Productivity Commission "Access to Justice" enquiry 2013-2014.

Public Submission

Common Law, Common Sense, and some Nonsense.

Within a community, it is pleasing to live and work with people who support the principles of equity and equality; fairness and a fair go; merit and some merriment.
Some might say that this description covers everyone except for the lawyers.

Table of Contents

A brief history of the justice system

With the best of community intentions, we have sought to create a justice system which attempts to maintain equity and harmony. We started with the Rule of Truth, and it was true that:

"*not only must justice be done, it must be seen to be done*".

Then we created the Rule of Evidence. Discovery takes time, and it took a while to discover that:

"*not only must justice be seen to be done, it must actually be done*".

So we created the Courts with their Justices, and along tagged the lawyers with their injustices.

In response, we asked the lawyers to create a Legal Profession with a requisite Code of Ethics. Instead the lawyers produced a written Code of Conduct, and a second unwritten code where:

"not only must injustice be overdone before it gets seen, it must be obscene before it gets undone".

The government acted upon this and enacted for the Legal Profession: the Office of Legal Services Commissioner and its lawyer complaints systems. That double-act is about as far as we've got!!

Why this submission?

For our community's reliance upon lawyers for the task of scribing our everyday ethics into a code of conduct, and for our reliance upon lawyers to administer the ethics of their own everyday behaviours, we have now legalised the stripping of wealth from everyday families and the everyday giving of same to lawyers. This is the legal system we now seek to fix by way of the Productivity Commission's recommendations.

The Productivity Commission identifies that the cost of accessing and securing legal representation is preventing effective access to the justice system, i.e. that access shouldn't be dependent on the capacity to pay. It identifies that justice should be timely and affordable, and it should produce fair and equitable outcomes. It should resolve disputes early, expeditiously, and at the most appropriate level. By comparison, the Commission notes that a system which effectively excludes a sizeable portion of society from adequate redress risks *considerable economic and social costs.* In other words, such a system has the real probability of destroying community value, rather than creating value. The bottom line is that our community demands a justice system which has a net-positive benefit, i.e. a system which creates unity and harmony, rather than division and disturbance.

Section 6 and 7 of the Commission's enquiry welcome further comment from participants relating to the powers, structure and execution of complaints handling in all jurisdictions. This submission responds to the following items:

IR 6.4 Complaints-handling system

IR 7.3 Regulation of the legal profession

COMPLAINTS HANDLING (IR 6.4)

To date, there have been very few of the two hundred and fifty-odd submissions received by the Commission which deal with the issue of Complaints Handling procedures. Almost all of the submissions received by the Commission in relation to this enquiry are from lawyers.

One submission quotes the OLSC (NSW) annual reports from 2010, 2011, and 2012 which identify that family disputes generate the most complaints. It also describes time taken, quality of service and inadequate communication as the top issues; and that legal costs, negligence, opposing parties and wills/probate are the top complaints.

A submission by the Law Council of Australia (LCA) claims to speak on behalf of 60000 lawyers, and provides no mention of issues with the complaints-handling systems. Recently in the Age newspaper however, there was an article which raised the problematic nature of dealing with complaints against lawyers via the Legal Services Commissioner (LSC). The following views echo the community's experiences.

Analysing the complaints data

Statistics quoted in the above-mentioned submissions identify 20716 respondents surveyed about their lawyer experiences. Of those surveyed, some 30% who had an issue with their lawyer did not pursue their gripe, 17% did what the lawyer wanted, 6% pursued resolution through another body, and only 4% through a complaint body (such as LSC). Clearly the reputation the LSC has earned within the community is of an ineffectual- and lawyer-biased- waste-of-time for consumers of legal services. In fact, only 1% of the respondents actually reported a dispute relating to a lawyer. Statistics never lie.

Australia-wide tallies on complaints received indicate 1 to 3 complaints per 1000 clients. In Victoria, LSC (Vic) reports 0.8.to 2.2 complaints per 1000 clients. Public comments from LIV reveal that LSC (Vic) is proud of this statistic by comparison to other States. What the LSC reports between the lines of fine print, is that for the purpose of this key performance indicator it actively discourages complainants from maintaining their complaints. Further it could be said that the LSC directly or indirectly aids the solicitors to disguise their unprofessional behaviours, and importantly it does so without recording complaints statistics against them. Lawyers make ignoble offers to reduce the complainants' bills by token amounts conditional upon those complainants withdrawing their complaints. These behaviours are systemised within the LSC's complaints-handling process.

It would not be too bold to suggest at this point that "If you are friends of the LSC Establishment then, for you, the Legal Profession legislation is optional". An element of transparency is missing in this process, but such transparency is the key to this dilemma. Below are two worked examples which identify some of the failings of the LSC's complaints-handling process. The examples are drawn from actual complaints handled by LSC in recent periods. They are happening in our front yards.

Worked Example 1:

A Client sacks his lawyer for misbehaving: They had withheld and failed to pass on correspondence which most probably would have produced a settlement without the need for court and the consumption of its taxpayer-funded public resources. The lawyer is now holding the client's file and some other personal items and diaries. The lawyer says the client can't have the items back unless there is a **court order** that requires the lawyer to give them back. The client lodges a complaint to the LSC, and the LSC says that the practitioner's failure to return the items to the client is not a disciplinary matter. The LSC writes to the complainant advising "we note that you have decided to withdraw your complaint" But the complainant said no such thing. One week later the LSC **dismisses** the matter under section 4.2.10(1)(f)(ii) of the LPA without outlining further rights for the complainant. Incredibly, the LSC concludes that the client already has their file, **because the lawyer said so**. As a result of the LSC's bias, the complainant is forced to pursue the lawyer via other avenues.

…….A complaint example happening in our front yard.

Worked Example 2:

A Lawyer refuses to bill his client for work they claim to have done. There are no monies due to the lawyer, but the lawyer maintains that there are. The client lodges a complaint about the absence of bills to the LSC. The LSC classifies the billing issue as a costs dispute. It is therefore dismissed under section 4.2.10(1)(f) and the complainant is advised they could sort the issue out at VCAT if they wish. David versus Goliath. The non-existence of bills is not considered to be a conduct matter for the LSC. The LSC's case officer asks the lawyer to produce bills to the client, but the lawyer refuses. Hence neither the practitioner nor the LSC's case officer can produce the bills that are the subject of the complaint. But the LSC ignores its own case officer's investigation and **concludes the investigation to the contrary**, concluding instead that the bills existed because the **lawyer said so**. Meanwhile the practitioner has raised a faulty claim in VCAT for "monies owing", doing so prior to the LSC concluding its investigation. This behaviour is expressly prohibited by the LPA, and the LSC is made aware of it. However the **LSC takes no action** against the practitioner for its breaches of the LPA.

Meanwhile the VCAT process is lengthy, but they get there in the end and VCAT concludes there are **no bills**. The client has had to sit through five hearing days to find out what they already knew i.e. there were no bills, the subject of their complaint more than 12 months earlier. But the lawyers continue to **hold the client's file** under the premise of a solicitor's lien. After VCAT dismisses the lawyer's unmeritorious claim, the client renews their request to retrieve the client file.

……A complaint example happening in our front yard.

Discussion of the examples

The above example are deconstructed into the following premises:

A. LSC prematurely encouraging complainant to withdraw complaint
B. LSC facilitating settlement offers prematurely
C. LSC dismissing prematurely
D. LSC ignoring blatant and patent facts
E. LSC mis-categorising to disguise conduct issues
F. LSC referring to VCAT
G. LSC not advising avenues for resolution

A….LSC prematurely encouraging complainant to withdraw complaint

When a complaint made to LSC, the LSC spends a number of weeks looking at the issue, then writes to the complainant advising "we note you have decided **to withdraw your complaint**".

Q's. Does the LSC not have the capacity to handle this level of detail?

What does that say for investigation of the substantive complaint?

B… LSC facilitating settlement offers prematurely

LSC intervenes in a billing issue, and requires the client to pay money in. The LSC then negotiates a middle position which includes a private gag agreement. Surprise surprise, no further details available on this one!!

Q's. What statistics are the LSC recording for complaints settled by gag agreement?

Are the clients happy with the result, or are they held over a barrel after paying money into the LSC?

C….LSC dismissing prematurely

A client who has terminated their solicitor's services, then asks for the client files. There is no money outstanding, so the solicitor gives the client **some but not all** of the documents. The LSC dismisses the matter on the basis that the solicitor says ALL files were given.

Q's So the LSC investigation consisted of reading the complainant's statement that they had not received all their documents, then reading a reply from the solicitor that the client "has received all files that they are entitled to", then writing to the client to say we believe the practitioner.

If the LSC is going to sweep this under someone else's carpet, why not give the client the right to let VCAT sort it out?

Shouldn't this be as simple as an objective test on what the practitioner has or has not provided?

D….LSC ignoring blatant and patent facts

A solicitor refused to bill the client for services. The LSC's case officer made the request of the practitioner for bills to be produced. The practitioner refused. The LSC then said they **could not force the practitioner to produce bills.** Further, the LSC classified it as a cost matter only, did not consider this to be a disciplinary matter and dismissed it entirely. The LPA requires otherwise.

> Q's. Was the LPA effective in requiring the solicitor to produce a bill on demand from the client? (No it wasn't!) If yes, then why did the LSC not classify this issue as a disciplinary matter. If not, then will the new Act provide us with any comfort?
>
> Will the LSC process the solicitor for a breach of the Act, or will they use the excuse that the matter has already been litigated?
>
> What is the effect of a cost agreement, and any client statement within it that the client has a right to receive a bill?

E….LSC mis-categorising to avoid conduct issues

While the LSC was in the middle of conducting an investigation, a practitioner lodged a claim in VCAT for "monies owing". The **LSC was made aware of this** as a conduct issue, but chose to ignore it.

> Q's. Would the reason the LSC chose to ignore it be because it was too blatantly a breach of the LPA by the practitioner, and the LSC would then be obliged to issue a disciplinary action against the practitioner?
>
> Perhaps the LSC is biased, and wanted to protect the practitioner? What effect will this have on consumer confidence?

F….LSC not advising avenues for resolution

In a conduct matter, a solicitor who had been sacked chose to retain the client's personal items. The LSC said this was not a disciplinary matter and dismissed it. Common Law and common sense say otherwise. The LSC's failure to act means the consumer needs to seek redress elsewhere via the ACL and the courts.

> Q's. Is this conduct unprofessional? Should it be covered by the rules which cover the Profession? Have you watered down your solicitors' conduct rules so much that this issue is not contemplated? If this issue is in the rules then this **is** a disciplinary matter.
>
> If it is not in the black-letter of the rules, then you still have the power to mediate. Is the LSC not competent to mediate such an issue?
>
> Why didn't the LSC identify avenues for resolution?

Example letters from the LSC follow ……..**(6pp)**

Legal Services **COMMISSIONER**

9/330 Collins St Melbourne VIC 3000
GPO Box 492 Melbourne Vic 3001 DX 185 Melbourne
t 1300 796 344 (local call) t 03 9679 8001 f 03 9679 8101
www.lsc.vic.gov.au ABN 66 489 344 310

Your ref:

Our ref: [redacted]

[redacted]

Private and Confidential

M[redacted]
[redacted]

[redacted]

Dear M[redacted]

Complaint about M[redacted] of [redacted]

I refer to the telephone calls and emails between you and [redacted] of this office about your complaint about M[redacted] ('the practitioner').

About my office's processes

When people complain to my office about a practitioner, the two general categories of complaint are

- civil disputes, being a limited range of disputes mainly about monetary issues, which I can try to help resolve; or
- disciplinary complaints, which are about a practitioner's conduct.

When I receive a complaint about a practitioner's conduct, I must decide

- whether I have the power to deal with the complaint under the *Legal Profession Act 2004* ("the Act"); and if so,
- whether it is likely that the allegations, if proved, would amount to unsatisfactory professional conduct or professional misconduct on the part of the practitioner. These are objective standards, set by the Act and decisions of the Courts and the Victorian Civil and Administrative Tribunal ("VCAT").

Your complaint appears to concern a dispute about the legal fees that are being claimed by the practitioner. I understand you have paid the practitioner in excess of $[redacted] but maintain that you do not owe the sum of $[redacted]. I note that your complaint also stated an aim of:

- for the lawyer to return my file;
- for the lawyer to improve their service.

I note that the practitioner has stated that your file will not be released to you until the outstanding legal costs have been paid.

Complaints about costs, monetary loss and other disputes

When you lodged your complaint, [redacted] assisted you and discussed the matter with the practitioner. He reviewed the documents you sent him and met with you on [redacted] to

discuss your claim in an effort to try and resolve the costs dispute. Following discussions between [redacted] and the practitioner, an offer was made to reduce the outstanding account by $2,000 if you withdrew your complaint. I understand you rejected this offer.

As advised by [redacted], this office does not have power to make any decision or ruling about the matters in dispute as the amount being disputed by you is in excess of $25,000.

Further, there is no evidence that the practitioner failed to provide you with legal services. I note that according to the practitioner's records, invoices were sent to you for payment, payments made by you were receipted and copies of receipts sent to you. I note that the practitioner also stated that you were sent a statement of account dated [redacted]

As your complaint does not raise issues that may warrant taking disciplinary action against the lawyer, I have decided therefore to dismiss the complaint under section 4.2.10(1)(f) of the *Legal Profession Act 2004*.

As advised by [redacted] as your complaint concerns a dispute over legal costs and legal services you may wish to seek legal advice about your claim and take action through Victorian Civil and Administrative Tribunal (VCAT) or through the Costs Court. The Costs Court can review whole or any part of legal costs charged by a legal practitioner. The Supreme Court web site, www.supremecourt.vic.gov.au has information on disputing a solicitor's bill.

I have enclosed a document entitled, '*Your right to challenge legal costs*', for your information.

If you have any queries, please do not hesitate to contact [redacted]

[redacted]cerely

[redacted]

Delegate of the
Legal Services Commissioner

Legal Services **COMMISSIONER**

Your ref:

Our ref: [redacted]

9/330 Collins St Melbourne VIC 3000
GPO Box 492 Melbourne Vic 3001 DX 185 Melbourne
t 1300 796 344 (local call) t 03 9679 8001 f 03 9679 8101
www.lsc.vic.gov.au ABN 66 489 344 310

[redacted]

[redacted]

Private and Confidential

M[redacted]
[redacted]

Dear M[redacted]

Complaint about [redacted] of [redacted]

I refer to your letter dated [redacted]

In response to your concerns:

1. *Costs dispute.* Section 4.2.2 of the *Legal Profession Act 2004* ("Act") provides:

> **4.2.1 Complaints**
>
> (1) A complaint may be made under this Chapter about conduct to which this Chapter applies.
>
> (2) A complaint may involve a civil complaint, a disciplinary complaint or both.
>
> **4.2.2 Civil complaints and disputes**
>
> (1) A ***civil complaint*** is a complaint about conduct to which this Chapter applies, to the extent that the complaint involves a civil dispute.
>
> (2) A ***civil dispute*** is any of the following—
>
> (a) a dispute (***costs dispute***) in relation to legal costs not exceeding $25 000 in respect of any one matter—
>
> (i) between a law practice or an Australian legal practitioner and a person who is charged with those costs or is liable to pay those costs (other than under a court or tribunal order for costs); or

The effect of s.4.2.2(2)(a) is that where there is a costs dispute and the total costs charged in the matter is greater than $25,000, this office cannot deal with the matter. It does not matter that the complainant is only disputing a portion of the amount charged.

2. *Invoices rendered.* Our preliminary assessment indicates that documentation has been provided to you establishing your indebtedness for the amount claimed. I note that the trust account statement listed all the invoices, including fee notes for barristers, and you have not indicated which of those invoices you have not been given. The firm asserts that you have been given copies of all invoices on a number of occasions.

[redacted]

3. *Handling and dismissal of complaint.* The file has been reviewed and I am satisfied that it was dealt with in an appropriate and timely fashion and was correctly finalised. The information you have provided and our preliminary assessment does not indicate a possible disciplinary breach. This office will not, and indeed must not, continue to investigate claims that could not amount to unsatisfactory professional conduct or professional misconduct.

4. *Further review.* The Act does not provide for review and reopening of complaints. If you remain unhappy with our handling of your complaint, you can contact the Victorian Ombudsman. The Ombudsman does not have the authority to change my decision, but may recommend that my office re-examines the decision, particularly if any issue has not been dealt with in accordance with the provisions of the Act. The office of the Ombudsman can be contacted in the following way:

   Ombudsman Victoria
   Level 9, 459 Collins Street (North Tower)
   Melbourne Victoria 3000

Telephone	03 9613 6222
Toll Free	1800 806 314 (regional only)
TTY	133 677 or 1300 555 727
Fax	03 9614 0246
Email	ombudvic@ombudsman.vic.gov.au
Website	www.ombudsman.vic.gov.au

5. *Other options.* If you remain unhappy with the bills, you may be able to dispute them as a claim under the *Australian Consumer Law & Fair Trading Act 2012* at the Victorian Civil and Administrative Tribunal. For more information please see www.vcat.vic.gov.au/disputes/civil-disputes.

   You may also be able to dispute the bills through the Costs Court at the Supreme Court of Victoria. For more information please see www.supremecourt.vic.gov.au/home/costs+court/.

Yours sincerely

[redacted]

Delegate of the
Legal Services Commissioner

[redacted]

Legal Services **COMMISSIONER**

Your ref:

Our ref: [redacted]

9/330 Collins St Melbourne VIC 3000
GPO Box 492 Melbourne Vic 3001 DX 185 Melbourne
t 1300 796 344 (local call) t 03 9679 8001 f 03 9679 8101
www.lsc.vic.gov.au ABN 66 489 344 310

[redacted]

Private and Confidential

M[redacted]
[redacted]

Dear M[redacted]

Complaint about M[redacted] of[redacted]

I refer to your complaint about M[redacted] ('the practitioner').

About my office's processes

When people complain to my office about a practitioner, the two general categories of complaint are

- civil disputes, being a limited range of disputes mainly about monetary issues, which I can try to help resolve; or
- disciplinary complaints, which are about a practitioner's conduct.

When I receive a complaint about a practitioner's conduct, I must decide

- whether I have the power to deal with the complaint under the *Legal Profession Act 2004* ("the Act"); and if so,
- whether it is likely that the allegations, if proved, would amount to unsatisfactory professional conduct or professional misconduct on the part of the practitioner. These are objective standards, set by the Act and decisions of the Courts and the Victorian Civil and Administrative Tribunal ("VCAT").

Your complaint appears to concern the failure of the practitioner to return to you property items, and files that you believe you have a right to receive.

The complaint was sent to the practitioner and a response was received. I understand a copy of the response was sent to you. In summary, the practitioner advised that:

- the said property contained[redacted]office is being held as a result of a court order made[redacted];
- [redacted]claim ownership of the property in dispute;
- the ownership of the property may be resolved by you and[redacted]by reaching agreement or making a claim to the appropriate court;
- the practitioner will surrender the property once agreement is reached or by order of a court;
- the files that you requested have been provided to you by the practitioner;

[redacted]

As you have told me you do not wish to withdraw your complaint, I have assessed the issues you have raised in order to decide whether it is appropriate that I investigate them as raising possible disciplinary breaches. While I understand that you believe the matters raised do require investigation, this is a determination that my office alone must make, having regard to the requirements of the Act and decisions of VCAT and other Courts.

Your complaint has been carefully reviewed and I have concluded that it does not raise issues that may warrant taking disciplinary action against the lawyer. Accordingly, I have decided to dismiss the complaint under section 4.2.10(1)(f)(ii) of the *Legal Profession Act 2004* as the complaint does not warrant further investigation.

If you have any queries, please do not hesitate to contact [redacted]

Yours sincerely

[redacted]

Delegate of the
Legal Services Commissioner

Discussion for change re Complaints-handling of Conduct matters -:

Do these examples really happen? Yes they are happening today in our front yards, and the above letters from LSC are included with this submission so that nothing gets lost in translation.

It is hard to distinguish between the self-proclaimed impotence of the LSC, the self-importance of the LSC, or just plain incompetence of the LSC. Certainly it will be watched with great interest post-1st July 2014, as to whether the LSC's new-found powers will result in more investigative activity for simple complaints, or whether they will still dismiss claims similar to the default clause 4.2.10(1)(f)(ii) "the complaint does not warrant further investigation".

On paper, the current redress for consumers when a legal practitioner is behaving poorly is initially to the LSC, secondarily to the Tribunal, and thirdly to the Courts. If the LSC is already playing hide-n-seek by choosing to dismiss matters under 4.2.10(1)(f)(ii), then how will its habits change when the LSC's powers are increased? We should expect a negative effect on consumer confidence, and unless the transparency of the system is assured, it suggests that a closed-door policy will emerge.

In 2008 the Vic Ombudsman criticized the Vic LSC following investigation of its complaints process. (McGarvie 2012) This resulted in RRT – the Rapid Resolution Team in 2010. But the true test of its effectiveness is actually whether the regulations, procedures and powers are physically exercised **in practice**. This test must be objective, and it must be transparent.

Absolutely we can say there is a lack of transparency. We currently have the cover of privilege for the LSC's investigations, and hence there are no effective penalties for misleading the investigator. A rogue practitioner simply yanks on the LSC's chain by creating a denial to the concerns raised by the complainant. The fact that they are **invited to do** so by the LSC is mind-boggling. The 2013 report for LSC identifies a significant percentage of complaints are withdrawn, but the above example letters indicate how this is occurring, and probably includes meritorious complaints being withdrawn prematurely.

A recommendation for triaging of complaints received against legal practitioners is a type of Public Interest Test. This would work to maintain a positive interest in ethical professional behaviour. Section 296 of the new LPUL frames up this premise based on the standard of professional conduct a member of the public is entitled to expect of a legal practitioner, but it is up to the LSC to enforce it properly. The LSC's present focus is on rapid and premature dismissal of complaints which might otherwise have an adverse effect on a legal practitioner.

A current provision of the LPA and now the LPUL is the presumption that a complainant client has waived their rights of privilege or duty of confidentiality within the solicitor-client relationship, in order to make a complaint. Further, that **any** information so disclosed may be used in conjunction with any procedure or proceeding relating to the complaint. Refer section 321 of LPUL. This is potentially a problem for Family Law clients, given that the contents of the client's files and correspondence are required to be kept confidential under the Family Law Act. How does the LSC deal with this issue? It is recommended that the right of client-solicitor confidentiality be retained for family law matters, otherwise the consumer rights to complain are ill-affected.

In the 2008 report from the Victorian Law Reform Commission, it considered the Objectives of the Civil Justice system. It defined fundamental goals as fairness, openness**, transparency**, proper application of the substantive law, independence, impartiality, accountability. Certainly **transparency** is the key to the LSCs fairness.

Discussion for change re Complaint-handling of Billing matters

Certainly there are systemic issues with lawyers billing practices. OLSC NSW Dr George Beaton describes a cavalier attitude towards invoicing, contrasted to the practice of communicating an eagerness to discuss. OLSC NSW top billing complaints categories were reported as follows: – bills delivered months/years after matter finished; in excess of estimates; increases on request for itemisation; inadequately explaining time recorded; charges for overheads; price close to verdict/settlement amount; obvious errors.

A recommendation is that the solicitor provide, as part of their initial disclosure, a sample invoice of the typical items they would bill for during a matter. A further recommendation re disclosure is that explanation of disclosure obligations to a prospective client be non-billable time, with a mandatory minimum amount of time e.g. 15 to 30 minutes just to explain the client's rights and obligations under the solicitor-client relationship. There is a power imbalance here which needs to be recognised.

In the earlier billing example, had the LSC properly investigated and not played hide-n-seek with a finding and a dismissal that was contrary to the obvious facts of the complaint, justice might have been administered. Forcing a client to endure five hearing days to get a bill from a solicitor, and 18 months of waiting to get the client file returned **cannot** be construed as access to justice. Not in anyone's book, except perhaps the **LSC, who seems okay with it**.

Further power imbalances occur when a lawyer threatens or initiates legal action, and bullies client while the LSC is investigating. Yes it is happening, but the **LSC appears to be okay with that one too**. A recommendation is to summons the Victorian LSC to this enquiry to respond to allegations of selective incompetence, impotence and corruption issues.

So if the LSCs are filled with lawyers to the exclusion of non-lawyers, then these examples show that the system **cannot be trusted to police itself**. Transparency is the key to LSC's integrity. The main recommendation in relation to the LSC's transparency is to use non-lawyers in key audit positions within the complaints-handling framework. One example might be for every complaint to be logged in parallel by Consumer Affairs bodies, and/or published on their website (dis-identified of course).

Summary of the Complaints-Handling system:

If our families and our communities are putting their trust in the "legal profession" to act professionally in our best interests, then we ought to have a level of confidence in the upholding of these professional standards.

The included examples are occurring in our front yards. If they are taken to be indicative of the normal procedures and process of legal complaints handling within the office of the LSC, then we have a potent combination of incompetence, bias or corruption within that office. None of those ingredients gives us the confidence the community demands.

What will make the biggest improvement in the professionalism of legal services is for the actions of the office of the Legal Services Commissioner to be fully **transparent**. This means "policing the policemen" by way of non-lawyer administrative controls, controls which are not currently provided for within the Legal Profession Uniform Law. Discussion of the legislation itself occurs in section 7.3 below.

REGULATION OF THE LEGAL PROFESSION (IR 7.3)

Two of the biggest complaints from the consumers of legal services are billing issues, and cost disclosure. Recent history says that both of these matters are covered within the Legal Practice Act 1996; then the Legal Profession Act 2004; and now the Legal Profession Uniform Law (2014). In reality these regulated procedures have been enshrined in legislation for many years, but major errors and omissions remain.

The LCA says in its submission to Productivity Commission (ref submission 096) that there is "no material known to it to suggest that there is a need for further regulation as such further regulation would bring additional compliance costs". This statement confirms the nexus between regulation and compliance – it comes at a cost, a cost which a greedy legal practice might seek to minimise at the expense of their client, the protection of whom the regulations exist in the first place.

So there are two issues to consider here: firstly whether the wording of the regulations are of themselves sufficient; secondly whether they are being followed by the full complement of lawyers. To the former, there are the regulations which cover the behaviours of the legal practitioners. To the latter, there is a policing system, also covered within the LPUL. However there is no clear appellate process, nor a transparent audit process in relation to decisions made by the policing body (the LSC). The absence of these has produced a lower standard than the community expects, since the lawyers are policing their peers and are letting each other off the hook when they transgress the regulated provisions.

To contain the discussion of these issues, we can deconstruct the LPUL into the provisions which deal with the common topics of complaint: How and when bills are to be given, itemised billing, cost disclosure; and secondarily to the powers and diligence of the LSC to investigate complaints properly.

Relevant sections of the LPUL – re Billing Practices and Costs Disclosure(emphasis added)

174 Disclosure obligations of law practice regarding clients

(1) Main disclosure requirement A law practice— (a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and (b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client— together with the information referred to in subsection (2).

(2) Additional information to be provided Information provided under— (a) subsection (1)(a) must include information about the client's rights— (i) to negotiate a costs agreement with the law practice; and (ii) to negotiate the billing method (for example, by reference to timing or task); and (iii) **to receive a bill from the law practice** and to request an itemised bill **after receiving a bill that is not itemised** or is only partially itemised; and (iv) to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs; or (b) subsection (1)(b) must include a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter.

(3) Client's consent and understanding If a disclosure is made under subsection (1), the law practice must take all reasonable steps **to satisfy itself** that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

…

178 Non-compliance with disclosure obligations

(1) If a law practice contravenes the disclosure obligations of this Part— (a) the costs agreement concerned (if any**) is void**; and (b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority; and (c) **the law practice must not commence or maintain proceedings** for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been

determined by the designated local regulatory authority or under jurisdictional legislation; and (d) the contravention is **capable of constituting unsatisfactory professional conduc**t or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

(2) In a matter involving both a client and an associated third party payer where disclosure has been made to one of them but not the other, this section—

(a) does not affect the liability of the one to whom disclosure was made to pay the legal costs; and

(b) does not prevent proceedings being maintained against the one to whom the disclosure was made for the recovery of those legal costs.

(3) The Uniform Rules may provide that subsections (1) and (2)—

(a) do not apply; or

(b) apply with specified modifications— in specified circumstances or kinds of circumstances.

180 Making costs agreements

(1) A costs agreement may be made—

(a) between a client and a law practice retained by the client; or

(b) between a client and a law practice retained on behalf of the client by another law practice; or

(c) between a law practice and another law practice that retained that law practice on behalf of a client; or

(d) between a law practice and an associated third party payer.

(2) A costs agreement must be written or **evidenced in writing**.

(3) A costs agreement may consist of a written offer that is accepted in writing **or** (except in the case of a conditional costs agreement) **by other conduct**.

(4) A costs agreement cannot provide that the legal costs to which it relates are not subject to a costs assessment.

186 Form of bills

A bill may be in the **form of a lump sum bill** or an itemised bill.

187 Request for itemised bills

(1) **If a bill is given** by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.

(2) A request for an itemised bill must be made within 30 days after the date on which the legal costs become payable.

(3) The law practice must comply with the request within 21 days after the date on which the request is made in accordance with subsection (2).

(4) If the person making the request is liable to pay only a part of the legal costs to which the bill relates, the request for an itemised bill may only be made in relation to those costs that the person is liable to pay.

194 Restriction on commencing proceedings to recover legal costs

(1) A law practice must not commence legal proceedings to recover legal costs from a person **unless a bill has been give**n for the legal costs **and the bill complies with the requirements of this Law and the Uniform Rules.**

(2) A law practice must not commence legal proceedings to recover legal costs from a person who has been given a bill until—

(a) where the legal costs are the subject of a costs dispute before the designated local regulatory authority—the authority has closed or resolved the dispute; and

(b) at least 30 days after the later of—

(i) the date on which the person is given the bill; or

(ii) the date on which the person receives an itemised bill following a request made in accordance with section 187.

195 Interest on unpaid legal costs

(1) A law practice may charge interest on unpaid legal costs in accordance with the applicable terms of a costs agreement.

(2) To the extent that the applicable terms of a costs agreement do not deal with the charging of interest, a law practice may charge interest on unpaid legal costs if the costs are unpaid 30 days or more after the law practice has given a bill for the costs in accordance with this Part.

(3) A law practice must not charge interest under this section on unpaid legal costs unless the bill for those costs contains a statement that interest is payable and of the rate of interest.

(4) A law practice must not charge interest under this section or under a costs agreement at a rate that exceeds the rate specified in or determined under the Uniform Rules for the purposes of this section.

(5) A law practice must not charge interest under this section or under a costs agreement **on a bill given more than 6 months after** the completion of the matter.

(6) Subsection (5) does not apply where—

(a) the law practice has provided a lump sum bill within the 6-month period after completion, but the client or an associated third party payer requests an itemised bill outside of the 6-month period; or

(b) a bill has not been issued within the 6-month period (or an earlier bill has been issued but withdrawn) at the request of the client or associated third party payer.

472 Supreme Court may order delivery up of documents etc.

(1) On the application of a client of a law practice, the Supreme Court may order the law practice—

(a**) to give to the client a bill** of costs in respect of any legal services provided by the law practice; and

(b) to give to the client, on any conditions that the Supreme Court may determine, any of the client's documents that are held by the law practice in relation to those services.

(2) Subsection (1) does not affect the provisions of Division 7 of Part 4.3 with respect to the assessment of costs.

….

<u>Discussion of new LPUL provisions – re Billing Practices and Costs Disclosure:</u>

A relevant comment from an earlier submission is a quote from Bergin CJ: “Solicitors livelihoods are bound up with taking a particular step”. Put simply, if a solicitor were to desire greater revenue, it is easy for them to stand in the way of effective justice by introducing a series of unnecessary court-related steps that the parties themselves may not agree with. That would not be ethical professional conduct, and this is perhaps the underlying reason for regulation of the billing and disclosure procedures. Let’s not forget that the rules are only as good as the enforcement of them.

Refering to s174(3): The solicitor has a special duty to put the client at ease as to their own rights and obligations, since the client is relying upon them as a professional. Transferring this duty to another is a failure for the first practitioner to accept their own professional duty. The suggestion that a prospective client should consult a second solicitor before engaging the first solicitor is a circular, monopolistic approach.

Similarly at s180: -It is worrying that Acceptance of Costs Proposal by conduct is still permitted. In what possible circumstance could you expect to provide a 20-plus page “Cost Agreement” document to a prospective client and then proceed as if they have agreed to those conditions without them signing the document? If the terms of the offer of services were reasonable then surely you would receive a signed acceptance, and you could withhold the provision of services until you receive them. If the terms were not acceptable to the client then perhaps you would not receive a signature. This is not because you had informed consent to the terms of the legal practitioner’s offer. It is because you did **not** have such. So why would the legal industry seek to enshrine a

common law issue into a right for the solicitor? This provision avoids the need for practitioners to explain their terms prior to providing them. They simply show up after the fact and present a version of events that they showed the terms to the client and that the client did not object.

It is not difficult to find VCAT examples where the solicitor has relied on acceptance by conduct to evidence a cost agreement with a client. Clearly there is no intention for an agreement to exist within a "Costs Agreement", otherwise signatures would be mandatorily requested. Another submission raised the issue: Where is the underlying morality by way of ethics training? VCAT resources should not be diverted where solicitors fail to act reasonably.

S174(2) covers the right to receive a bill, but where is the definition of "bill". By contrast the ATO has a specific definition of a tax invoice, a form of "bill" that the world of commerce has come to know in the post-GST landscape of Australian business. The public knows what a bill is, and what a bill isn't. Why don't lawyers know? Or are they stuck in the 1800s? The LPUL should consider a model billing disclosure, so that parties are not having to litigate to get a definition of what a bill is from the courts. We shouldn't be relying on wasting the courts' resources repeatedly to tell solicitors what a bill isn't. The Victorian Supreme Court recognised this anomaly in a 1999 case in relation to the 1996 Legal Practice Act, we have since had the 2004 LPA, and now the 2014 LPUL. Section s186 entitled "Form of Bills" is of little guidance here. It should be expanded via the Regulations to identify the true form of a legal practitioner's bill and the proper treatment of in-house items, barristers and other disbursements, GST and other sundry items. Legal hubris and inadequate lawyer self-education seem to consume valuable public resources in relation to such issues.

Section 187 identifies that the right to receive an itemised bill is contingent upon receiving a lump sum bill first. See also section 174(2)(a)(ii). However those sections do not crystalise the time limit for giving of a bill in the first instance. It seems LPUL is useless in this regard, and the consumer needs to rely on the Australian Consumer Law (ACL) for reasonable time limits. Section 195 identifies the probability that a legal practitioner will be tardy in doing so, albeit that this provision only deals with allowable claims for interest monies. In s472, the Supreme Court may order the law practice to (a) give bill. However this seems like an extreme method of extracting a bill from a reluctant practitioner, whose motive might be to delay the release of the client's file by suggesting there is money owing. The question of whether there is or isn't a valid step is a question that won't achieve an answer for up to 12 months via VCAT, and meanwhile the solicitor holds up on providing the client's file. It is not difficult to guess in this example why the solicitor is reluctant to hand over the file. It is probably that they failed to pass on some correspondence during the handling of the matter, and they are seeking to delay being called to account for those breaches of professional duty. In matters such as family law especially involving children, withholding the file can produce circumstances and outcomes which are not curable simply by interest payments after-the-fact. That is, the outcomes are time-sensitive because children grow up and family dynamics change.

A recommendation for such circumstances is if the practitioner is discharged for whatever reason, then the file should be handed over immediately. The concept of solicitor's lien is no longer relevant to our community's needs, we have plenty of other protections which allow for debt recovery without destroying the value of the services just-rendered. We need efficient and quick outcomes, not outcomes which produce and promote delays and inaction.

Also because the solicitor continues to hold the client's files under lien, it makes it difficult for the client to change lawyers until monies are advanced. The conduct rules permit giving the files to another lawyer, but not by way of alternative securities. This is a trade restraint. Professionals

should act professionally and allow the product of their work to be passed onto the client's choice of agent when the matters are time-sensitive. There is also informational asymmetry here. Such behaviours are not in the interest of the public's perception of the Legal Profession. This behaviour doesn't happen in any other profession, and it should be legislated OUT. If the lawyer's bill isn't on the table, they shouldn't be allowed to hold the file. It is a reversal of the onus of proof, dumped in the hands of the lesser-experienced client.

If lawyers cannot, of their own volition, accept their professionalism then this issue can only be solved by increasing the type of mandatory upfront disclosure information. A prescribed form would be advantageous. However, cooperation ought to exceed compliance, something which is promoted by positive behaviours and role-modelling. The challenge might be where to look for a role model, if the entire legal landscape is polluted with bad behaviours.

Another issue within the disclosure provisions is that there is no mention anywhere of the advocates' immunity principles. Most clients would have no idea about this and would be assuming that there is a liability that attaches to the solicitors (barrister's) engagement. The all-care, no-responsibility idea should be brought to the fore, since the public perception is that they are paying to get a **professional** service coupled with its duty of care. It is of no surprise that the LCA and its members are not queueing up to properly inform the public on this issue, since it would increase the perceived risk of using a solicitor and have a downward effect on prices.

<u>Relevant sections of the LPUL re Complaint-Handling Powers (emphasis added)</u>

277 Closure of whole or part of complaint after preliminary assessment

(1) At any stage after the preliminary assessment of a complaint, the designated local regulatory authority **may close the complaint without further consideration of its merits** for any of the following reasons to the extent they are applicable—

(a) the complaint is vexatious, misconceived, frivolous or lacking in substance;

(b) the complaint was made out of time;

(c) the complainant has not responded, or has responded inadequately, to a request for further information;

(d) the subject matter of the complaint has been or is already being investigated;

(e) the subject matter of the complaint would be better investigated or dealt with by police or another investigatory or law enforcement body;

(f) the designated local regulatory authority has made a recommendation under section 82(4) in relation to the lawyer concerned;

(g) **the subject matter of the complaint is the subject of civil proceedings**, except so far as it is a disciplinary matter;

(h) the designated local regulatory authority, having considered the complaint**, forms the view that the complaint requires no further investigation**, except so far as it is a consumer matter;

(i) the complaint is not one that the designated local regulatory authority has power to deal with;

(j) the designated local regulatory authority is satisfied that it is otherwise in the public interest to close the complaint.

(2) After the preliminary assessment of a complaint made by a commercial or government client, the designated local regulatory authority must immediately close the complaint without further consideration of its merits unless it contains or gives rise to a disciplinary matter.

Note Section 268(3) precludes a commercial or government client from obtaining relief under this Chapter in relation to a consumer matter.

(3) A complaint may be closed under this section **without any investigation or without completing an investigation**.

(4) The designated local regulatory authority is not required to give a complainant, a lawyer or law practice an opportunity to be heard or make a submission to the designated local regulatory authority before determining whether or not to close a complaint under this section.

(5) The power to close a complaint under this section extends to closure of part of a complaint.

282 Power to investigate complaints

(1) The designated local regulatory authority **may investigate** the whole or part of a complaint.

(2) The designated local regulatory authority may appoint a suitably qualified person to conduct a complaints investigation.

(3) The appointment may be made generally, or in relation to a particular law practice, or in relation to a particular complaints investigation. Note Chapter 7 applies to an investigation under this Division.

287 Informal resolution of consumer matters

The designated local regulatory authority **must** attempt to resolve a consumer matter by informal means as soon as practicable.

288 Mediation

(1) This section applies to a complaint to the extent that it contains a consumer matter.

(2) The designated local regulatory authority **may order the parties** to the complaint to attend mediation in good faith in relation to the consumer matter.

…

Division 3—Further provisions applicable to costs disputes

291 General role of local regulatory authority in costs disputes

(1) The designated local regulatory authority is, subject to the other provisions of this Division, to deal with a costs dispute in the same manner as other consumer matters if—

(a) the total bill for legal costs is **less than $100 000** (indexed) payable in respect of any one matter; or

(b) the total bill for legal costs equals or is more than $100 000 (indexed) payable in respect of any one matter, but the total amount in dispute is less than $10 000 (indexed).

(2) If a complaint contains a costs dispute that cannot be dealt with under subsection (1), the designated local regulatory authority **is not to deal with or continue to deal with the dispute**, but is to inform the parties of the right to apply for a costs assessment or to make an application under jurisdictional legislation for the matter to be determined.

296 Unsatisfactory professional conduct

For the purposes of this Law, unsatisfactory professional conduct includes conduct of a lawyer occurring 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 lawyer.

Division 2—Determination by local regulatory authority

299 Determination by local regulatory authority— unsatisfactory professional conduct

(1) The designated local regulatory authority **may**, in relation to a disciplinary matter, find that the respondent lawyer or a legal practitioner associate of the respondent law practice has engaged in unsatisfactory professional conduct and may determine the disciplinary matter by making any of the following orders—

(a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;

(b) an order reprimanding the respondent or a legal practitioner associate of the respondent law practice;

(c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;

(d) an order requiring the respondent or a legal practitioner associate of the respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;

(e) an order requiring—

(i) the respondent lawyer; or

(ii) the respondent law practice to arrange for a legal practitioner associate of the law practice— to undertake training, education or counselling or be supervised;

(f) an order requiring the respondent or a legal practitioner associate of the respondent law practice to pay a fine of a specified amount (not exceeding $25 000) to the fund referred to in section 456;

(g) an order recommending the imposition of a specified condition on the Australian practising certificate or Australian registration certificate of the respondent lawyer or a legal practitioner associate of the respondent law practice.

(2) If the designated local regulatory authority proposes to determine a disciplinary matter under this section—

(a) the designated local regulatory authority must provide the respondent or associate and the complainant with details of the proposed determination and invite them to make written submissions to the designated local regulatory authority within a specified period; and

(b) the designated local regulatory authority must take into consideration any written submissions made to the designated local regulatory authority within the specified period, and may, **but need not**, consider submissions received afterwards; and

(c) the designated local regulatory authority is not required to repeat the process if the designated local regulatory authority decides to make a determination in different terms after taking into account any written submissions received during the specified period; and

(d) the rules of procedural fairness are not breached merely because no submissions are received within the specified period and the designated local regulatory authority makes a determination in relation to the complaint, even if submissions are received afterwards.

(3) If the designated local regulatory authority **determines a disciplinary matter under this section, no further action is to be taken under this Chapter** with respect to the complaint.

(4) If a complaint contains both a consumer matter and a disciplinary matter and the designated local regulatory authority has already made a determination of the consumer matter under section 290, the designated local regulatory authority may, in subsequently making a determination about the disciplinary matter, take into account the determination already made about the consumer matter, but not so as to make further orders under that section.

<u>Discussion of new LPUL provisions – re Complaint-Handling Powers of LSC</u>

Section 277 allows the LSC to **close** the whole or part of a complaint, formerly known as dismissal, "without any investigation or without completing an investigation" and "without requiring to be heard or make submission". This is the new equivalent to 4.2.10(1)(f)(ii) of the 2004 LPA. It is being actively used by LSC, so the present indication is that this practice will continue under the new numbering scheme.

Section 282 says that the LSC may investigate, but does not require same mandatorily. Section 291 now sets a jurisdictional limit of $100,000 of billings, up from $25,000 of billings. This is a significant increase, and one for which the transparency of the LSC's decision-making is all-important. Currently VCAT handles such matters, and there is a reasonable amount of transparency there.

Section 296 defines Unsatisfactory Professional Conduct to include "conduct which falls short of standard of competence and diligence that a member of the **public** is entitled to expect of a reasonably competent lawyer". But the LSC sets a very high bar based on its own belief of what it should be able to prove with 100% confidence. The result is a lower standard, not a higher one. Other government departments and ombudsman bodies have realised the error of this way of thinking, it's now time for the LSC to get with the same program.

Section 299 (also s280) suggest that rules of procedural fairness are not breached merely because no submissions are received **within the specified period**, even if a submission is received afterwards. LSC defines its own timeframe here. In recent examples of LSC's conduct, such timeframes are as short as 24 hours.

Within the new LPUL, there are useful provisions for powers to issue cautions, requiring an apology, requiring work to be re-done, requiring education, counselling, or compensation. These measures are welcomed, but again the test is objectivity – did the LSCs action rectify the behaviour, or just sweep it under someone else's carpet?

Summary of the Legal Profession Uniform Law for Regulation of the Legal Industry

The provisions re-stated above identify the discretionary powers that exist at the LSC level. If properly used, the community might expect that the standard of legal professional conduct to be set at an appropriate level. Occasional transgressions by rogue practitioners could be quickly exposed and those rogues would be expelled for professional misconduct, or corrective measures for minor unprofessional conduct matters.

However, having the **right** set of rules is the first part of this issue, and **enforcement** of such rules is the second part of the equation. The present perception by the client base is that the regulations are being under-policed by reliance on these various discretionary provisions to dismiss or under-investigate complaints. By setting the bar impossibly high for what constitutes misconduct, the legal industry has produced a conduct standard too low to be taken seriously as a "profession". The nature of dismissal of complaints suggests that there are elements of bias, favouritism and corruption within the culture of the office of LSC. This is a cancer which is allowed to grow by allowing peers to police peers, without sufficient oversight and audit by others who do not share the bias of being a legal practitioner.

By comparison to other professional conduct boards, the legal professional board does not have a mix of professions and public stakeholder representatives. It simply has lawyers. Lawyers who studied with, and who might be friends with the lawyers who are practising in the community. The result is that the legislation which exists as a result of a public need for the legal profession to be accountable to the public and to its clients, has become the subject of farce.

Transparency is the key to the Legal Profession's accountability.

TABLE OF RECOMMENDATIONS

The above discussion and summaries of LSC complaints-handling and the LSC regulatory powers, as well as billing and cost agreements, produced the following recommendations:

Re Complaints Handling (IR 6.4)

a) Positive focus on a "public interest test" of professional ethical behaviour.
b) A "free consultation" for full explanation of client rights and cost agreement.
c) No waiver of client confidentiality rights with respect to family law matters.
d) Corruption enquiry OR incompetence OR impotence. Summons the Vic Commissioner to this enquiry.
e) Policing the LSC using non-lawyers.
f) Transparency – consider an independent exit poll for all complaints dismissed.

Re Regulation of the Legal Industry (IR 7.3)

g) Define and prescribe a form of "bill" in the Regulations or within the Act.
h) Dis-allow Cost Agreements' "acceptance-by-conduct".
i) Dis-allowing the holding of client files under "solicitor's lien", especially for family law cases.
j) Reduce power of commissioner to "close" a complaint without explanation.
k) Transparency of decisions for all cases <$100k
l) Objective testing/reporting if the LSC takes no action on a UPC matter.

CONCLUSION

This submission has discussed:

- That Courts are slow and unwieldy. Transparency of process and timeliness are the keys to efficient justice.
- The public's expectation of professional conduct compared to the standard of lawyers'conduct actually condoned by the LSC. Transparency of the standard is the key to LSC's fairness.
- Lawyers attempts to buy their way out of trouble when their conduct is exposed, and the prevalence of this conduct being endorsed by the LSC. Transparency of these settlements is the key to the LSC's integrity.
- The new LPUL and the greater powers it confers upon the LSC. Transparency of the discretionary powers is key to the Legal Profession's accountability.
- Transparency does not presently exist within the LPUL framework, nor within the LSC.

Andrew Watkins, Professional Engineer.

In the State of Victoria, June 2014.

Poetic Justice

by K. Ottic

If the outcome is Equality,
then justice is but one tool,
alas a rather blunt one.

If the outcome is sharper Justice,
then the profession of laws is but one tool,
alas a rather blunt one.

If the outcome is a sharper Legal Profession,
then ethics is but one tool,
alas a rather blunt one.

If the outcome is sharper Legal Ethics,
then conduct-complaints is but one tool,
alas a rather blunt one.

If the outcome is sharper Conduct,
then transparency is the ‘but-none’ tool,
alas a rather unexceptional none.

To see through all, and see all through,
Productivity Commission, the community’s tool,
Alas, a justice well-won.