

I will endeavour to carry out that mandate in my present capacity and should I be appointed permanently to this role.