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Restrictions on Advertising by Claims Harvesters under the Personal Injuries Proceedings (Legal Advertising) and Other Acts Amendment Bill 2006 (Qld)

*The **Personal Injuries Proceedings (Legal Advertising) and Other Acts Amendment Bill 2006 (Qld) (**the Bill**)** was introduced into the Queensland Legislative Assembly on 28 March 2006 by the Minister for Justice and Attorney-General, the Hon Linda Lavarch MP. The Bill will amend the* Personal Injuries Proceedings Act 2003 *(Qld) to extend the existing restrictions on the advertising of legal services to apply to non-lawyers and will amend the* Legal Profession Act 2004 *(Qld) to enable the Legal Services Commissioner to investigate and enforce breaches of those advertising restrictions. Through extending the restrictions to non-lawyers, advertising by 'claims harvesters' – a new phenomenon where non-lawyers advertise that they can assist people with beginning personal injury actions and in finding a lawyer – will now be covered.*

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The ***Personal Injuries Proceedings Act 2003*** **(Qld)** (*PIP Act*) forms part of Queensland's response to rising insurance premiums fuelled by a surge in public liability actions from 2001 onwards. The *PIP Act* sought, among other things, to curb large damages payouts; impose restrictions on costs that lawyers could recover on small damages awards; mandate pre-court procedures; abolish jury trials; and restrict lawyer advertising and touting. During 2003, a number of provisions in the *PIP Act* were transferred to the *Civil Liability Act 2003* leaving the *PIP Act* to cover matters such as procedural pre-court requirements and lawyer advertising restrictions: **pages 1-2**.

As a result of competition policy reforms, lawyers have been permitted to advertise in the print and electronic media since 1995. It has been reported that there was agreement among stakeholders that the growth in the number of damages claims being brought by Australians in the late 1990s and early 2000s was being encouraged by the aggressive advertising practices by some lawyers. **Chapter 3**, **Part 1** of the ***PIP Act*** sets out the restrictions on advertising of personal injury services and touting. While a firm can provide 'no-win-no-fee' services, it cannot advertise that it does so: **pages 2-3**.

The **advertising** restrictions in Chapter 3, Part 1 of the *PIP Act* apply only to lawyers and persons acting for lawyers. The provisions do not apply to non-lawyers. **Pages 3-5** explain the existing restrictions on lawyers' advertising of personal injury services. The **touting** restrictions apply to a range of persons covered by the provisions and the prohibition against payment for touting applies to lawyers as well as non-lawyers. Thus, the touting provisions apply broadly but the advertising provisions apply only to lawyers. These measures are discussed on **pages 5-6**.

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Few **Australian jurisdictions** appear to have imposed restrictions on lawyers' specifically advertising for personal injury services. It seems that only New South Wales, and to a lesser extent, the Northern Territory and Western Australia have laws that restrict non-lawyers from inducing potential claimants to seek out a legal practitioner to make a personal injuries claim. The various measures are discussed on **pages 12-14**.

1 INTRODUCTION

The **Personal Injuries Proceedings (Legal Advertising) and Other Acts Amendment Bill 2006 (Qld) (**the Bill**)** was introduced into the Queensland Legislative Assembly on 28 March 2006 by the Minister for Justice and Attorney-General, the Hon Linda Lavarch MP. The Bill will amend the *Personal Injuries Proceedings Act 2003* (Qld) to extend the existing restrictions on the advertising of legal services to apply to non-lawyers and will make changes to the *Legal Profession Act 2004* (Qld) to enable the Legal Services Commissioner to investigate and enforce breaches of those advertising restrictions.[1] Through extending the restrictions to non-lawyers, advertising by 'claims harvesters'– a new phenomenon where non-lawyers advertise that they can assist people with beginning personal injury actions and in finding a lawyer – will now be covered.

Many jurisdictions have passed laws to restrict the types and methods of advertising by lawyers as part of the recent move by governments to curb the growth in litigiousness of Australians and rein in large damages awards that were contributing to spiralling insurance premiums. Restrictions on lawyer advertising were among the many reforms to tort law, court proceedings and the legal profession that have occurred in the past few years. Further background is provided in the previous Queensland Parliamentary Library publications 'Public Liability Insurance', RBR 2002/07; 'Time for Tort Law Reform?', RBR 2002/19, and 'Reform of Negligence Law - The Queensland Response: The draft Civil Liability Bill 2002', RBR 2003/01.

2 BACKGROUND

The *Personal Injuries Proceedings Act 2003* (Qld) (*PIP Act*) forms part of Queensland's response to rising insurance premiums fuelled by a surge in public liability actions from 2001 onwards. Small non-profit community groups found themselves stretched to the limit in obtaining insurance cover to allow them to hold community fetes and carnivals. At the time, there was considerable division among insurance companies, small businesses, governments and the general public about what factors were contributing to the problem. However, it was considered by some government ministers and eminent lawyers that the pressure on insurance costs was largely caused by the growing litigiousness of the Australian population

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[1] The Bill also amends the *Dangerous Prisoners (Sexual Offenders) Act 2003* to enable the Supreme Court to impose interim detention pending final determination of an application relating to a contravention of a supervision order. These amendments are not considered in this Brief.

and the expectation of large damages payouts – payouts that are made possible only by costly insurance policies.

In March and May 2002, senior Commonwealth, State and Territory Ministers attended a national forum on public liability and agreed on a package of measures aimed at solving the public liability insurance crisis. Among the proposed measures was the reform of tort law and changes to lawyers' practices such as advertising and touting.[2] At the time, the then Federal Assistant Treasurer, the Hon Helen Coonan MP, was reported to have said that while people injured by someone else's negligence should be able to claim, the system had got 'out of whack' and reforms were necessary to bring the balance back.[3]

During a 2002 symposium address, former Chief Justice of the High Court, Sir Harry Gibbs, criticised lawyers and some judges for fostering a system of litigation and exposing deficiencies in the law of negligence.[4]

State and Territory Governments then embarked on various reforms to negligence law. In Queensland, tort reform was given impetus by the findings of the Liability Insurance Taskforce Report.[5] The *PIP Act* was the first of three pieces of legislation seeking to address the problems. The *PIP Act* sought, among other things, to curb large damages payouts; impose restrictions on costs that lawyers could recover on small damages awards; mandate pre-court procedures; abolish jury trials; and restrict lawyer advertising and touting. During 2003, a number of provisions in the *PIP Act* were transferred to the *Civil Liability Act 2003*, leaving the *PIP Act* to cover matters such as procedural pre-court requirements and lawyer advertising restrictions. The *Professional Standards Act 2004* completed the trilogy of remedial legislation, providing for limitations on occupational liability in return for implementing risk management systems.

2.1 ADVERTISING RESTRICTIONS ON LAWYERS

As a result of competition policy reforms, lawyers have been permitted to advertise in the print and electronic media since 1995.

It has been reported that there was agreement among stakeholders that the growth in the numbers of damages claims being brought by Australians in the late 1990s

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2 This issue was discussed in the Research Brief 'Time for Tort Law Reform?' RBR 2002/19.

3 Steve Lewis, 'Crisis draws limited action', *Australian Financial Review*, 28 March 2002, p 3.

4 Editorial: 'Lawyers blamed for crisis', *Courier Mail*, 16 May 2002, p 16.

5 Queensland Government, Public Liability Taskforce Report, February 2002.

and early 2000s was being encouraged by the aggressive advertising practices by some lawyers.[6]

Indeed, a number of lawyers advertised 'no-win-no-fee' arrangements. These arrangements entail the lawyer only charging the client for the cost of their legal services if the client wins the action. Given that legal aid is not available for personal injuries actions, the 'no-win-no-fee' concept is attractive to people who may have a potential claim through being injured through the negligence of another person, but cannot afford the cost of a lawyer to pursue the matter.

It is the possible benefits of the 'no-win-no-fee' arrangements for an impecunious potential client that, at the time of the impending introduction of the *PIP Act*, caused some lawyers to protest against the advertising restrictions. The then Queensland Law Society president, Mr Joe Tooma, agreed that there was merit in stopping sensationalist advertising by a small number of solicitors but was opposed to a blanket ban on advertising by lawyers because he considered that suitable advertising informs an injured person that a 'no-win-no-fee' service is available if he or she cannot otherwise afford to pursue an action. Mr Tooma argued that solicitor advertising was no different to advertising by other professions.[7]

Chapter 3, Part 1 of the *PIP Act* sets out restrictions on advertising of personal injury services and touting. While a firm can provide 'no-win-no-fee' services, it cannot advertise that it does so.

In addition, r 80 of the Queensland Law Society Rules 1987 imposes other advertising restrictions on practitioners. While a practitioner may advertise or promote his or her expertise or practice in any way the practitioner considers appropriate, the advertising or promotion must not be false, misleading or deceptive; and must not contravene the *Fair Trading Act 1989* (Qld) (or the *Trade Practices Act 1974* (Cth) if done by a corporation).

2.1.1 Advertising

The advertising restrictions in Chapter 3, Part 1 of the *PIP Act* apply only to lawyers and persons acting for lawyers. The provisions do not apply to non-lawyers.

A lawyer or a person acting for a lawyer will be taken as 'advertising personal injury services' if they publish, or cause to be published, a statement that may

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6 Craig Johnstone, 'Ducking for cover', *Courier Mail*, 9 May 2002, p 19.

7 Queensland Law Society, 'Public Need Protection in Ad Ban Plan', *Media Release*, 1 March 2002, downloaded from http://www.qls.com.au/p-frame.htm in March 2002.

reasonably be thought to be intended or likely to encourage or induce a person to make a personal injuries claim for compensation or damages; or to use the services of a lawyer in connection with making such a claim: **s 64**. A statement is 'published' if it is published in a printed publication; broadcast by radio or for television; displayed on an Internet website; publicly exhibited in, on, over, or under a building, vehicle or place; or by any of the other means set out in s 64(3).

Section 66 provides that a lawyer or a person acting for a lawyer must not advertise personal injury services except by the publication of a statement that states only the name of the lawyer or the firm of lawyers, contact details and information regarding the area of practice or speciality of the lawyer or firm.

The advertising of the statement must only be done by an 'allowable publication method', the types of which are specified in **s 65**. Those methods are publication by way of a printed publication; publication on an Internet website if the electronic version is merely a reproduction of the statement published in a printed publication and the printed publication is published independently of the lawyer; public exhibition in, on, over, or under a building, vehicle or place; display on any printed document gratuitously sent or delivered to a person or thrown or left on premises or a vehicle (e.g. 'junk mail' or a flyer); or the display on any printed document given to a person as a receipt or record. Note that broadcasting by radio or television is not an 'allowable publication method'. The other types of advertising that are not allowable methods under s 65(2) are public exhibition of the statement in or on a hospital; and the display of the statement on any printed document gratuitously sent or delivered to a hospital or left in a hospital or on any vehicle in the vicinity.

An example that the *PIP Act* gives of advertising that breaches s 66 is '*advertising personal injury services on a 'no-win-no-fee' or other speculative basis*.'

There will be no breach of the provision if the personal injury services are advertised to a person who is already a client; or to any person at the lawyer's place of business; or under any order by a court. Nor will there be a contravention of the restriction if the services are advertised on the lawyer's website provided the advertisement is limited to a statement about the operation of the law of negligence and a person's legal rights under that law and the conditions under which the lawyer is prepared to provide the services.

The maximum penalty for a breach by an individual is $22,500.[8] A lawyer contravening the advertising restrictions may also be charged with professional misconduct.

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[8] 300 penalty units: see s 5 of the *Penalties and Sentences Act 1992* (Qld). If a corporation, the maximum penalty may be up to $112,500: s 118B.

2.1.2 Touting

The touting restrictions apply to a range of persons covered by the provisions and the prohibition against payment for touting applies to lawyers as well as non-lawyers. Thus, the touting provisions apply broadly but the advertising provisions, above, apply only to lawyers. The maximum penalty for touting is $22,500 for an individual.

Section 67 prohibits touting at the scene of an incident at which a person has allegedly suffered personal injury (a potential claimant) or at a hospital after the incident. It provides that, at the scene or at the hospital, a person must not solicit or induce, in a way that would be unreasonable in the circumstances, a potential claimant involved in the incident to make a claim. An example of this 'unreasonableness' given in the *PIP Act* is of a nearby resident who comes to the potential claimant's aid immediately after the incident and, without being asked, telephones a lawyer and insists that the potential claimant speak with the lawyer about a possible claim.

A 'prohibited person' must not, at the scene or at a hospital thereafter, solicit or induce a potential claimant involved in the incident to make a claim. A 'prohibited person' is a person who, for the purposes of the person's employment, is attending the scene of the incident or at the hospital thereafter. An example of such a 'prohibited person' is a tow truck operator, police or ambulance officer, emergency services officer, doctor, or hospital worker.

A penalty also applies if a prohibited person, or a person who obtains information about the incident for the purposes of their employment, gives the potential claimant the contact details of a lawyer or a law firm or of an employee or agent of the lawyer or the firm. It is also an offence for a person, who for the purposes of his or her employment, has contact with the potential claimant mainly because of an incident at or from which a person allegedly suffered personal injury (such as a casualty department worker of a hospital) to do this: s 67(2),(3),(4). In addition, the name and address of a person involved in the incident can only be revealed to a police officer or other persons specified in s 67(5) or (6) or an offence is committed.

However, no offence against **s** 67(3) and (4) is committed if the person, acting on behalf of a community legal service or industrial organisation, gives the potential claimant the details of a particular lawyer or law firm: **s 67A**.

Pursuant to **s 68**, a person (including a lawyer) is prohibited from paying, or seeking payment, for soliciting or inducing of a potential claimant to make a claim or an offence is committed. However, no offence is committed if a person who is neither a lawyer nor acting for a lawyer advertises legal services about claims as part of the ordinary course of their advertising business. Also, no offence is

committed if a lawyer or a person acting for a lawyer charges a fee for professional services provided to the potential claimant as part of making a claim.

In addition to liability for a fine, a person who is convicted of a touting offence who is approved for a regulated profession, type of employment, or calling, may have their approval suspended or cancelled or they may be disciplined for misconduct: **s 69**.

3 CLAIMS HARVESTERS

The restrictions on lawyers' advertising of services are being circumvented by businesses which are known as 'claims harvesters'.[9]

3.1 WHAT IS A 'CLAIMS HARVESTER'?

'Claims harvesters' are non-lawyers who advertise that they can help potential claimants to begin a personal injuries action and assist them to find a lawyer to pursue it. They also advertise that they do not charge the potential claimant for their services. The claims harvester then charges lawyers for case details and it has been reported that these charges can be up to $8,000. That extra cost will ultimately be passed on, as part of the legal costs, to the person who then takes up the offer and goes to the advertised lawyer. [10] This amount will usually be paid out of their compensation or damages payout.

Claims harvesters are able to engage in this advertising activity without constraint because, as non-lawyers, they are not presently covered by the advertising restriction provisions of the *PIP Act*. It has been reported that one claims harvester has radio advertisements that begin with the sound of a siren. Potential claimants are informed that they could get thousands of dollars for injuries incurred at places such as shopping centres, workplaces, sporting grounds, or schools.[11]

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9 Personal Injuries Proceedings (Legal Advertising) and Other Acts Amendment Bill 2006 (Qld), *Explanatory Notes*, p 2.

10 'Beattie aims to curb 'claims harvesters', *CCH News Headlines*, 29 March 2006, http://www.cch.com.au, downloaded 29 March 2006.

11 Darrell Giles, 'Ban on "ambo chase" adverts', *Courier Mail*, 13 November 2005, p 42.

Some lawyers have commented that few law firms use claims harvesters and their methods contribute to the stereotyping of lawyers as 'ambulance chasers' while, at the same time, undermining the 'no-win-no-fee' services provided by some firms.[12]

3.2 NEW SOUTH WALES LEGISLATIVE RESTRICTIONS ON ADVERTISING

3.2.1 The 2003 Advertising Restrictions

Regulations made under s 84 of the New South Wales *Legal Profession Act 2004* (NSW) prohibit the advertising by barristers and solicitors of personal injury services. The tightening of already existing restrictions on such advertising in the Legal Profession Regulation 2002 was brought about by amendments contained in the Legal Profession Amendment (Personal Injury Advertising) Regulation 2003. It is both an offence and professional misconduct to breach the ban. The 2003 amending Regulation prohibited barristers and solicitors from advertising personal injury services in much the same manner, and subject to similar exceptions, as found in the existing restrictions on lawyer advertising under the Queensland legislation. In some respects, the NSW Regulation was more stringent, for example in not allowing any Internet advertising.

3.2.2 High Court Decision in *APLA Limited v Legal Services Commissioner (NSW)*

The validity of the 2003 amending Regulation was challenged on constitutional law grounds by three lawyer groups in *APLA Limited v Legal Services Commissioner (NSW)*.[13] The three plaintiffs were the Australian Lawyers Alliance (formerly the Australian Plaintiff Lawyers' Association – APLA), an association of plaintiffs' lawyers whose members are legal practitioners, which is registered in NSW; secondly, a legal practitioner incorporated in Victoria, NSW and Queensland; and thirdly, a sole practitioner. APLA wished to place an advertisement in the Sydney Yellow Pages directory and newspapers circulating within NSW. The advertisement, directed to people who may have suffered personal injuries, offered the services of APLA members. The second plaintiff wished to continue to advertise in newspapers and on its website. The website allowed material to be downloaded in NSW, Queensland, Victoria and elsewhere.

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[12] Bruce Simmonds, '"No win, no fee" advertising ban is ridiculous', *Online Opinion*, 30 December 2005, http://www.onlineopinion.com.au/print.asp?article=3987.

[13] [2005] HCA 44 (1 September 2005).

It was claimed, among other grounds of invalidity, that the Regulation infringed the implied constitutional right of communication on political and governmental matters and, also, the prohibition against freedom of trade, commerce and intercourse among the states in s 92 of the Constitution. Inconsistency with federal legislation was also alleged.

By a majority of 5 to 2, the High Court held that the Regulation was valid. All of the plaintiffs' arguments were rejected by the majority justices, Gleeson CJ, Heydon J, Gummow, Hayne and Callinan JJ.

On the point concerning restrictions on communication about governmental matters, majority justices Gleeson CJ and Heydon J said that the plaintiffs were "drawing a long bow when they claim that restricting their capacity to advertise for business was incompatible with the requirements of responsible and representative government established by the Constitution". The advertising was commercial in nature.[14] As for whether the prohibition on advertising infringed s 92 of the Constitution, their Honours said that the object of restricting advertising of legal services in NSW could only be achieved by a general restriction on advertising and the impediment to interstate intercourse was no greater than is reasonably necessary to achieve that object.[15] In addition, it was also found that preventing lawyers from advertising did not impair federal legislation, such as the Commonwealth *Trade Practices Act* 1974, as none of the legislation depended for its efficacy upon the unrestricted promotion of legal services and, indeed, most Acts were passed at a time when advertising restrictions were normal.[16]

The two dissenting justices, McHugh and Kirby JJ, found that the Regulation was invalid on the basis that the advertising restrictions interfered with rights given to people to bring causes of action conferred by the exercise of powers by the Commonwealth under Chapter 3 (judicial powers) of the Constitution. Kirby J dissented on a number of other points also.

Thus, the 2003 amendments to the advertising restrictions were held to be valid.

3.2.3 Current Advertising Restrictions in New South Wales

The current advertising restrictions for personal injury services in NSW are found in Part 5, Division 2 of the Legal Profession Regulation 2005 which commenced on 1 July 2005. Subdivision 2 deals with advertising by barristers and solicitors

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14 [2005] HCA 44, para 29.

15 [2005] HCA 44, para 38.

16 [2005] HCA 44, paras 38-39.

and is framed in similar terms to the 2003 amendments, discussed above. However, it also provides that an advertisement will be taken to have been published by a barrister or solicitor if it promotes their availability or use for the provision of legal services; or the barrister or solicitor is a party to an agreement with the person publishing the advertisement that provides for the referral of persons to the barrister or solicitor; or the person advertises on the barrister's or solicitor's behalf. There is an exception for advertising of services provided by community legal centres in connection with domestic violence or discrimination.

Advertising by non-lawyers is covered by subdivision 3 of the Regulation which makes non-lawyers subject to the same advertising restrictions as lawyers. A person must not publish a personal injury advertisement if it advertises the availability or use of a lawyer to provide legal services, or the advertisement includes any reference to, or depiction of, the recovery of money in respect of personal injury. Moreover, a person must not publish a personal injury advertisement if the person is engaged in a practice involving, or is party to, an agreement that provides for, the referral of persons to lawyers for provision of legal services in respect of personal injury. The latter restriction would appear to cover advertising by claims harvesters. Various exceptions also apply.

The Workers Compensation Amendment (Advertising) Regulation 2005 contains similar provisions to those in the Legal Profession Regulation 2005 regarding advertising by lawyers and agents of work injury services.

4 QUEENSLAND MEASURES TO DEAL WITH CLAIMS HARVESTERS

In the wake of the High Court decision in *APLA Limited v Legal Services Commissioner (NSW)*, which upheld personal injury services advertising restrictions in NSW, the Queensland Government announced that it would ban radio and television advertising by claims harvesters. Claims harvesters are managing to circumvent the current restrictions under Chapter 3, Part 1 of the *PIP Act* because they were non-lawyers. It was considered that amendments to the *PIP Act* would be the most likely way to proceed.[17] The Attorney-General, the Hon Linda Lavarch MP, said that she did not wish to restrict the awareness of personal injury compensation or access to information about making a claim but, equally, the Government did not want to encourage people to make frivolous claims that force up the price of insurance premiums.[18]

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[17] Team Beattie, Queensland Labor, 'Queensland to ban advertising by claims harvesters', 13 November 2005, http://www.teambeattie.com.

[18] 'Queensland to ban advertising by claims harvesters', 13 November 2005.

In November 2005, Mrs Lavarch indicated that she would seek further national action on claims harvesters by taking the issue to the Standing Committee of Attorneys-General.[19]

4.1 THE PERSONAL INJURIES PROCEEDINGS (LEGAL ADVERTISING) AND OTHER ACTS AMENDMENT BILL 2006 (QLD)

Accordingly, on 28 March 2006, the Personal Injuries Proceedings (Legal Advertising) and Other Acts Amendment Bill 2006 (Qld) (the Bill) was introduced into the Queensland Parliament to amend the advertising provisions in Chapter 3, Part 1 of the *PIP Act* and to amend the *Legal Profession Act 2004* (Qld).

Clause 10 amends **s 64** of the *PIP Act* by altering the 'meaning of "advertises personal injury services"' to apply not just to a practitioner but, also, to another person, whether or not they are acting for a law practice. This effectively prohibits any person, including claims harvesters, from publishing a statement that may reasonably be thought to be intended or likely to encourage or induce a person to make a damages or compensation claim or use the services of a practitioner. **Clause 11** also amends **s 65** to make it clear that the definition of 'allowable publication method' extends to advertising by not just practitioners but also by another person whether or not acting for a law practice.

Clause 12 replaces **s 66**, leaving the substance of the restriction on advertising the same but now extending it to non-lawyers as well. Thus, again, the only advertising of personal injury services that can be engaged in by a practitioner or another person is by way of an 'allowable publication method' set out in s 65 and restricted to the name and contact details of the practitioner or law practice together with information about any area of practice or speciality of the practitioner or law practice. The same exceptions apply as previously in the **proposed new s 66(2)** (for example, a practitioner, or person acting for the practitioner or a law practice of which the practitioner is a member, can advertise the personal injury services to an existing client or to any person at the practitioner's or the law practice's place of business).

A practitioner who contravenes s 66 may be charged with misconduct in addition to being liable to the penalty provided.

Clauses 13-15 update the terminology used in the touting provisions of ss 67-68 to achieve consistency with the terminology used in the *Legal Profession Act 2004*.

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19 'Queensland to ban advertising by claims harvesters', 13 November 2005.

Section 73A of the *PIP Act* is amended by **cl 16** to enable the Legal Services Commissioner (the Commissioner) or a person authorised by him or her to commence proceedings for an offence against the above provisions regarding advertising restrictions and touting.

A transitional provision is inserted with a **proposed new s 85** providing that the Commissioner may, after the commencement of the new provisions, investigate or continue to investigate, under the *Legal Profession Act 2004*, an act or omission that contravened the advertising or touting provisions of the *PIP Act* as in force before the commencement of the new provisions but not finally dealt with at the time of their commencement. The Commissioner is also able to bring proceedings in relation to the act or omission. Thus, the conduct that contravened the advertising or touting provisions of the *PIP Act* will be dealt with under the *Legal Profession Act 2004* if it has not been finally dealt with before the new provisions commence.[20]

Part 3 of the Bill amends the *Legal Profession Act 2004* regarding investigations of complaints about, and disciplining of, practitioners under Chapter 3 of that Act. A **proposed new s 252A** enables the Commissioner to deal with the conduct of all persons including Australian legal practitioners and law practice employees suspected of contravening the advertising or touting provisions of Chapter 3, Part 1 of the *PIP Act*: **cl 22**. Note that the conduct of both lawyers and non-lawyers can be dealt with by the Commissioner and **s 255** is amended by **cl 23** to make it clear that a complaint can be made about the conduct of any other person who contravenes the advertising or touting restrictions in Chapter 3, Part 1 of the *PIP Act*.

Under Chapter 3, Part 4 of the *Legal Profession Act 2004*, if a complaint is received by the Commissioner and the Commissioner believes an investigation should be started into the conduct of an Australian legal practitioner or a law practice employee, the Commissioner may refer the complaint or investigation to the relevant regulatory authority to investigate and report about. **Clause 24** amends **s 265** to provide for such referral if any person, including a legal practitioner, is suspected to have contravened the advertising or touting provisions of the *PIP Act*.

5 OTHER JURISDICTIONS

Few jurisdictions appear to have imposed restrictions on lawyers' specifically advertising for personal injury services. It seems that only New South Wales (as seen above), and to a lesser extent, the Northern Territory and Western Australia

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[20] See also the amendment to s 250 of the *Legal Profession Act 2004* inserted by **cl 21** of the Bill.

have laws that restrict non-lawyers from inducing potential claimants to seek out a legal practitioner to make a personal injuries claim. In the case of non-lawyers, it would probably be a matter of assessing whether the advertising in question offends against the 'unfair practices' provisions of the relevant *Fair Trading Acts* in each jurisdiction (or the Commonwealth *Trade Practices Act 1974*, if done by a corporation).

5.1 AUSTRALIAN CAPITAL TERRITORY

The ACT Law Society's Professional Conduct Rules 2003, r 39 allows practitioners to advertise provided the advertising is not false, misleading or deceptive, sensational, vulgar or such as to bring the practitioner or the profession into disrepute. Practitioners should also consider carefully any claim to specialty.

A practitioner can communicate with a non-client with a view to obtaining their instructions for business provided that the material used in such communication complies with the foregoing requirements and it does not involve undue influence, coercion, duress, harassment or nuisance. The practitioner must not communicate with a person who has made it known that they do not wish to receive such communications. In addition, a practitioner must not do, or permit in the carrying on of his or her practice, any act or thing that may reasonably be regarded as calculated to attract business unfairly.

There do not appear to be any laws directed at non-lawyers' advertising of personal injury services.

5.2 NORTHERN TERRITORY

Part XA (ss 130AA-130AD) of the *Legal Practitioners Act* (NT) deals with advertising services for personal injury claims. A practitioner must not publish a statement that may reasonably be thought to encourage or induce a person to make a personal injury claim and use the services of a practitioner or legal practice to do so. To 'publish' is broadly defined in a similar way to that under s 64(3) of the Queensland *PIP Act*. However, a practitioner can advertise the name and contact details of the practitioner or the practice and details of any area of speciality provided it is done in accordance with the 'permitted methods' specified (which are similar to the 'allowable publication methods' set out in s 65 of the *PIP Act*). In addition, the restriction on personal injury advertising will not apply if the statement is published in accordance with the professional conduct rules.

There is also a prohibition (ss 130AE-AF of Part XA) against touting for potential claimants by persons at the scene of an incident or at a hospital after the incident. A person must not reward another person for soliciting or inducing a potential

claimant to make a claim or seek a reward for doing the soliciting or inducing of the potential claimant. These provisions effectively cover non-lawyers.

Part XA does not apply to advertising by a practitioner in situations specified in s 130AA. Those include advertising which educates people about the content of the law or their rights, liabilities and duties under it; advertising to identify persons who could become parties to a class action; advertising pursuant to a statutory duty; or advertising exempted by the *Legal Practitioners Regulation* regs 11 and 12.

5.3 VICTORIA

The Victorian Professional Conduct and Practice Rules 2005 allows a practitioner to advertise provided the advertising is not false, misleading or deceptive or where it is ordered to cease on the basis of being undesirable: r 35. In addition, a practitioner must not use the words "*'no-win-no-fee', … or any similar expression or indicate that the practitioner is willing to enter into a conditional costs agreement unless the advertisement states, and in sufficient detail and prominence to be readily intelligible to a potential client, if conditions apply, the words "conditions apply". An example of such conditions is "the agreement does not cover the other party's legal costs or any disbursements incurred" (if such conditions are applicable)*": r 35(5).

The Law Institute of Victoria has published some advertising ethics as a guide to what is and what is not acceptable advertising.

There do not seem to be any specific restrictions on non-lawyers engaging in the advertising of legal services.

5.4 SOUTH AUSTRALIA

The Law Society of South Australia's Rules of Professional Conduct and Practice 2003, rule 36, allows advertising provided it is not false; not misleading or deceptive; is not likely to bring a practitioner, the profession or the legal system into disrepute; and is not defamatory of another practitioner. Rule 36.2 warns practitioners about taking care with advertising that claims expertise or specialty in a particular field.

There do not appear to be any specific laws or rules covering legal advertising by non-lawyers.

5.5 TASMANIA

The Tasmanian Law Society's Rules of Practice 1994 covers advertising by practitioners in rules 7 and 8. Under r 7 advertising is permitted provided it does not contain a statement the practitioner knows to be false; and is not misleading or deceptive; and does not make or imply comparison with another practitioner; and is not vulgar, sensational or of a nature as to bring the practitioner, legal profession or legal system into disrepute. Again, care should be taken if the practitioner seeks to advertise a claim of specialty or expertise in a field of law.

Rule 8 prohibits practitioners from directly or indirectly doing any act or thing that may be regarded as attracting business in an offensive manner; or using harassment or coercion; or calculated to attract business unfairly.

The provisions do not appear to cover other persons.

5.6 WESTERN AUSTRALIA

The *Civil Liability Act 2003* (WA) deals with advertising legal services relating to personal injury and touting in Part 3. The restrictions on lawyer advertising in ss 16-18 are similar to those under those currently in the Queensland *PIP Act* and apply to legal practitioners and persons acting for a legal practitioner. They do not appear to extend to non-lawyers. Permitted advertising is limited to contact details and can only be by one of the methods set out in s 18 (which does not include a radio or television broadcast).

There is also a ban on touting by any person at the scene of an incident where a potential claimant may have suffered personal injury or at a hospital afterwards. The provisions are very similar to those in ss 67-69 of the *PIP Act*.

APPENDIX A – MINISTERIAL MEDIA STATEMENT

Hon. Linda Lavarch MP, Justice and Attorney-General

28 March, 2006

Curbs on 'claims harvesters' introduced into Qld Parliament

The Beattie Government today introduced legislation into the Queensland Parliament to restrict advertising by so-called claims harvesters.

Attorney-General Linda Lavarch said claims harvesters were non-lawyers who offered free advice about personal injury claims but only wanted to sell people's case histories on to lawyers.

Advertising by claims harvesters tells people they can get tens of thousands of dollars for injuries in places such as work, shopping centres, sporting events or schools.

Claims harvesters charge lawyers up to $8000 for case details. This extra, unnecessary cost is eventually passed on to the injured person, to be paid out of any compensation they receive.

"I am not prepared to let these ambulance chasers get a toehold in Queensland," Mrs Lavarch said.

"The Beattie Government has led the way in changing the US-style 'sue for anything' mentality that has contributed to spiralling insurance costs," she said.

"This includes passing the *Personal Injuries Proceedings Act 2002* to prevent lawyers advertising personal injury services on radio and television," she said.

"However, claims harvesters avoid the existing law because they are not lawyers."

Claims harvesters do not provide people with advice or assistance in making a claim – they simply want to onsell their details for profit.

Mrs Lavarch said the *Personal Injuries Proceedings (Legal Advertising) and Another Act Amendment Bill 2006* would mean claims harvesters would face the same advertising bans as lawyers.

Lawyers cannot advertise personal injury services on radio or TV.

They can advertise in print but the advertisement can only give the name of the lawyer or legal firm, along with information about any area of practice or specialty.

Under the new legal changes, the Legal Services Commissioner is able to take complaints, investigate and prosecute both lawyers and non-lawyers for breaches of advertising restrictions.

Mrs Lavarch said the Queensland Law Society and Australian Lawyers Alliance had alerted her to the problem of claims harvesters.

“We have taken strong steps to prevent a US-style compensation culture in this State and I do not want claims harvesters getting in the back door,” she said.

“It is only fair that claims harvesters face the same advertising restrictions as lawyers and companies acting on behalf of lawyers.

“We do not want to restrict awareness of personal injury compensation or restrict access to information about claiming compensation,” she said.

“Equally we do not want to encourage people to make frivolous claims that can force up the price of insurance premiums.”

Media inquiries: Paul Childs 323 96400 or 0407 131 654.

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