

## **REPORT ON MATTERS CONCERNING VIRTUAL PRACTICE**

### **Purpose of this Report**

This Report examines an example of the provision of information by legal practitioners through a particular internet based ‘question and answer’ service (“the service”).

The Committee notes that the Bar Council recently considered a barrister’s use of the service in consideration of a Professional Conduct Committee (“PCC”) report.

This report examines the service as an aspect of practice development within the broader notions of “virtual practice” and the compliance and regulatory matters raised by the PCC.

The Committee notes that the service – or services similar to it – represent a very different practice model to that normally associated with the use of computer technology in a traditional model of practice at the Bar.

### **The service**

The Executive of the New South Wales Bar Association identified the service as being appropriate for consideration.

The Committee undertook an overview of the service to identify its apparent operation. However, the Committee did not purchase information or provide information for sale through the service, as that approach was considered inappropriate.

An examination of the service indicates that it appears to operate as follows:

(a) The service provides a facility whereby persons professing expertise can register with the service to be available to provide information in response to persons using the service requesting information. The registered “experts” include legal practitioners from different jurisdictions, including Australia.

(b) The nature of the verification of the expertise is not immediately apparent. It is assumed that verification of qualification is not onerous.

(c) The service appears to work by persons seeking information posting questions and the registered experts proffer an answer. The person requesting the information can then accept the answer and that person is then required to make payment. If the answer is not accepted, no payment is required. A person requesting information must register with the service and must pay the service a fee which is then held by the service until the person requesting information approves payment to the expert proffering the answering by accepting the answer.

(d) The fee which is paid for the information varies and appears to range from about AUD\$27 to AUD\$84. The Committee was unable to identify whether larger fees were paid because the areas available for public viewing appeared to all relate to this level of payment. The service takes a component of the fee.

(e) From a review of the questions proffered and the answers supplied, it may be appropriate to describe the inquiries as being general and the answers being general, but in the main relating to legal advice. Further, the answers lack content specific to a legal outcome and having a tendency to suggest referral to legal practitioners operating in the traditional model. Indeed, it was apparent that some of the registered experts had identities that permitted easy identification of their traditional legal practice (*viz.*, solicitors and their practices).

(f) It also appears that there is a facility for the person seeking information and for the person who proposes to answer to exchange further 'chat' requests for information and provision of information.

(g) The service provides a variety of statements disclaiming liability that the service may have in respect of the questions asked and the information provided.

### **The PCC Report**

The PCC report dealt with a barrister who used the service in the period March 2010 to April 2010. The PCC did not conduct an investigation and but relied on materials supplied by the barrister in response to its preliminary enquiries.

The PCC:

(a) Noted that while an investigation as to the character of the information conveyed and the nature of the advice had not been performed, on proper consideration of the circumstances it was conceivable that the barrister may have been providing "legal services" to a "client" within the LPA and the NSW Barristers' Rules.

(b) If legal services to a client within the LPA and NSW Barristers' Rules had been provided, then issues arose as to whether there had been compliance or breach of ss.312, 309, 322 and 252 of the LPA (costs agreements, disclosures and use of trusts) and NSW Barristers' Rules 80, 81, 82, 16, 17, 17A, 17B and 75 (direct access disclosures, sole practitioner rules, duties to client and barristers' work);

(c) If legal services to a client within the LPA and NSW Barristers' Rules had been provided, the preliminary view was:

(i) that costs disclosure in accordance with Rule 80 was required and had not been provided;

(ii) the disclosure of the likely cost by the service was not consistent with s.309;

(iii) the purported limitation sought to be imposed by the service on the contractual relationship (that no professional relationship is created and the relationship

is information and education) was to be contrasted with the fact of the provision of legal advice by a barrister and may be inconsistent with a barrister's other professional obligations and may give rise to a conflict between the ordinary obligation of a barrister to give comprehensive advice;

(iv) the service's deposit arrangement – including refund regime and commission regime – likely constituted a breach of s.252.

## **Consideration**

The Committee's review suggests that in many cases the answers provided represent legal advice – albeit at a small fee – and, therefore, “legal services” to a “client” within the LPA and the NSW Barristers' Rules. It is also apparent that some answers are limited to information and education.

The Committee's review also highlighted instances where the legal advice provided was incorrect and represented legal advice that had been provided with haste and without consideration of broader – but important – considerations. Furthermore, that the nature of the service – or similar services – encourages (by its payment terms and structure) incomplete legal advice.

The Committee shares the PCC concern that the service – or similar services – would have a tendency to create a situation where legal advice provided by a barrister would be necessarily incomplete and incompatible with the barrister's ordinary professional obligation to provide legal advice.

The Committee – for the same reasons as the PCC Report – cannot reach any final conclusions as to the service – or similar services – concerning compliance and regulatory issues because those matters will depend on the particular circumstances.

The Committee considers that matters identified by the PCC Report are such that barrister's using the service – or similar services – are likely to encounter the regulatory and compliance issues identified and the professional obligation conflict identified and discussed above. The Committee considers that these matters are substantial reasons against Barristers pursuing this business model.

The Committee considers that the service – or similar services – are difficult to reconcile with the NSW Barristers' Rules concerning direct access and will likely give rise to compliance issues as to those matters.

## **Conclusion**

The Committee does not generally endorse the identified service – or similar services – as being a suitable and appropriate direction of practice development to be pursued by members of the Association.

The Committee considers:

- (a) The regulatory and compliance issues and the professional obligation conflict identified by the PCC Report are substantial reasons against barristers pursuing this business model.
- (b) If Barristers wish to pursue this business model, the barrister should satisfy himself or herself that there is compliance with the LPA, LPA Regulations and the NSW Barristers' Rules.