

Assessment of Professional Performance: where doctors tread, will lawyers dare to follow?

Richard Gulley was awarded his AM for services to the Law and to the legal profession. He is the coordinator of the [Lawyers' Assistance Program](#) which was established by the Law Society of New South Wales in April 2001. He is a solicitor of some 40 years standing and has served on many Law Society committees, including the Professional Conduct Committee, which he chaired from 1993 to 1996. He was also the Law Society's representative on the New South Wales Legal Aid Commission for 19 years, until 2000. He is currently deputy president of the Mental Health Review Tribunal.

When I was first contacted by Dr Mal Stuart earlier this year, he asked me if I would consider delivering a paper to tonight's meeting on the Lawyers Assistance Program or LAP, as it is known. We had earlier had the opportunity to discuss assistance schemes afforded to lawyers and doctors.

Assessing professional performance

It was later suggested that my paper would address the issue *Assessing the Professional Performance of Doctors and Lawyers*. That was an interesting topic, particularly having regard to the fact that we have virtually no mechanisms in place for undertaking a performance assessment of a lawyer other than the regulatory processes involved in the [Legal Profession Act 2004](#) and its predecessor the [Legal Profession Act 1987](#). That process is in effect a conduct or disciplinary process which may eventually lead to proceedings being commenced in the [Legal Services Division of the Administrative Decisions Tribunal](#) where a range of penalties may be imposed by the Tribunal, including the ultimate penalty of removal from practice.

Assessing capacity

Having said that, the Act does provide for some assessment to be made of a practitioner's capacity. In considering whether the Council will renew, grant, suspend or cancel a practising certificate the Council may require a practitioner to undergo a medical examination by a medical practitioner nominated by the Council ([s. 105](#)). This examination, I understand, is usually achieved with the agreement of the practitioner and without the need for a Council resolution.

Assessing fitness to practise

Sections [42](#) and [48](#) of the Act deal with fitness to practise and the capacity of the Council to impose conditions on the practitioner's practising certificate. The fit and proper requirements under sections 42 and 48 relate to matters other than medical, although one would imagine that under section 48(3), the Council would use that power to make a determination that a practitioner was not a fit and proper person on medical grounds and would take action in relation to that practitioner's practising certificate.

'Show cause'

The Act also defines a 'show cause' event which requires a practitioner to disclose to the Council the fact that the practitioner has become bankrupt, has been served with a Creditor's Petition or has suffered a conviction for a serious offence or a tax offence. Upon disclosing a show cause event, the practitioner must then provide evidence within a tight time-frame to the Council as to reasons why the practitioner considers himself or herself a fit and proper person to hold a practising certificate. I am informed that very few of the convictions are drug-related and that most are charges of low- to middle- range prescribed concentrations of blood alcohol.

An assessment process

The temptation on my part was simply to respond and to confirm my original thoughts, but this was possibly a trifle negative. I was provided with a considerable amount of material concerning the

performance assessment procedures of the NSW Medical Board, including a document entitled *Executive Summary*. The more I read of that summary, the more I became convinced that there was merit in considering proposals for an assessment process as far as the legal profession was concerned.

Possible further amendment of the *Legal Profession Act 2004*

I find the proposition attractive to remove what are clearly capacity or performance problems or indeed minor complaints from the disciplinary process and into a process where peer assessment may well lead to a resolution of the problem in a manner favourable to all parties. However such an approach would require substantial amendment to the *Legal Profession Act 2004*. As this Act, which I will speak of later in this paper, commenced as recently as October 2005, I doubt that it would be seen to be practical to undertake a major overhaul of the conduct provisions. Having said that, it would, in my view, be completely proper to undertake further investigation of an assessment system as it could apply to the legal profession.

I now turn to the further discussion of the Lawyers' Assistance Program (LAP) which, it was originally agreed, would form the basis of my paper to you this evening.

Taskforce established

Towards the end of the 1990's, there was a general feeling, at least at Law Society Council level, that we had in our midst a number of seriously disturbed practitioners who were clearly in need of some form of assistance. The Council resolved to set up a taskforce to consider ways in which an assistance scheme could be put in place to assist solicitors in difficulties.

Senior Solicitors' Scheme

At the time, we had the Senior Solicitors' Scheme, which consisted of a number of senior practitioners available to give advice, particularly in the area of disciplinary proceedings.

Lawcare

We also had in place [LawCare](#), an assistance scheme, designed to put practitioners in touch with Dr Ian Chung, a General Practitioner experienced in dealing with medical problems affecting the professions.

The taskforce under the Chairmanship of Robert Benjamin, a then member of the Executive Committee of the Law Society, conducted extensive research into the areas of assistance schemes, including looking closely at schemes involving legal practitioners and the medical profession, both in Australia and overseas.

Funding of *Lawcare* (formerly *Solcare*) in the UK

The taskforce was particularly interested in an assistance scheme originally known as *Solcare*, which had at that stage only recently been set up in the United Kingdom with funds from the solicitors' indemnity insurer. This was an interesting position, as the indemnity insurer saw the wellness of the profession as being of paramount importance in reducing claims upon the insurer. When in the United Kingdom, I took an opportunity to discuss the scheme with those involved. They were enthusiastic about its success to date and its potential.

The Lawyers' Assistance Program (LAP) in NSW

As a result of our enquiries, it was resolved to establish a scheme similar to the United Kingdom scheme. Funding was sought from, and approved by, the Law Society.

The Management Committee of the LAP

A management committee comprises a number of senior practitioners, many involved in the early stages of the formation of the program. The Chairman is Norman Lyall AM, a former President of the Law Society and the former senior partner of Ebsworth & Ebsworth. The committee includes myself, Dr Ian Chung, who was involved in the discussions from the outset and whose input is greatly appreciated, Mr John Currie, a senior practitioner in the Sydney CBD, Ms Margaret Hole AM, a former President of the Law Society and senior practitioner in the Sydney CBD, the

Reverend J McPherson, who was previously with St James Church in Phillip Street Sydney, and Mr Doug Humphries, from the Government sector.

The Lawyers' Assistance Program - 2001

The LAP commenced its operations in January 2001. Prior to the commencement of operations, the committee appointed me as co-ordinator, to run the day-to-day activities and to consult with members of the profession who sought assistance. A toll-free telephone line [1800.777.662] was put in place and advertising commenced on a small scale. As the LAP did not have substantial funds, the committee utilised whatever areas it could to advertise to the profession, including *The Law Society Journal*.

The reasons for my selection as co-ordinator were essentially that I had, at that stage, over thirty years experience in the profession, with twelve of those spent on the Law Society Council with six as Chairman of the Professional Conduct Committee. We rightly anticipated that quite a number of contacts from members of the profession would involve problems with the disciplinary process. While on that particular reason for contact, I might point out that the New South Wales legal profession is probably one of the most highly regulated professions in Australia.

The regulatory process in NSW

The regulatory process for solicitors involves the [Office of the Legal Services Commissioner](#) and The Law Society. Those two bodies deal with a substantial number of complaints by members of the public every year.

Early inquiries to the LAP

Initially contacts were few, but by the end of March 2001, the LAP had been consulted by 18 practitioners. That might seem a very low number, but what needs to be taken into account is the fact that we had little to spend on advertising. In fact, the committee was somewhat surprised at the number, having regard to the fact that, over an equivalent period of time in the United Kingdom in the early days of their scheme, they had fewer contacts from their more than 60,000 practitioners compared with our 18,000 plus.

Profile of solicitors contacting the LAP

Contacts with the LAP grew steadily, until by August 2007, the LAP had had over 900 contacts. From the initial contacts, we were able to develop a profile of the practitioners contacting the LAP. The practitioner was likely to be a male, sole practitioner in suburban Sydney, with over 10 years in practice. This profile tended to mirror that of the practitioners subject to the greatest number of complaints in the disciplinary system and of claims on the indemnity insurer.

Mail-outs

As a part of its awareness program, the LAP, within about twelve months of commencing, had mailed-out advice about its services to all practitioners in NSW. This has since been done twice, the last occasion being June this year. Following each mail-out, there has been a noticeable increase in the number of contacts. This confirmed to the committee the need to consider mail-outs and the like on a fairly regular basis. Despite the expense, they would seem the best way of establishing contact. There is some anecdotal evidence that only about 30% of the profession reads the monthly *Law Society Journal*, the main medium for advertising the services of the LAP.

A changing profile

As the number of contacts grew, the nature of the persons contacting the LAP and the reasons for contact have changed. Initially, the bulk were male suburban practitioners and the reasons many and varied. After several years, the trend became contact by more young women practitioners, the majority working in the Sydney CBD.

Young female practitioners from the CBD

The common thread was depression. It would be fair to say that, during the years that the LAP has been operating, there has been a substantial increase in the number of women lawyers practising in NSW. Many are employed in major Sydney CBD firms.

Anxiety and bullying

One of the major reasons for contacting the LAP was depression, arising particularly from difficulties in the workplace, including problems associated with bullying. Some of the information passed to the LAP would indicate that bullying is a serious problem for the profession. The Law Society perception that it was becoming a problem was confirmed by the LAP's statistics. Excessive work hours and very demanding schedules in relation to work were causing anxiety and depression amongst. The difficulty is in addressing these problems. Clearly some major firms need to look at their work practices and to institute procedures for addressing the grievances of staff. In my view, it is simply not good enough to pass the problem to the Human Relations Department of the firm which tends, at times, to mirror the attitude of the hierarchy.

Depression

While we at the LAP do our best to counsel and assist, it is obvious that the problem needs to be addressed elsewhere. As the number of contacts with the LAP have continued to increase, it has become clear that depression is causing many practitioners to contact the LAP. Our concerns were reinforced by the results of a survey, the Beaton Consulting Annual Profession Study released in April 2007.

[The Beaton Consulting Annual Profession Study, 2007](#)

Beaton Consulting conducts an annual survey of professionals in Australia. *beyondblue* was requested to include a series of questions in relation to mental health issues. The findings of the survey in respect of the legal profession were alarming. The survey of over 7,500 professionals indicated higher than average levels of depression when compared with the general public. I quote:

“Statistical analysis demonstrates that respondents from legal professions particularly, were more likely to report moderate to severe symptoms of depression when compared with the total sample.”¹

Depression in younger practitioners

The younger professionals had higher rates of depressive symptoms than their older colleagues. It was also clear that the number of respondents who used alcohol or other non-prescription drugs to attempt to feel well was highest in the legal profession.

Drug and alcohol abuse

These figures tended to match the figures of the LAP, apart from the figures concerning the use of alcohol or non-prescription drugs to obtain a feeling of wellness. The LAP has little statistical information on that.

Depression and legislative reform

As far as the LAP is concerned, depression in the legal profession has its starting point in many areas. I have already touched on the causes of depression or anxiety amongst young women. It must be understood that the legal profession has gone through some very drastic changes over the last six or seven years. Those changes have had a dramatic impact on the income of the average practitioner.

The impact of legislative reform

I exclude the major Sydney CBD commercial firms, as these changes did not, in my view, dramatically affect them. The impact was mainly in the smaller city firms, and the suburban and regional practitioners. Due to a number of substantial reforms introduced by the NSW government,

¹ The Beaton Consulting Annual Professions Study April 2007 page 2 of the research summary.

personal injury work has virtually disappeared from the legal landscape. Conveyancing, another staple of suburban and regional firms, is being constantly eroded by the impact of licensed conveyancers. Competition between legal firms to obtain this work has resulted in ridiculously low charges which cannot meet overheads. There is, of course, the need to constantly update in respect to changes in the law and particularly to comply with the requirements of the *Legal Profession Act 2004*, which commenced in October 2005.

The Legal Profession Act 2004

This Act, incidentally, is the largest piece of legislation ever passed in the history of the Parliament. It comprises 739 sections, together with a vast number of regulations. It has already been amended twice. There is also a very large body of 'Professional Conduct and Practice Rules'. By way of contrast, the *Medical Practice Act 1992*, regulating the medical profession, contains 199 sections. The impact on the profession of the *Legal Profession Act* was substantial and is continuing.

The Regulatory Compliance Unit

The Law Society had earlier seen fit to establish within the Society the Regulatory Compliance Unit to assist practitioners with enquiries in relation to regulation and, in particular, to assist with inquiries concerning trust account regulations and the impact of the new legislation and regulations on the running of their practices. This unit has been of great assistance to practitioners. The unit has been able to refer practitioners with problems to the LAP, which has, in turn, been able to utilise the resources of the unit in referring practitioners for assistance.

Increase in the number of legal practitioners

It must also not be forgotten that the profession has increased to now number 21,049 holding Law Society practising certificates, comprising 15,086 practitioners in private practice, 3,600 in corporate practice and 2,353 in government practice. Many are seeking to make a living in an area where the traditional avenues of work have substantially declined. Today's clients are much more sophisticated, aware of their rights and more demanding of their service providers. Clients are also much more inclined to complain to the Legal Services Commissioner or the Law Society if they believe the standard of a practitioner's work is not what they expected.

Limited resources

Can we do more, and can we do it better? I think so. Steve Mark, the Legal Services Commissioner, is reported as having recently said words to the effect that we have limited resources, our programs are usually run by one person, we are reactive and not proactive. The LAP accepts those comments. Steve Mark went on to say, it is reported, that the programs could not deal with the multitude of personal problems faced by lawyers.

Funding for professional assistance

We, like all organisations of a similar nature, have a funding problem. Additional funding would allow us to engage the services of professionals from other disciplines to assist troubled practitioners. We have had discussions with psychologists and counsellors skilled in this area who would be prepared to assist. It is only fair, however, that they be paid a reasonable fee. Many of the practitioners who contact the LAP are extremely short of funds. If we could build up our funding base, we could provide funds for at least a limited amount of counselling to get practitioners back on their feet and to give them some direction.

beyondblue

The LAP has recently had discussions, which will continue, with persons involved with the Regulatory Compliance Unit with a view to conducting a series of sessions for practitioners, involving *beyondblue*. There is no doubt that bringing the expertise of those involved with organisations such as *beyondblue* to the profession could be of enormous assistance to practitioners who are suffering from depression and anxiety - provided that we can get them to attend such sessions or at least to talk to us.

The consequences of depression

People with depression or anxiety problems are reluctant to talk about it. Experience tells us that it is difficult to recognise such symptoms in other people. An example of this arose tragically in the last twelve months when a young practitioner took his life. When I talked about it to others who were practising in his area, they had had no idea that he was that depressed. It is those whom we do not know about until it is too late who must be our greatest worry.

Conclusion

The LAP, LawCare, the Regulatory Compliance Unit and the Senior Solicitors' Scheme are all endeavouring to ease the burden on the profession and to provide assistance where required.