ADVISER COMPLAINTS – WHERE TO FROM HERE?

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INTRODUCTION

The Immigration Advisers Complaints and Disciplinary Tribunal adjudicates on complaints that may be levied against licensed advisers, who now number something like 1100 licensees both onshore and overseas.[1] Since the appointment of the Chair of the Tribunal in October 2010, 448 complaint decisions have been issued.[2]

The Tribunal's work, and the messages being sent through the decisions that have been issued, have shifted and refined over the years. Although highly specialised, it now represents a jurisdiction with influence over a statistically significant body of professional people. It is therefore timely to make observations about just some of the issues that arise out of this area of law.

This paper addresses the following topics:

1. The changing pattern of numbers of decisions are referred and determined;
2. Access to the messages coming out of decisions;
3. "Lawful and informed instructions";
4. The personal nature of the adviser/client relationship; and
5. No "right to silence" for advisers.

1. DECISIONMAKING DYNAMICS

The pattern of referrals to the Tribunal has shifted in recent years, owing to a significant change in practice by the IAA in its handling of complaints. This was signalled in a 2013 decision which was critical of the Authority's previous stance of referring almost all complaints to the Tribunal without investigating whether there was any objective basis for the complaint beyond what the complainant said. The Tribunal pointed to the Authority's powers under ss 56 – 57 of the Immigration Advisers Licensing Act 2007 ("the Act") to carry out inspections; and that there was a positive obligation to screen complaints using s 45(1) of the Act to "determine" whether grounds of complaint exist.[3]

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1 The Minutes of the IAA Reference Group meeting of 23 November 2016 give the figure as 1055 at that time, down from 1100 - http://iaa.govt.nz/adviser/news/reference-group/minutes/2016-11-23.asp

2 From a search of the NZLII database on 6 May 2017, http://www.nzlii.org

3 *ZQI v DI* [2013] NZIACDT 70 (24 October 2013)

Shortly thereafter the current Registrar was appointed, and the Authority has switched to carrying out a fairly thorough initial investigation. The following table demonstrates how this has played out:[4]

Year to July -	2012	2013	2014	2015	2016	2017 *
Complaints received by IAA					55	48
Disposals by IAA per s 45(1)					25	23
Referrals to IACDT	62	66	4	75	18	13
Case disposals by IACDT	27	50	76	55	24	19
Complaints on hand – IAA					27	38
Complaints on hand - IACDT	69	85	13	33	60	46

* Figures to March 2017 only

The figure of "disposals" by the Tribunal may need to be treated cautiously. The numbers up to 2015 from the Annual Report fold together dismissals, complaints merely upheld, and complaints resulting in sanctions imposed, while the 2016 and 2017 figures are numbers of liability decisions only. The Tribunal made 31 sanctions decisions in 2016, and 15 in 2017.

Points to note are:

1. In the 2016 and 2017 years, 45% and 48% of complaints referred to the Authority were determined not to warrant referral to the Tribunal. Section 45(1) filters complaints out for reasons such as failure to disclose a ground of complaint in s 44 such as negligence, or if the complaint is trivial in nature;

2. As a result the number of cases put up to the Tribunal dropped to a fraction of those in 2012 – 2015. This may partly be explained by the rising number of matters "on hand" with the Authority, which is spending more time gathering evidence from the parties and assessing whether the complaints are worth referring;

3. The backlog of cases before the Tribunal dropped away in 2014, largely because the Authority was busy re-assessing a large number of cases which the Tribunal sent back because it was not satisfied that the Authority had discharged its investigative function;[5]

4. However, in spite of the reduced inflow of case work, the Tribunal's backlog has veered upward toward the 2012 level in the last 2 years.

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[4] Figures sourced from IACDT Annual Report 2015, https://www.justice.govt.nz/tribunals/immigration/advisers-complaints-disciplinary/about/ ; and those for 2016 - 2017 kindly supplied by the IAA Registrar

[5] Consequent on the approach taken in *ZQI v DI*, supra at n 3

Some concern has been expressed that the Chair, who continues to determine complaints in isolation, may be facing difficulties in getting through the workload. This could be exacerbated by a trend over the last couple of years to convene oral hearings to address issues of disputed or non-documentary evidence. Some support for this comes from the publication of decisions on the Ministry of Justice website - only one decision has been published since October 2016.[6]

2. ACCESS TO DECISIONS

As noted above, a large corpus of Tribunal decisions now exists. So far, to the writer's knowledge, these have not been headnoted in order to allow searching under key themes. The Ministry of Justice front-end only seems to allow searching by the case name,[7] Decisions are available on the New Zealand Legal Information Institute public domain service, but this requires some careful crafting of Boolean search criteria in order to get any meaningful results.[8] The writer uses Westlaw, which does not currently collect Tribunal decisions.

A helpful resource is the Authority's online Code of Conduct Toolkit[9] which links key Tribunal decisions to its clause-by-clause discussion of how the Code is to be applied. Unfortunately some of the links to caselaw no longer work. More critically though, this is necessarily selective in directing users to relevant decisions and may delimit searching outside what the Authority itself deems to be useful in an adviser's practice. Identifying precedents and principles to be applied when responding to complaints can be somewhat different – for instance, the framework in which to consider an application for rehearing before the Tribunal, or "sentencing guidelines" when sanctions are to be imposed. The Registrar has also recorded a webinar on "The limits of immigration advice" including a discussion of unlicensed activity and key cases on this point.[10]

However, the situation is unsatisfactory, especially in light of:

1. The volume of decisions which will only increase over time;

2. The solitary position of the Tribunal Chair making decisions on all complaints without the peer review of other decisionmakers in the same jurisdiction;

3. The small numbers of appeals and reviews that have been mounted. Advisers are daunted by the cost of going to Court, especially when they are demoralised by being named and shamed in a decision that calls into question their professional conduct; and

4. The small number of Counsel actively involved in representing advisers before the Tribunal.

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6 https://www.justice.govt.nz/tribunals/immigration/advisers-complaints-disciplinary/ sourced on 6 May 2017
7 https://www.justice.govt.nz/tribunals/immigration/advisers-complaints-disciplinary/iacadt-decisions/
8 http://www.nzlii.org/
9 http://iaa.govt.nz/code-toolkit/
10 http://iaa.govt.nz/tools.asp

The systematic classification of decisions, which would allow advisers and representing lawyers alike to learn their way around this specialised legal field, appears necessary but would require dedicated effort to achieve and maintain.

3. LAWFUL AND INFORMED INSTRUCTIONS

Over the years the Tribunal has refined and restated the critical need for advisers to give real effect to the requirement at cl. 2(e) of the Code of Conduct to "obtain and carry out the informed lawful instructions of the client." What is often overlooked is that the client is to *give* instructions. This may particularly be the case when advisers do a large number of what they see as standard applications, such as Student Visas or Partnership Work Visas. Once a client presents themselves, the adviser quickly moves to issuing a generic service agreement and templated list of documents.

Obtaining instructions is seen as a key element of the client engagement process, and this is particularly so once the direction to "carry out the lawful informed instructions" at cl. 1.1(b) of the 2010 Code acquired the addition of "obtain" in the 2014 version. This involves a conversation, an exchange of information in which the client sets out their situation and the professional then presents them with options which they can choose. In the context of the legal profession, Prof. Duncan Webb observes:

> Clients rarely abdicate all control of their affairs into their lawyers' hands. Clients look to the lawyer for special skills and knowledge while seeking to maintain control over their affairs. To ensure this is possible, it is necessary for a lawyer to take time to discuss with clients their affairs and the relevant aspects of the legal environment. This enables the lawyer to obtain clear instructions from the client which accord with the client's actual wishes.[11]

This is restated in similar terms in the Code of Conduct Toolkit.[12]

The client must be left in a position to make an informed decision, which Webb likens to the informed consent given for a medical procedure. The extent to which the adviser explains the situation and the options is a hallmark of the exercise of professional judgment:

> A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[13]

The liability decision of *J v Khetarpal* involved a client instructing the adviser to file a request for visa under s 61 Immigration Act 2009, where the client had no English and the Tribunal took the view that the case disclosed limited prospects of success. While the decision was made under the old Code, the Chair already saw the requirement of "carrying out instructions" as encompassing the need to ensure that the client understood the situation they faced so that the adviser could, in turn, "obtain informed instructions":

> . . . she took instructions from a client who had been in New Zealand unlawfully for five years, apparently without justification or excuse. In those years, he had taken no steps to address his unlawful status. . . . At the meeting of 3 September 2012, Ms Khetarpal was obliged to have a very frank communication with her client.[14]

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[11] Webb, *Ethics, Professional Responsibility and the Lawyer* (3rd Ed, 2016), 289
[12] http://iaa.govt.nz/code-toolkit/02.asp
[13] American Bar Association, *Model Rules of Professional Conduct* (2002), Rule 1.4(b)
[14] *J v Khetarpal* [2015] NZIACDT 95 (5 November 2015) at [30] – [31]

In that case and in others, the Tribunal links objective evidence of the adviser having obtained informed instructions to the obligation to "confirm in writing to the client the details of all material discussions with the client."[15] That is, failure to give a written report to the client, at around the time of the engagement in particular, can reinforce the view that the adviser never discussed the client's situation and made them aware of (say) the chances of success or their various visa options. It is also a form of insurance for the adviser:

> The obligation under clause 3(f) of the Code is to "confirm in writing the details of material discussions with clients". That means it is necessary to send a letter, email or similar communication to clients. That has a primary purpose of effective communication, ensuring clients have written notice, and allowing them to reflect and ask questions if necessary. It has the secondary purpose of protecting the adviser, as they cannot be accused of making up self-serving file notes after the event (typically an email trail is available).[16]

The reference to making up file notes is reminiscent of the suspicion with which the Tribunal viewed the production of a file chronology part-way through proceedings, and after an adviser had provided what was supposed to be the full client file in response to the Authority's request at the outset of the complaint.[17] The writer has observed that advisers who maintain a comprehensive record of their communications with the client will present far more credibly than those who do not. Furthermore, verbal communication with the client about their case will not suffice in the face of the Code's explicit requirement to record key discussions in writing.

4. THE PERSONAL CLIENT RELATIONSHIP

The initial client engagement process in particular has received increasing attention over the years. One aspect of this is criticism of situations in which the adviser purports to delegate aspects of the client intake process, and the provision of advice to clients, to others in their practice or even agents in other countries.

One strand of this has been the Courts' developing view about whether there are limitations on a licensed adviser's responsibilities when employed by another. At first, we saw Somerville J grapple with the situation where the adviser was only one of a number of licensed advisers and administrative staff in the company who dealt with the client, and where the quotation of fees to the client was (incorrectly) carried out by someone else but held by the Tribunal to have been the adviser's responsibility:

> The corporate structure in which Ms Y has operated, with her employer allocating different functions in the process to other agents, while at the same time retaining control over the contract formation and charging process, must limit Ms Y's accountability for errors made by others. I see no reason why she ought to be held accountable for the actions of the accounts department which, itself, is answerable to Oceania [the employer] and not Ms Y.[18]

However, a sterner application of professional accountability was expressed in *Wang v IAA* decided two years later. In that case Mr Wang was an employee of Richard Martin who was subsequently imprisoned for multiple breaches of the Licensing Act, but who operated by proxy through licensed advisers. Mr Wang left Richard Martin Immigration Ltd partway through the case in question, and claimed that he could do no more for the client after that

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15 IAA Code of Conduct 2014, cl. 26(c), carried over from cl. 3(f) of the 2010 Code
16 *Gill v Singh* [2016] NZIACDT 36 (30 June 2016) at [48]
17 *Matheis v Ling* [2015] NZIACDT 91 (8 October 2015)
18 *Yap v Immigration Advisers Authority* (DC Christchurch, 20 January 2014) at [71]

because he was under a restraint of trade prohibition *vis-à-vis* RMIL. The Tribunal at first instance found that he was not entitled to wash his hands of the professional duty to the client; and that he should have taken steps from the outset to address the effective lack of control over key elements of the client relationship.[19] Hastings J at the District Court agreed:

> . . . the basis of the Tribunal's sanctions decision is that Mr Wang knew from the Tribunal's decision and the scheme of the Act that the Act imposes personal responsibility on individual advisers. Only individual advisers can be licensed. This individual liability cannot be diminished by the corporate structure within which Mr Wang worked or the part-time nature of his employment. Notwithstanding the steps he took on the day he started employment, the steps he took when Mr Lepcha resigned, and the steps he took when he resigned, the Tribunal found that the Act itself required him to do more to discharge his statutory responsibility. I do not read the Tribunal's decision as requiring the appellant to have taken steps after he left RMIL, but it certainly required him to take steps before he left to manage his departure. It was up to him to come up with systems to manage the obligations imposed on him by the statute despite the ill-fitting arrangement under which he was engaged.
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> . . . The legislation is clear that the statutory obligations of advisers are personal to the adviser. It is for the adviser to take steps to ensure her or his obligations are met regardless of the business structure in which she or he gives advice. It is not possible for advisors to use a business structure to opt out of some or all of these statutory professional obligations.[20]

This approach requires any adviser in a corporate situation to wrest control of, and access to, all matters touching on the client relationship under the Code, including:

- the giving and taking of instructions;
- drafting and explaining service agreements;
- invoicing and fees; and
- handling of client funds.

The obligations go further. Many in the industry have assumed that certain "standard" aspects of the client intake process can be handled by unlicensed staff because they are only "clerical work" and are excluded from the definition of immigration advice at s 7 of the Licensing Act. The Tribunal in *Matheis v Ling* and elsewhere has taken a restrictive interpretation of what clerical work means. It is defined at s 5 of the Act as:

> (a) the recording, organising, storing, or retrieving of information;
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> (b) computing or data entry;
>
> (c) recording information on any form, application, request, or claim on behalf of and under the direction of another person.

The Tribunal took the view that the natural meaning of "recording information . . . on behalf of or under the direction of another . . ." is that the unlicensed person is simply a cipher, copying down what another person dictates:

> The definition does not give any authority for the unlicensed person to make inquiries and determine what is to be recorded on the form. Under the definition they must do nothing more than "record" information as directed. This is the role of a word processor operator, not an author. Assisting a

[19] *Ali v Wang* [2015] NZIACDT 2 (22 January 2015) at [93]
[20] *Wang v Immigration Advisers Authority* (DC Wellington, 18 February 2016) at [20] – [21]

> person to fill in a form by telling them what is required, or seeking the relevant information, does not come within the exception.[21]

The view that an adviser's professional obligations must all be discharged personally was recently challenged in *Sparks v IAA*.[22] Mr Sparks' Counsel argued that the wording of the Code did not directly imply that an adviser had to personally see to the performance of those duties. They could be delegated to others including agents in the Philippines; and in fact Philippines law required an agency in that jurisdiction to perform some of those functions directly (referring to regulations set by the Philippines Overseas Employment Administration).

Dobson J took into account the scheme of the Act and the Code of Conduct, including for instance the need to explain the Code to clients mandated by cl. 1.4 of the 2010 Code[23] which would perforce require expertise in its subject matter. He posited that an adviser could presumably set up systems which allowed others to carry out key functions provided that the adviser then received reliable confirmation that they had been carried out. But he concluded that the "preferable" interpretation was that the obligations under the Code are personal to the adviser. A primary justification here was the Licensing Act's focus on individual licensing, and perceived inconsistency between that and the ability to hand out professional duties to unlicensed persons.[24]

5. NO RIGHT TO SILENCE FOR ADVISERS

This last is an afterthought, but a critical one for those facing a complaint. The complaint in *Gill v Singh* included an allegation that the adviser had demanded and taken a significant sum in fees, but without a written agreement and in circumstances that indicated dishonesty.[25] There was no direct evidence that the complainant ever paid such a sum. The adviser was represented by a respected colleague who, unfortunately, took the position that the obligation to make out the complaint rested with the complainant and that the onus of proof rested with the complainant. In the present situation, there was effectively no case to answer.

The context of that case did not help the adviser's cause because the file was poorly documented, and the Tribunal found it *prima facie* implausible that the adviser would do the work for free, as he claimed. It did not help that the adviser was offered an oral hearing so that evidence might be tested, but later elected to go on the papers. The Chair went on to say:

> It is true that if there is nothing to respond to, then that may well be the end of the matter. However, there has never been a right to silence on the part of professional persons facing a disciplinary process. If it were otherwise, it would be virtually impossible for many professional services to be subject to effective scrutiny.

He cited *dicta* from a medical disciplinary decision from New South Wales to the following effect:

> In our opinion, there is no right to silence or any privilege against self-incrimination upon which a medical practitioner, answering a complaint before the Tribunal, is entitled to rely . . . There is a public interest in the proper discharge by medical practitioners of the privileges which the

[21] *Matheis v Ling* supra at n 17, at [44]
[22] *Sparks v Immigration Advisers Authority* (HC Wellington, 8 March 2017)
[23] Carried over into cl. 17(b) of the 2014 Code
[24] *Sparks* supra at n 22, see discussion at [26] – [34]
[25] *Gill v Singh* supra at n 16

> community accords to them, and in the due accounting for the exercise of the influence which the nature of the occupation permits them, and indeed requires them, to exert over their patients . . . we are of the opinion that if a medical practitioner fails to answer by giving his or her account of the matters charged, there can be no complaint if the Tribunal draws the unfavourable evidentiary inference which absence from the witness box commonly attracts.[26]

The writer does not take this to mean that an adviser must, for instance, prove a negative or prove their innocence in some way. They must, however, be prepared to give a full account of their side of the story when confronted by a complainant's set of allegations. It is then for the decisionmaker to weigh the credibility of the two stories, and their supporting evidence, in the balance. In *Gill*, although the complainant's account about the fees had little other evidence to support it, the Tribunal nonetheless found his story "coherent". The adviser had the opportunity to refute it but did not fully utilise it. As a result a finding of dishonestly taking fees was entered against him.

In the event that finding was reversed by way of an application for rehearing.[27] However, the clear moral to be drawn is that an adviser should be prepared on every occasion to comprehensively answer any complaint made against them. This in turn means careful record-keeping, and documenting all the key aspects of professional practice.

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[26] *Bowen-James v Walten & Ors* [1991] NSWCA 29
[27] *Gill v Singh* [2017] NZIACDT 5 (6 April 2017)