LEGALWISE SEMINAR
26 JUNE 2014

THE NEW LEGAL PRACTITIONERS ACT

POWERS OF THE COMMISSIONER
INVESTIGATION / CONCILIATION / DISCIPLINE

Greg May
Legal Profession Conduct Commissioner

The *Legal Practitioners (Miscellaneous) Amendment Act 2013* (**Amending Act**) makes major amendments to the *Legal Practitioners Act 1981* (**LP Act**). All lawyers need to be aware of the changes – they will have a significant impact on the way all lawyers go about their day-to-day business.

In this paper, I will be looking mainly at the changes the Amending Act will make to the disciplinary system that governs the legal profession.

Various provisions of the Amending Act came into operation on 17 April 2014 – but none of those provisions that have early operation are all that relevant to most lawyers. More importantly, on 5 June 2014 the Governor proclaimed that the remaining provisions of the Amending Act would come into operation on 1 July 2014. Also, the *Legal Practitioners Regulations 2014* (**Regulations**) have now been gazetted.

The structural change to the system is that the Legal Practitioners Conduct Board will cease to exist on 30 June 2014, and from 1 July 2014 complaints against lawyers and investigations into suspected "misconduct" by lawyers will be handled by the Legal Profession Conduct Commissioner. The disciplinary system in which the Commissioner will operate will be significantly different to the present system.

In relation to its impact on the disciplinary system for lawyers, it seems to me that the Amending Act really had 2 main objectives:

- first, to expand the range of conduct that might amount to "misconduct" – in particular, to include a "fit and proper person" test that relates to conduct both in practice and outside of it; and

- second, to make the disciplinary process a more efficient one, both for the lawyer and the client who complains of his or her conduct – with this (hopefully!) to be achieved by giving the Commissioner wider disciplinary powers, such that appropriate disciplinary action can (except in the case of very serious misconduct) be taken by the Commissioner and there will therefore be a reduced need for charges to be laid against a lawyer in either the Tribunal or the Supreme Court.

That is of course a bit of an over-simplification. There are other things that the Amending Act brings into the LP Act relating to the disciplinary system. For example, with the toughening up of the costs disclosure provisions (which I'm not dealing with in any detail in this paper – but which are extremely important!), the disciplinary system now needs to be better able to deal with costs complaints. And, from a consumer protection point of view, there is the new public register of disciplinary action that I must maintain. I have tried to deal with most of these other issues in this paper, even if only briefly, but I will inevitably focus on the provisions that relate to the 2 main objectives that I've set out above.

1. **Misconduct definitions**

   The definitions of misconduct will be changed significantly by the Amending Act. Under new sections 68 and 69, misconduct will be defined in virtually identical terms to the definitions that apply in other States and Territories.

   Although there will only be 2 defined terms – ie "unsatisfactory professional conduct" and "professional misconduct" – there will essentially be 3 types of misconduct:

   - **unsatisfactory professional conduct** – a lawyer's conduct in respect of his or her practice **falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner**;

   - **professional misconduct (no. 1)** – a lawyer engages in unsatisfactory professional conduct (ie as defined above) on a **substantial or consistent** basis, such that he or she **fails to reach or maintain a reasonable standard of competence and diligence**;

   - **professional misconduct (no. 2)** – a lawyer engages in conduct, **either in practice or otherwise**, which means that the lawyer is no longer a **fit and proper person** to practise the profession of the law.

These new definitions are only relevant to conduct that occurs on or after 1 July 2014. If the conduct occurred before 1 July 2014, then it can only be considered under the existing, narrower definitions. That is the case regardless of when the complaint is made, or when the investigation commences – ie whether before or after 1 July 2014. [*Clause 14(2) of the Transitional Provisions – Part 4 of Schedule 2 to the Amending Act.*]

New section 70 of the LP Act will specify certain types of conduct that are "capable of constituting misconduct" – that is, this conduct won't necessarily amount to misconduct, but there's a pretty good chance that it will! For example:

- breaching the LP Act, the regulations or the legal profession rules;
- charging excessive legal costs;
- being convicted of a "serious offence", a "tax offence" or an offence involving dishonesty (the first two of which will be defined terms in clause 5 of the LP Act);
- becoming insolvent;
- failing to comply with an order of the Disciplinary Tribunal.

Not surprisingly, the new disciplinary provisions to be included in the LP Act refer constantly to "*unsatisfactory professional conduct*", "*professional misconduct*" and "*unsatisfactory professional conduct or professional misconduct*". In this paper, I will refer to these various types of conduct simply as "misconduct". If in any case the distinction between the 2 definitions is important, then I'll use the full term.

2. Transitional Provisions

There are transitional provisions in the Amending Act that set out the way in which I will assume the conduct of matters that are currently before the Board that do not resolve before 30 June 2014 – whether those matters are already before the Supreme Court / Tribunal, or simply where the Board hasn't yet completed an investigation or made a final resolution.

These transitional provisions are in clause 13 of Part 4 of Schedule 2 to the Amending Act. I won't go into detail here as to how they will work, as that will only be of real interest to a small number of lawyers who are currently involved in a complaint / investigation by the Conduct Board. But essentially:

- any unresolved complaints, incomplete investigations, and Tribunal / Court proceedings that aren't then finalised, will all transfer from the Conduct Board to the Commissioner on 1 July 2014;
- in any such matter that I assume:
  - the lawyer's conduct will still be measured by reference to the "old" misconduct definitions; but
  - my powers to deal with that conduct will be the substantially stronger powers that I have been given compared to those of the Conduct Board.
- if any such matter that I assume is a complaint of overcharging, then I must continue to investigate and deal with that complaint in accordance with the new powers relating to overcharging.

My office will be writing to all lawyers and complaints who are involved in such matters in early July to explain exactly how the transitional provisions will operate.

I should also mention that the Board's staff (as at 30 June 2014) will be employed in my office as from 1 July 2014. It is likely therefore that anyone involved in a matter that isn't resolved before 30 June will just continue to deal with the same person in relation to an ongoing complaint, investigation or Court / Tribunal matter.

3. **Disciplinary Powers**

New section 77J of the LP Act will set out the Commissioner's powers in relation to misconduct. In very general terms:

- I need first to be "satisfied that there is evidence of" misconduct – and to be so satisfied, that evidence will need to be **admissible, reliable and substantial evidence** that would in my view be sufficient to sustain a charge in the Tribunal;
- if I find that a lawyer's conduct amounts to misconduct, then I could lay a charge before the Tribunal – but I can determine not to do so if I consider that I can adequately deal with the misconduct under section 77J.

If I find **unsatisfactory professional conduct**, but I consider that I can adequately deal with it by any 1 or more of the following (ie instead of laying a charge), I can:

a) reprimand the lawyer;
b) order the lawyer to apologise to the client;
c) order the lawyer to redo the work complained of, either at no cost or for reduced fees;

d) order the lawyer to pay the costs of having the work complained of redone (ie by another lawyer);
e) order the lawyer to undertake training, education or counselling or be supervised;
f) impose a fine not exceeding $5,000;
g) impose certain conditions on the lawyer's practising certificate.

[*Section 77J(1)(a)*]

And, if the lawyer consents to me doing so, I can also do any 1 or more of the following:

a) if I believe the lawyer may be suffering from a range of conditions (eg illness, physical or mental impairment, disability, addiction to alcohol) that is detrimentally affecting his or her ability to practise:
    i. order the lawyer to submit to a medical examination and to undertake any treatment recommended by the medical practitioner; or
    ii. order the lawyer to receive counselling, or to participate in a program of supervised treatment or rehabilitation designed to address behavioural problems, substance abuse or mental impairment;
b) order the lawyer to enter into a professional mentoring agreement;
c) make orders with respect to the examination of the lawyer's files and records;
d) impose a fine not exceeding $10,000;
e) suspend the lawyer's practising certificate for up to 3 months;
f) require the lawyer to pay a specified amount, or do or refrain from doing a specified act in connection with legal practice.

[*Section 77J(1)(b)*]

I will mention "professional mentoring agreements" in more detail in paragraph 4 of this paper.

If I find **professional misconduct**, if the lawyer consents, and if I consider that the conduct can be adequately dealt with by me exercising any 1 or more of the powers set out above (ie instead of laying a charge), then I can do so – but noting the following differences:

a) I may impose a higher fine of up to $20,000;
b) I may suspend the lawyer's practising certificate for up to 6 months.

[*Section 77J(2)*]

It's worth just briefly comparing these powers with the much more limited powers of the Conduct Board. Essentially, if the Conduct Board was "satisfied that there is evidence of" misconduct (ie the same test that I will have), and if:

- the Conduct Board was satisfied that the misconduct was "relatively minor" and could be adequately dealt with in the following way; and
- the lawyer consented to this course,

then the Conduct Board could determine not to lay a charge before the Tribunal and could instead exercise any one or more of the following powers:

a) reprimand the lawyer;
b) order the lawyer to undertake training, education or counselling;
c) impose conditions on the lawyer's practising certificate relating to the lawyer's legal practice;
d) make an order requiring the lawyer to make a specified payment (whether to a client or to any other person) or to do or refrain from doing a specified act in connection with legal practice.

So, the Conduct Board had a much more limited range of options available to it, and it could only exercise any of those options if the misconduct was minor and if the lawyer consented. Otherwise, it had no choice but to lay a charge before the Tribunal.

It's therefore reasonable to expect that my office will be laying a lesser number of charges in the Tribunal than did the Conduct Board.

4. **Professional Mentoring Agreements**

As mentioned previously, section 77J says that in certain circumstances I can order a lawyer to enter into a "professional mentoring agreement". The provisions relating to PMAs are set out in section 90B, and in Part 4 of the Regulations.

Section 90B provides that the lawyer concerned can enter into a PMA with either the Commissioner or the Law Society. There's no requirement that the lawyer enter into an agreement with the professional mentor – and I think the most likely thing is that the professional mentor will also enter into an agreement with the Commissioner / Law Society (as appropriate), rather than with the lawyer.

The obligations of a professional mentor so appointed are set out in section 90B(3):

a) to provide guidance to the practitioner in relation to the conduct of the practitioner's practice and the meeting of his or her professional obligations; and

b) to carry out the duties, obligations and powers prescribed in the Regulations; and
c) to report on the practitioner and the practitioner's practice as required by the Regulations to the Society and, if the appointment was made under an agreement entered into with the Commissioner, the Commissioner.

The Regulations really don't add that much in relation to the duties of a professional mentor. Regulation 7(1) says that a professional mentor has the following duties:
a) to act in good faith;
b) to maintain confidentiality in his or her dealings with the practitioner, and in particular to maintain confidentiality in respect of the practitioner's practice and the practitioner's dealings with the profession at large;
c) to respect the relationships between the legal practitioner and his or her staff, professional colleagues and clients;
d) to meet with the practitioner as required under the professional mentoring agreement.

The Regulations also don't tell us much about the professional mentor's reporting obligations. Regulation 7(2) just says that the mentor will report as required by either the Society or me – although it says it in a slightly confusing way.

So, it remains to be seen as to how useful these PMAs will be in practice. I am working closely with the Law Society to determine how best we can each utilise the new PMA provisions, so that the mechanism can achieve its purpose, which is clearly to help lawyers who are "off the rails", or ideally those who are about to leave the rails but haven't quite done so just yet!

One hurdle to the success of a PMA arrangement may well be the need for the lawyer concerned to pay the professional mentor in relation to his or her role. Regulation 8 says that the lawyer who is being mentored has to pay the mentor's fees based on the Supreme Court scale of costs, as well as the mentor's reasonably incurred expenses. At a time when the lawyer concerned is struggling in the first place, that may be a bit problematic.

5. **Laying of charges**

If I find misconduct, and if I don't think that any of the disciplinary powers I've set out above are adequate, then I **must** lay a charge before the Tribunal.

It seems to me that I am likely to lay a charge mostly in the following scenarios:

a) where I find professional misconduct, and it is sufficiently serious that the lawyer should be struck off;
b) where I find professional misconduct that may not warrant the lawyer being struck off, but my disciplinary powers aren't sufficient to deal with the conduct appropriately – eg the conduct warrants a suspension of more than 6 months, or a fine of more than $20,000;
c) where I find misconduct, but (in those circumstances where I need to get the lawyer's consent) the lawyer doesn't consent to me exercising the disciplinary power I consider appropriate.

In the first of those scenarios (ie professional misconduct that is sufficiently serious that the lawyer should be struck off), then I may be able just to institute proceedings directly in the Supreme Court without first having to lay a charge before the Tribunal.

6. **Appeals**

New section 77K will say that any decision I make under section 77J to exercise one of these disciplinary powers may be subject to an appeal to the Tribunal, either by the complainant or the lawyer (except that obviously the lawyer can't appeal in circumstances where he or she has consented to me exercising a particular power – in which case only the complainant can appeal).

This type of appeal is an entirely new process in the disciplinary system.

There will most likely be new Rules of the Tribunal to cater for this new type of appeal. We expect that we will get at some stage soon, either through those Rules or in some other way, some guidance as to exactly what form the appeals will take, and how they will be run.

7. **Investigations**

I will be obliged to investigate any complaint I receive about a lawyer, and I also must investigate a lawyer's conduct if I am directed to do so by the Attorney-General or the Society. Even without a complaint or a direction, I may decide on my own initiative to investigate a lawyer's conduct if I have reasonable cause to suspect misconduct.
[*Section 77B*]

Having said that, section 77C also gives me the ability to close a complaint at any stage, without having to consider its merits any further. Some of the circumstances in which I can do so are where:

- the complaint is vexatious, misconceived, frivolous or lacking in substance;
- the complainant doesn't respond, or responds inadequately, to a request for further information;
- the complainant unreasonably fails to cooperate in the investigation or conciliation of the complaint;
- the subject matter of the complaint has been or is already being investigated, whether by me or by another authority;
- I don't have power to deal with the complaint (eg it is about negligence, not misconduct);
- I am satisfied that it is otherwise in the public interest to close the complaint.

I will have significantly wider powers when investigating a complaint than those currently available to the Board. Those powers will be set out in Schedule 4 to the LP Act.

Essentially, in various ways (eg by giving a notice, and in some circumstances by executing a search warrant) I can:

a) require a lawyer to produce any specified document, to provide written information, or to otherwise assist in, or cooperate with, the investigation;
b) obtain from a lawyer's practice access to any documents, or any other information, relating to the lawyer's affairs;
c) require any other person (which may include a non lawyer) to allow access to documents relating to the affairs of a lawyer.

Anyone who is asked to so produce, assist, cooperate, provide etc, must comply with the requirement. The maximum penalty for not doing so is $50,000 or imprisonment for 1 year. A lawyer who fails to co-operate or comply may also be guilty of misconduct.

8. Conciliation

My current expectation is that, in appropriate circumstances, if a complaint is successfully conciliated between lawyer and complainant, then I will be able to bring the complaint / my investigation to an end more easily than could the Conduct Board. The Conduct Board took the view (quite properly under its legislation) that a potential misconduct issue couldn't be conciliated – that is, even if a complaint was successfully

conciliated between lawyer and complainant, the Conduct Board still needed to investigate the underlying conduct issue.

My current intention is that:

- if a complainant walks out of a conciliation and he or she is "happy" (which I'll assume from the fact that the conciliation has been successful!);
- if at the time that the matter goes from an investigation to a conciliation, my investigator hasn't seen anything that could give rise to a reasonable cause to suspect misconduct on the part of the lawyer; and
- if the lawyer doesn't have a "history" of misconduct,

then the complaint will almost certainly be closed at the end of the conciliation (subject to compliance by the lawyer with the terms of the conciliation agreement).

So I am hopeful that conciliation will be able to be used more extensively, and hopefully more effectively, than it could under the current regime.

9. **Overcharging**

The new provisions relating to complaints of overcharging is a part of the new disciplinary system that in my view will impact on just about every lawyer, at some stage in his or her career.

If a client believes that they have been overcharged by their lawyer, then they can make a complaint to me about it. The new mechanism for dealing with complaints of overcharging is set out in section 77N.

If a complaint is made to me within 2 years of the client receiving the final bill to which the complaint relates then **I must investigate it**. If the complaint is made to me outside of that 2 year period, then **I may investigate it**.

Incidentally, in that respect it seems to me that there isn't necessarily any "start date" for a complaint about a bill to be made to me. That is, section 77N doesn't relate just to bills which are raised after 30 June 2014. If, for example, a client received a bill from a lawyer in (say) December **2012**, and if the client complains to me about it in July 2014, then section 77N will apply and I **must** investigate the complaint etc. Even if a bill complained of was received by the client in (say) December 2011, and if the client

complains to me about it in July 2014, then section 77N will apply to it and I **may** investigate the complaint etc.

There will be some circumstances where I may determine not to investigate a complaint, even if it is made within the 2 year period – for example, if I determine that the complaint is frivolous, or if the bill complained of is already the subject of civil proceedings between the client and the lawyer. I would consider that under section 77C.

I can require a fee to be paid before investigating an overcharging complaint, but I don't propose to do so – at least until I see how the new system works in practice.

Once I receive a complaint of overcharging, the first step will usually be to consider whether the complaint can be sorted out by agreement between the parties, most likely through conciliation.

If conciliation doesn't resolve the dispute, then I will determine what I think is a fair and reasonable amount of legal fees for the work done. If the amount I determine is less than the amount that has been charged, then I can recommend that the bill be reduced (or, if already paid, that there be a refund). This type of recommendation will not be binding – but at the very least, I would hope that it is persuasive.

If my recommendation isn't accepted (by either or both the lawyer and the complainant), then:

- if the amount in dispute is more than $10,000, I am unlikely to be able to do too much else (although I could determine that an adjudication by the Supreme Court is appropriate, and if there is gross overcharging then that may of itself amount to misconduct);
- if the amount in dispute is $10,000 or less, I may make a **binding** determination as to whether or not there has been overcharging and, if so, the amount that has been overcharged.

As to the second of these possibilities, before I can make a binding determination, I must:

- have the costs assessed by a suitably qualified legal practitioner (ie one who I consider is properly qualified to make that assessment);

- give both the complainant and the lawyer details of the assessment; and
- invite both the complainant and the lawyer to make written submissions to me within a nominated period (which must be at least 7 days).

At the end of that process, and having had regard to any submissions I receive, I can make a binding determination as to whether or not there has been overcharging and, if so, the amount that has been overcharged.

There are various rules set out in section 77N and Schedule 3 as to how any recommendation / determination I make ties in with an adjudication by the Supreme Court. For example:

- I am able to institute proceedings in the Supreme Court for an adjudication, and must do so if I'm ordered to do so by the Tribunal;
- if I am investigating a complaint, I have to stop that investigation if the bill is referred to the Supreme Court for adjudication (whether by the client or presumably by me);
- a determination I make under section 77N will not be binding on the parties in the face of a subsequent adjudication by the Supreme Court;
- in conducting a subsequent adjudication, the Supreme Court must (amongst other things) have regard to any recommendation I have made under section 77N that the charges be reduced;
- if an application for an adjudication of costs is made after I have made a determination under section 77N, the applicant is required to pay the costs of the adjudication, unless the Supreme Court orders otherwise – but in determining whether to make such an order, the Supreme Court must have regard to the extent (if any) to which the result of the adjudication is more favourable for the applicant than my determination.

It's also worth noting the following actions that might also arise at or following an adjudication:

- if the Supreme Court considers that the legal costs charged by a law practice are grossly excessive, the Court must refer the matter to me so that I can consider whether I should take any disciplinary action;
- if the Supreme Court considers that there is any other matter that may amount to misconduct by the lawyer, the Court may refer the matter to me so that I can consider whether I should take any disciplinary action.

My final comment in dealing with the subject of overcharging is that I expect that there will be a larger number of complaints of overcharging that are made – many more than has been the case under the current regime. That is because:

- the extensive requirements for costs disclosure that are to be brought in by the Amending Act actually require most clients to be advised at least twice in the course of a matter (from opening the matter to billing it) that they can "make a complaint to the Commissioner" if they believe they have been overcharged; and
- the new system under which I can make a binding determinations in relation to a dispute concerning $10,000 or less will undoubtedly be attractive to many clients.

In relation to the first of these factors (ie costs disclosure), that disclosure needs to be made on or with virtually **every bill that is sent to a client on or after 1 July 2014** (subject to the operation of the transitional provisions). The only bills that escape that requirement are those that relate to a "sophisticated client" – which will be defined by reference to clause 13(1)(c) and (d) of Schedule 3 of the LP Act. There are a couple of comments that are worth making about that:

- first, in circumstances where costs disclosure doesn't need to be made to a client at the start of a matter – eg if the fees aren't likely to exceed $1,500 – the client's ability to complain to the Commissioner about overcharging must still be disclosed on or with the bill (but for sophisticated clients); and
- second, even though this disclosure doesn't need to be made to a sophisticated client, a sophisticated client is still entitled to complain about overcharging under section 77N.

10. **Register of Disciplinary Action**

I will be required by section 89C to maintain a public register of lawyers who, after 1 July 2014, are subject to certain types of disciplinary action. No such register has previously been maintained in this State.

A finding of professional misconduct against a lawyer (whether made by the Supreme Court, the Tribunal, or by me) **must** be displayed on the Register. A finding of unsatisfactory professional conduct **may** be displayed on the Register.

The Register will show what order(s) was made – such as whether the lawyer was struck off, suspended from practice, reprimanded, fined or similar. Links to relevant decisions of the Tribunal and to judgements of the Supreme Court will be provided.

In relation to disciplinary action taken before 1 July 2014, I will have discretion as to whether to display it on the Register. At the moment, I intend only to display information in relation to prior disciplinary action if it involves:

- a lawyer who was struck off, and who hasn't been subsequently re-admitted to practice;
- a lawyer who has been suspended from practice or placed under supervision for a period of time, but only if that suspension or supervision is still in effect as at 1 July 2014.

The Register will be available on the Commissioner's new website, which will (from 1 July 2014) be available at www.lpcc.sa.gov.au. I hope that the website will also be a useful resource both for members of the public and for any lawyer against whom a complaint is made.

Greg May
Legal Profession Conduct Commissioner