

DISCUSSION NOTES PREPARED FOR THE NATIONAL LEGAL PROFESSION REFORM CONSULTATIVE GROUP

ADVERTISING BY LEGAL PRACTITIONERS

An important aspect of the application of the rule of law is the principle that all citizens should have access to justice. A legal system that seeks to promote access to justice should seek to create an environment where its citizens are able to obtain information about their legal rights and entitlements. This principle is of course qualified by the need to protect the vulnerable from information which is misleading or deceptive and to protect the legal system from being undermined by legal practitioners acting in a way which brings the profession as a whole into disrepute. This is in fact the law as it currently applies in Victoria, South Australia, Tasmania and the Australian Capital Territory.

In the late 1990's and early part of the new millennium governments in various Australian jurisdictions moved to restrict the availability of information concerning personal injury claims and legal services. At the time, the stated justification¹ for imposing restrictions on advertising and marketing by legal practitioners in this area was to reduce the possibility of the profession being brought into disrepute by advertising and marketing practices that were regarded by some stakeholders to be distasteful generally or specifically because the practices were thought to encourage individuals to make a claim arising from a personal injury. In addition, there was a concern that consumers of personal injury legal services are particularly vulnerable and were in fact being misled by the advertising and marketing activity conducted by legal practitioners.

Some isolated examples of advertisements that showed images of an accident or its immediate aftermath, that claimed that the legal practitioner concerned could "win" more money for the claimant than another legal practitioner, or that the legal practitioner concerned would achieve a better result than another legal practitioner were relied on to support the need for restricting advertising in this area. No evidence has to my knowledge ever been advanced to the effect that in fact such advertising either brought the legal profession into disrepute or encouraged or incited individuals to make claims.

The real purpose of advertising and marketing activity is to ensure potential consumers of legal services are aware of the fact that they have or may have a need for legal services and to direct them to lawyers who wish to assist them.

In essence, the current provisions have created one set of standards for lawyers who perform personal injuries work and another for lawyers who do not. In response some legal practitioners have resorted to alternative means to attract new clients and has also given rise to the growth of a new non-lawyer market soliciting enquiries from personal injury claimants on behalf of lawyers. It has not resulted in a decline in advertising, rather it has resulted in marketing budgets increasing. It has also resulted in legal regulators' resources being disproportionately diverted from core regulatory functions and has had no impact on the rate of injury in the general community.

There is no evidence that the provisions which apply in Queensland,² New South Wales,³ Western Australia⁴ and the Northern Territory⁵ have had any impact on:

- (i) Consumers of legal services being better informed;
- (ii) Injury rates;
- (iii) Legal practitioners making misleading or deceptive claims about their services;

¹ See the Law Council of Australia submission, Advertising for Personal Injury Legal Services, November 2009.

² Legal Profession Act 2007, Legal Profession (Solicitors) Rule 2007, Personal Injuries Proceedings Act 2002

³ Legal Profession Act 2004, Legal Profession Regulation 2005, Workers' Compensation Regulation 2003

⁴ Legal Practice Act 2003, Legal Profession Act 2008, Civil Liability Act 2002

⁵ Legal Profession Act, Legal Profession Regulations

- (iv) The legal profession being held in higher regard by the general community;
- (v) Reducing the volume of advertising and marketing by legal practitioners who operate in personal injury law; or
- (vi) The nature of advertising in the sense that it may be more or less likely to bring the profession into disrepute.

On the other hand:

- (i) There is evidence that individuals who are injured in accidents are not aware of their legal entitlement to make a claim in many circumstances;
- (ii) There is more money spent on legal advertising in Queensland and New South Wales (the two most regulated States) per head of population than in any other State presumably with a consequential impact on the cost of the provision of legal services in those States;
- (iii) There is some evidence that the jurisdictions with the least prescriptive regulations have had fewer issues i.e. in New South Wales and Queensland where the level of prescription is very high there appears to be a greater level of concern;
- (iv) Over regulation in this area has led to legal practitioners having to embark upon more sophisticated and expensive advertising and marketing techniques. The cost of this is passed on to the consumer with no benefit to the community or to the legal profession;
- (v) The regulatory burden which falls out of the requirements increases the cost of regulation disproportionately to any known or likely benefits. Legal Services Commissioners have now become gate keepers for Yellow Pages ads and web sites,⁶ distracting them from the important task of regulating the legal profession in ways which will improve public confidence and improve the client service experience; and
- (vi) The prescriptive regulatory regimes have fostered the growth of non-legal practitioner (and largely unregulated) legal information websites increasing the "trafficking" in client enquiries and probably increasing the cost of personal injury litigation.

An unintended consequence of the prescriptive restrictions on the advertising of personal injury legal services, particularly in New South Wales and Queensland, has been the surge in third party, non-lawyer personal injury advisory and referral services, or claims farmers. These operations have grown as a result of the inability of legal practitioners to freely advertise their services to prospective clients, and as the operators are not legal practitioners, this has caused difficulties for legal regulators charged with enforcing the advertising restrictions.⁷

The restrictions have also made the use of claims farmers an appealing alternative for some legal practitioners. Non-lawyers are not constrained by professional conduct obligations in the way that they make promises to prospective clients and the marketing practices that they utilise are considered by some stakeholders to give rise to a greater risk that consumers will be misled. It is also likely to be the case that by inadvertently creating a market for claims farmers the advertising restrictions imposed on legal practitioners have also increased the cost of legal services for clients.

It is likely that if the more prescriptive form of advertising restrictions in place in NSW, QLD and WA were removed claims farmers would disappear from the market place and there would be less likelihood that clients will be misled by the advertising and marketing techniques utilised by them. It is also more likely that freed from the responsibility as acting as gatekeepers for websites and Yellow Pages ads, regulators could redirect their resources to ensuring that the minimum standards proposed below are properly and consistently enforced. As a result personal injury lawyers would be able to provide information about their expertise and services, like any other member of the legal profession, that is, in a professional manner. No one lawyer would be disadvantaged as against another and consumers would have access to information that informs

⁶ The Queensland Legal Services Commission is for example conducting an audit of every personal injury practitioner's website while the Office of the New South Wales Legal Services Commissioner has conducted prosecutions

⁷ See *The Council of the Law Society of New South Wales v. Australian Injury Helpline Ltd & Ors* [2008] NSWSC 627

them to make choices about their rights, entitlements and possible representation. Any advertisement or marketing practice would be subject to the general law relating to misleading or deceptive conduct as well as legal professional conduct rules crafted to ensure that advertising or marketing activity which is likely to bring the legal profession into disrepute is equated with unprofessional conduct.

OBSERVATIONS

The new National Law should be modeled on the provisions applying in Victoria, Tasmania, ACT, and South Australia.

The proposed new National Legal Services Board should publish standards which all legal practitioners (and legal practices) must comply with, which set out the type and style of advertising or marketing activity which would be considered to bring the legal profession into disrepute. In relation to the personal injury area I suggest the standards would include provisions that exclude advertising or marketing activities which:

- (i) Depict an accident causing injury, depict personal injury or the immediate aftermath of an accident or injury;
- (ii) Sets out the amount of damages or compensation to which a person who makes a personal injury claim may be entitled; or
- (iii) Utilises billboard advertising, signage or other materials advertising personal injury legal services within a medical treatment facility.⁸

The proposed new National Legal Services Board may determine that there is a need to establish other standards for areas of practice outside of personal injury legal services initially or from time to time and may therefore from time to time publish standards relating to advertising and marketing activity in those areas of practice.

Andrew Grech
Managing Director
Slater & Gordon Ltd
15 December 2009

⁸ Medical treatment facility or hospital as broadly defined in the NSW and Qld restrictions