

Without Prejudice

CLIENTS AND CONDUCT

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

ISSUE 37 AUGUST 2007

IMPAIRED PRACTITIONERS; SUBSTANCE ABUSE AND MENTAL ILLNESS IN THE LEGAL PROFESSION

By Steve Mark
Legal Services Commissioner

On 21 May 2007, Peter Hayes QC a prominent barrister in Melbourne died of a lethal drug overdose of cocaine and heroin. His death prompted much discussion in the media about lawyers and substance abuse. Although several influential members of the profession attempted to emphatically deny that substance abuse is a problem for the legal profession¹, many², including at least 100 ninemsn readers in an online survey³ claimed extensive drug use in the Melbourne legal fraternity. Similar claims were also made about substance abuse within the legal profession in New South Wales.⁴

The problem of substance abuse in the legal profession is intimately linked to mental health issues. Peter Hayes QC was bipolar and, according to friends, was known to self-medicate.⁵ This was not an unusual situation. According to research from *beyondblue*, a national organisation working to address issues associated with depression and related substance misuse disorders in Australia, 50% of people with depression self-medicate with

drugs and alcohol.⁶ For people who work in a profession, like law or medicine, this statistic is considerably higher.

Research recently undertaken by Beaton Consulting in collaboration with *beyondblue* on the professions revealed that the correlation between depression, anxiety and related drug and alcohol use amongst all professions is higher than average when compared with the general Australian population.⁷ The Beaton study further found that those working in law firms indicated higher rates of depressive symptoms when compared with the other professional groups examined. According to the study one-third of legal practitioners reported suffering from depressive symptoms self-medicated. The study also revealed that practitioners in the early stages of their legal careers were twice as likely to be depressed than the more senior practitioners and that salaried partners were significantly less depressed compared to the total sample.

This is not the first time I have addressed the problem of substance abuse within the legal profession, thus these statistics come as no surprise to me or many of my colleagues. As I stated in the May 2005 issue of *Without Prejudice*⁸, law is a stressful and draining career. Hourly

billing has placed unrelenting pressure on practitioners to work long hours and forsake much of their leisure/family time for the pursuit of profit. In addition to the pressures of hourly billing, law firms are now asking more of their employees as firms transform into business-like enterprises. Practitioners, for example, now have to act in a managerial capacity as well as run their general practice. As the National HR Manager of Corrs Chambers Westgarth recently commented;

“Once upon a time legal advice was enough, but now clients want to know the ramifications on the industry that they are in and other businesses. What motivates a lawyer is their ability to solve a client’s problem. They love that. But it’s all the other things we are asking them to do [that cause additional stress]. Clients are savvy purchasers of legal services. The profession of law is integrated with the skills that we need to run the business.”⁹

Legal practitioners are also susceptible to stress because they are high achievers and perfectionists. As Associate Professor Dr Mamta Gautam, a leading Canadian psychiatrist who specialises in professional health and wellbeing said of practitioners in delivering the Inaugural Tristan Jepson Memorial Lecture, to the legal profession at the Supreme Court of NSW, last year¹⁰:

¹ See the comments of Sir Laurence Street and David Bennett cited in J. Roberts, “Hayes ‘ingested coke and heroin’”, *The Australian*, 29 May 2007 available at <http://www.theaustralian.news.com.au>

² See P. Faris, “Confront reality on drugs: ‘high-flyers’ need help”, *The Australian*, 25 May 2007 available at <http://www.theaustralian.news.com.au>; C. Buttner, “Lawyer sniffs cocaine problem in the profession”, *Lawyers weekly*, 25 May 2007.

³ “Lawyer’s drug claim backed by ninemsn readers”, 17 May 2005 available at <http://www.news.ninemsn.com.au/article>

⁴ “Lawyers ‘should be drug tested’”, *news.com.au*, 16 May 2007 available at <http://www.news.com.au/story>

⁵ A. Shand, ‘Star silk dies’, *The Bulletin*, 22 May 2007 available at <http://www.bulletin.ninemsn.com.au>

⁶ See <http://www.beyondblue.org.au>

⁷ Questions about depression were integrated into Beaton Consulting’s 2007 Annual Professions Study which surveyed 20,000 people across professional service firms. See Beaton Consulting and *beyondblue*, Annual Professions Survey 2007, available at <http://www.beyondblue.org.au>

⁸ http://infolink/lawlink/olsc/ll_olsc.nsf/pages/OLSC_publications_resources

⁹ K. Gibbs, “Profession depression”, *Lawyers Weekly*, 29 September 2006 available at <http://www.lawyersweekly.com.au/articles>

¹⁰ The Jepson Memorial Lecture is an initiative of the Tristan Jepson Memorial Fund. The Fund was established in memory of Tristan Jepson, a UNSW law student who suffered from clinical depression and took his own life in 2004.

IMPAIRED PRACTITIONERS; SUBSTANCE ABUSE AND MENTAL ILLNESS IN THE LEGAL PROFESSION (CONTINUED)

"We are very conscientious; we aim to do the very best we can. We pay attention to every little detail. If there is something more that can be done, we will try our best to do it. We want to please people. A lot of time and effort goes towards that extra step, to ensure that everybody you possibly can please is going to be pleased...."

We're unrelentingly perfect. We come close, as close as mortals can, to being perfect. We are functioning at a very high level, but then take on the pressure to maintain this."

Unfortunately, as Geoff Gallup, former West Australian Premier, has commented, it is this strive for perfection that drives legal practitioners that also has the potential to destroy them.¹¹ Many law firms consequently face high attrition rates amongst associates who report dissatisfaction with their professional life.¹² However few firms appear to acknowledge this predicament and deal with the problem. Practitioners are thus often left isolated and forced to deal with the problem on their own. It is herein that the danger lies.

Many practitioners may not realise that they are actually suffering from mental illness/substance abuse. Even if they are aware that there is a problem many will choose not to acknowledge it. The services that are currently available in New South Wales (see text box) largely rely on self-referral by the individually impaired practitioner. Practitioners who choose not to self-refer are consequently left helpless and in a dangerous predicament both for the profession and the general community without any recourse to effective assistance. Peter Hayes QC, for example, had all the support networks he needed, but he did not turn to them¹³. When Mr Hayes did eventually seek psychiatric treatment for an addiction to sleeping pills, at a friend's insistence, Mr Hayes was

¹¹ "Survey reveals depth of depression problem", Law Institute Journal, June 2007, at p.25.

¹² Phillippe Gray-Grzeszkiewicz and Davyd Wong, NSW Young Lawyers Submission to the Legal Fees Review Panel, covering letter.

¹³ Adam Shand "Even lawyers get the blues" *ibid*.

CURRENT SERVICES AVAILABLE TO NSW PRACTITIONERS

In New South Wales legal practitioners have access to the Law Society's *LawCare* assistance programme and the Bar Association's equivalent of *LawCare*, *BarCare*. Each of these services assist practitioners with stress-related difficulties such as relationship and marital problems and/or drug and alcohol problems. Each service aims to prevent practitioner's problems from being exacerbated and to reduce the risk of impact on themselves, their families, partners and clients.

BarCare offers barristers and their immediate family the opportunity to confidentially discuss their personal problems with a specialist professional counsellor. The Bar Association covers the costs associated with the initial consultation, assessment and (if applicable) referral by the *BarCare* counsellor. Costs of treatments thereafter, for example consultations with specialists, participation in specific programs etc, is the responsibility of the individual barrister. Enquiries about *BarCare* may be addressed to the Legal Assistance Manager on (02) 92291733 or barcare@nswbar.asn.au

Like *BarCare*, *LawCare* offers the free confidential support of a counsellor 24 hours a day via a mobile phone number to practitioners and their family members. The current *LawCare* counsellor, Dr Ian Chung is a general medical practitioner with expertise in treating stressed professionals. Dr Chung can be contacted on 0416 200 788.

In addition to *LawCare* and *BarCare*, practitioners are also able to seek assistance from the Lawyers Assistance Programme (LAP). The LAP is designed to help practitioners in relation to problems with their own practice, such as stress due to overwork or lack of work, professional conduct issues, partnership problems, practice management, bankruptcy and employment issues. If required and agreed to LAP may subsequently refer practitioners to a health professional, or to the *LawCare* counsellor or to some other relevant person such as a practice management consultant. The LAP coordinator Richard Gulley AM, can be contacted on 1800 777 662 or via LAP's website at <http://www.lap.com.au/>

able to "outsmart" the psychiatrist. Unfortunately, the traits that make people good lawyers, such as argumentativeness, workaholism and egotism, may in effect hinder their rehabilitation and recovery¹⁴. Recognising this problem, impaired practitioners in the United States and Canada are now being offered a range of sophisticated services and programs in addition to the common referral service offered by *LawCare/BarCare/Lawyers Assistance Programme*.

In Minnesota, for example, the Minnesota Lawyers Assistance Program offers formal interventions to assist impaired

¹⁴ WC Smith "Pass the bar, flunk rehab." *ABA Journal* 89 (January): 18-19, 2003

practitioners to recognise his/her problem and commence the recovery process. Formal interventions are conducted by trained volunteers and/or licensed professionals who plan, rehearse and facilitate the intervention. This involves bringing together a group of people with the practitioner to explore how his or her problem has affected all their lives. The formal intervention is usually used when the person has repeatedly refused to get help. The point of the intervention is to ask the practitioner to take concrete steps to address the problem and lead them to the help they need (i.e. go for an evaluation, attend counselling, enter in- or out-patient treatment).

The Minnesota Lawyers Assistance Program also offers a mentoring program which provides the assistance of a lawyer mentor matched by gender, age, type of law practice and personal problem. The mentor supports the practitioner throughout the course of professional treatment. The mentor can also introduce the practitioner to other practitioners who may have experienced similar problems.

The use of monitoring programs is also widely used. The program, designed to protect the public and be probationary in nature, operates by using a trained monitor who is assisted by the ABA's "Planning Guide for Designing and Implementing Lawyer Recovery Monitoring Programs." In relation to chemical dependency the Guide, for example, suggests that a monitoring program could require the practitioner to maintain abstinence from all alcohol and other mind altering drugs; actively participate in a stipulated recovery program and/or treatment program throughout the duration of the monitoring period; and report any failure to maintain abstinence to the monitor. In relation to mental impairment the Guide suggests that a monitoring program could require the practitioner to submit to a psychiatric or psychological assessment at the beginning of the monitoring period to be conducted by a mental health care provider approved by the disciplinary body and take all actions necessary to allow the monitor as well as the disciplinary body to receive a copy of the assessment along with a treatment plan.

Several jurisdictions also provide a range of online services offering educational

articles and links to relevant websites for treatment and help. The Missouri Bar Association for example provides a link on their website to an online depression screening test from the New York University Medical Center/School of Medicine. Similarly, the Legal Profession Assistance Conference in Canada in conjunction with the professional liability insurer, LawPRO has developed an online interactive stress coach that addresses many issues including stress and lawyer/client relationship skills. The online coach includes a series of self-assessments to help practitioners identify the problems they may be experience.¹⁵

In addition to these services, a number of jurisdictions in the United States have enacted a rule requiring the mandatory reporting of impaired colleagues.¹⁶ Model Rule 8.3 charges lawyers with a duty to report those that have violated the Model Rules. Model Rule 1.16 requires that a lawyer whose "mental condition materially impairs the lawyer's ability to represent the client" withdraw from representation. If the lawyer continues to represent the client while so impaired, the lawyer and the observing lawyer will be in violation of the Model Rules and may be subject to disciplinary proceedings if they choose not to report any materially impairing behaviour.¹⁷ In the United Kingdom practitioners are under a duty to report another solicitor to the Law Society if they believe the conduct of that practitioner "falls short of the proper standard of

conduct for the profession." There is no such rule in New South Wales requiring practitioners to report other practitioners for their misbehaviour, except for trust account violations.

However it is not just the professional associations that have a responsibility to ensure that the wellbeing of their practitioners, there is also a need for law firms to acknowledge and properly respond to any problems. Stress management education and training within an individual law firm can be used to educate employees about how to identify and manage mental health issues and reduce the personal and financial costs thereof. *Beyondblue* chair Jeff Kennett recommends law firms adopt scientifically-based training and education programs to specifically address depression among employees.¹⁸ Corrs Chambers Westgarth, for example, have enlisted the services of an organisational psychologist to deal with issues as they arise and teach partners to identify stress amongst their peers as they arise. Corrs has also used psychologists to talk to partners about mental illness and stress within the firm and how to identify such symptoms.

What do you think about the programs discussed above ? The OLSC is very interested in seeking your comments.

¹⁸ "Survey reveals depth of depression problem", Law Institute Journal, June 2007, at p.24-25.

¹⁵ <http://www.lpac.ca/English/Main/StressCoach.aspx>

¹⁶ See for example, the Alabama Rules of Professional Conduct available at <http://www.alabar.org>

¹⁷ See R. Dowers, "Duties Invoked Under the Model Rules of Professional Conduct by a Mentally Impaired Lawyer", Georgetown J of Legal Ethics, Summer 2006.

JULY STATISTICS

The OLSC's inquiry line took 638 calls during the month of July; a slight increase of nine calls than the previous month.

Once again the most frequently raised matter during July was family/de facto matters at 15.5%, followed by conveyancing at 15.4% and other civil matters at 14.1%.

Consumers mostly complained about communication during July at 48.1%, followed by costs at 34% and negligence, which increased considerably from 22.6% in June to 25.2% in July.

During the month of July the OLSC received 257 written complaints, 61 more written complaints than in June 2007.

LEON NIKOLAIDIS V LEGAL SERVICES COMMISSIONER [2007] NSWCA 130

On 1 November 2004, Legal Services Division of the Administrative Decisions Tribunal of New South Wales, (the Tribunal) found Leon Nikolaidis guilty of professional misconduct for failing to comply with notices issued by a costs assessor in breach of s 207(1) of the *Legal Profession Act 1987* and for deliberately charging grossly excessive amounts of costs as declared to be professional misconduct by section 208Q(2) of the 1987 Act. On 25 August 2005 the Tribunal made orders in relation to its findings whereby it publicly reprimanded the practitioner, ordered him to pay fines and ordered him to pay the Commissioner's costs of the proceedings.

Nikolaidis appealed against the decisions of the Tribunal of 1 November 2004 as to liability and 25 August 2005 as to penalty. Nikolaidis submitted that to treat the costs assessment as conclusively determining misconduct involved a fundamental error of construction of section 208K(2) of the Act. The OLSC argued, inter alia, that the bill, which had been drafted by another solicitor in the firm, was the responsibility of Nikolaidis, that he adopted the bill as his own and would have benefited from the bill once it was paid. The appeal was heard on 12 September 2006 in the Court of Appeal before Beazley, Hodgson and McColl JJA.

On 8 June 2007 the Court of Appeal upheld the appeal and set aside the finding of the Tribunal made on 1 November 2004 that the second complaint was established [being the

complaint relating to the deliberate charging of grossly excessive amounts of costs] and that the conduct complained of amounts to professional misconduct. The Court of Appeal also set aside the orders made by the Administrative Decisions Tribunal on 25 August 2005 in respect of the second complaint and ordered the OLSC to pay costs of the appeal.

The Court of Appeal, by majority (McColl JA, Hodgson JA), held that the Commissioner had not established that the appellant was guilty because, in order for a legal practitioner to be guilty of professional misconduct for deliberately charging excessive amounts of costs, whether at common law or pursuant to section 208Q(2), it is necessary to prove the practitioner was personally implicated in either knowingly overcharging or was reckless as to whether or not excessive costs had been charged. In finding so, McColl JA, with whom Hodgson JA agreed relied on the principle in *Re Mayes and the Legal Practitioners Act* [1974] 1 NSWLR 19, that "the misconduct of a solicitor must be brought home personally to him."¹ As McColl JA concluded:

"It is apparent from this review of authorities dealing with overcharging that in each case in which the complaint was made good, the solicitor had either knowingly engaged in systematic overcharging or, as in the cases of Miles

and *Re A Solicitor*, had been reckless as to whether or not excessive fees had been charged through failure to exercise adequate supervision. In the Nikolaidis matter, Mr Nikolaidis had not prepared the bill of costs and had not seen the bill of costs. The bill of costs was prepared and sent by his employed solicitor. Supervision of that solicitor had not been charged in the Information before the Tribunal."²

Beazley JA disagreed. According to Her Honour the question that ought to be considered is whether a solicitor can deliberately overcharge in circumstances where the solicitor, on whose behalf the bill was sent, did not have any personal involvement in its preparation or in forwarding the bill to the client. As Beazley JA stated:

"...it is irrelevant that some person other than the solicitor may have prepared the bill. If that was a defence to a complaint of "deliberate charging of grossly excessive amounts of costs" it is unlikely that professional misconduct on that basis would ever be established. Solicitors would always have their costs prepared by someone else."³

Clearly this decision has implications for the costs regime and more generally for the obligations and responsibilities of lawyers. The office will be exploring the need for clarification of the existing legislation.

¹ per Slessor LJ, *Myers v Elman* at 127. See also *Re Hodgekiss* [1959] 62 SR (NSW) 340, *Myers v Elman* [1940] AC 282, in *Re City Equitable Fire Insurance Co Limited* [1925] Ch 407, *Forster v Great Western Railway Company* [1905] 2 KB 532.

² At para 164

³ at para 82.

WITHOUT PREJUDICE VIA EMAIL

As indicated in our last issue the OLSC will send out future issues of *Without Prejudice* via email. If you would like to receive *Without Prejudice* via email and haven't already let us know please contact us at OLSC@agd.nsw.gov.au

Comments? Suggestions? Something you'd like to know more about? Write to us at OLSC@agd.nsw.gov.au



WITHOUT PREJUDICE is published by The Office of the Legal Services Commissioner

GPO Box 4460, Sydney NSW 2001 DX 359 Sydney

Level 15, Goodsell Building, 8-12 Chifley Square Sydney 2000

Tel: 02 9377 1800 Fax: 02 9377 1888 Toll Free: 1800 242 958 www.lawlink.nsw.gov.au/olsc

Printed on Monza Satin – 55% recycled and 45% FSC paper stock, using vegetable oil based inks and an environmentally friendly alcohol-free printing process.