Justice and Other Legislation Amendment Bill 2023

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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street Brisbane Qld 4000

by email: lasc@parliament.qld.gov.au

RE JUSTICE AND OTHER LEGISLATION AMENDMENT BILL 2023

Dear Committee Secretary,

We refer to the above matter and write to provide a written submission in respect of proposed amendments to cost disclosure obligations under the *Legal Profession Act 2007*.

Summary

In summary, our submission is this:

1. We welcome the proposed lifting of the threshold for 'detailed disclosure';
2. We oppose the extent of the matters to be disclosed for 'detailed disclosure' or proposed 'abbreviated disclosure';
3. We doubt that 'abbreviated disclosure' is desirable or necessary;
4. Our objections to the extent of costs disclosure is based on the following:
   a) Many of the matters that are required to be disclosed are reasonably obvious and border on platitudes;
   b) The common law already provides legal consumers with protection if matters relating to costs are not disclosed to them beforehand;
   c) Some of the matters that are required to be disclosed are confusing or irrelevant;
   d) The number of matters that need to be disclosed mean that less attention is likely to be given by legal consumers when asked to read such long legal documents in compliance with law firm obligations, which means that information they may really want is going to be harder to find or may even be overlooked, thereby undermining the entire purpose of costs disclosure;
   e) Such excessive regulatory burden results in solicitors having to spend more of their time on attending to costs disclosure requirements, which ultimately is against the interests of clients; and
   f) Given the consequences of non-disclosure, the way the law operates and the proposed amendments, the other main effect of onerous costs disclosure obligations is that it makes it easier for clients who simply do not wish to pay their

legal bills to use the provisions of the *Legal Profession Act* to evade paying their just debts by deterring lawyers from recovering them.

We provide an explanation for matters (a)-(f) below.

Obvious matters

Section 308(1) of the *Legal Profession Act* among other things requires lawyers to disclose the following matters to their clients:

1. the client's right to negotiate a costs agreement with the law practice;
2. the client's right to receive a bill from the law practice;
3. details of the person whom the client may contact to discuss the legal costs; and
4. that the law of this jurisdiction applies to legal costs in relation to the matter.

In our view, the above matters are reasonably obvious to nearly anyone who has capacity to provide instructions to a lawyer. Anybody who has dealt with a tradesperson, real estate agent, accountant, doctor or other professional person would know that the costs of service providers are ordinarily the subject of agreement, that a bill will ordinarily be provided, that one may request the bill before paying or at a later stage, as the case may be.

Similarly, other than perhaps in large firms, clients would in practice know who they may discuss their concerns about costs. Even when they don't, they can always ask, and that should almost always result in them knowing who they may contact to discuss the legal costs.

Mandatory provisions that require these things to be disclosed to clients are in our view superfluous. In the writer's long experience in the law, he is not aware of one case where disclosure of the above matters assisted any consumer of legal services.

Common law

In our view, some requirements of the *Legal Profession Act* seem to duplicate the common law, and are unnecessary for those reasons.

For instance, the requirement that the basis on which legal costs will be calculated be disclosed to the client is also an essential requirement of a legally binding contract. In order for a contract to exist, there must be sufficient certainty of terms. Any agreement which does not provide enough information or is silent on the amount of the remuneration is void for uncertainty: eg *Whitlock v Brew* [1968] HCA 71. For these reasons, the common law requires that the basis on which legal costs will be calculated be provided to the client in order for there to be a contract. Absent a binding contract, a Court may later have to determine the amount of the legal costs, and in many cases that would result in a cost assessment.

Similarly, the requirement for the disclosure of the basis on which legal costs will be calculated be in writing is also unnecessary because the common law for centuries has generally not allowed solicitors to rely on oral retainers.

Denning LJ in *Griffiths v Evans* [1953] 2 All ER 1364, 1369 stated that:

> *"On this question of retainer, I would observe that where there is a difference between a solicitor and his client on it, the courts have said for the last 100 years or more that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it."*

These comments were cited with approval in *Adamson v Williams* [2001] QCA 38 at [19].

Confusing or irrelevant

Interest

Section 308(1)(e) of the *Legal Profession Act* requires lawyers to disclose the rate of interest that the law practice charges on overdue legal costs, as well as whether that rate is a stated rate of interest or is a benchmark rate of interest to their clients. Section 308(2) says that a benchmark rate of interest is a rate of interest for the time being equal to or calculated by reference to a rate of interest that is stated or decided from time to time by an ADI or another body or organisation, or by or under other legislation, and that is publicly available.

In order to comply with this obligation, we now advise our clients in this way:

> *"If bills remain unpaid for 14 days of becoming due for payment, interest will be charged on the unpaid amount(s) at a rate equal to the prescribed rate provided for at section 59(3) of the Civil Proceedings Act 2011 at the date of the bill. This is a benchmark rate of interest. A benchmark rate of interest is a rate of interest for the time being equal to or calculated by reference to a rate of interest that is stated or decided from time to time by an authorised deposit-taking institution within the meaning of the Banking Act 1959 (Cwlth) or another body or organisation, or by or under other legislation, and that is publicly available."*

Needless to say, any person is not a sophisticated client as defined by the *Legal Profession Act* (and therefore does not require any costs disclosure) would find this paragraph to be confusing or meaningless. Lots of words, no benefit to legal consumers.

Rights under a corresponding law

Section 308(1)(l) of the *Legal Profession Act* requires lawyers to disclose the following matters to their clients:

1. information about the client's right to accept under a corresponding law a written offer to enter into an agreement with the law practice that the corresponding provisions of the corresponding law apply to the matter; and
2. information about the client's right to notify under a corresponding law, and within the time allowed by the corresponding law, the law practice in writing that the client requires the corresponding provisions of the corresponding law to apply to the matter.

In the vast majority of retainers between lawyers and clients, such rights are irrelevant because the client, the solicitor, and the Court, if the matter is litigated, are all situated in the same state.

In the writer's long experience in the law, he has never been asked by a consumer of legal services for his firm to enter into an agreement with them under an interstate law or for corresponding provisions of an interstate law to apply.

In the writer's long experience in the law, he is not aware of one case where this has occurred. Nearly all clients and the vast majority of solicitors would not be aware of the differences in regulation of the legal profession between Queensland and other states.

Lack of benefit to legal consumers

We have pointed out how many of the matters required to be disclosed to clients under the *Legal Profession Act* are superfluous, irrelevant or confusing.

Section 308 of the *Legal Profession Act* implicitly assumes that clients have a great deal of interest in knowing about all of their legal rights, which law applies to the agreement and related matters. In the writer's long experience in the law, in practice clients tend to be primarily interested in having lawyers provide services to them, and obtaining the best outcome possible in their legal matter. Clients are also interested in knowing how much it is going to cost them, but from our observations often little else relating to their legal costs.

It is normally only after a dispute with a lawyer has arisen that close attention will be paid to costs disclosure.

Because most clients have little interest in reading long documents containing confusing and irrelevant information, no doubt in many cases they may overlook or forget the matters about which they do wish to know about. This undermines the purpose of the costs disclosure regime.

> *"A lawyer's time and advice are his stock in trade"*
> - Abraham Lincoln

Furthermore, the more resources that law practices need to devote to complying with their costs disclosure obligations, the more legal services will cost, because those costs are inevitably passed onto consumers. For these reasons, we respectfully submit that costs disclosure requirements should not be unduly onerous.

In addition, there is a higher risk that there will be a minor omissions from firms making costs disclosure in accordance with their obligations.

The *Legal Profession Act* provides the following consequences for any non-disclosure, no matter how minor:

1. the client or associated third party payer, as the case may be, need not pay the legal costs unless they have been assessed: Section 316(1);
2. the client or associated third party payer may also apply under section 328 for the costs agreement to be set aside: Section 316(3);
3. the law practice must pay the costs of the costs assessment: Section 342(2);
4. on an assessment of the relevant legal costs, the amount of the costs may be reduced by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose Section 316(4); and
5. Failure by a law practice to comply with this division is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any Australian legal practitioner, or Australian-registered foreign lawyer, involved in the failure: Section 316(7).

The effect of such provisions is that the small minority of dishonest clients who are willing to advance any allegation or use any device at their disposal in order to delay or avoid having to pay their just debts can misuse the cost disclosure provisions for such purposes. In practice, this either results in lawyers writing off their fees entirely or engaging in long, bitter costs disputes in the Courts which result in use of significant Court resources over time at cost to Queensland taxpayers.

It is apparent from the above that the consequences of not complying with costs disclosure can potentially be very serious indeed. A practitioner can potentially find himself in quintuple jeopardy.

For all these reasons, we submit that costs disclosure obligations be limited to matters that honest clients ordinarily really want to know. Ultimately, such changes will benefit clients and lawyers alike by having clients informed of what they want to know and the lawyers they appoint being more free to focus on advancing their interests.

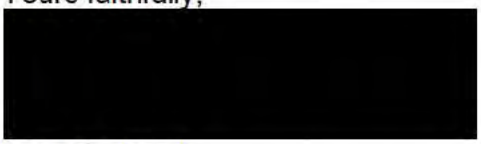
Summary

We note that in contrast to Queensland, section 174 of the *Legal Profession Uniform Law* that applies in other states requires far less matters to be disclosed to clients. We would suggest that an approach more in line with the *Legal Profession Uniform Law* would be desirable.

For the reasons set out in this submission, we submit that 'abbreviated disclosure' is unnecessary and undesirable when client's fees are capped up to $3,000. The common law provides sufficient protection for clients whose retainers with their lawyers are modest and limited.

Finally, we submit that the number of matters to be disclosed to clients under Section 308 of the *Legal Profession Act* are excessive, and ultimately do not benefit clients. Our view is that the matters to be disclosed to clients about their legal costs should be confined to what they would ordinarily regard as important.

Yours faithfully,



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