

Proactive regulation of the Legal Profession in Victoria, Australia

A brief overview of some of the preventative and alternative regulatory tools employed by the Victorian Legal Services Board and Commissioner

As it is in the rest of the world, the legal profession in Australia is constantly evolving. This evolution is influenced by technological advancements, globalisation and the advent of new practice models. Regulators need to be agile and flexible enough to learn from and respond to these changes, preventing outdated regulatory practices from constraining the flow of legal services while adequately protecting consumer interests.

The Victorian Legal Services Board and Commissioner, the regulators of the legal profession in Victoria, operate under the Legal Profession Uniform Law. In brief, the Commissioner handles complaints against lawyers and the Board deals with other regulatory functions such as: running a register of legal practitioners; issuing practising certificates; overseeing trust accounts; compensating victims of trust fraud; granting foreign licences, ensuring continual training of all lawyers and supervision of new lawyers; regulating legal practices and intervening in failing law practices.

The first legal regulatory regime in Australia to span jurisdictional boundaries, the Uniform Law commenced operation in Victoria and New South Wales in July 2015. Under the Uniform Law the Board and Commissioner regulate the legal profession in Victoria using both traditional and new, proactive tools designed to help practitioners avoid problems arising, where possible. Below is a synopsis of some of the regulatory instruments used by the Board and Commissioner.

Risk-based regulatory approach

The Board has initiated two innovative new projects which will help us move to a risk-based approach for some of our functions. In February 2016 we entered into a research partnership with the University of Melbourne to help us to better identify risk patterns and predict areas of concern within the Victorian profession for use in targeted regulatory actions. It involves analysis of ten-years of regulatory data including complaints, trust account investigations, law practice audits, and CPD compliance records.

The study will be conducted in three phases:

1. Identifying associations between characteristics of lawyers and regulatory issues;
2. Catalogue risk hot-spots and instances of concern amongst particular categories of lawyers; and
3. A detailed analysis of all data to better understand the risk factors behind the hot spots of concern, and to identify opportunities for early intervention.

A second risk-based regulation project involved looking at how we allocate our resources in trust account investigations. The traditional approach has been to conduct routine inspections of a set number of trust accounts each year. We are now moving to a process which dictates inspections based on a practitioner or legal practice's demographics, complaints history, any previous trust account issues, past failure to respond to requests from the regulator, and information provided by external trust account examiners and other practitioners.

Taking such a strategic approach to streamline and enhance our regulatory actions has other benefits. By reducing regulatory interference for low-risk practitioners and law practices, we will be cutting both red tape and the cost of doing business in Victoria. These new processes will help to identify practitioners to whom we can offer further support, where appropriate. Additionally, consumers of legal services will also benefit with more proactive protection of their interests.

Audits of law practices

With the commencement of the Uniform Law, the Board's existing power to audit incorporated legal practices was expanded to cover all types of law practices. This enables the Board to conduct an audit of any law practice if it considers there are reasonable grounds to do so, such as where a complaint or conduct history reveals potential systemic issues with the business practices of the lawyer or law firm. Audits allow targeted guidance and assistance to be provided to law practices to help prevent further complaints and issues arising in the future. In this way audits benefit both law practices and consumers of legal services.

Self-assessment audits

As a part of its educative strategy to assist the profession, the Board has further developed its existing self-assessment audit resource for law practices. Self-assessment audits assist users to benchmark their business practices against their regulatory obligations. They describe several key concepts relevant to each of ten objectives which the Board expects law practices to be mindful of, and provides suggested approaches to help ensure those objectives are met. These are quite well received, and we actually get requests from law practices who see the benefits to their operations.

Imposing conditions on legal practice

In addition to the statutory conditions imposed on a practising certificate by the Uniform Law, the Board may impose *discretionary conditions* on the holder of a practising certificate. These include:

- limiting the type of legal practice in which the holder may engage;
- specifying the type of legal practice the holder is not able to engage in;
- completion of further continuing legal education;
- undertaking specific legal education or training;
- undergoing a specified period of supervised legal practice;
- restricting employment or supervision arrangements;
- preventing the holder from supervising others;
- requiring the holder to undergo counselling or medical treatment or directing the holder to act in accordance with medical advice;
- engaging the services of a financial specialist in connection with the holder's legal practice;
- providing the regulator with evidence of outstanding tax obligations; or
- imposing a condition which has been agreed to by the holder.

Legal costs requirements

The Uniform Law requires that legal costs must be 'fair and reasonable'. This is defined by reference to proportionality in amount and in having been incurred, having reference to the skill and experience of the lawyer, the complexity of the matter, the amount of work involved, urgency, context, quality of the work done, nature of the instructions and compliance with requirements of the Uniform Law and rules generally. Clients must be informed of how the costs will be calculated and an estimate of the total legal costs.

Complaints handling

Over the past several years the Commissioner has refined the approach to complaints handling by increasing emphasis on using mediation and conciliation to resolve disputes between lawyers and consumers. The Uniform Law recognises that many problems between lawyers and consumers can usually be resolved quickly with continued communication between the disputing parties.

We now require that disputing parties make a reasonable effort to settle their differences before the Commissioner can accept a complaint about legal costs or about the quality of legal services. We have found that this has led to a greater proportion of matters being resolved between the parties themselves without our intervention. With more matters resolved by mutual agreement and with careful front-end management of enquiries to our office, there has been a corresponding decrease in the number of formal complaints received.

Consumer matters involving disputes over legal costs or the quality of services provided, can usually be addressed without the need for a formal investigation process. Most consumer matters received by the Commissioner are handled by two teams skilled in mediation and conciliation. We use direct discussions with the lawyer and complainant over the phone, in person, or by email to try and resolve complaints. An important part of the process involves managing the parties' expectations.

Making determinations

The Commissioner now has the power to make binding determinations in consumer matters. In costs disputes where the disputing parties have reached a stalemate, and where the disputed amount is below \$10,000, the Commissioner now has the power to determine what is fair and reasonable in the circumstances. The Commissioner will generally refer these matters for a costs review; the outcome of which will often form the basis of a finding of fair and reasonable legal costs. After a costs review has been completed, it is not unusual for the parties to recommence negotiations and reach a settlement themselves on the basis of the review. Where this does not occur and the Commissioner flags what the determination is likely to be, it is not unusual for the parties to resolve their dispute and settle. The power to make determinations has taken some pressure off the Victorian Civil and Administrative Tribunal (VCAT), where we previously had been required to direct disputing parties to obtain a binding decision.

In 2015-16 the Commissioner exercised this new power to make a binding costs determination in eight consumer matters. A notable consequence of this power was that in numerous other matters, when a proposed determination was foreshadowed in writing for the parties' comment, many matters settled without the need to issue the binding determination. The Commissioner also has the power to make a determination in consumer matters that involve service issues, including the power to order compensation of up to \$25,000.

For matters involving unsatisfactory professional conduct, the Commissioner has the power to make a conduct determination involving a range of sanctions, including issuing a reprimand or a caution, ordering compensation be paid to a complainant, ordering an apology be given or work be redone, and issuing a fine of up to \$25,000.

Publicising outcomes

As an educative tool, the Commissioner now publishes redacted costs determinations on its website, and also publishes a blog which summarises of the outcomes of each disciplinary matter brought before VCAT.

Public Purpose Fund

The Public Purpose Fund (PPF) is a statutory fund established by Victorian legislation and managed by the Board. Its primary function is to meet the costs of regulating the legal profession in Victoria, while also providing funding for several other purposes that benefit the general public and consumers of legal services in particular. The interest earned on all money held in trust by lawyers and approved barrister's clerks on behalf of their clients, provides one major income stream of the PPF. Additional sources of income are investment returns, the annual licensing fees paid by lawyers and any fines imposed on lawyers following disciplinary action taken against them in the courts.

The primary purpose of the PPF is to generate sufficient income to pay for the regulation of the legal profession as well as to provide an ongoing stream of funding support for a range of other legal bodies and programs, such as legal aid, community legal education and law reform.

Fidelity fund

The Fidelity Fund exists to compensate clients of a law practice for the dishonest or fraudulent behaviour of lawyers, law firms, barristers and clerks in relation to trust moneys and trust properties. Lawyers holding particular classes of practising certificates make contributions to the fund, which the Board administers.

Mental health disclosures

In 2011 the Board introduced its Mental Health Policy which relieved lawyers of disclosing mental health issues in many circumstances. The Board no longer expects a lawyer with a mental health condition to disclose it to the regulator, providing it is being managed appropriately and does not impact on their ability to engage in legal practice. This was a breakthrough policy which has since been adopted in its entirety in Queensland.

Further information about the Board and Commissioner powers and functions can be found at www.lsbv.vic.gov.au

Michael McGarvie

Board CEO & Commissioner

2 September 2016