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A PRAGMATIC APPROACH TO LEGAL REGULATION

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INTRODUCTION

In their challenging book, Practical Wisdom, Barry Schwartz and Kenneth Sharpe draw on Aristotle's ethics teachings to state: 'A wise person knows when to bend the rules. A wise person knows when to improvise. And most important, a wise person does this improvising and rule-bending in the service of the right aims'. The authors go on to explain that rules only take us so far: that rules need constant interpretation and balancing. This concept applies equally to rules regulators.

The *Legal Profession Act (2004)* (the Act) regulates the legal profession in Victoria, Australia. Regulation of the legal profession is integral to the promotion of appropriate standards of conduct and the protection of the interests of consumers of legal services.³ In the current climate of rights-oriented consumerism, regulation must also continue to evolve to reflect the changing expectations of consumers and culture in the legal profession.⁴ It also needs the application of the kind of *practical wisdom* Aristotle and Barry Schwartz refer to that involves improvising to achieve the right aims.

There are many competing demands in the task of legal regulation. Lawyers expect regulation to be reasonable and sensible in light of what is required to maintain the high standards they expect of their own profession. Consumers of legal services expect from the profession a high level of trustworthiness and competent, valuable service, and they want their grievances redressed where they believe these standards have not been met. Society as a whole recognises the importance of the integrity of the legal profession, and expects the regulator to maintain the standards. Regulation of the profession is therefore a complex task; a living and dynamic activity.

This paper is about the great benefit of moving from a cautious, legalistic approach in regulation and complaint handling to a more dynamic, personal and pragmatic approach. The benefits are best illustrated by the case study of my own office and the significant changes we effected over the last two years, focusing particularly on new ways of handling complaints.

The study begins with a picture of a regulator in crisis. When I commenced my role as Commissioner in late 2009, the office was operating under a model of regulation with significant problems in its effectiveness, efficiency and credibility. Open complaints were at unsustainable levels and the office had been subjected to a highly critical report by Ombudsman Victoria which indicated an urgent need for change.

¹ I acknowledge the work of my staff members, Karen Williams, who researched and wrote the original draft of this paper, and Jennie Pakula (Manager, Complaints & Resolution) who settled the final version.

² Barry Schwartz, *Using our Practical Wisdom* (speech posted in December 2010 on http://www.ted.com).

³ Legal Profession Act (2004) (Vic).

⁴ David Edmonds, Chair of the Legal Services Board UK, *Training the lawyers of the future – a regulator's view* (speech delivered at The Lord Upjohn Lecture 2010, Inner Temple, 19 November 2010).

It was important for us to understand why this crisis occurred. We needed to look carefully at the aims of legal profession regulation and think carefully about the tools at our disposal in order to achieve those aims. A wholesale cultural change in our office resulted in a more complex, nuanced, personal and flexible approach to regulation and complaint handling that has delivered significant improvements in effectiveness, efficiency and credibility.

Finally, I reflect on what we have achieved, considering themes of trust, risk, timeliness, communication, relationships and the importance of the individual engaged in the task of regulation and complaints handling. I conclude that the regulator is far more than the legislation that creates it: the culture of the regulator is critical to the success or failure of regulation.

2009: A REGULATOR IN CRISIS

Towards the end of 2009, the Legal Services Commissioner ("LSC") was a regulator in crisis. Since the commencement of the Act in December 2005, the LSC had been the body primarily responsible for handling complaints about the legal profession. The crisis at hand was focussed on this important task.

After receiving a number of complaints from lawyers and complainants and conducting follow up investigations, the Victorian Ombudsman conducted a review of the complaint handling processes and procedures of the LSC.⁵ The review identified a number of systemic problems arising from the management of complaints, which included

- delay in investigating and finalising complaints,
- poor practice in dealing with minor service-related complaints,
- poor investigatory techniques, including failure to use investigation plans, poor evidence gathering, and failure to substantiate and verify lawyers' explanations,
- denial of procedural fairness to parties, through an opaque and poorly explained process; and
- inadequate documentation and explanation of decisions.

The Ombudsman expressed concern at the low number of substantive prosecutions of lawyers for serious misconduct, commenting that "The lack of results suggests that the current practices of the LSC are inadequate in order for it to fulfil its statutory obligations. The LSC is at risk (if the view is not already held) of being seen as a 'toothless tiger' by both the legal profession and complainants alike. The end result is that the legal profession is under regulated and consumer confidence in the legal profession undermined."

The Ombudsman made several recommendations to the LSC for improving complaint handling processes and procedures to ensure that complaints and disputes were dealt with in a timely and effective manner. Recommendations, which were subsequently implemented, included the thoughtful use of investigation plans; ensuring staff undertake relevant training; and considering more appropriate response to what were essentially not disciplinary matters but customer service complaints.

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⁵ Ombudsman Victoria Annual Report 2009.

⁶ Ombudsman Victoria Investigation Report into Legal Services Commissioner's Complaint Handling Processes (2008), p54

Ombudsman Victoria Annual Report 2009, p. 23.

Feedback received by our office indicated that the Ombudsman's criticisms had substance. Complainants and lawyers alike were often dissatisfied with delays in completing the complaints process and the lack of communication regarding the likely outcome of the complaint. Complainants also felt they had no real input into the process and a sense that this was a case of 'lawyers protecting lawyers'.

Finally, the open complaints figures bore out the fact that there was a significant problem. Over 2009-2010, the number of open complaints continued to increase to the point that in April 2010, just prior to the implementation of our changed processes, there were over 1600 open complaints: each complaint handler in the office was responsible for an average of over 110 open complaints (see figure 1, as at April 2010).

Ongoing complaint & investigation cases



Figure 1
Open Complaint Files per month, July 2006 to April 2012

HOW DID IT GET TO THIS?

In early 2010, at the commencement of my appointment as Commissioner, I sought a detailed briefing and analysis of the problem from my management team.

Notwithstanding considerable efforts to implement some suggestions for improvement by the Ombudsman, the underlying philosophy of regulation and complaint handling was shown to be inadequate for the task given to the LSC under the Act.

A narrow, legalistic interpretation, of the legislative framework

We saw that we were looking at the Act in a narrow, legalistic way in the development of the complaints handling process then employed by the office.

Under the Act, complaints regarding lawyers are categorised as a civil complaint, a disciplinary complaint or both. ⁸ Civil complaints are primarily disputes between lawyers and their clients, which are further categorised into costs disputes⁹, pecuniary loss claims or any other genuine disputes 10. Disciplinary complaints are defined as complaints about a lawyer's conduct that would, if proved, amount to 'unsatisfactory professional conduct' 11 or 'professional misconduct', 12 and disciplinary complaints must be investigated. 13 It should also be noted that the Commissioner may summarily dismiss complaints on certain grounds. 14

While the Act is quite prescriptive about what constitutes a civil complaint and what constitutes a disciplinary complaint, many complaints received by the office do not fall strictly within either category. Our statistics indicate that in any given period, about 35% of the complaints received fall into the Act's category of a civil dispute and about 15% would amount to a disciplinary complaint. It is quite rare to receive a complaint about dishonesty, theft, fraud or other serious misconduct that would ordinarily attract a prosecution, although complaints that may warrant some kind of lower level disciplinary action are relatively common.

About 50% of complaints received however, fall into neither category. In fact, the vast majority of complaints are largely about a universal consumer issue: the breakdown of the adviser-client relationship. They usually relate to a failure to communicate, uncertainty or inadequacy relating to costs disclosure, issues of timeliness, unclear advice and lack of attentiveness, or lack of value for money. So this leaves a question - what should the regulator do with these 'none of the above' complaints?

professional misconduct includes—

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of an Australian legal practitioner, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

⁸ Ibid s 4.2.1.

⁹ Costs disputes that can be handled within the scope of the Act are matter where the total costs do not exceed \$25,000; where the bills are no more than six months old; and where the lawyer has not already sued the consumer to recover outstanding costs. ¹⁰ Ibid s 4.2.2.

¹¹ unsatisfactory professional conduct includes conduct of an Australian legal practitioner 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 Australian legal practitioner.

¹² Ibid s 4.2.3: (1) For the purposes of this Act—

¹³ Ibid s.4.4.7

¹⁴ Ibid s.4.2.10(1). Here, the Act states the complaints may be dismissed on the grounds that adequate details of the complaint have been requested but not provided; the complaint is vexatious, frivolous or misconceived; it has been previously investigated; it is outside the power of the Commissioner to handle; and, in the case of a disciplinary complaint, it becomes evident that no further investigation is warranted

In the past the LSC took the view that complaints could only be dealt with if they were classified as either a civil or disciplinary complaint, or a combined civil and disciplinary complaint. ¹⁵ Therefore, any complaints that raised concerns about conduct that were not trivial usually followed the same process as those more serious disciplinary allegations and lengthy investigations often followed. Parties to the complaint were often given little or no indication as to the likely outcome of the complaint until the end of the investigation and the reasons for such lengthy delays in finalising the complaint were not always adequately communicated.

Alternatively, complaints that did not fit within the parameters of what is a civil or disciplinary complaint were summarily dismissed. This resulted in legitimate consumer concerns not being appropriately addressed. Complainants were advised of the reasons for the dismissal as required under the Act, mostly by formal correspondence in a legalistic fashion, and sometimes this was done frustratingly late in the piece. In many cases processes were not in place to enable complainants to have an opportunity to discuss their complaint, attempt to address the concerns raised by seeking the lawyer's explanation, or to provide any other means for resolution.

The result of a narrow, legalistic conception of the role of the LSC in handling complaints was, as stated by the Ombudsman, a build up of needlessly lengthy investigations, and poor handling of complaints involving minor, service related issues. The steps set out in the Act controlled our entire system of work. We forgot to superimpose the needs of complainants and lawyers alike.

A narrow, legalistic conception of the task of regulation

Anecdotally, a narrow, legalistic outlook is common in regulators of the legal profession. It is a traditional notion of regulation described as *command and control*. Under this model, the regulator enforces rules and laws created by government to the exclusion of the many other ways in which regulation can be carried out.¹⁶ The model has also been described as the *policing model* of regulation. The Hon Wayne Martin, Chief Justice of Western Australia, in his presentation paper to the Conference of Regulatory Officers in 2009 noted that

'one of the assumptions which is inherent in that model is the imposition of a punishment that fits the crime. So, if the practitioner's transgression was not particularly serious, ineffective sanctions like admonition or a fine were generally utilised, even though the nature of the transgression might have demonstrated a basic lack of aptitude or character necessary for the practice of law. 117

The task of the regulator in handling complaints is conceived as being similar to that of the police, looking for crimes to prosecute, in relation to which the complainants are not parties but merely witnesses. Larger systemic issues, such as the suitability of the person to be a lawyer, or a consistent failure to provide appropriate customer service, are ignored by this model. In a number of cases, despite the regulator being aware of systemic problems in the way a practice is being run, the lawyer may continue to practice without pointed and appropriate intervention, until significant problems occur. As Martin CJ succinctly described it, 'often it was a bit like watching a train wreck in slow motion, powerless to do anything to stop it¹⁸'.

¹⁶ Arie Freiberg, *The Tools of Regulation*, (Sydney: The Federation Press, 2010), p 83

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¹⁵ 2009 Annual Report of the Legal Services Commissioner, 8.

¹⁷ The Hon Wayne Martin, Chief Justice of Western Australia, *The Future of Regulating the Legal Profession: Is the Profession Over Regulated?* (Paper presented at the Conference of Regulatory Officers, Kings Park Function Centre, Perth, Western Australia, 16 September 2009) 15, as cited in the paper by John Briton and Scott McLean, *Lawyer Regulation, Consciousness-Raising and Social Science*.

¹⁸ Ibid

A narrow view like this also does not recognise that the task of regulation can be performed in many ways other than through rules and, in order to be effective, involves a great deal of complexity and a certain amount of imprecision and intuition, which will cause great discomfort in a legalistic culture of regulation. Arup notes that, conceived in such a broad sense, "Regulation will not display the coherence and order that ... lawyers find satisfying." Lawyers, including those engaged in regulation, sometimes prefer simplicity, predictability and certainty.

Further, the narrow view does not recognise that in many cases, the regulatory space is already occupied by others – in this case, by lawyers themselves with their history of self-regulation and their long established rules of ethics to which most adhere and are deeply committed. Freiberg notes that 'failure to recognise competing or complementary regulatory systems is one of many reasons for regulatory failure.' Where the regulator does not communicate an understanding that the majority of those regulated are themselves committed to appropriate standards, a crucial opportunity to strengthen regulation is lost. Further, resentment and non-cooperation can result.

Flawed assessment of risk

As the view was taken that the only way complaints could be dealt with was by treating them as fitting into the categories described by the Act, many lengthy investigations took place into issues that were not really potential disciplinary breaches. The resultant backlog of complaints meant that more serious investigations often languished for months and years, as did matters that should have been subject to prosecution. Although notionally minimising the risk of an adverse court ruling against the LSC in a particular complaint, there was a substantial increase in the risk, and the reality, of professional and public criticism, and the risk of failing to carry out the functions for which the office existed.

In the larger regulatory scheme, relationships with the other legal regulators and co-regulators were subject to the same flawed conception of risk, with unfortunate consequences. The Act creates the Legal Services Board as well as the LSC, and links the two organisations by making the Commissioner the Chief Executive Officer of the Board. The Board's functions include supervision of law practices by means of trust account inspections and audits of Incorporated Legal Practices, determination of whether a person is suitable to become, and remain, a legal practitioner, external interventions (including the appointment of supervisors and managers to practices, and applying to the Court for the appointment of a receiver to a practice), prosecution of persons for unqualified practice and so on.

The regulatory field is also occupied by the professional associations, the Law Institute of Victoria (in relation to solicitors) and the Victorian Bar (in relation to barristers); these bodies are delegated certain functions by both the Board (for example issuing practicing certificates, conducting trust account inspections, receiverships and investigations of unqualified legal practice) and the LSC (investigating complaints about lawyers and recommending an outcome but not making the final determination).

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¹⁹ C. Arup, 'Labour Law and Labour Market Regulation: Current Varieties, New Possibilities' in Arup et al (eds) Labour Law and Labour Market regulation (Sydney: The Federation Press, 2006), as quoted in Freiberg, Op Cit, p26 ²⁰ Freiberg, Op Cit, p 4

The Act describes the circumstances in which information may be shared between the regulators.²¹ Again, the narrow legalistic interpretation of the Act, and the overly cautious approach to the risk of not complying with the Act meant that very little information flowed between the regulators, even between the Board and the LSC. Given also the incomplete match of aims and interests in almost all Australian jurisdictions between the professional associations and any statutory regulator, communication here was often strained and inadequate. The result of this was almost no ability to see the 'big picture' of systemic problems within practices and in individual lawyers, and no effort could be made to co-ordinate action related to these problems.

The risk that had become the primary focus was, in effect, an institutional risk – that the office would be criticised for not complying with the Act. As Freiberg comments, "Managers who are required to manage institutional risks ... are likely to find that much of their time is spent on such internal matters. This might prompt them to lose sight of the broader purpose of the enterprise. Compliance with internal rules becomes an end in itself rather than a step towards achieving the desired regulatory outcome."22

Communication and relationship with external parties

The cumulative impact of distant, formal and legalistic communication was very damaging to our relationships with lawyers and complainants alike. Our communications with lawyers gave them the impression that we were out to catch them misbehaving and aiming to punish them wherever possible. Research in the area of regulation indicates that when the regulator communicates distrust to those regulated, the impact is that they become less trustworthy: "the mistrust signalled through harsh regulation serves as a self-fulfilling prophecy. A policy that threatens people overlooks the possibility that threatened punishment is perceived as a signal that noncompliance is widespread.²³" There is, then, a "fear of being the only 'sucker' who obeys the law".24

Conversely, this 'policing' attitude insults the majority of lawyers who uphold and meet the ethical attitudes inculcated in the profession over many generations. No respectable lawyer likes to feel they are seen as the 'bad apples'. Unsurprisingly, considerable resentment was expressed by the profession towards the LSC.

Lawyers were being weighed down by the thought of possible disciplinary action for minor disciplinary or service related matters that could have been finalised very early in the process. This resulted in them often showing reluctance to maintain an open and transparent relationship with the LSC. If they wrongly thought their license to operate was in peril they would resist opportunities to concede any aspect of complaints made. The LSC's failure to signal the direction being taken in complaints investigations exacerbated the confusion.

Complainants were similarly frustrated by delays, a lack of explanation of the process and likely outcome, and a perception that their concerns were not being dealt with appropriately - that a lawyer's explanation was accepted on face value and that it was a case of lawyers protecting each other. The regulator was losing at both ends of the spectrum.

²¹ See ss. 6.4.5, 7.2.14 & 7.2.15.

²² Freiberg, Op Cit, p58

²³ Yuval Feldman, "Five models of Regulatory Compliance motivation: Empirical Findings and Normative Implications", Bar-Ilan University Public Law and Legal Theory Working Paper No. 12-10, August 2010, p10 lbid, p4

A CHANGE IN CULTURE AND PROCESS

The tasks of the LSC as set out in the act are not merely to discipline, but also to maintain the legal profession's own existing high ethical standards, to educate and to provide redress to consumers. It is not a merely policing role but a positive, proactive task. It was recognised that to do this requires a large and varied set of tools, both from within and outside the parameters of the Act. As Freiberg notes, "regulation is not just restrictive or coercive; it is also constitutive, facilitative and enabling. It can make things happen, not just stop them from occurring."25

A change in outlook was required. It was a change in not only practical investigative practices and complaint handling techniques, but also in internal cultural and philosophical outlook. The act of Parliament alone does not create respect. A regulator must earn the respect of those it regulates by maintaining ongoing communications and continuing to properly manage those relationships.²⁶ It should not be forgotten that legal regulators in Australia are overseeing compliance with the profession's own very high standards of good conduct and ethical behaviour. The regulators do not own those standards; the lawyers do, along with the communities they serve. The vast majority of lawyers meet those standards. It becomes the task of the regulator to nurture, support and uphold the profession in its acceptance and maintenance of these standards.

In addressing our culture and processes we focussed our attention on how we did what we do: the way in which we communicated; what we communicated by how we did things; the level of formality, and; the relationship between the regulator, the lawyer and the complainant in any one matter. As part of our reform process, the importance of the co-ordination and co-operation of the regulators was given a higher priority. The range of powers of the Board was reexamined, and it became apparent that many lower level interventions, such as auditing of Incorporated Legal Practices and the appointment of managers to troubled law practices, had not been used before. Also, in order to be effective, communication and co-ordination between the different regulatory bodies had to improve.

Communication

We needed to move from a culture of lack of transparency and laborious investigations to one whose reputation was shaped around nimble, efficient, variable processes that resolved many complaints but prosecuted the hard cases. To achieve this, staff were encouraged to communicate more often and more freely with the parties to a complaint. Staff were also encouraged to be more flexible in their approach to effective communication by using email. phone contact, and meeting the lawyer more often in person rather than by written correspondence. Similarly, processes were put in place to ensure that complainants were contacted once a complaint had been received and confirmation of the understanding of their concerns was discussed. This process attempted to ensure the complainant felt their concerns were heard and understood and that they were given a realistic understanding of if and how those concerns could be addressed by our office. It also attempted to establish rapport with the complainants, providing proper management of the relationship from the beginning of the complaints process.

²⁵ Freiberg, Op cit, p5

²⁶ Michael McGarvie, 'The Ethics of Complaint Handling', (speech delivered to a forum of the Legal Ethics Teachers' Network, Monash University, 30 March 2010).

Our internal cultural change also focussed on regaining the trust of lawyers through open communication and assistance in compliance. For example, where a lawyer in the past may have been prosecuted for failing to comply with requests for documents and information, we shifted to using other methods of achieving co-operation and responses to inquiries through visits, personal phone contact and face to face requests. Staff were encouraged to deal with lawyers' fear and distrust of the regulator through personal contacts, and through giving a realistic understanding of the issue under investigation and its likely outcome.

Staff dealing with complaints were encouraged to adopt a more consumer-friendly approach when dealing with complainants and with members of the public generally. Meeting rooms and interview rooms were constructed with the intention of inviting complainants and lawyers to attend the office and discuss their issues and concerns face to face with the complaints handler. The overall intention was to increase good communication and therefore levels of procedural satisfaction with the complaint handling process and to strengthen the relationship with the wider community.

Underpinning all these changes was a change in attitude towards the individual complaint handler. Under the old system, our staff had little discretion in the way they dealt with lawyers and complainants. We recognised that the people we employed possessed a great many skills, including good judgement, wisdom, maturity, empathy, and the ability to analyse and skilfully solve problems. It was important for the LSC to communicate trust and confidence in staff and to support them fully in the efforts they made to carry out their work. Tight rules and rigid pathways for investigations were replaced with increased discretion and flexibility for the complaints handlers to apply practical wisdom to different cases. As each member of staff interacts with individuals in the complaint process, they have the opportunity to establish a working relationship that enables the parties to participate fully in the process. While parties may not always achieve what they want, the level of procedural satisfaction increases markedly when they know they have been heard, understood and taken seriously.

In recruiting new members of staff over time, I have also moved to employ not only lawyers, but skilled professionals of varied backgrounds in dealing with complaints and conducting investigations. I have particularly sought to recruit for and develop those with skills in conciliation and alternative dispute resolution (ADR), who have proved highly effective in matters where a formal investigation is not warranted, but where an acceptable outcome for the consumer is essential.

Investigations: foreshadowing of decisions

Processes were put in place to ensure that parties involved in investigated complaints were advised of the likely decision of the LSC prior to the decision being made. This approach has been found to alleviate the stress that the threat of disciplinary action produces in the minds of lawyers. Lawyers now appear more willing to be involved in the complaint handling and resolution process when they anticipate a more predictable, manageable and timely finish to the case. Signalling scope, direction and outcome also manages the expectations of complainants about what can and cannot be achieved through the complaint handling process.

Effective handling of service related complaints – the Rapid Resolution Team

Given most complaints about lawyers do not neatly fit either of the categories explicitly described by the Act, a third option had to evolve: conciliation. A complainant generally does not care whether the Tribunal would be likely to find a lawyer guilty of a disciplinary breach. They do, however, want to have their say, be understood and recognised. In certain circumstances resolution will involve them receiving some kind of redress, such as a concession or an acknowledgement or apology from the lawyer. This has been the strategy behind the formation of our Rapid Resolution Team (RRT) in April 2010.

The establishment of the Rapid Resolution Team was to address service related complaints and those complaints exhibiting no evidence of any serious disciplinary breaches, albeit often involving complex legal issues. Its brief was to resolve complaints sensibly with minimal delay. Ultimately, it gives lawyers a chance to resolve the complaint themselves, but with the LSC's help. In many ways it mirrors what many well-organised law firms already do without involvement by the LSC. As part of the change process, we deployed other senior staff in a file assessment team for old open cases. It operated in parallel to the rapid resolution of new cases. This team reviewed whether old, ongoing investigations had been appropriately undertaken; if not, the complaint in question would be dealt with by seeking a resolution of the issues in dispute.

It is well worth noting that many law practices in this jurisdiction efficiently manage concerns of their clients internally with the assistance of a compliance manager or managing partner. This proactive approach to complaints resolution effectively minimises the extent to which concerns of clients leave the domain of the firm and come to the attention of the LSC. This is where truly effective regulation can occur: where the lawyer and client resolve their differences and achieve high standards of ethical behaviour, good communication and professional service without necessarily involving the institutional regulators.

Triage of complaints

A proven strategy for the best management of complaints is to establish a triage system. This process was invented by armies first, and then perfected by modern hospitals the world over. Complaints are received, analysed and distributed to the most appropriate team for handling. Teams within the office are organised into specialities and include the Rapid Resolution Team (for complaint conciliations), the Dispute Resolution Team (for the mediation of costs disputes), two investigations & prosecutions teams (for the sharp end of misconduct), and a regulation and litigation team (to enforce compliance for the Legal Services Board outside complaints).

A significant benefit of the use of a triage system is the reduction in the volume of complaints set aside for full investigation. We still get 5,000 enquiries and 2,000 complaints per year. Fewer of them however, end up being subjected to full blown investigations. Accordingly, each investigator now carries around 30 open matters, down from over 100 two years ago. Investigations staff are now able to dedicate more time to ensuring thorough investigations are done faster. With a lighter file load, investigations staff are better able to communicate more frequently with parties and direct their "heavier" investigative skills towards more serious disciplinary issues. The benefit of this approach has been evident in the immediate and continuing drop in the numbers of open complaints since April 2010 (refer again to Figure 1).

Dealing effectively with systemic issues

Our office has also actively sought to reduce the potential for systemic issues to arise by encouraging staff to visit the offices of lawyers who are the subject of a number of related, low level complaints. Anecdotally, visits to law practices have been very successful in resolving both minor and complex matters. They also provide lawyers with good management insights and solutions to identified or potential systemic issues to reduce the occurrence of future complaints. Just as importantly, visits to law firms allow the investigator to get a better understanding of the context, environment, resources and work atmosphere from which the complaint arose.

Understanding context, and filling in the missing pieces can produce excellent regulatory outcomes. For example, individual members of staff often play a significant role in assisting lawyers to amend poor practices. We see from time to time a cluster of complaints involving particular lawyers. Sometimes these complaints are indicative of significant personal issues. At this point, the lawyer may be contacted and visited and assistance offered to work through the presenting issues before they get worse. In situations like this, the power of guidance and forgiveness encourages lawyers to deal with their problems rather than avoiding and entrenching them.

Where a higher level of intervention is required, the Legal Services Board can become involved. For example, a recent complaint indicated not only a failure by a law practice to give appropriate costs disclosure, but it revealed other signs that the practice was being poorly conducted. The LSC complaint handler contacted the Board to request that a trust account inspector attend the practice, following which the suspicions of a poorly run practice were confirmed. With the lawyer's consent, a manager was appointed to assist him to put in place better management systems. Undertakings were given, and the manager continues to visit the practice from time to time to ensure it is being conducted in a more competent and compliant fashion. In this way it is hoped that the lawyer will improve his standards and avoid future complaints, while remaining involved in what is otherwise a viable law firm. Clumsy, legalistic regulation might only have resorted to the extreme sanction of putting the firm into receivership and winding up the practice.

The Victorian co-regulators now meet on a regular basis to discuss issues of common concern, and great effort is taken to co-ordinate action taken against a lawyer where serious intervention is required. For example, where a lawyer is subject to the investigation of serious conduct complaints, it may also be appropriate to take action to suspend the practicing certificate and/or appoint a receiver to the practice. This requires the regulators to act in concert.

Where systemic issues become evident in particular areas of law, my office now takes the initiative to publish guidance on such matters. For example, a number of law firms specialising in civil recovery work had been the subject of a considerable number of related complaints revealing industry-wide flaws in the ways law firms operated in this field of practice. Members of my staff considered the common issues, formulated guidelines as to what conduct was and was not appropriate, and then visited each practice to discuss our concerns. In one instance, major undertakings have been extracted from a lawyer running such a practice, representing a big change in behaviour in the consumer interest. Action taken to assist lawyers to comply with appropriate standards are appreciated by the profession, and clearly indicate to them that we will view seriously a decision to work outside those standards once that guidance has been given. Of course, it's also very good for consumers.

IMPACT: CURRENT FIGURES

The 2010-2011 Annual Report of the Legal Services Commissioner provides a clear indication of the success of the implementation of our new initiatives:

'Most notable is the number of complaints finalised, which was 2,609. This is 31% more than the number of 1,796 finalised in 2009-2010. The amount of investigations commenced was reduced from 749 in 2009-2010 to 449. The above statistics are a direct indication of the success of the RRT in dealing with complaints in a way that does not lead to unnecessary investigation and therefore providing the investigations team with fewer complaints to investigate and more time to progress and finalise without delay.

Further, the regulator's ability to finalise complaints faster resulted in there being only 848 unresolved complaints at 30 June 2011. This is compared with 1,515 outstanding complaints in the previous year. Reducing the number of outstanding complaints to below 1,000 is a significant milestone for the regulator.²⁷

These reductions were achieved in a year where the number of incoming enquiries and complaints remained almost static.

WHAT WE LEARNED: SOME THEMES

Flexibility

Flexibility comes from recognising all the tools a regulator has at their disposal, which includes not only those set out within the constituting legislation, but also personal, informal instruments. We recognise that every complaint has individual features and that one size does not fit all. By tailoring our approach, we are able to reach much more appropriate solutions to the issues that present to our office.

Risk

Our new processes have not removed risk from our work. Rather, we have reconsidered the full range of risks we face and have reprioritised how we handle risk. Risk is inherent to any process to deal with complaints where emotions run high, money is involved and reputations may be challenged. Some of the risks that we recognise are that there is the potential for inconsistent outcomes, particularly where discretion and decision-making is less controlled and centralised within the organisation.

A more personal, forgiving regime may give rise to potential for lawyers to perceive this approach as a way of concealing more serious disciplinary issues. The experience and judgment of the individual complaint handler is important here, as is the scheme to ensure appropriate external monitoring continues. The process of resolving complaints is not to be perceived as a way for lawyers to *talk their way out* of a serious complaint investigation; nor is it a process whereby misconduct can be concealed from the LSC.

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²⁷ 2010-11 Annual Report of the Legal Services Commissioner, 4.

Trust

Trust is a central theme in legal profession regulation. Trust is central to being a lawyer. Most lawyers know it and remain trusted advisers to their clients all of their professional lives. They guard their clients' secrets, they deal transparently and honestly with their clients' money and they are expected to act in their clients' best interests. They know how to navigate the unfamiliar and threatening waters of the legal system. This often puts their clients in a weaker position. It is incredibly important for clients to know their lawyers are trustworthy and conversely, they feel a strong sense of betrayal if that trust is lost. The task of the regulator is, in the minds of society at large, to underpin that foundation of trust, and to swiftly remove from the profession those rare few who are not worthy of trust.

The primary importance of the individual staff member

The skill and judgment of the individuals engaged in regulation is crucial. Every contact between a member of my staff and a party to a complaint is an opportunity to establish and develop a good working relationship. Good regulation relies on good relationships²⁸; and Lord Hunt notes that "*In an ideal world an atmosphere of mutual trust and respect would exist between the regulator and those it regulates*".²⁹ Many of the measures now adopted are designed to enhance the working relationship between the regulator and the consumer as well as between the regulator and the legal profession.

The individual staff member can have a powerful impact in helping to resolve relationship difficulties between lawyer and client, in assisting a lawyer under pressure to resolve ongoing concerns, and in providing procedural satisfaction to the parties. This makes it a priority to recruit people who combine specialist skills (such as investigation or dispute resolution) with maturity, sound judgment, wisdom, commonsense and empathy. I seek to convey to my staff my trust, confidence and support as we work together in the important task of regulation, and to ensure they continue to grow in their skill and knowledge to carry out this work.

²⁹ Lord Hunt of Wirral, *The Hunt Review of the Regulation of Legal Services*, October 2009, at page 32.

²⁸ McGarvie, 'The Ethics of Complaint Handling', (speech delivered to a forum of the Legal Ethics Teachers' Network, Monash University, 30 March 2010).

CONCLUSION

The reality of legal profession regulation is that it is a complex, multi-faceted task. There will always be tension between addressing the service concerns of consumers and the relative autonomy of the independent legal profession. The regulator must deal deftly and skilfully with both lawyers and consumers to build trust, and to know where to resolve, where to let something go, and where to step in with strong disciplinary measures. Regulating lawyers involves demonstrating respect for the existing high levels of self regulation, compliance and ethical values that already exist within the profession, as well as encouraging in some lawyers, greater sensitivity for the level of service consumers are entitled to receive. In order to fulfil this task, the regulator must look far beyond its constituting legislation to a purposeful, flexible and nuanced approach to regulation.

There is no quick fix for dealing with and resolving complaints. Although education and preventative measures can and have been implemented to reduce the number of complaints received by the LSC, the reality is that with consumers becoming increasingly aware of their rights and entitlements, complaints will never cease. Regulators must recognise that they are ideally placed to generate goodwill between consumers, lawyers, professional associations and the wider community to maintain the good reputation of the profession. The culture of the regulator, and its own application of 'practical wisdom', has been an essential part of attaining these goals in the State of Victoria, Australia.

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