Contingency fees must be ruled out

The subject of contingency fees for lawyers is back in the headlines once again.

The costs of accessing justice are an ever pressing concern in our community, but the introduction of contingency fees is no answer.

Barristers owe their paramount duty to the administration of justice. Each barrister is an officer of the court, with an obligation to maintain high standards of professional conduct. To do so each barrister must avoid a conflict between his or her duty to the courts, to their clients, to their fellow professionals and his or her personal interest. It is only on this basis that as a profession barristers are able to serve the public.

The New South Wales Bar Association has consistently opposed allowing lawyers to enter contingency fee arrangements. The Association remains of the view that contingency fees cannot be implemented without adversely impacting upon both litigants' interests and lawyers' duties.

Victoria has moved to introduce contingency fees for plaintiff solicitors in representative proceedings like class actions, which is regrettable.

The Commonwealth Attorney General has now announced a parliamentary inquiry to consider the potential impact of proposals to allow contingency fees and ramifications for lawyers, amongst other matters. This inquiry is a welcome development, and comes at a critical time for users of Australia's justice system when trust in the legal profession has been put under the spotlight.

The legal profession needs to reassert its opposition and explain to policy makers why such proposals are so fraught and contrary to the public interest.

The practise of law is and should remain a profession driven by ethics, not a business driven by profit.

This distinction is basic and important. It is enshrined in our laws, which strictly regulate what lawyers can charge and make it unlawful to bill for legal costs that are not fair and reasonable in all the circumstances of a case. It is currently unlawful in NSW and Victoria to enter into a costs agreement to charge legal fees calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates, and for good reason.

The distinction is also enshrined in lawyers' ethical duties, which include to avoid any conflict between their own interests and their client's.

And it is inherent in barristers' special obligations, which include to act independently and provide services of the highest standard unaffected by any personal interest in the outcome of the case.

The Association has previously warned that allowing lawyers to hold a direct financial interest in the outcome of a case risks seriously compromising the lawyer's paramount duty to the court, the overriding duty of candour and, possibly, their duty to their client. It fundamentally undermines the independence of the Bar by creating the appearance of a conflict between a client's interest and the barrister's own interest, which can be just as damaging to the profession's reputation as an actual conflict of interest.

The Parliamentary Joint Committee on Corporations and Financial Services will consider whether contingency fees could result in less financially viable results for plaintiffs. The inquiry will also consider the ramifications of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement.

It follows recommendations by the Australian Law Reform and Victorian Law Reform Commissions that solicitors acting for the representative plaintiff in class action proceedings should in limited circumstances be permitted to enter into contingency fee agreements.

I disagree with those recommendations. With respect to both Commissions, allowing contingency fees would substantially lessen the independence and impartiality of legal practitioners.

Lawyers must act without fear or favour, avoid any compromise to their integrity and professional independence, and not engage in conduct that is materially like to prejudice or diminish public confidence in the administration of justice or bring the profession into disrepute.

To extend entrepreneurial litigation to the very person arguing the case is inconsistent with such notions of professional detachment.

The empirical case for change has not been made out. In particular, there is a dearth of evidence to support the central argument put forward by those calling for the introduction of contingency fees, namely, that it would improve access to justice.

Nor have ethical concerns been sufficiently addressed, or safeguards proposed. In fact, contingency fee regimes are so inimical to lawyers' professional responsibilities it is difficult to see how any effective safeguards could be formulated.

The New South Wales Bar Association continues to work closely with our members, as well as with the Office of the Legal Services Commissioner and governments, to protect the public interest by promoting best practice cost disclosures and charging.

But the legal profession must oppose contingency fees in view of our ethical considerations and professional obligations. In the view of the New South Wales Bar Association, these cannot be reconciled.

Tim Game SC