



# Disclosure obligations for public authorities

By Phillipa Alexander

**S**ection 312(1)(c)(viii) of the *Legal Profession Act* 2004 (NSW) (LPA) provides that disclosure under s309 or 310(1) does not have to be made if the client is a 'public authority' of a jurisdiction or the Commonwealth. 'Public authority' is defined in s302 LPA as 'an authority or body (whether a body corporate or not) established or incorporated for a public purpose by a law of a jurisdiction or of the Commonwealth, and includes a body corporate incorporated under a law of a jurisdiction or of the Commonwealth in which a jurisdiction or the Commonwealth has a controlling interest.'

Some public authorities tender for their legal services, and s312(1)(d) LPA also exempts a practitioner from disclosure where the legal costs, or the basis on which they will be calculated, have been agreed as a result of a tender process.

These provisions appear relatively straightforward in exempting a practitioner from having to make statutory disclosure under the LPA to a public authority. However, difficulties can arise where disclosure has voluntarily been made to an exempt client at the outset of a matter in which disclosure is routinely stated to apply under s309 LPA and such disclosure is not properly updated. Section 316 LPA provides that 'a law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this division as soon as is reasonably practicable after the law practice becomes aware of that change.' It appears arguable that having volunteered disclosure, a practitioner may become obliged to update that disclosure under s316 as there is no specific provision exempting public authorities or other exempt clients from the benefit of that provision. It may then be open to the client to argue non-disclosure under Division 3 of Part 3.2 LPA and the practitioner may become subject to the 'failure

to disclose' provisions of s317, whereby the client need not pay the legal costs and the law practice may not proceed to recover legal costs unless the costs have been assessed. Section 317 also enables a client to apply to set aside a costs agreement, and a costs assessor can reduce the costs on assessment proportionate to the seriousness of the failure to disclose. Where disclosure is made to an exempt client, practitioners may wish to make it clear that the information is being provided on a basis other than by way of statutory obligation under s309 LPA.

The main area of complaint by public authorities, in the writer's experience, is the failure by practitioners to update the estimate of legal costs. In *Cameron v Campbell Paton & Taylor*, Kirby J considered that, where costs had significantly increased without further disclosure, there was a *prima facie* failure to comply with the obligation under the former LPA to disclose an increase in the estimated costs. This failure disentitled the law practice from pursuing proceedings without first assessing their costs.

Practitioners should endeavour to monitor and, where necessary, update their estimates of costs on a regular basis. Failure to provide proper estimates appears to be one of the primary motivators for a public authority to seek an audit of its legal costs. This is an increasing trend, which can often lead to a practitioner having to substantially reduce his or her charges and/or put the relationship with the client at risk. ■

**Note:** 1 *Cameron v Campbell Paton & Taylor* [2009] NSWSC 121.

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