

Monday, 12 January 2015

Dear Commissioner;

## ***Submissions with respect to the proposed Legal Profession Uniform Law***

### **\*\*\*Advertising by Legal Practitioners of Personal Injury Services\*\*\***

Subdivision 2 of the Legal Profession Regulation 2005 (NSW), places significant restrictions on the advertising of personal injury legal services by New South Wales Legal Practitioners.

Albeit, prima facie the provisions of Subdivision 2 may seem to be aimed at the legitimate regulation of the Legal Profession in accordance with the objectives of the current Legal Profession Act 2005 (NSW), it could be argued that the provisions contained in Subdivision 2, viz, Regulation 24 go further and serve other purposes.

Regulation 24 of the Legal Profession Regulation 2005 (NSW) stipulates as follows:

#### ***Restriction on advertising personal injury services***

##### ***24 Restriction on advertising personal injury services***

*(1) A barrister or solicitor must not publish or cause or permit to be published an advertisement that promotes the availability or use of a barrister or solicitor to provide legal services if the advertisement includes any reference to or depiction of any of the following:*

***(a) personal injury,***

***(b) any circumstance in which personal injury might occur, or any activity, event or circumstance that suggests or could suggest the possibility of personal injury, or any connection to or association with personal injury or a cause of personal injury,***

*(c) a "personal injury legal service" (that is, any legal service that relates to recovery of money, or any entitlement to recover money, in respect of personal injury).*

*Maximum penalty: 200 penalty units.*

*(2) A contravention of this clause by a barrister or solicitor is declared to be professional misconduct.*

**Note :** *A contravention of clause 75 of the Workers Compensation Regulation 2003 can also be a contravention of this clause.*

*(3) Evidence that a barrister or solicitor has been convicted of an offence under this clause or under clause 75 of the Workers Compensation Regulation 2003 is sufficient evidence of a contravention of this clause by the barrister or solicitor for the purposes of any proceedings under Chapter 4 (Complaints and discipline) of the Act.*

The subject provisions in effect limit the number of claims being made by individuals who suffer an injury and/or permanent disability at work or in an accident by limiting the information available to them on making a claim and also by restricting/limiting their access to such legal services indirectly: that is, in essence by gagging the Personal Injury Legal service providers.

For example, Individuals who cannot speak English and/or who have immigrated to Australia and have no knowledge about their legal rights when injured at work are significantly

disadvantaged by the current provisions. Currently, Legal Practitioners are prevented from reaching out to such class of people and making them aware of their legal entitlements to compensation in such circumstances. Legal Practitioners are also prevented from advertising their personal injury legal services in different languages in a bid to inform Australian coming from non-English speaking backgrounds.

Under the current regime there is a differentiation between personal injury legal services and other legal services with respect to Advertising of such services. Disabled individuals are already disadvantaged due to their disability but additionally burdened by the subject provisions because they cannot easily have access to providers of personal injury legal services. They need to take active steps to locate providers of such legal services.

It is my view that the subject provisions breach the following international Treaties/Conventions to which the Commonwealth of Australia is a signatory:

**Articles 5, 8 and 11 of the Declaration on the Rights of Disabled Persons, Proclaimed by UN General Assembly resolution 3447 (XXX) on 9 December 1975:**

***11. Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property.*** If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account.

8. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.

5. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

**Convention on the Rights of Persons with Disabilities**

The Convention on the Rights of Persons with Disabilities recognises that people with disability have the rights to freedom of expression and **information** [emphasis added] which are recognised for all people in ICCPR Article 19. The CRPD also goes on to

- make clear that positive measures and not only non-interference are needed to ensure the enjoyment of these rights and
- specify some of the measures needed.

Article 21 stipulates as follows:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

- a. Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;**
- b. Accepting and facilitating the use of sign languages, Braille, augmentative and alternative

communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;

**c. Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;**

**d. Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;**

e. Recognizing and promoting the use of sign languages.

**Article 19 of the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49**

### *Article 19*

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

**I think it is prudent that the commission expressly addresses the issues mentioned above as they have unintended and adverse implications for disabled individuals and that the new Legal Profession Uniform Laws conform with Australia's Treaty obligations.**

### **\*\*\*Incorporated Legal Practices and Legal Practitioner Directors with Restricted Practicing Certificates\*\*\***

The current regulatory regime in NSW does not allow a Legal Practitioner with a Restricted Practicing certificate (that is, a Practitioner who can only engage in Supervised Legal Practice) from becoming a Legal Practitioner Director of an Incorporated Legal Practice. Whereas, by comparison a Legal Practitioner with a Restricted Practicing certificate can currently obtain a Restricted Principal's Practicing Certificate in NSW and practice as a "Supervised Partner" in a Partnership of practitioners. This creates issues for Legal Practitioners who would like to start-up a new firm with selecting the best legal structure for the new firm. E.g. An individual who holds a Restricted Practicing certificate is unable to opt for the creation of an ILP and benefit from the 30% corporate tax rate an Incorporated Legal Practice is subject to because they are unable to become a Legal Practitioner Director of an ILP and play an also active role in the management of the ILP.

I am of the view that the new regime should allow Restricted Practicing certificate holders to become "Restricted Legal Practitioner Directors" of Incorporated Legal Practices **but only on the condition that the Incorporated Legal Practice has at least one other Legal Practitioner**

**Director who holds an Unrestricted Practicing Certificate.** This way the Restricted Legal Practitioner Director with a Restricted Practicing certificate can still play an active role in the management of the Incorporated Legal Practice but under the supervision of the other Legal Practitioner Director who holds an Unrestricted Practicing Certificate.

The aforementioned proposal would enable mature individuals who have newly transitioned into the Legal Profession from starting up a firm of their own and also from benefiting from the Corporate Tax rate of 30% without any adverse impact on the consumer of legal services, as they will still be supervised by another Legal Practitioner Director (with a unrestricted practicing certificate). If one can become a Supervised Partner in a Partnership of Practitioners then one should be able to become a Restricted Legal Practitioner Director in an Incorporated Legal Practice.

### **\*\*\*Legal Practice by Unqualified Individuals\*\*\***

There should be an exemption for Practical Legal Training students and/or paralegals from assisting individuals with legal issues for no fee/remuneration (Volunteers). This will aid in the accessibility to justice by individuals coming from low socio-economic backgrounds.

### **\*\*\*Protection of the dignity and mental health of Legal Practitioners\*\*\***

It is no secret that Depression is a serious issue affecting the legal profession. Yet there have been no legislative attempts to address the root causes of such issue within the profession.

Advocates should not tremble with fear because a specific Judicial member has overtly ridiculed or humiliated them in Court for a simple mistake. I have had firsthand experience of young newly admitted practitioners being ridiculed or humiliated in open Court for making a simple error during a mention.

It is my view that any new Legislation aimed at regulating the legal profession should seek to protect the dignity and mental wellbeing of Legal Practitioners also.

### **\*\*\*Duty of Full and Frank Disclosure to be imposed on Prospective clients\*\*\***

Many Legal Practitioners have faced circumstances whereby clients have not provided full and frank disclosure of material facts. This is especially the case in matters which are done "on spec" by Legal Practitioners. E.g. Client's may conceal pre-existing injuries from their solicitors in personal injury matters. Solicitors who are unaware of ANY pre-existing injuries then incur significant costs in funding disbursements and litigation only to find out at a later stage that the client has misled them. The client is then unsuccessful in his claim but protected by the no "win-no fee cost agreement" they had executed leaving the Legal Practitioner to foot the bill.

The new regime should address the issue of clients misleading legal practitioners and the reliance placed on such misleading statements by Legal Practitioners. The imposition of a Duty of Full and Frank Disclosure in Civil matters on the client (similar to that implied in Insurance contracts) would be the best way of addressing such issue.

Yours faithfully;

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