On 16 October the Commissioner participated in a panel discussion at the Continuing Legal Education of Australasia Conference in Sydney where he spoke about amending the undergraduate law curriculum to include training in emotional intelligence. An excerpt from the Commissioner’s speech which is available on the OLSC’s website at http://infolink/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches follows.

Much has been written about the dismal lives lawyers face and the inordinate amount of stress lawyers have to deal with on a day to day basis.1 Much has also been written about the effect of the adversary system on lawyers.2 Lawyers thus as a result tend to be adversarial, pessimistic and risk adverse. Such emotions not only affect how we think but also the values we hold and the attitudes we choose. Becoming aware of the inevitable emotional influences helps us to understand ourselves and others, to anticipate and to interpret behaviour and attitudes in ourselves and others. The best way to become aware of such emotions is through training in emotional intelligence.

Emotional intelligence is a form of intelligence that can be taught and learned, in essence through improving self-awareness in ways that will benefit interactions with other people, including clients, colleagues, managers and employees. Emotional intelligence does not correlate with IQ. Nor does emotional intelligence correlate with any particular personality type.

Training in emotional intelligence teaches skills in self-awareness which has been shown to significantly benefit interactions in a professional context. Emotional intelligence training is therefore particularly relevant to members of the legal profession, for whom persuading, communicating, influencing, advocacy, negotiating and counselling are central to their role. By improving the emotional competence of lawyers, it is expected that they will have higher competence in professional skills that are essential to good lawyering. This includes improving their understanding of others and promoting the interests of others. Adopting such a mindset leads to prioritising improvements to the justice system above self-interest.

There are many benefits to the development of emotional intelligence and associated skills for the professions. According to research on emotional intelligence, people who are emotionally competent have the most potential in the workplace and become leaders in their field.3 Emotionally intelligent partners, according to Rhonda Muir, bring better judgment, higher productivity, enhanced business development skills and better client relationship management. Muir also states that high emotional intelligence promotes leadership which is critical to excellence in the 21st century, and that can provide law firms, for example, with a competitive edge.4 The professional and economic benefits of training in emotional intelligence has long been recognised by the business community. Over the past decade enlightened businesses have been consciously hiring people and coaching people to develop their emotional intelligence.

What do you think about including training in emotional intelligence in the undergraduate law school curriculum? We would be very interested in your views.


MONEY LAUNDERING – AN UPDATE

There is currently much debate in the legal profession regarding the forthcoming application of Tranche Two of the Anti-Money Laundering & Counter Terrorism Financing Act 2006 (Cth) (AML Act) to the profession which are expected to come into effect in July 2009. Unfortunately, the risks around money laundering and terrorist financing (AML/CTF) to the profession are real, current and are faced by all practitioners, not just those who face, or will face, obligations under the AML Act. This article by Paddy Oliver, Director, Legal Risk, SSAMM Management Consulting will outline several of the risks.

The risks faced by all practitioners around ML/TF include criminal proceedings for breaches of the substantive money laundering or terrorist financing offences under the Criminal Code Act 1995 (Cth) (Criminal Code); disciplinary action for potential misconduct arising from (a) above and reputational damage.

MONEY LAUNDERING & TERRORIST FINANCING – CRIMINAL CODE OFFENCES

All practitioners are at risk of criminal prosecution under the Criminal Code Act 1995 (Cth) (Criminal Code). Money laundering offences under Division 400 relate to dealing with money or other property which is the proceeds of crime or will become an instrument of crime (s400.1). The ambit of the proceeds of crime is extremely wide and includes not just the proceeds of drug trafficking or fraud, but also money or other property realised, directly or indirectly, from an indictable offence (s400.1). An instrument of crime is any money or property, the proceeds of crime or not, that is used in the commission of an indictable offence (s400.1). Dealing with money or other property includes receiving, possessing, concealing or disposing of it (s400.2).

Division 400 offences include intentionally, recklessly or negligently dealing with the proceeds of crime or an instrument of crime (ss400.3–400.8). The negligence offences may pose the greatest risk to practitioners. Although negligence in this context is the criminal standard, it may be low enough to potentially allow a practitioner to be charged and potentially convicted. Section 5.5 states:

“A person is negligent with respect to a physical element of an offence if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the physical element exists or will exist – that the conduct merits criminal punishment for the offence.”

A practitioner dealing with client funds which they know, reasonably suspect, or to which they turn a Nelsonian eye of being the proceeds of crime may very well fail the negligence test.

Penalties under ss 400.3–400.8 range from 12 months imprisonment and/or 60 penalty units to 25 years imprisonment and/or 1500 penalty units, depending on the monetary value and the degree of culpability.

Of more potential concern to practitioners is the s400.9 offence of receiving, possessing, concealing or disposing of money or other property where it is reasonable to suspect that the money or other property is the proceeds of a crime in relation to a commonwealth, state, territory or foreign indictable offence. The burden of proof is reversed and placed on the defendant (s400.9(5)). The penalty is two years imprisonment and/or 50 penalty units (s400.9(1)).

In addition to the principal money laundering offences, there are accessory offences, including: attempting (s11.1); aiding, abetting, counselling or procuring (s11.2); incitement (s11.4); and conspiracy (s11.5).

These wide-ranging offences present risks for practitioners. For example, what
would be the criminal liability, if any, of a practice which allowed funds to pass through its trust account during a property transaction, where a practitioner had a reasonable suspicion that the funds were the proceeds of crime? What if the practice had received, possessed, concealed or disposed of funds which are the proceeds of crime, or the instrument of crime? What would be the position if a client paid legal fees with cash and the practitioner suspected that the cash might be the proceeds of crime?

Division 100 of the Criminal Code deals with terrorist financing which encompasses: getting funds to, from, or for a terrorist organisation; providing support to a terrorist organisation; financing terrorism; financing a terrorist. Sentences range from 15 years imprisonment to life imprisonment (ss102.6, 103.1, 103.2). It is self evident that a prosecution and conviction for this type of offence would be catastrophic for a practitioner due to both the likely jail sentence and the subsequent loss of livelihood.

**POTENTIAL CONSEQUENCES OF A CRIMINAL CONVICTION**

A money laundering or terrorist financing related conviction, whether criminal or regulatory (e.g. failing to report potentially under the AML Act), could potentially lead to a custodial sentence, professional misconduct charges, striking off, and subsequent loss of livelihood.

As the majority of the offences under Division 400 of the Criminal Code are indictable offences they constitute “serious offences” under s4 of the Legal Profession Act 2004 (NSW). Several consequences would flow from a criminal conviction. First, a conviction would be a “show cause event” (s4), requiring the practitioner to explain why, despite the show cause event, they should be considered a fit and proper person to hold a local practising certificate (s67). Second, the conviction would be capable of constituting unsatisfactory professional conduct or professional misconduct (ss496-8, 502), leaving the practitioner open to a potential disciplinary complaint (s4.2.3).

**REPUTATIONAL ISSUES**

It is often forgotten by practitioners that clients select their legal representatives for many reasons – including trust, reputation and legal knowledge. If a practitioner was charged with, or convicted of, a Criminal Code ML/TF offence, or a related disciplinary matter, it is likely that their reputation would suffer in the eyes of their clients, potential clients, and the wider profession. There is little doubt that the press would take a keen interest in a “solicitor charged with money laundering”, and the legal subtleties of whether the charge was criminal or regulatory might be overlooked. As the American investor and philanthropist Warren Buffet said, “it takes twenty years to build a reputation and five minutes to ruin it. If you think about that, you will do things differently”.

**MITIGATING THE ML/TF RISKS**

Good risk and reputation management requires all practitioners to be aware of the risks around ML/TF and to take a proactive approach to identifying, mitigating and managing those risks. This can be achieved by an in-depth understanding of the ML/TF risks and integrating ML/TF risk management into the overall risk manage management of the practice. For those practices which will face obligations under the AML Act this will form part of their Anti-Money Laundering/Counter-Terrorist Financing Program (assuming that this obligation will apply to legal practitioners under Tranche Two).

The OLSC is working together with the Legal Services Commissioners in Queensland and Victoria, the Legal Practice Board in Western Australia and the Law Council of Australian in drafting national AML/CTF implementation guidelines to assist the profession.
RECENT PAPERS

THIRD INTERNATIONAL LEGAL ETHICS CONFERENCE

On 13-16 July 2008 the Legal Services Commissioner and the Research and Projects Coordinator attended and presented papers at the Third International Legal Ethics Conference, which was held on Gold Coast. The Conference provided a platform from both an international and national perspective on the ethical dilemmas that legal practitioners now face as well as the ethical challenges to be faced in the future.

The Commissioner presented a paper entitled “Technology and Compliance Auditing – The Future of Legal Regulation. This paper covered the advances in technology and the way that it impacts on regulating the legal profession. In addition to this paper the Commissioner and the Research & Projects Coordinator also presented a paper with Dr Christine Parker regarding our ARC Project – ethics in large law firms. The paper, entitled “Assessing the Impact of Incorporation and Listing: An Opportunity for the Ethical Maturation on the Law Firm?” tested the hypothesis that the incorporation of law firms has provided an opportunity to improve ethical performance of incorporated law firms because of the requirement that they must implement “appropriate management systems.”

Copies of these papers are available on the OLSC’s website at http://www.lawlink.nsw.gov.au/olsc

2ND AUSTRALIAN ACADEMY OF LAW SYMPOSIUM

On 25 July 2008 the Commissioner delivered a keynote address at the 2nd Australian Academy of Law Symposium. The address entitled “Re-imagining Lawyering: Whither The Profession?” discussed the future of the legal profession in the current marketplace. The paper considered the traditional definitions of “profession” and “legal profession” and discussed how globalisation and changing business structures in the legal services marketplace have diminished the traditional role of lawyering as law becomes big business. The paper then discusses the implications of this change and how the OLSC has responded.

A copy of this paper is available on the OLSC’s website at http://www.lawlink.nsw.gov.au/olsc