

AUSTRALIAN LAWYERS ALLIANCE QUEENSLAND STATE CONFERENCE

13 February 2009

ETHICAL ISSUES IN PERSONAL INJURIES PRACTICE: ADVERTISING RESTRICTIONS AND GUIDELINES

John Briton - Legal Services Commissioner ¹

You will be keenly aware as personal injury lawyers that you have found yourselves subject to increasing regulatory controls in recent years and that the Legal Services Commission is the primary regulator for two of them – the so-called 50/50 rule which caps the fees you are entitled to charge in speculative personal injury matters and the restrictions on how you can advertise your personal injury services.

I have been asked to speak about the advertising restrictions and how the Commission interprets and applies them and will confine myself to those issues. Simon Morrison will no doubt address the 50/50 rule and related issues in his talk under the title *Managing Costs and Understanding the Costs Rules*.

The restrictions on the advertising of personal injury services

The restrictions on the advertising of personal injury services came into effect on the commencement of the *Personal Injuries Proceedings Act 2002* (the Act) in response to an not entirely unwarranted public perception that some personal injury lawyers were ‘ambulance chasing’. The Act prohibited touting at the scene of incidents where someone might have suffered an injury and at hospitals following such incidents and it

¹ I want to acknowledge and thank the staff of the Commission and especially Michael Roessler and Louise Syme for helping write this paper and for doing the work it describes.

imposed restrictions on the advertising of personal injury services – restrictions on what advertisements can say and where they can be published.

The Act had some loopholes, however, not least that the restrictions applied only to lawyers and were unaccompanied by any effective enforcement provisions, and it comes as no surprise then that they were as honoured as much in the breach as the observance, as any cursory glance at the phone books of the time will tell you. Whatever else might be said about this sorry state of affairs it was unfair to and must have been galling for the majority of personal injury lawyers who tried to do and did the right thing.

The Act was amended to fix the loopholes with effect from on 29 May 2006 and the changes included corresponding amendments to the *Legal Profession Act 2004* (which have carried over to the *Legal Profession Act 2007*). The amendments extend the advertising restrictions to lawyers and non-lawyers alike and make the Legal Services Commission responsible for their enforcement through a simple extension to our complaints and investigation matter powers – they give us powers to receive and investigate complaints which allege that the restrictions have been breached, to initiate investigations of our own motion if the Commissioner believes an investigation should be started, and to prosecute lawyers and non-lawyers alike if the evidence after investigation establishes a reasonable likelihood an alleged breach or breaches will be proved.

Notably, the amendments give us powers to prosecute lawyers either before a disciplinary body pursuant to the *Legal Profession Act* or before a court pursuant to the Act or both.²

I note before proceeding that some personal injury lawyers have expressed the view forcefully to us that the restrictions on the advertising of personal injury services amount to an ‘indefensible infringement of the right to free speech’ and ‘a sop to the insurance industry’ and should be repealed. They’re entitled to their view of course and to express it but the argument is sometimes overstated - the right to free speech they say is being infringed is their right as business people to seek to maximize their profits by

² section 66

securing a commercial advantage over their competitors through advertising. We should keep the debate in perspective.

In any event not all lawyers find the restrictions objectionable. I note that the immediate past president of the Queensland Law Society, Megan Mahon, recently asked her members to comment. She wrote in the August edition of *Proctor* that there was only a limited response and that her impression was that while some of the larger firms practising in the area wanted the restrictions relaxed, smaller firms and especially sole practitioners wanted them further tightened. That is our impression also.

Be all that as it may, we've been given a job to do and we'll do it, as fairly and reasonably as we can. We interpret the restrictions strictly, and deliberately so, in order to leave the least possible room for slippage and the thin 'end of the wedge' arguments that would inevitably accompany any broader interpretation. This seems to us to be the best and probably the only practical way to achieve some certainty and to keep a level playing field – to look after the majority of practitioners who do the right thing and who are rightly annoyed by and stand to be disadvantaged by the minority of their colleagues who push the boundaries.

So: when is an advertisement a personal injury advertisement; what can a personal injury advertisement say and not say; and what are we doing by way of enforcement?

When is an advertisement a personal injury advertisement?

The Act provides that '*a practitioner or another person... advertises personal injury services if the practitioner or person publishes or causes to be published a statement that may reasonably be thought to be intended or likely to encourage or induce a person:*

- a) [***either***] to make a claim for compensation or damages under any Act or law for a personal injury; ***or***

b) to use the services of the practitioner, or a named law practice, in connection with the making of a claim.’³

I added some emphasis because some lawyers appear not to have noticed the second limb to the definition. This is the limb that casts the net most widely. It says simply and clearly that an advertisement doesn’t have to be intended to or likely to cause or induce a person to make a claim for compensation or damages to count as a personal injury advertisement, only to use the services of a particular lawyer or law firm for the purposes of making a claim.

And that’s a much broader notion. Clearly a person who has suffered an injury might have already decided to make a claim for compensation or damages without having read or seen or been influenced by advertisements of any kind and might simply be looking around for a lawyer for the purposes of making the claim.

And that means, having regard to the fact that the whole point of advertising is to influence people who read or see an advertisement to use the advertiser’s services, that any advertisement advertising the services of a lawyer or law firm becomes a personal injury advertisement merely by announcing or suggesting or implying that the named lawyer or law firm provides personal injury services.

It’s usually pretty easy to pick out personal injury advertisements from the rest, but not always, and in those circumstances we have to make judgement calls. The most obvious example occurs when two ostensibly separate print advertisements for the same law firm appear in close proximity or even side by side on a page, one of them a personal injury advertisement and fully compliant and the other one not a personal injury advertisement but an advertisement that would clearly have been non-compliant if it were.

The same situation can arise with street signage, when two ostensibly separate advertisements appear on separate hoardings but in close proximity and in the same line of vision.

³ section 64 (1)

The question in each case is whether we're dealing with two separate and both fully compliant advertisements, one of them a personal injury advertisement and the other not, or in their full context really just the one non-compliant personal injury advertisement. We have to ask ourselves whether, taken together, the advertisements '*may reasonably be thought to be intended or likely to encourage or induce a person to use the services of the named law firm in connection with the making of a claim.*' In each of the cases that have confronted us thus far, we've decided they did.

We've also come across 'advertorials' and articles written by lawyers commenting on matters of public interest and even what appear to be news items about law firms opening new offices which appear in the same edition of a newspaper as advertisement for the lawyers and law firms. We have construed the apparently discrete pieces to be but one multi-sited advertisement, depending on their proximity, and assessed them against the restrictions accordingly.

Inevitably we will have to make judgement calls of these kinds and we repeat that we read the Act narrowly and strictly, to look after lawyers and law firms who do the right thing and to prevent them being put at a competitive disadvantage by colleagues who appear keen to push the envelope.

What can personal injury advertisements say and not say?

The Act provides that '*a practitioner or another person... must not advertise personal injury services except by the publication of a statement that:*

- a) *states **only the name and contact details** of the practitioner or a law practice of which the practitioner is a member, together with **information as to any area of practice or specialty** of the practitioner or law practice; and*
- b) *is published by an allowable publication method.'*⁴

⁴ section 66(1). Notably the Act lists a series of allowable publication methods at section 65 and, by implication, because of their conspicuous omission from the list, identifies other methods of publication that are not allowed. It allows personal injury services to be advertised in printed publications, and hence in newspapers and the Yellow Pages and the like. It allows them to be exhibited in or on buildings and hence on billboards and signage and also to be displayed in printed documents that are 'gratuitously sent or delivered to any person or thrown or left on premises or vehicles', and hence in handbills and junk

The wording of the section leaves some room for interpretation, but not much. A logo is arguably just part of a law firm name, for example, and an alpha-numeric phone number is arguably just a contact detail.

Fair enough, but not if they're a contrivance to include slogans and sales pitches that would otherwise be prohibited – statements like 'free quotes', 'home visits and after hours appointments welcome', 'industry leaders in injury compensation', 'compensation doesn't happen by accident', 'tough case, we're tougher' and the like. Slogans and sales pitches are clearly prohibited. .

Notably the definition prohibits photographs and drawings, whether they be photographs of the lawyers who are providing the services or drawings of pleasing local landscapes or even more obviously - and these are all real examples from the only recent past - photographs or drawings of ambulances and hospitals and people with various of their body parts swathed in bandages. It's simple: photographs and drawings are not names, and nor are they contact details or information as to areas of practice or specialty.

That's the general rule, but there are two exceptions. The Act provides that a '*practitioner or another person... does not contravene [the subsection just quoted] only because:*

- a) *the practitioner or person advertises personal injury services to any person who is already a client of the practitioner or law practice [and the Act provides that a client includes a person who makes 'a genuine inquiry' of a law practice about a personal injury] or to any person at the practitioner's or law practice's place of business... or*

mail - but not however on billboards or signage in or on a hospital or in handbills and junk mail delivered to a hospital or left in a hospital or on any vehicle in the vicinity of a hospital.

Importantly, the Act does not allow personal injury services to be advertised on radio and television - broadcasts on radio and television are included within the meaning of *advertises personal injury services* but excluded from the meaning of *allowable publication method* Nor does it allow 'the public exhibition of photographs, films or other recordings of images or sound [in cinemas, for example, or on recorded telephone messages] or their exhibition to persons attending a place for the purpose of receiving professional advice, treatment or assistance.'

- b) *the practitioner or person advertises personal injury services on the Internet website of a practitioner or a law practice... if the advertisement is limited to a statement about:*
- (i) *the operation of the law of negligence and a person's legal rights under that law; and*
 - (ii) *the conditions under which the practitioner or law practice is prepared to provide personal injury services.'*⁵

So some statements which are specifically prohibited in all other forms of personal injury advertising are specifically allowed in personal injury advertising on the internet – including slogans and sales pitches like ‘free quotes’, ‘home visits and after hours appointments welcome’ and ‘no win, no fee’ and the like, all of which are statements about the conditions under which the lawyer or law firm is prepared to provide personal injury services.

It's not open slather, however. Slogans and sales pitches like ‘compensation doesn't happen by accident’ and ‘tough case, we're tougher’ remain prohibited in personal injury advertisements and similarly war stories, client testimonials and statements like ‘we have a 98% success rate’ and ‘the WorkCover Act favours employers and disadvantages employees by making it difficult to obtain fair compensation for injury and by protecting employers interests’. Those are real and recent examples.

So far so good, but advertising on the internet gives rise to some nice questions, two in particular. The first question arises when a website contains a page that isn't a personal injury advertisement but which contains content that would be prohibited if it were and which links to a page that is a personal injury advertisement.

This is the internet counterpart of the problem that arises when ostensibly separate print advertisements appear in close proximity to one another, one a personal injury advertisement and the other not and both of them fully compliant considered in and of themselves. Are we dealing with two separate and fully compliant advertisements, one

⁵ section 66 (2)

of them a personal injury advertisement and the other not, or in their full context really just the one non-compliant personal injury advertisement?

We say the latter, but as with print advertisements it’s a matter of proximity. We’ve come up with a rule to bring some operational certainty to the issue. The rule is this: a page that contains a direct link to a page that is a personal injury advertisement counts as a personal injury advertisement and so must itself be compliant, with one exception. The one exception is when the direct link is to a page which references personal injury only by a simple descriptive mention of personal injury law as one of the firm’s areas of practice or speciality and when that page serves as the link to a page that is a personal injury advertisement.

Let me give you an example. It is not uncommon for law firm home pages to include promotional material and photographs and brief biographies of the principals and the lawyers who work for the firm. Home pages like those are fully compliant provided they make no reference to personal injuries or personal injury services, directly or otherwise, but we count them as personal injury advertisements even so whenever they include a direct link to a page that is a personal injury advertisement. We will not however count them as personal injury advertisements if they link to a page – let’s call it an ‘areas of practice page’ – that does no more than list personal injury as an area of the firm’s practice or speciality and the listing serves as the link to the personal injury page or pages, as in the following graphic:



That is to say, an ‘areas of practice’ page is an acceptable link between a page that is not a personal injury advertisement but which includes content which would be prohibited

if it were and a page that includes content which makes it a personal injury advertisement. It provides an appropriate gateway to information that is otherwise restricted.

The second question goes to the issue of just when a person who visits a law firm website counts as a person making ‘*a genuine inquiry of the law practice about a personal injury.*’ Some firms deal with the issue simply by asking people who visit their websites whether they’re making a genuine inquiry, ‘yes’ or ‘no’, and, if they click ‘yes’, give them immediate access to ostensibly ‘clients-only’ information. advertisements.

We say devices of that kind however well intended fail to adequately differentiate people who are making genuine inquiries from people who are merely browsing, and gives people who are idly curious ready access to information the Act envisages being made only to people making a genuine inquiry.

There are ready alternatives more consistent with the Act’s fundamental purposes, including making the otherwise restricted information password protected. That is neither difficult nor unduly onerous – it may involve no more than asking people who are making a genuine inquiry to contact the firm to obtain a password, or perhaps simply to click a box to say they’re a genuine inquirer and, if they do, taking them to a page that asks them to type in their in their email address and in that way to automatically generate an email to themselves from the law firm enclosing a password.

What we’re doing by way of enforcement

We’ve set ourselves the goal to secure compliance by persuasion as far as possible and not by prosecution. There are two aspects to that - to try to head off non-compliance if we can by issuing guidelines and, when we come across advertisements we believe are non-complaint, by giving the lawyers and law firms concerned the opportunity wherever possible and appropriate to rectify their mistake before resorting to prosecution. We’ve done that and we will continue to do that although we’ll be disinclined to leniency whenever we’re persuaded the non-compliance is flagrant or knowing or repeated.

We published *A Guide to Advertising Personal Injury Services* in June 2006, less than a month after we were handed the job, and took pains to bring them to the attention of the profession including by publishing them in Proctor and on our website. We followed them up in August 2006 with a separate *Guide to Advertising Personal Injury Services on the Internet* and have taken every opportunity since to talk about the guidelines publicly at continuing legal education events and seminars and workshops like the one we're at today.

We have developed a good working relationship with the Law Society in relation to these issues. We try to be cautious as the regulator not to give specific advice to lawyers and law firms when we may be called upon to form a view during the course of a subsequent investigation whether their advertisements contravene the restrictions and so we refer them when they request our advice to the Law Society as their professional body. The Client Relations Centre people understand these issues very well.

We received a handful of complaints in 2006-07, the first full year we had responsibility for enforcing the restrictions, a few of them about advertisements in local papers and one each about a billboard, a radio and a television advertisement, but we directed our energies in the main to systematically reviewing the Yellow Pages directories for the Brisbane and every other telephone district in Queensland. We had to start somewhere and that was the obvious place to do it.

We initiated just short of a hundred investigations into alleged or apparently non-compliant advertisements during that first year and another fifty or thereabouts in 2007-08, only six of which involved 'repeat offenders'. We persuaded every one of those 150 lawyers and / or law firms to bring their advertisements into line in future editions, albeit some of them reluctantly, and we achieved that result through persuasion, without having to resort even once to prosecution.

That's a good result. We note that our counterpart in New South Wales (where there are also restrictions on the advertising of personal injury services, but unhelpfully different restrictions to the restrictions we have here) has had occasion twice in recent times to

initiate disciplinary proceedings and the lawyers concerned have been ordered to pay substantial financial penalties.⁶

That task now largely behind us, we issued revised and updated *Guidelines* just a couple of months ago, in September, and we've taken pains once again to bring them to the profession's attention – including this time by a mail-out to all personal injury practitioners and law firms. We said we're about to begin systematically reviewing lawyer and law firm websites to ensure their compliance and that we will take the same approach we've taken with print advertisements in the past – we will identify the websites we believe are problematic, inform the lawyers and law firms concerned and seek their cooperation to make the necessary modifications.

It isn't easy to describe the restrictions on the advertising of personal injury services in words alone, especially as they apply to websites. We hope to supplement the *Guidelines* in the near future by including a short interactive guide on our website. It will take viewers on a tour through the website of a fictitious law firm and will include screen shots of both compliant and non-compliant pages and explanatory comment by way of voice-over. We hope that will prove helpful.

Conclusion

We have initiated several hundreds of investigations over the past several years into apparent breaches of the restrictions on the advertising of personal injury services, and similarly apparent breaches of the 50/50 rule. Notably very few of these investigations were triggered by complaints – the vast majority were investigation matters, or 'own motion' investigations.

That simple fact illustrates a reality that has gone largely unnoticed among lawyers and their professional bodies and legal profession regulators - that traditional complaints-based regimes for monitoring and enforcing standards of conduct in the legal profession

⁶ See *Legal Services Commissioner v Malouf* [2007] NSWADT 215 and *Legal Services Commissioner v Keddie* [2008] NSWADT 185.

cast the regulatory net too narrowly and tell us little if anything about the prevalence or distribution of misconduct in the profession.

And both issues - the issues related to the 50/50 rule and the costs rules more generally, and the restrictions on the advertising of personal injury services – illustrate another obvious reality that has failed to get the attention it deserves: that the law is not only a profession but a business, and that lawyers sell their services for profit within commercial enterprises and have commercial as well as more narrowly professional motivations.

Those neglected realities combine to form the beginning of a much longer story - a story about the changing face of the regulation of professional standards in the delivery of legal services, and the desirability and in my view the inevitability that it will come and come sooner rather than later to include systematic *law firm* rather than *lawyer only* regulation.

The restrictions on the advertising of personal injury services is one small example of what I mean – it is effectively a form of law firm rather than lawyer regulation. The framework for the regulation of the delivery of legal services by incorporated legal practices is the big example, and the model in my view for a framework that should and will come to apply to all law firms, incorporated or otherwise.⁷

⁷ Scott Mclean and I develop the story at greater length in a paper we gave at the Third International Legal Ethics Conference in July. The paper is titled *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era* and is available on the Commission's website.