The Legal Profession Uniform Law – (possible) Impact on Personal Injury Practice

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1. OLSC – WHO WE ARE AND WHAT WE DO

On 1 July 1994, the Office of the Legal Services Commissioner (OLSC) began operations, as part of a co-regulatory regime with the Law Society of New South Wales and the New South Wales Bar Association.

OLSC receives all complaints about lawyers in New South Wales. Complaints are broadly categorised either as consumer disputes or as complaints involving an issue of unsatisfactory professional conduct or professional misconduct. Some complaints may be hybrid complaints.

OLSC deals with most consumer disputes, providing legal practitioners and their clients with assistance in dispute resolution. OLSC also investigates complaints involving conduct issues. Complaints may also be referred to the professional bodies.

OLSC currently employs 16 complaint handlers, split between two teams, one dealing with consumer disputes, the other investigating complaints involving conduct issues. The consumer disputes team comprises staff with legal qualifications and non-lawyers. All investigators in conduct matters are legally qualified. OLSC also has an inquiry line, fielding initial telephone inquiries from consumers. In 2013-2014 OLSC received 2,528 written complaints and 8,026 inquiry calls, with the majority of complaints characterised as consumer disputes.

2. LEGAL PROFESSION UNIFORM LAW LEGISLATIVE SCHEME

The Legal Profession Uniform Law (LPUL) was developed under the auspices of the Council of Australian Governments with the aim of delivering harmonised regulation of the legal profession across all States and Territories. New South Wales and Victoria have launched the scheme and it is hoped other States and Territories will join in time.

The LPUL as enacted is the culmination of an extensive consultation process that began in May 2010.

The LPUL was initially enacted in Victoria. It applies as a law of New South Wales by virtue of section 4 of the *Legal Profession Uniform Law Application*

Act 2014 (Application Act). Any future amendments to the LPUL passed by the Victorian Parliament will be automatically picked up in New South Wales by operation of section 4.

The LPUL creates two new overarching regulatory authorities – a Legal Services Council and a Commissioner for Uniform Legal Services Regulation – tasked with setting the policy framework under the new scheme and monitoring its implementation.

All substantive regulatory functions will be carried out by designated local regulatory authorities, in New South Wales the Office of the Legal Services Commissioner, the Law Society of New South Wales and the New South Wales Bar Association.

To date, only those parts of the LPUL necessary to establish the new regulatory authorities and frameworks for making *Uniform Rules* have commenced. The substantive provisions will commence once the *Uniform Rules* are in place, and the *Legal Profession Act 2004* will then be repealed. The Legal Services Council is currently developing Uniform Rules, and the remainder of the LPUL is currently expected to commence on 1 July 2015.

Once fully operational, the legislative scheme will comprise:

Legal Profession Uniform Law (NSW)
- Uniform Rules:
  - General Rules
  - Admission Rules
  - Legal Profession Conduct Rules (Solicitors) 2014
  - Legal Practice Rules (Solicitors) 2014
  - Continuing Professional Development Rules (Solicitors) 2014
  - Legal Profession Conduct Rules: Barristers
  - Continuing Professional Development Rules: Barristers
  - Uniform Regulations (if made)

Legal Profession Uniform Law Application Act 2014
- Regulation
- Costs Assessment Rules

3. THE ADVERTISING OF LEGAL SERVICES

Of particular relevance to those of you attending the Personal Injury and Litigation streams of this conference is the news that the current Clause 24 of the NSW Legal Profession Regulation which prohibits the advertising of legal services in any way connected with personal injury claims will not be replicated in the new Legal Profession Uniform Law. Accordingly, upon the commencement of the Uniform Law, that prohibition will be lifted.

I am authoritatively advised that the current parallel prohibition contained in the NSW Workers Compensation Regulation 2003 (Clauses 74-80) will similarly no longer apply.

From 1 July 2015, or whatever date commencement of the Uniform Law takes place, the advertising of legal services in Personal Injury matters will no longer be treated differently from all other matters.

It is important to remember, however, that there will remain in place the general provisions governing advertising by legal practitioners contained presently in Sections 84 and 86 of the Legal Profession Act 2004 and in Rule 36 of the NSW Solicitors Rules. Each of these provisions will be replicated in the Uniform Law or Rules.

Those provisions are set out below:

Legal Profession Act 2004 – section 84

(1) A barrister or solicitor may advertise in any way the barrister or solicitor thinks fit, subject to any regulations under section 85.

(2) However, an advertisement must not be of a kind that is or that might reasonably be regarded as:

(a) false, misleading or deceptive, or

(b) in contravention of the Trade Practices Act 1974 of the Commonwealth, the Fair Trading Act 1987 or any similar legislation.

(3) A contravention by a barrister or solicitor of subsection (2) is capable of being professional misconduct or unsatisfactory professional conduct, whether or not the barrister or solicitor is convicted of an offence in relation to the contravention.

Legal Profession Act 2004 – section 86

(1) A barrister or solicitor must not advertise or hold himself or herself out as being a specialist or as offering specialist services, unless the barrister or solicitor:

(a) has appropriate expertise and experience, or

(b) is appropriately accredited under an accreditation scheme conducted or approved by the Bar Council or Law Society Council.

(2) The Bar Council or Law Society Council is required to approve an accreditation scheme if directed to do so by the Attorney General.

Solicitors' Rules 36

36.1 A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not:

36.1.1 false;

36.1.2 misleading or deceptive or likely to mislead or deceive;

36.1.3 offensive; or

36.1.4 prohibited by law.

36.2 A solicitor must not convey a false, misleading or deceptive impression of specialist expertise and must not advertise or authorise advertising in a manner that uses the words accredited specialist or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional body.

Comment: I note the continued requirement that in the advertising of areas of accredited specialists, the advertisement may only refer to the individual practitioner and their respective specialised accreditation.

It remains an important aspect of the regulation of legal practitioners that advertisements, which might reasonably be regarded as false, misleading or deceptive, may result in a finding of either professional misconduct or unsatisfactory professional conduct.

4. COSTS UNDER THE LEGAL PROFESSION UNIFORM LAW

The LPUL will bring about some important changes to the disclosure, billing and recovery of legal costs:

- The prescriptive costs disclosure requirements contained in section 309 of the *Legal Profession Act 2004* will be replaced by new, streamlined costs disclosure requirements.
- There will be new billing requirements.
- There will be new, low-cost and informal ways of resolving disputes over costs.

Provisions relating to costs disclosure and billing are contained in Part 4.3 of the LPUL. Part 4.3 will apply if the client first instructs a law practice on or after the LPUL commencement day – Schedule 4, clause 18(1).

Provisions relating to costs dispute resolution are contained in Part 5.3, with transitional provisions in Schedule 4, clauses 26-27.

Complaints on foot will continue to be dealt with under the *Legal Profession Act 2004.* Complaints made after the commencement date about conduct that occurred before that date can be dealt with under the LPUL.

COSTS DISCLOSURE

Information to be disclosed

LPUL will replace the prescriptive disclosure obligations currently contained in the *Legal Profession Act 2004* with section 174, which is designed to focus on the substance rather than the form of costs disclosure.

There is an obligation to disclose at the outset, after instructions are initially given in a matter, and an ongoing obligation to disclose after any significant change to anything previously disclosed.

After instructions are initially given
The main disclosure requirement is contained in section 174(1)(a):

A law practice—

(a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs;…

"*Legal costs*" is defined in section 6 and essentially comprises professional costs and disbursements but not interest, namely:

(a) amounts that a person has been or may be charged by, or is or may become liable to pay to, a law practice for the provision of legal services; or

(b) without limitation, amounts that a person has been or may be charged, or is or may become liable to pay, as a third party payer in respect of the provision of legal services by a law practice to another person—

Section 174(2)(a) provides that in addition, the costs disclosure must include information about the client's rights

(i) to negotiate a costs agreement with the law practice; **and**

(ii) to negotiate the billing method (for example, by reference to timing or task); **and**

(iii) to receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised; **and**

(iv) to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs

After there is any significant change
There is also an ongoing obligation to disclose, contained in section 174(1)(b):

A law practice—

(b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including

information about any significant change to the legal costs that will be payable by the client—

A law practice must include a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter – section 174(2)(b).

Informed consent

LPUL adopts a principle of *"informed consent",* requiring a law practice, after costs disclosure has been made, to take all reasonable steps to satisfy itself, that a client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs – section 174(3).

Costs disclosure thresholds

Recognising that full costs disclosure is time consuming and may come at a significant opportunity cost, the LPUL creates a staggered approach to costs disclosure, with less onerous costs disclosure requirements in relatively inexpensive matters.

Section 174(4) provides that disclosure is not required to be made if the total legal costs (excluding GST and disbursements i.e professional costs) in a matter are not likely to exceed the amount specified in the *Uniform Rules* (the ***lower threshold***), currently $750.00 - section 174(4) and LPUL Sch 4, 18(3).

Section 174(5) provides that if total legal costs (excluding GST and disbursements) are not likely to exceed the amount specified in the *Uniform Rules* for the purposes of that subsection (the ***higher threshold***), currently $3,000.00, the law practice may, instead of making full disclosure provide the client with a uniform standard disclosure form as prescribed by the *Uniform Rules* – section 174(5) and LPUL Sch 4, 18(4).

A uniform standard disclosure form is being developed by the Legal Services Council.

A law practice that uses the short form disclosure must, when or as soon as practicable after it becomes aware (or ought reasonably become aware) that total legal costs (excluding GST and disbursements) are likely to exceed the threshold, inform the client and make appropriate disclosure (for the updated amount of total legal costs) – sections 174(7) and (8).

There must be full costs disclosure if total legal costs are likely to exceed $3,000.00.

Disbursements
Section 175(1) provides that if a law practice intends to retain another law practice, for example a barrister or solicitor agent, on behalf of a client, the law practice must disclose to the client the information specified in section 174(1) in relation to that second law practice.

Any other anticipated disbursements should also be disclosed.

Consequences of non-compliance with disclosure obligations
The consequences of failing to comply with costs disclosure obligations are set out in section 178(1):

(a) the costs agreement concerned (if any) is void;

and

(b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority;

and

(c) the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority;

and

(d) the contravention is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

Costs Agreements
A client of a law practice has the right to require and to have a negotiated costs agreement with the law practice – section 179. The provisions relating to costs agreements are contained in Part 4.3, Division 4 of the LPUL.

BILLING

Costs must be fair, reasonable and proportionate
Many consumers do not have the ability to judge what is a fair and reasonable price for legal services. To ensure lawyers do not take advantage of this information asymmetry, the LPUL imposes a positive obligation on law practices:

- to charge costs that are no more than fair and reasonable in all the circumstances and that in particular are—
  (a) proportionately and reasonably incurred; and
  (b) proportionate and reasonable in amount - section 172(1).

- not to act in a way that unnecessarily results in increased legal costs payable by a client. In particular, a law practice must act reasonably to avoid unnecessary delay resulting in increased legal costs – section 173.

LPUL sets out the factors to be taken into account in ascertaining whether costs are fair, reasonable and proportionate – section 172(2) and (3).

Provided costs disclosure has been made in accordance with the LPUL, and the costs agreement complies with Part 4.3 Division 4 a costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable.

Responsibility for charging

Section 188 of the LPUL requires a law practice to identify the principal responsible for the charging, by requiring that a bill or letter accompanying the bill must either:

- be signed by a principal of the law practice designated in the bill or letter as the responsible principal; or
- nominate a principal of the law practice as responsible for the bill.

If a law practice does neither, each principal of the law practice is taken to be a responsible principal for the bill.

RESOLVING COSTS DISPUTES

LPUL gives OLSC new and expanded powers in relation to consumer matters and costs disputes, and this is probably the most controversial change.

OLSC's role, functions and powers

Chapter 5 of the LPUL deals with dispute resolution and professional discipline and sets out OLSC's complaint handling functions and powers.

Section 268 provides a complaint may contain either, or both, a consumer matter and a disciplinary matter.

Section 269 defines what a "*consumer matter*" is, and section 270 defines "*disciplinary matter*".

A "*consumer matter*" is defined as:

…so much of a complaint about a lawyer or a law practice as relates to the provision of legal services to the complainant by the lawyer or law practice and as the designated local regulatory authority determines should be resolved by the exercise of functions relating to consumer matters.

"Consumer matter" includes a dispute about legal costs – section 269(2).

The LPUL gives OLSC new, expanded powers to make determinations in consumer matters, including:

- an order requiring the respondent to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work – section 290(2)(c).
- an order that the respondent lawyer or law practice pay monetary compensation, not exceeding $25,000 – sections 290(2)(e) and 308(2).
- an order that the respondent lawyer or law practice cannot recover or must repay the whole or a specified part of the amount charged in respect of specified legal services – sections 290(2)(e) and 308(3).

When can OLSC deal with a costs dispute?
The LPUL itself sets some parameters:

- there must be a complaint containing a costs dispute - section 269(2)
- the dispute must be about solicitor-client costs – s269(2)

  (But note commercial or government clients as defined in section 170(2) cannot obtain relief in relation to a consumer matter – section 268(3)).
- there are monetary limits – section 291(1). OLSC can deal with the dispute if:

  (a) the total bill for legal costs is less than $100,000 (indexed) payable in respect of any one matter; or

  (b) the total bill for legal costs equals or is more than $100,000 (indexed) payable in respect of any one matter, but the total amount in dispute is less than $10,000 (indexed).
- there are time limits [(which OLSC may waive in certain circumstances) – section 272(2).] Generally, OLSC can deal with a complaint involving a costs dispute made:

  (a) 60 days after the legal costs become payable; or

  (b) if an itemised bill was requested in respect of those costs in accordance with section 187(2)—30 days after the request was complied with.

  OLSC may waive the time limit but only if the complaint is made within 4 months of the period set by the legislation, so in practice the outer time limit for costs disputes is about 6 months, more if an itemised bill is requested, but still less than the 12 month time limit for costs assessment.

  Note there is a time limit for requesting an itemised bill - within 30 days after the date on which the legal costs become payable – section 187(2) – and it must be provided within 21 days – section 187(3).

- there is a requirement that at least one of the parties has made a reasonable attempt to resolve the dispute and the attempt has been unsuccessful, or it would be unreasonable to expect the complainant to be involved in such an attempt – section 286.

Section 279(1)(a) provides OLSC may, after receiving a complaint, notify the respondent of the complaint or give the respondent a summary or details of the complaint. It is usual for OLSC to provide a lawyer complained about with a full copy of the complaint, although we may sometimes relay the details by telephone.

If OLSC is not able to deal with a costs dispute, it is to inform the parties of their right to apply for a costs assessment – section 291(2).

Attempting resolution

The LPUL gives emphasis to the resolution of consumer matters and costs disputes. For example, under section 287 OLSC must attempt to resolve a consumer matter (including a costs dispute) by informal means (for example, a telephone call) as soon as practicable.

OLSC may order the parties to the complaint to attend mediation – section 288.

If the parties reach agreement, OLSC may prepare a written record of the agreement (a settlement agreement). The settlement agreement may be filed in a court. It will then be taken to be an order of the court in accordance with its terms, and may be enforced accordingly – section 289.

Binding costs determinations

In complaints containing costs disputes, the LPUL also gives OLSC power to make binding determinations in costs disputes, in limited circumstances – section 292.

When can a binding costs determination be made?

Section 292 of the *Legal Profession Uniform Law* (LPUL) empowers OLSC to make binding determinations about costs in circumstances where:

(a) OLSC is unable to resolve a costs dispute (whether wholly or partly); and

(b) the total amount of legal costs still in dispute is less than $10,000 (indexed) – section 292(2).

The determination must specify the amount payable as legal costs (including a nil amount), and the amount ordered as payable must be less than $10,000 (indexed) – section 292(3).

Factors to be considered
A determination is to be based on OLSC's assessment of what is fair and reasonable in all the circumstances (section 292(4)), having regard to the factors set out in section 200 (section 292(5)), namely:

- Costs must be proportionately and reasonably incurred, and proportionate and reasonable in amount- sections 200(1) & 172(1)
- Regard **must** be had to whether the legal costs reasonably reflect—
  - (a) the level of skill, experience, specialisation and seniority of the lawyers concerned; **and**
  - (b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; **and**
  - (c) the labour and responsibility involved; **and**
  - (d) the circumstances in acting on the matter, including (for example) any or all of the following —
    - (i) the urgency of the matter;
    - (ii) the time spent on the matter;
    - (iii) the time when business was transacted in the matter;
    - (iv) the place where business was transacted in the matter;
    - (v) the number and importance of any documents involved; **and**
  - (e) the quality of the work done; **and**
  - (f) the retainer and the instructions (express or implied) given in the matter – sections 200(1) & 172(2).
- Regard **must** be had to whether the legal costs conform to any applicable requirements of Part 4.3 of the LPUL (Legal costs), the Uniform Rules and any fixed costs legislative provisions – section 200(1) & 172(3).
- A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable if —
  - (a) the provisions of Part 4.3, Division 3 of the LPUL relating to costs disclosure have been complied with; and
  - (b) the costs agreement does not contravene, and was not entered into in contravention of, any provision of Part 4.3, Division 4 of the LPUL – sections 200(1) & 172(4).
- Regard **may** be had to the following matters —
  - (a) whether the law practice and any legal practitioner associate or foreign lawyer associate involved in the work complied with the LPUL and the Uniform Rules;
  - (b) any disclosures made, including whether it would have been reasonably practicable for the law practice to disclose the total

costs of the work at the outset (rather than simply disclosing charging rates);

(c) any relevant advertisement as to the law practice's costs or the skills of the law practice or any legal practitioner associate or foreign lawyer associate involved in the work; and

(d) any other relevant matter – section 200(2).

- The determination **must** take into account the incidence of GST – section 200(3) but the amounts payable by way of GST are to be excluded in calculating the amount payable as legal costs.
- In conducting an assessment of legal costs payable by a non-associated third party payer, must also consider whether it is fair and reasonable in the circumstances for the non-associated third party payer to be charged the amount claimed.

OLSC must, before making a determination and if it has not already done so, give the respondent a summary or details of the complaint and a notice informing the respondent of the right to make submissions – section 279(1)(c).

OLSC has long experience in making determinations. Under the *Legal Profession Act*, the Legal Services Commissioner has power to make determinations as to whether to deal with complaints outside the statutory time limit, and in disciplinary matters has power to caution or reprimand legal practitioners, and to make compensation orders. OLSC has procedures in place to ensure practitioners are accorded procedural fairness, and will modify those procedures to ensure procedural fairness is accorded in making binding costs determinations. The process will evolve over time, and may be subject to guidelines or directions issued by the Commissioner for Uniform Legal Services Regulation.

Determination is final

Once a determination about costs is made it is final – section 312. There is no statutory right of appeal or review against a determination (see section 314), but the designated local authority (OLSC) may, in its absolute discretion, conduct an internal review of the decision if it considers it appropriate to do so.

There is a duty, under section 318, to give the complainant and the respondent written notice of the determination, which must include a statement of reasons for the decision.

Legal costs that are, or have been the subject of a binding costs determination may not be the subject of a costs assessment – section 197.

There is currently no provision in the LPUL for enforcement of binding costs determinations.

Costs assessment
If OLSC is unable to deal with a costs dispute, or if attempts to resolve the costs dispute are unsuccessful (wholly or in part) and OLSC does not, or cannot make a binding determination about costs, the parties will be referred to the Costs Assessment Scheme of the Supreme Court of New South Wales.

It seems the position under the LPUL, subject to any guidelines or directions that may be issued by the Commissioner for Uniform Legal Services Regulation, is that for bills up to $100,000.00:

- A client can either apply to the Costs Assessment Scheme for assessment or make a complaint - see sections 197-198.
- A law practice can apply for an assessment of costs, unless the client has made a complaint - sections 197 – 198.
- OLSC will be able to refer parties to costs assessment in appropriate cases - section 293. OLSC intends to work with the Costs Assessment Scheme to establish a protocol. One example may be in matter where there is an itemized bill, running to many line items, with the majority of items objected to.

One of the stated objectives of the LPUL is to provide a framework for the assessment of legal costs - section 169(c). The LPUL does not deal with the process of costs assessment save to the limited extent provided for in Part 4.3 Division 7.

State specific provisions, relating to the practice and procedure of costs assessment, are contained in Part 7 of the *Legal Profession Uniform Law Application Act 2014*.

Under that Act, costs assessments will be conducted in accordance with costs assessment rules, which are to be made by a Costs Assessment Rules Committee. OLSC will have a representative on the Committee.

OLSC understands Regulations to accompany the *Application Act*, and implementation of the recommendations of the Chief Justice's Review of the Costs Assessment Scheme will soon be enacted.

5. HOW TO AVOID COMPLAINTS

OLSC will only become involved in a costs dispute if there is a complaint, so it makes sense to try to avoid complaints.

Drawing on its lengthy experience in complaints handling, and its knowledge of what drives people to make complaints, OLSC offers the following tips for avoiding complaints.

Try to prevent disputes over costs arising - avoid the "nasty surprise" to the client:

- Consider providing full costs disclosure in matters under the higher costs disclosure threshold, especially if the client or any aspect of the matter raises concerns.
- Provide realistic estimates from the outset. Explain, emphasise and re-emphasise an estimate is not a fixed quote.
- Keep client informed:
  - monitor costs closely, especially if escalating rapidly.
  - disclose substantial changes promptly and in writing - don't assume issuing a bill in excess of an earlier estimate, or verbally notifying a client, will suffice. Don't assume a client will realise additional work, such as further hearing days, will result in higher costs.
  - provide updated estimates.
- Deliver bills promptly on completion of the work, or within the timeframe stipulated in the costs agreement. Check bills are correct with no arithmetical errors, typographical errors or duplication, that rates match those agreed and that work is described in sufficient detail to explain how time was spent.
- Consider giving the client an itemised bill rather than a lump sum bill. Clients are very suspicious of bills that increase upon requesting itemisation.

If a dispute arises, try to resolve it:

- Listen to client and take their objections and criticisms on board. Costs may be the focus of the dispute but often a client has issues with the legal services that may not be clearly articulated. Don't assume a client is simply trying to avoid paying the bill. Try not to be defensive or evasive.
- Admit mistakes and try to fix them, preferably free of charge.