MEMO

My responses to some of the evidence that has been given to the Commission are set out in Part A of this memo.

In Part B of this memo, I have also provided some comments on the draft recommendations contained in section 6 in the Commission's Draft Report. Those draft recommendations deal with (amongst other things) costs / charging issues and complaints avenues for legal service consumers. I have attempted to describe where the South Australian system already contains the type of things that are recommended.

As you noted in your email to me, the South Australian situation is "a little bit unusual" in that our regulatory arrangements have only just (as at 1 July 2014) seen significant changes. The *Legal Practitioners (Miscellaneous) Amendment Act 2013* (**Amending Act**) has made major amendments to the *Legal Practitioners Act 1981* (**Act**), and these changes have had a major impact on the disciplinary regime in SA.

In making these submissions, I thought it might be helpful if I provided a copy of a paper that I presented recently in the lead up to 1 July. I hope it helps with your understanding of the changes that have been made to the Act by the Amending Act. I am happy to discuss any of those changes with you.

PART A

I will start these submissions by referring to the transcript of the evidence given by Mr Johnson and Mr Snow which you sent me (at http://pc.gov.au/_data/assets/pdf_file/0004/137578/20140605-adelaide-access-justice-transcript.pdf).

Mr Johnson's evidence

1. Page 359 – "*I have read a lot of submissions from what I would call vested interests, saying that the system of regulation is [sic] South Australia is satisfactory with the Legal Practitioners Conduct Board.*"

   I think that the fact of the very significant changes to the disciplinary regime in South Australia, including the replacement of the Conduct Board with a Commissioner, suggests that the submissions that Mr Johnson might have been referring to did not "win the day"!

   Mr Johnson goes on (same page) to refer to the deficiencies in section 77AB of the Act. That section has been repealed as at 1 July 2014. I could expand on why section 77AB wasn't perhaps quite as bad as Mr Johnson thinks, but to do so seems a bit pointless now that the section is gone.

2. Page 359 – "*I have numerous pieces of correspondence from the board telling me the board does not have power to adjudicate to make binding determinations in respect of legal costs.*"

   Mr Johnson is right in saying that the Conduct Board did not have the power to make binding determinations in respect of legal costs. But the mechanism by which we will deal with overcharging complaints has changed very substantially as a result of the Amending Act. Section 77N of the Act now provides that the Commissioner can make binding determinations where the amount in dispute is less than $10,000.

   It's also worth me noting that, as part of the new costs disclosure regime, most clients will be told at least twice that they can complain to the Commissioner if they think they have been overcharged. The first time is at the start of a matter under the new costs disclosure requirements in Schedule 3. The second is on virtually every bill that is sent to a client on or after 1 July 2014. So, in matters where interim bills are sent, the client will potentially be told many times. (There are some exceptions to those requirements, and I'm happy to expand on them if you want, but essentially they relate to "sophisticated clients" and to bills on matters that commenced before 1 July 2014 – although the latter exception only applies until 1 July 2015.)

3. Page 359 – "*As I say, I can read other comments from the board and it seems to me, having read all of them, the board is very forthcoming in telling me what they can't do but I actually haven't been able to find anything they can do, to be perfectly honest . . .*".

   I think that the Board would be amongst the first to admit that its hands were somewhat tied by restrictive legislation. Hopefully at least some of those restrictions have now been removed by the passing of the Amending Act.

4. Page 361 – "*The board has limited power to intervene in all but the most blatant cases. The lay observer was ineffective and the ombudsman's power, who looked at it as well, I found them to be quite helpful but they said all they can do is look at administrative processes. They can't actually substitute and say, "You have made a wrong decision. We disagree with your decision." All they seem to be able to do is to say, "Have you filled in this piece of paper and have you gone through the proper process?" The final thing is that the cost of taxation of bills acts as a severe deterrent to justice.*"

Major changes have been made in this respect by the Amending Act. The Commissioner has much broader powers to discipline lawyers, although they do not go so far as to give any jurisdiction over mistakes / matters of negligence. The Commissioner must still find "misconduct" (as more broadly defined now as a result of the Amending Act) before he or she can exercise those disciplinary powers.

There is no lay observer any more – that position was removed by the Amending Act. Instead there is a new appeals process, involving appeals by the complainant and (potentially) the lawyer, to the Legal Practitioners Disciplinary Tribunal.

5. Page 365 – "*Firstly, I note that in the board's website and all their discussion papers, they talk about mediation, and that was talked about right at the outset, but it was never proceeded any further with, and I know the ombudsman, in his draft report, challenged them on that and the board were able to produce a note of a phone conversation to both parties where, right at the outset, the board decided not to go down the track. I guess certainly - I know the board can only talk about mediation when it comes to fee disputes, and that was one aspect of my complaint. The other aspect was methodology, et cetera, et cetera, and the fact that information appropriate to making appropriate decisions was withheld from me. Like, the full extent of that Tax Office's position, as disclosed to the practitioner, about, "We don't need to do anything." I was told - in fact, it wasn't withheld from me; I was actually told we need to do something totally different, totally inappropriate.*"

   As I note in the attached paper, Conciliation will be a major focus of my new office. Not all conduct, or misconduct, can be conciliated, but we'll be trying where appropriate to get a good result from early conciliation.

6. Page 366 – "*The thing I found surprising was that the board refused to talk to me. Everything had to be in writing. They wouldn't answer the phone. They'd say, "Send me an email." When I asked to see, "Look, you're putting your report forward" - this is the final report they did - "can I see what you are saying?" because I'd like the opportunity to put my spin on it, or correct things that I might disagree with, so the board have got my opinion; not just yours. That didn't happen*"

   I don't think much will change in that respect – we are best served by having written evidence in case we need to take a particular matter to a Tribunal / Supreme Court.

   I should also note that new section 77J of the Act requires all proposals as to the disciplinary action that the Commissioner intends to take to be put to the parties (ie the lawyer and the complainant) for their further submissions before a final decision is made under that section (see section 77J(4)).

Mr Snow

A lot of Mr Snow's early comments relate to the involvement of consumers in the regulatory process. And at page 394 Dr Mundy says "*Just coming back to your point about consumer representatives, you would seen then, I guess - I am not wanting to put words in your mouth - so these legal practitioners boards should have, by their constitution, have consumer representatives on them rather than - we know certainly there is actually a non-lawyer who runs the board in Queensland.*"

It's worth me noting that:

1. the Conduct Board had lay representation on it (3 of the 7 board members had to not be legal practitioners);

2. I am a lawyer, so the "Commissioner level" of the process no longer has lay representation on it (although it can – see section 71(3) of the amended Act);

3. however, that lay representation is now present at the Disciplinary Tribunal level – section 78 of the amended Act requires 5 of the 15 members of the Tribunal to not be legal practitioners); and

4. the Tribunal is likely to continue to play a significant part in proceedings given the new appeal provisions in section 77K.

Frankly, although I have been in the Commissioner role formally for only 2 weeks, I think it would be difficult for a non-lawyer to fulfil the role. He or she wouldn't have the experience to be able to assess what amounts to "*the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner*", so as to be able to determine the most common types of alleged misconduct, which are mostly at that lower end of the misconduct scale.

I'm not sure that I can usefully add much else to Mr Johnson's and Mr Snow's comments that are relevant to the role I now play.

Part B

I will now turn to some of those recommendations in the Commission's Draft Report which deal with costs / charging issues and complaints avenues for legal service consumers.

I'm sure that, at least to some extent, particularly in relation to costs issues, what I say here is likely to cover some of the same ground that has already been covered in submissions to the Commission by the Law Society of South Australia.

1. DRAFT RECOMMENDATION 6.1

    In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

    The new costs disclosure provisions now set out in Schedule 3 of the Act are intended to achieve this. I refer you in particular to clause 10(1) of Schedule 3, which says (so far as is relevant) that a law practice must disclose the following to a client when a new matter is commenced:

    - the basis on which legal costs will be calculated, including whether a scale of costs, or a recommendation as to the calculation of barristers' costs, applies to any of the legal costs; and

- if the law practice will not be calculating legal costs in accordance with an applicable scale of costs—that another law practice may calculate legal costs in accordance with the scale; and

- an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs; and

- if the matter is a litigious matter, an estimate of the range of costs that may be recovered if the client is successful in the litigation, and the range of costs the client may be ordered to pay if the client is unsuccessful.

These new disclosure requirements don't apply to all matters – the exceptions to the requirements to disclose are set out in clause 13. In summary, the exceptions are:

- if the total legal costs in the matter, excluding disbursements, are not likely to exceed $1 500 (exclusive of GST);

- if there has already been recent disclosure to the client, and the client agrees in writing to waive the right to disclosure;

- if the client is a "sophisticated client" (which is then defined to include, for example, another law practice or legal practitioner, public companies etc);

- if the legal costs or the basis on which they will be calculated have or has been agreed as a result of a tender process;

- if the client will not be required to pay the legal costs or they will not otherwise be recovered by the law practice (eg pro bono work).

2. DRAFT RECOMMENDATION 6.2

Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.

I refer you again to Schedule 3 of the Act. As well as rules relating to costs disclosure, there are rules relating to costs agreements (Part 5) and bills (Part 6).

3. DRAFT RECOMMENDATION 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

- *This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.*
- *The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.*

I have no comment on this recommendation.

4. DRAFT RECOMMENDATION 6.4

In the event that overcharging is found from a complaint, complaints bodies should have the power to access existing files relating to the quantum of bills, including original quotes and final bills. The lawyer in question would be free to submit additional information if they saw fit. This process should not breach any privacy considerations within the lawyer-client relationship (though as a result of later investigations, the complaints body may wish to publish percentages related to any overcharging).

- *Lawyers should be required to provide access to this information within five days of the request.*
- *The cost information should be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates. This could indicate that the lawyer's overcharging may be a systemic, rather than isolated, issue.*
- *Any initial conclusions drawn from the cost information can contribute to an own motion investigation if the complaints body deems that one is warranted.*

As a result of the Amending Act, South Australia has a new overcharging complaints mechanism. See section 77N of the Act.

Under section 77N(4), for the purposes of an investigation, the Commissioner may do either or both of the following:

(a) by notice in writing—

(i) require the legal practitioner or former legal practitioner to make a detailed report to the Commissioner, within the time specified in the notice, on the work carried out for the client to whom the bill was delivered; and

(ii) require the legal practitioner or former legal practitioner to produce to the Commissioner, within the time specified in the notice, documents relating to the work;

(b) arrange for the costs that are the subject of the complaint of overcharging to be assessed by a legal practitioner who is, in the opinion of the Commissioner, qualified to make such an assessment.

The maximum penalty for a legal practitioner who doesn't comply with a notice under subsection (4)(a) is $10 000 or imprisonment for 1 year.

Before the Commissioner makes a binding determination under section 77N(7), the lawyer and the complainant must both have the opportunity to make submissions.

If:

- the Commissioner were to consider that it could amount to misconduct for a lawyer's final bills to frequently (across a range of clients) be much greater than initial estimates – ie that systemic overcharging could be misconduct; and

- the Commissioner has reasonable cause to suspect that a lawyer is systemically overcharging,

then an own motion investigation could be commenced under section 77B(1).

5. DRAFT RECOMMENDATION 6.5

Cost assessment decisions should be published on an annual basis (and, where necessary, de-identified to preserve privacy and confidentiality of names, but not of cost amounts or broad dispute type).

- *Cost Assessment Rules Committees (and their equivalents) should develop and publish guidelines for assessors relating to the inclusion or exclusion of categories of charge items in cost assessments.*

I expect that the Commissioner will include statistics relating to overcharging complaints and costs assessments in the annual report that is required to be made to the Attorney-General and the Chief Justice of the Supreme Court.

I have no comment on that part of the recommendation relating to Cost Assessment Rules Committees.

6. DRAFT RECOMMENDATION 6.6

Other state and territory governments should align their legislation with New South Wales and Victoria to allow disciplinary actions for consumer matters (those matters relating to service cost or quality, but which do not involve a breach of professional conduct rules).

- *This should include the ability for complaints bodies to issue orders such as: cautions; requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation.*
- *Failure to comply with these orders should be capable of constituting a breach of professional conduct rules, and be subject to further disciplinary action.*

The new rules brought in by the Amending Act (new section 77J) give the Commissioner very broad disciplinary powers – including all of those referred to in this recommendation (ie cautions (which, in the Act, are "reprimands"); requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation).

However, these disciplinary powers can only be used if the Commissioner is first "*satisfied that there is evidence of unsatisfactory professional conduct and that the conduct in question can be adequately dealt with under this subsection*". That is, they only come into play if there is first a misconduct finding. There are no equivalent powers for "consumer matters".

7. DRAFT RECOMMENDATION 6.7

As in New South Wales and the Northern Territory, all complaints bodies should be empowered by statute to suspend or place restrictions on a lawyer's practising certificate, while allegations are investigated, if the complaints body considers this in the public interest.

The Act doesn't give the Commissioner this power, but section 89A of the Act effectively gives that power to the Supreme Court. That section says:

> *"If—*
>
> *(a) disciplinary proceedings have been instituted against a legal practitioner before the Tribunal or the Supreme Court or a legal practitioner has been charged with or convicted of a criminal offence; and*
>
> *(b) the Supreme Court is satisfied that the circumstances are such as to justify invoking the provisions of this section,*
>
> *the Supreme Court may, on its own initiative or on the application of the Commissioner, the Attorney-General or the Society, make an interim order—*
>
> *(c) imposing conditions on the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate) relating to the practitioner's legal practice; or*
>
> *(d) suspending the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate),*
>
> *until disciplinary proceedings against the practitioner have been finalised or until further order."*

For myself, I am comfortable with that being an outcome that can only be achieved by the Commissioner going to the Court for an interim order. I don't consider that that should be a power for the Commissioner.

8. DRAFT RECOMMENDATION 6.8

> *The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself*

Under the Act as amended, the Commissioner has extremely extensive investigatory powers. Those powers are set out in Schedule 4 of the Act.

Those powers include the power to compel lawyers to produce information or documents – see clause 4(1) of Schedule 4.

The Act doesn't expressly deal with confidentiality in that context, but it deals with issues relating to legal professional privilege and self-incrimination in section 95C.

The maximum penalty for a legal practitioner who doesn't comply with a requirement under clause 4(1) of Schedule 4 is $50 000 or imprisonment for 1 year.

Schedule 4 does not differentiate between the source of the complaint, or an own motion investigation. The powers of investigation in that Schedule are available "*for the purpose of carrying out a complaint investigation*", and "complaint investigation" is defined to mean "*an investigation of a complaint under Part 6 and includes an*

investigation made into the conduct of a legal practitioner or former legal practitioner on the Commissioner's own initiative or at the request of the Attorney General or the Society".

To the extent that I haven't already done so, I hope that my attached paper clarifies any issues that you are uncertain about in relation the newly amended Act in South Australia.

Of course, if you want to discuss any other aspects of the new South Australian disciplinary regime, I'm happy to do so.

Dated 13 July 2014

Greg May

Legal Profession Conduct Commissioner