The Law Society Disciplinary Powers and your obligations under the *Legal Profession Act*

This is an extract of the CPD seminar delivered by Ms Jacqueline Presbury on 6 March 2008. The full paper is available for purchase from the Law Society.

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The areas presently raising the most concern for the Society are with respect to:

- "Trust monies/accounts";
- Costs disclosure requirements;
- the lack of understanding of the Society's obligations in addition to its powers; and
- the timeliness of responses to complaints in the course of the Society's investigations.

AND not necessarily in that order.

As you are aware the substantive parts of the *Legal Profession Act (LPA)* commenced on 31 March 2007. The Trusts money and trust account provisions of the Act commenced on 1 July 2007. The Costs Disclosure provisions commenced on 31 December 2007. Therefore, the LPA, as of 31 December 2007, became fully operational: subject, of course, to the transitional provisions.

In relation to trust accounting issues Shamus Morton, was recently appointed as the Society's Trust Account Investigator (TAI). Given the increased reporting requirements of the Society it was important that the Society engage someone on a more permanent basis to manage those requirements and the Society's obligations.

Prior to commencing employment with the Society, Shamus practised in public accounting in Perth and Sydney. As part of his undergraduate studies, Shamus lived in China studying Chinese and teaching English for a period of 12 months.

In the initial stages of Shamus' appointment, the Society considers that it is important for Shamus to carry out inspections of Trust Accounts and endeavour to assist practitioners to be compliant with the LPA. It is intended primarily that Shamus as the TAI, look at what practitioners are doing in relation to their trust accounts, seeing whether they have fallen short of their trust accounting responsibilities and point them in the right direction. This may be contrary to what the profession's perception might be. I reiterate that at present Shamus is trying to assist practitioners to be compliant with the legislative requirements.

The exception being if Shamus does discover any defalcation problem, which would then require immediate action, in which case it will be investigated. Otherwise, at some stage in the not too distant future, Shamus will revisit and review practices and procedures adopted by practitioners and it may then be necessary to bring down "the big stick". If it comes to that, then it will be a matter for investigation through me as Professional Standards & Ethics Solicitor (PSS & E), the Ethics Committee, the Council and in some circumstances will need to be referred to the Disciplinary Tribunal.

I have spoken to Shamus about the problems he has seen in his inspections to date, and the most common are:

- practitioners withdrawing monies from trust for their professional fees without notice to or proper authority from the client;
- not issuing trust statements to clients reporting on how trust monies dispensed; and
- money sitting in trust for prolonged periods which should either be repaid to clients or paid into the fidelity fund.

Any anomalies uncovered in the trust account investigations will then be referred to me to implement further investigation: that is, Shamus will pass on the "big stick" to me!

The very meaning of the word "trust" (and this is not adjective preceding a deed) imparts knowledge of what is expected of a practitioner when dealing with trust monies. I have extracted below in part the definition from the Macquarie Concise Dictionary:

Trust n. 1. Reliance on the integrity, justice, etc, of a person, or on some quality or attribute of a thing; confidence. 2. Confident expectation of something; hope.

An issue which has been recently raised with me through complainants

on three occasions over a period of about a week or so, which is a major concern to me as PSS & E, are situations where practitioners have dealt with trust monies either contrary to clients' instructions or without instructions. This is not acceptable! It is serious and if an investigation upholds the complaint, then it potentially has fairly serious consequences. It is a matter which would likely come under the "auspices" of the more serious offence of "professional misconduct".

It is important to highlight what amounts to a breach under the LPA: effectively anything. Section 16 of the LPA states that:

"An offence against this Act is an offence to which Part IIAA of the Criminal Code applies."

AND it is noted that

"For Section 16 Part IIAA of the Criminal Code states the general principles of criminal responsibility (including burdens of proof and general defences) and defines terms used for offences, for example, conduct, intention, recklessness and strict liability."

Part IIAA of the Criminal Code, together with Schedule 1 of the Code, as well as a copy of the *LPA* should have pride of place in every practitioners office – along with a copy of the *Interpretation Act.*

It is either interesting or frightening that s 43AA(1) of the Criminal Code (within Part IIAA) states:

(1) This Part applies only in relation to Schedule 1 offences, and declared offences, committed on or after the commencement of the Part.

Obviously it is the intention of the legislators that breaches of the *LPA* are to be seriously dealt with.

This brings us to the importance for practitioners to advise the Society of any "show cause event" on an ongoing basis. Not to do so would amount to an adverse finding of a practitioner not being a "fit & proper person" to hold a practising certificate.

As you would all be aware prior to the commencement of the Act, all practitioners were invited to advise of any "Show cause event" to be recorded by the Society on each practitioner's file. The Society is required to keep a register and any of these matters the Society is required to reveal in the event a "Certificate of Fitness" is requestedby a practitioner wishing to obtain an interstate practising certificate. Just as an aside, notwithstanding the ability to practice interstate, a practitioner can only hold one current practising certificate.

A "show cause event" is defined in s 4 of the *LPA*.

Show cause event, in relation to a person, means:

(a) his or her becoming bankrupt or being served with notice of a creditor's petition presented to the Court under section 43 of the *Bankruptcy Act 1966 (Cth)*; or

(b) his or her presentation (as a debtor) of a declaration to the Official Receiver under section 54A of the *Bankruptcy Act 1966 (Cth)* of his or her intention to present a debtor's petition or his or her presentation (as a debtor) of such a petition under section 55 of that Act; or

(c) his or her applying to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounding with his or her creditors or made an assignment of his or her remuneration for their benefit; or

(d) his or her conviction for a serious offence or tax offence, whether or not:

(i) the offence was committed in or outside this jurisdiction; or

(ii) the offence was committed while the person was engaging in legal practice as an Australian legal practitioner or was practising foreign law as an Australian-registered foreign lawyer, as the case requires; or

(iii) other persons are prohibited from disclosing the identity of the offender.

Whilst there are onerous obligations and responsibilities for practitioners in the LPA, it's not all bad news and there are also provisions which impose obligations and responsibilities on the Society. An overview of some of the more serious of these provisions are covered in the paper delivered by me.

Complaints process synopsis

Lastly I would like to give an overview of the complaints process. A complaint must be made in writing and once received must be investigated by the Society. The Society can summarily dismiss a complaint, uphold a complaint and impose penalties ranging from private or public reprimand to fines.

Once the Society has found that a complaint should be upheld, and it is not appropriate to deal with it by way of reprimand and/or fine, then the Society must refer the matter to the Disciplinary Tribunal.

Once a decision is made by the Society, then it is required to give a Statement of Reasons to the parties. Unlike the repealed Act, both parties then have available to them rights of appeal within 28 days after receiving the information notice (Statement of Reasons). Under the repealed Act, the right of appeal was immediately available to the practitioner but the complainant had to seek a review by a lay member of the Professional Standards Committee (the forerunner to the current Ethics Committee).

Mediation is available for consumer disputes. The Society may require the mediation, or the parties can agree to mediation.

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There are now some time limitations to the laying of complaints. Section 473 provides that a complaint made more than three years after the conduct complained of cannot be dealt with (other than to dismiss it or refer it to mediation) unless:

- the Society determines that it is just and fair to deal with it having regard to the delay and the reasons for the delay, OR;
- there is an allegation of professional misconduct and it is in the public interest to deal with the complaint.

These restrictions were absent from the repealed Act.

Contrary to some beliefs, I restate that the Society can (and does) investigate complaints of its own motion: s 471.

Where there are ongoing complaints of a similar nature about a practitioner which would normally be considered as not being of a serious nature, the repeated complaints can themselves amount to a more serious conduct issue as the practitioner is not demonstrating that he or she is "generally competent or diligent". Again this was not a consideration under the repealed Act.

Am I going to the moon or pushing a broom?

In the 1997 film 'Gattaca', Vincent, aka Ethan Hawke, refused to believe that his life was determined by his DNA. In a time when eugenics was rampant and your DNA determined your position in society, Vincent broke all the rules. Now, just over a decade later, you can get comprehensive genetic information about yourself.

Jason Schoolmeester

A number of a web-based services offer to help you read and understand your DNA. Users provide a saliva sample using an at-home kit. When returned, the saliva is analysed and using interactive tools you can review the results. You can learn about ancestry, disease risk and the inheritance of physical traits. More information about your DNA is added as new knowledge becomes available, which means you will be continually learning about yourself.

DNA is the most fundamental physical element of a person's individuality. The Australian Law Reform Commission conducted a two year inquiry looking at the ethical, legal and social implications of genetics producing report 96 called "Essentially Yours: The Protection of Human Genetic Information in Australia". This report was finalised in 2003 and acknowledged at the time the rapid pace of advances in genetics.

Now, just over four years later, individuals are able to review their DNA on the Internet. The genetic information becoming more available, it is not hard to imagine how this information might be used or misused if it is not properly protected by law and by the holders of genetic information.

As I am writing, the US Senate has unanimously passed legislation banning employers and health insurance companies from discriminating against people on the basis of their genes. In Australia, privacy laws already class genetic information as sensitive information.

Service providers take privacy very seriously, and take the time to explain the types of measures taken to protect your genetic information against unauthorised access to or unauthorised alteration, disclosure or destruction of data. The protective measures typically include use of physical, technical and administrative procedures, including:

analysing the sample anonymously (ie. the laboratory does not have your name or other details);

restricting the analysis to DNA only (ie the sample is not analysed for biological or chemical components, markers or agents other than your DNA);

securing the database with fire-walls, encryption (both the data and the connections to the Internet site) and the separation of genetic

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