Thoughts on Transparency

- Transparency is not about restoring trust in institutions. Transparency is the politics of managing mistrust. Ivan Krastev
- One [person's] transparency is another's humiliation. Gerry Adams
Thoughts on Transparency

- I've come to learn there is a virtuous cycle to transparency and a very vicious cycle of obfuscation. Jeff Weiner
- We live in a culture of destructive transparency. Tina Brown

Overview

- Ten legal principles that apply to the transparency and openness debate
- Applying risk management principles to:
  - Complaints decisions
  - Policy development

Principle #1 - Confidentiality

- Statutory duty
  - Usually default position
- Preserve privacy rights of practitioners
- Promote candid policy development
- Prevent disruption of regulatory activities
Principle #2 - Access to Info

- Exceptions list to confidentiality duty
  - “In connection with the administration of the Act”
- Open meetings / hearings
- Reports
- Circulation duties

Principle #3 - Process vs. People

- False distinction
- Lots of information about people is public
- Lots of information about regulatory processes are secret
- The confidential / public divide is elsewhere

Principle #4 - Fairness

- Fair procedure for practitioner
  - E.g., notice, opportunity to respond, impartiality
- Always a balancing act
  - E.g., public hearings
  - E.g., “victim” rights
- E.g., Impact of access on complaints process
Principle #5 - Substance vs. Form

- Similar rules apply to changes in technology
  - E.g., photocopiers
  - E.g., electronic records
  - E.g., digital signature
- Evolution of registers
- Evolution of on-line harassment laws

Principle #6 - Impact of Action

- Courts do consider impact of type of access
  - E.g., service of notice of hearing on practitioner
  - E.g., Posting upcoming hearings on reception wall
  - E.g., damages in defamation action

Principle #7 - Creatures of Statute

- Can only do what statute explicitly or impliedly permits
- Must be consistent with intent of statute
- Concern about enacting policy changes through register by-laws
Principle #8 - Closely Regulated

- By joining a closely regulated profession, practitioners give up some rights
- Including privacy rights
- E.g., investigations
- E.g., public register

Principle #9 - Societal Context

- Judges are people
- Courts understand they form part of a larger social organism
- E.g., drinking & driving
- E.g., face coverings
- E.g., end-of-life

Principle #10 - Public Interest

- Ultimate goal is shared
- Debate is over means
- E.g., is public shaming or peer remediation more effective?
- The whole point of today’s discussion
Risk Management

- Tool for identifying and managing risks and opportunities
- Best used at an organizational level
- Can be used for individual issues

Risk to What?

Need to identify goals of the regulator:
- Protect the public / serve the public
- Visibly good reputation
- Reasonableness (especially to the members)
- Efficiency

Risk to Whom?

Whose perspective?
- Harm to Regulator
- Harm to clients
- Harm to broader public
- Harm to individual practitioners
- Harm to the profession as a whole
Risk Management Cycle

- Identify Risk
- Assess Risk
- Treat Risk
- Monitor & Review

Identify Risks

- Gather data
- Ask what could possibly go wrong
- Hazard, Operational, Financial and Strategic risks
- Multiple ways (e.g., research, group work)

Identify Risks - Open Complaints

- Cost and lawsuits
- Remediation less effective
- More procedural fairness
- Less support in profession
- Changed behaviour
- Public can protect selves
- More reports of concerns
- Public confidence/survival
Identify Risks - Transparent Policy Development

- Less candour
- Misconceptions arise
- Use in legal challenges
- More scrutiny
- Skewed participation
- More participation
- More feedback
- More information

Assess Risks - Open Complaints

- Cost and lawsuits
- Remediation less effective
- More procedural fairness
- Less support in profession
- Changed behaviour
- Public can protect selves
- More reports of concerns
- Public confidence/survival

Assess Risks - Transparent Policy Development

- Less candour
- Misconceptions arise
- Use in legal challenges
- More scrutiny
- Skewed participation
- More participation
- More feedback
- More information
Transparency: Competing Legal Principles and Risk Management

Toronto, Ontario
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Treat Risks - Open Complaints

- Only dismiss/refer
- Explain, explain
- Buy insurance
- Do nothing & wait
- Super website

Treat Risks - Transparent Policy Development

- No new policies
- Train participants
- Buy insurance
- Current approach
- Interactive, all media

Review Risks - Open Complaints

- Implement, monitor, review, begin cycle
- Add to risk register
- Collect data on
  - Hits on website page
  - Increase in reports
  - Recidivism rates
  - Impact surveys
Review Risks - Transparent Policy Development

- Implement, monitor, review, begin cycle
- Add to risk register
- Collect data on
  - Participation rates
  - Types of participants
  - Media response
  - Quality of decision-making

Conclusion

- Transparency and openness are complex and multi-faceted
- It is also critical to the relevance / survival of self-regulation
- Use of risk management tools can help

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