for the record

Costs and Advertising: the next challenge

It is of great satisfaction to the Secretariat staff that our move to new premises is nearly completed - all we are waiting on is a reception desk, some final items of furniture and the opportunity to empty the remaining boxes. I thank members for their forbearance during a difficult period. It was amazing the amount of material, including what can only be defined as junk, we had accumulated during our time in NT House.

Two of the major issues facing many in the legal profession over the next couple of months are the commencement of the *Legal Practitioners Amendment (Costs and Advertising) Act* (Costs and Advertising Act) *and the Legal Practitioners (Incorporated Legal Practices and Multi Disciplinary Partnerships) Act*, along with respective regulations, on 1 May 2004. There will be more on the latter Act in next edition of *Balance*.

The Costs and Advertising Act will have a major impact on private legal practice in particular, although it also applies to community legal centres and other legal aid organisations. I urge all members to peruse a copy of the Act. Copies are available from the NT Government website (www.nt.gov.au at the Register of Legislation) or from the Law Society. The Regulations should be publicly available shortly. It is, as one might imagine, very complicated and some areas may require further clarification or judicial interpretation. Exemptions apply to various groups and situations and should be investigated.

I will deal with the issue of costs in this column and advertising, which appears to be less of an issue for practitioners, in the next edition of *Balance*.

Costs

A major focus of the legislation is introducing enhanced disclosure of costs.

The definition of "professional conduct" in section 45 of the *Legal Practitioners* Act (LPA) is extended so that failure to comply with the following sections can constitute professional misconduct, whether or not the conduct was wilful or reckless.

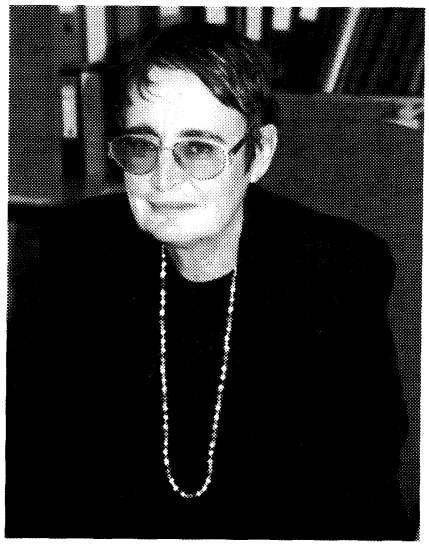
Currently the definition of "professional misconduct" includes "the charging by a legal practitioner in respect of professional services rendered to a client of fees or costs which are in the circumstances grossly excessive".

It will now include non-compliance with the following provisions (in summary):

* section 118B (requirements on how costs are to to be disclosed);
* section 129A (conditional costs agreements being made with respect to non approved matters such as criminal proceedings, proceedings under the *Family Law Act , Community Welfare Act*, adoption and Crimes Victims assistance matters);
* section 129B (providing for a premium other than one that is not a specified percentage of costs, no prescribed limit has been fixed);
* section 129C (costs not to be calculated on the amount recovered in proceedings);
* section 129D (legal practitioner must provide estimates of costs before the agreement is made); and
* section 129E (non-compliance with requirements regarding to the form of conditional costs agreements).

Based on previous queries from clients, both Josephine Stone and myself believe that unless practitioners are careful in complying with what is very complex legislation, there is the possibility for a number of potential misconduct situations to be brought before the Law Society.

Under amendments to section 45A of the LPA additional Professional Conduct Rules can be made. Council is monitoring the situation and will make additional rules if required.



Barbara Bradshaw, Chief Executive Officer, Law Society NT

The new section 120(2A) of the LPA provides that a person is not entitled to give notice to have the amount of costs payable under a conditional costs agreement determined by taxation unless the agreement provides for a premium on the costs payable under the conditional costs agreement.

New Section 118 "Costs to be Disclosed" and sections 129A-129G provides procedures for disclosure of costs and costs agreements. A LSNT Council sub-committee is currently considering the impact of these provisions and is amending the model Law Society Costs and Conditional Costs Agreement and developing other draft disclosure documents and explanatory material. It is hoped these will be available to the profession in April 2004. Watch this space.

Under section 129H a party to a costs agreement or conditional costs agreement may also apply to the Law Society or Supreme Court for review of the Agreement. The Law Society or Court can vary the amount payable or make other orders to restore the parties to the position they would have been in if the agreement was not made and certain provisions apply as if the agreement had not been made.

We are currently working out our procedures to deal with possible applications.

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disciplinary matters

A Practitioner's duty to co-operate

Section 46B of the Legal Practitioners Act requires the Law Society to investigate the professional conduct of practitioners in certain circumstances. It must do so upon receipt of a complaint or at the direction of the Attorney-General. It may do so of its own motion.

When investigating the professional conduct of a practitioner the Society may engage such persons as it considers appropriate to assist in carrying out its statutory function and may inspect and copy any books, accounts, documents or writings in the custody of the practitioner (under s47). This includes the client file. It is noted the complainant waives confidentiality as far as the Society is concerned upon the making of the complaint.

Practitioners are reminded of their obligation to co-operate with the Society in its discharge of its statutory obligations in investigating the professional conduct of the practitioner where a complaint has been made. This obligation applies equally where admission to practise is sought.

Professional Conduct Rule 32 provides that a practitioner "should be open and frank in his or her dealings with the Law Society", subject only to his or her duty to the client. Further, a practitioner should respond to any requirement of the Society for comment or information within a reasonable time and in any event within 14 days.

A practitioner who wilfully delays or refuses without reasonable cause to produce any book, account, document or writing when requested to do so by the Society to do so is guilty of an offence, punishable by 100 penalty units (currently $11,000) or imprisonment for 12 months (under s47B).

In the recent case of Council of the Queensland Law Society Inc v Whitman (2003) QCA 438 the duty of practitioners to co-operate in complaint investigations was considered at some length. In that case the practitioner's response to the Society's queries was found by the Solicitor's Complaints Tribunal to be knowingly false. The Tribunal observed: "When faced with such a request or inquiry from their professional body, a solicitor is in much the same position as when dealing with the Court. A solicitor has a duty to be truthful even to his own detriment, not just a duty to be truthful, but a positive duty to be full and frank, and for his answers to be candid as well as truthful".

Jersey CJ went on to state:

> "Especially bearing in mind that the end purpose of the Law Society's investigation is protection of the public, and not the quasi-criminal prosecution of an allegedly errant solicitor directed to the possible imposition of a penalty (see Adamson v Queensland Law Society Inc (1990) 1QdR 498 and Mellifont pp28, 30), one could not gainsay that observation, which is consistent with the high standard of candour and general fidelity expected of practitioners".

The Chief Justice also commented on the behaviour of the practitioner during the court process (at p13):

> "The respondent (Mr Whitman) was generally unco-operative with the Appellant, and apparently took an unduly combative approach before the Tribunal. Neither the investigation, nor the hearing, is criminal in nature: it is a process directed towards the protection of the public. Recognising that, a practitioner is duty bound to co-operate reasonably in the process. Mr Kein stressed that such lack of co-operation was not the subject of a separate charge (cf Barwick v Law Society NSW (2000) HCA 2 para 160, in relation to the rather higher level question of dishonesty), but this lack of co-operation etc attended the charges which were preferred in the way they were defended before the Tribunal, and because it characterised the matters directly before the Tribunal, the Tribunal was right to have regard to that aspect, for it bore on the respondent's lack of proper appreciation of the public interest which should have informed his professionalism. This having emerged the Tribunal would have been unrealistically blinkered to ignore it. Such considerations were taken into account in Bax (1999) 2Qd R 9, 22, **Carberry** (2000)QCA 450 paras 7,34 and other cases".

McPherson JA and Jones J concurred with the reasons of the Chief Justice.

Josephine Stone
Complaints Investigations Officer
josephine.stone@lawsocnt.asn.au

Costs and advertising: the next challenge cont...

Except with leave a person is not entitled to make application after proceedings have been taken for recovery of the amount payable under the agreement

Appeal provisions, in section 129I apply.

Under section 129G provisions of costs agreement and conditional costs agreement that are inconsistent with this part of the LPA are void, to the extent of the inconsistency.

In addition to the LSNT's review of material, a free CLE will also be held on 29 April 2004. Ian Morris and Merran Short will address practical issues, I will explain the Law Society's new regulatory powers and a DOJ officer will also be on hand to answer any queries on the Government's approach.

All affected practitioners are urged to avail themselves of these opportunities to assist them in compliance with this very complex legislation.