

LEGAL SERVICES COMMISSIONER V BRYDEN AND HAGIPANTELLIS (NO'S 2 AND 3) [2012] NSWADT 131, 225

By Steve Mark, Legal Services Commissioner (NSW)

It has now been more than ten years since legal practitioners in NSW have been subject to restrictions in advertising personal injury and work injury services. The restrictions, which were originally introduced by the *Legal Profession Amendment (Personal Injury Advertising) Regulation 2003*, were later amended by *Legal Profession Amendment (Advertising) Regulation 2005*, impose restrictions on practitioners' advertising. The *Workers Compensation Regulation 2010* (which replaced the *Workers Compensation Regulation 2003*), contain similar provisions effectively prohibiting practitioners' advertising of work injury services.

During this period the Office of the Legal Services Commissioner (OLSC) has dealt with many queries and complaints from members of the profession about potential breaches of the Regulation relating to print media, website and television and radio advertising. (Interestingly, we tend to receive many more complaints from legal practitioners about legal practitioners than we do from members of the public.) Despite an extensive education awareness campaign over the last decade, breaches of the Regulation continue to occur. The recent

matter of *Legal Services Commissioner v Bryden and Hagipantellis (No 2)* [2012] NSWADT 112 in which Robert Bryden and Bandeli "Lee" Hagipantellis were found guilty of professional misconduct illustrates such a breach.

The proceedings in Bryden and Hagipantellis relate to six applications (three against each legal practitioner), which had been before the Tribunal since February 2008. The proceedings were prolonged by the respondents' interlocutory application, in the first instance to the Tribunal, seeking a

declaration that Regulation 24 of the *Legal Profession Regulation 2005* and Regulation 75 of the *Workers Compensation Regulation 2003* were ultra vires the *Legal Profession Act 2004* and the *Workplace Injury Management Act* and *Workers Compensation Act 1998* respectively.

The Legal Services Division of the Tribunal found against the respondents on this issue.¹ The respondents then made an application to the Court of

¹ *Legal Services Commissioner v Bryden (No 2)* [2009] NSWADT 131



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Appeal in similar terms. They were unsuccessful in the Court of Appeal as well. The Court of Appeal held in its judgment of 15 April 2010 that, “advertising” fell within the scope of “marketing” and, accordingly, the Regulation was within the regulation making power and not ultra vires.² The legal practitioners then applied for Special Leave to the High Court. Leave was not however granted. In November 2011 the matters were listed for hearing in the Legal Services Division of the Tribunal. The date was vacated however when the Presiding Member had to recuse herself on the basis of apprehended bias. The matters were ultimately set down in April 2012.

Six applications were called on for hearing before the Tribunal on 10 April 2012. The six applications comprised 7 different grounds or incidents of breaches of the NSW advertising regulations. These included breaches on the internet (on the legal practitioners firm’s website), newspapers and magazines.

At the commencement of the hearing the OLSC applied, by consent, for the dismissal of 2 of the applications. An order was made by the Tribunal accordingly. The remaining 4 matters proceeded to a hearing at the conclusion of which the Tribunal reserved its decision on the question of whether the

legal practitioners should be found guilty of professional misconduct.

During the substantive hearing the legal practitioners sought to rely on clause 29(2) of the *Legal Profession Regulation 2005* by stating that they had taken all reasonable steps to prevent the advertisements from being published. The “reasonable steps”, in their argument, were the system that they had put in place with the firm’s General Manager checking advertisements before they were published. The Tribunal found that it was not sufficient to rely on a general instruction given to staff as to the need to comply with the NSW advertising regulations.³ In the Tribunal’s view a system must be in place to ensure that every fresh advertisement published on behalf of the firm is, before publication, scrutinised by a competent person.⁴ The Tribunal stated, “only then will it be relevant to conduct an enquiry as to whether the system represented ‘all reasonable steps’”.⁵ The fact that the legal practitioners had left it entirely to their firm’s General Manager to check advertisements was, in the Tribunal’s view “a gross abdication of their responsibilities and comes nowhere close to constituting ‘all reasonable steps’”.⁶ The Tribunal found that the six remaining

advertisements contravened the NSW advertising regulations. The legal practitioners were guilty of professional misconduct.

On 1 November 2012 the Tribunal handed down its decision on penalty. The Tribunal noted that whilst the breaches of the advertising regulations in this case were “very serious”, they did not warrant the practitioners being removed from the Roll of Legal Practitioners. The Tribunal instead reprimanded and fined each of the practitioners \$48,000 pursuant to section 562 of the *Legal Profession Act 2004 (NSW)* and ordered payment of the OLSC’s costs.

Comment

The introduction of the advertising legislation in 2002 was one of a series of responses made by the NSW Government to address steep increases in public liability premiums. The legislation was also introduced to address community perceptions that certain types of advertising by lawyers generate unnecessary litigation and drive the price of insurance premiums upwards.

Since the legislation was enacted, the OLSC together with the Law Society of NSW has provided legal practitioners with assistance in interpreting the legislation. By agreement with the OLSC, the Law Society of NSW has a webpage devoted to the advertising of personal injury or work injury services. It is imperative that

² *Hagipantelis v Legal Services Commissioner of New South Wales* [2010] NSWCA 79

³ *Legal Services Commissioner v Bryden and Hagipantelis (No 2)* [2012] NSWADT 112, para 61.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Legal Services Commissioner v Bryden and Hagipantelis (No 2)* [2012] NSWADT 112, para 62.



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legal practitioners continue to familiarize themselves with the content of this webpage and ask questions when in doubt. As the Tribunal stated in Bryden

and Hagipantelis it is not sufficient to rely on a general instruction given to staff as to the need to comply with the NSW advertising regulations. A system must

be in place to ensure that every fresh advertisement published on behalf of the firm is, before publication, scrutinised by a competent person.

GUIDELINES ON OUTSOURCING AND CLOUD COMPUTING

Over the last twelve months the OLSC has been working on the development of guidelines to assist practitioners in their use of new technology. The need for guidelines arose as a result of an in-depth research project with the University of Sydney that looked at the use of new technologies by the legal profession and the ethical implications of their use. The joint research project

focused in particular on issues relating to outsourcing, cloud computing services and social media.

The OLSC is pleased to announce that after a lengthy consultation period, guidelines on outsourcing and cloud computing have now been finalised. The guidelines have been drafted to assist legal practitioners who are using outsourcing and/or cloud computing

services. A copy of the guidelines can be obtained from the OLSC's website at <http://www.olsc.nsw.gov.au/>

Draft guidelines on social media are posted on the OLSC website for comment. We would be pleased to hear your views about the draft guidelines. A copy of the draft guidelines can be obtained from the OLSC's website at <http://www.olsc.nsw.gov.au/>

OLSC ANNUAL REPORT

The OLSC's Annual Report for 2010-2011 was recently tabled in Parliament.

Once again 2010-2011 proved to be an extremely productive year:

- We received 2,758 written complaints during 2010-2011;
- Of the total written complaints received, 1866 were assessed as consumer disputes and 837 as investigations. Fifty-five complaints were assessed as non-jurisdictional so were sent directly to the Law Society, MARA, OFT or regulators outside NSW.
- Of those complaints assessed as within jurisdiction, seventy-nine percent (79%) of those written complaints received were retained and handled by the OLSC. The remaining twenty-one percent (21%) were referred to the professional associations for handling.
- The OLSC registered the completion of 2805 written complaints, an increase of 186 on the previous year. Of the total written complaints completed, 1933 were closed as consumer disputes and 815 as investigations. Fifty-seven (57) complaints were non-jurisdictional so were closed and sent directly to Law Society, MARA, OFT or regulators outside NSW. Of those complaints assessed as within jurisdiction, seventy eight and a half percent (78.5%) of written complaints were completed by the OLSC. The professional associations completed the remaining twenty one and a half percent (21.5%).
- Sixty two percent (62%) of those complaints retained and handled by the OLSC were completed within three months of receipt. Eighty four percent (84%) were completed within six months, both well over the internal target set.
- In 2011-2012 the OLSC received 7920 calls from the public on our Inquiry Line, a decrease of 208 on the previous year.

Issues of negligence, communication, overcharging and costs dominated the calls we received on the Inquiry Line. These issues also featured prominently in the written complaints we received.

The Legal and Policy team finalised 416 investigations during the year in review.



Matters that resulted in a disciplinary outcome at the OLSC totalled 84 for the reporting year. The disciplinary outcomes included:

10 legal practitioners were referred to the Tribunal;

- 33 legal practitioners were disciplined by the Commissioner by way of summary conclusion of the complaint; and
- 41 legal practitioners where there was a likelihood of a finding of professional misconduct but dismissed in the public interest.

Those matters dismissed in the public interest were all breaches of the advertising regulations that prohibit the advertising of personal injury legal services.

The complaints were dismissed in the public interest on the basis that they were the first complaints about advertising received against those practitioners.

Of the balance of matters finalised, 163 were dismissed on the basis that there was no reasonable likelihood of a finding

of unsatisfactory professional conduct or professional misconduct were the matter to be referred to the Legal Services Division of the Administrative Decisions Tribunal.

A further 64 investigations were closed on the basis that they were lacking in substance or were frivolous, vexatious or misconceived, where the allegations were the subject of another complaint or where the complainant had failed to provide further particulars.

Seventeen complaints were withdrawn by the complainant prior to conclusion of the investigation. Twelve matters were dismissed without investigation on public interest criteria, predominantly on grounds that the practitioner has already been struck from the roll of practitioners or is suffering from significant ill health and can no longer practise. Seven investigations during the reporting year were suspended pending the outcome of court proceedings.

Copies of the 2010-2011 Annual Report can be obtained in via our website at <http://www.olsc.nsw.gov.au/>

PAPERS/SEMINARS

ETHICS SEMINARS IN FULFILMENT OF RULE 42 OF THE LEGAL PROFESSION ACT 2004 (NSW)

During January and February the OLSC presented numerous ethics and professional responsibility seminars to practitioners in fulfilment of the requirements under Rule 42 of the *Revised Professional Conduct and Practice Rules 1995 (NSW)*. Seminars were delivered to a range of organisations, law firms, in-house legal departments, regional law societies and government organisations.

If you would like the OLSC to present a seminar at your firm please contact us on (02) 9377 1800.



WITHOUT PREJUDICE VIA EMAIL

As indicated in previous issues the OLSC can send out future issues of *Without Prejudice* to you via email. If you would like to receive *Without Prejudice* electronically please contact us at OLSC@agd.nsw.gov.au

Comments ? Suggestions ? Something you'd like to know more about ? Write to the editor Tahlia Gordon at Tahlia_Gordon@agd.nsw.gov.au



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