

22 December 2014

Mr Dale Boucher
Legal Services Commissioner
Legal Services Council
Level 11, 170 Phillip Street
SYDNEY NSW 2000

Dear Mr Boucher

Uniform Rules – Professional Indemnity Insurance

I write in relation to the consultation draft of the *Legal Profession Uniform General Rules* insofar as they relate to professional indemnity insurance.

The Legal Practitioners' Liability Committee (LPLC) is the insurer of law practices and barristers practising in Victoria. The LPLC also insures most of the large law firms practising in Australia.

The LPLC has for many years actively participated in various consultation processes both in Victoria and nationally in relation to the requirements for professional indemnity insurance for lawyers. We assisted the committee of the Law Council of Australia which developed draft minimum terms and conditions for professional indemnity insurance under the previous national legal profession law project. As a result, the LPLC drafted suggested rules for inclusion in the Uniform Rules to be drafted under the new Legal Profession Uniform Law.

Our draft is incorporated into the **enclosed** table, together with our commentary on the consultation draft rules.

We would welcome the opportunity to expand upon or clarify any of the points made in our commentary, if that would be of assistance to the Council.

One important matter in our commentary relates to the draft rule 76(1)(d) – see footnote 30 of our commentary. It relates to local regulatory authorities having the general power to exempt incorporated legal practices from the requirement to be covered by an approved insurance policy. This is a matter on which the Council has expressly sought feedback. As stated in the commentary, the LPLC's view is that this proposed exemption power is wholly inappropriate.

The general subject of whether a law practice (incorporated or otherwise) should be exempted from the requirement to insure in a particular jurisdiction is one which goes to the integrity and viability of the compulsory schemes in each jurisdiction.

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The LPLC has drafted a suggested exemption policy for the Legal Services Council's consideration. It is also **enclosed**. It is based in fair measure on the exemption policy developed by the Legal Services Board in Victoria.

The draft exemption policy deals with the situation of a law practice which has offices in two jurisdictions. Section 215 expressly contemplates that such practices *may* be exempted, whereas law practices with offices in three or more jurisdictions *must* be exempted. Whilst the rationale for this distinction is not clear from the legislation of the associated explanatory material, it may not be appropriate for the rules to effectively ignore it.

Again, if it would be of assistance to the Council, we would welcome the opportunity to expand upon or clarify any aspect of the draft exemption policy or the rationale for it.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Miranda Milne', written over the closing text.

Miranda Milne
Chief Executive Officer

**Uniform Law
LPLC commentary on draft Uniform Rules**

Draft Rule¹	LPLC suggested wording²
<p>(2) Professional indemnity insurance³ may be underwritten on the basis of:</p> <p style="padding-left: 40px;">(a) coverage of a law practice, including all the legal practitioner associates of the law practice; or</p> <p style="padding-left: 40px;">(b) coverage of an individual Australian legal practitioner⁴.</p> <p>(3) Professional indemnity insurance must provide indemnity⁵ for the private legal practice of the insured in relation to the provision of legal services within Australia⁶.</p> <p>(4) Professional indemnity insurance must extend to civil liability incurred in connection with the legal services of the insured and persons engaged by the insured in the provision of legal services⁷.</p>	<p>The policy must cover any civil liability in connection with the private legal practice of the practitioner or law practice other than a liability the subject of an express exclusion⁸.</p>

¹ Consultation draft published by the Legal Services Council – December 2014.

² Alternative wording suggested by the LPLC, with mark-ups from the earlier version which the LPLC submitted through the Law Council of Australia.

³ s210 refers to a 'policy' complying with the minimum standards specified. It is therefore preferable from a drafting perspective to set out requirements for such a policy rather than for 'professional indemnity insurance'. This comment applies to all references in the draft rules to 'professional indemnity insurance'.

⁴ This draft rule is essentially permissive and, in the LPLC's view, is unnecessary. The Act contemplates that each Australian legal practitioner is to be covered by an approved policy –see ss209 and 210. It is self evident that this can be achieved by a single policy for a sole practitioner or a single policy for a law practice.

⁵ What does 'provide indemnity' mean? It is more accurate to refer to the type of liability which the policy is to cover. The language suggested by the LPLC accords with that used in the insuring clauses of scheme policies.

⁶ There is no warrant in the Act for the qualification 'in relation to the provision of legal services within Australia'. The central concept in the Act is engaging in legal practice. Insurance cover is generally required for that, not for the narrower concept of legal services, which are defined in s6 as 'work done or services transacted in the ordinary course of legal practice'. Nor is there any contemplation in the Act that legal work actually be performed in Australia for insurance cover to be available.

⁷ This drafting conflates the separate concepts of what is to be covered and who is to be covered. LPLC suggests that they be dealt with separately (see also footnote 13 below).

⁸ LPLC's drafting refers expressly to exclusions. All policies have exclusions – LPLC suggests that this be recognised, lest there be an argument that all exclusions are unenforceable because the rules do not provide for them.

<p>(5) Professional indemnity insurance must provide indemnity for claims actually made during the period of insurance that arise from the insured's law practice⁹ and for claims made in respect of circumstances notified during the period of insurance.</p>	<p>The policy must operate on a 'claims made' basis <u>and cover claims arising during or after the period of insurance arising from circumstances notified during the period of insurance</u>¹⁰.</p>
<p>(6) Professional indemnity insurance must provide minimum coverage of \$1.5 million¹¹ for each and every claim¹², or each and every loss, inclusive of the claimant's costs and defence costs.</p>	<p>The limit of the insurer's liability for any one claim under the policy, inclusive of defence costs and claimant's costs, must be not less than \$2 million.</p>
<p>(7) Professional indemnity insurance must provide indemnity for any former¹³ principals of, or those¹⁴ formerly engaged by, the insured¹⁵ and by any prior law practice of the insured¹⁶.</p>	<p>The policy for a law practice must cover all current and former principals and employees engaged in the private legal practice of that law practice.</p>
<p>(8) Professional indemnity insurance must provide indemnity¹⁷ for a minimum of seven years¹⁸ for run-off liabilities¹⁹ in the</p>	<p>Unless the practitioner or law practice is covered by a scheme of run-off insurance provided by the insurer or other provider approved under, or selected in accordance with,</p>

⁹ This qualification regarding arising from the insured's legal practice belongs in the previous rule dealing with the essential scope of cover. LPLC suggests that it is preferable to simply refer to the requirement for cover to operate on a 'claims made' basis and to add specific reference to claims arising from notified circumstances, per the marked-up amendment above to the LPLC's earlier suggested draft.

¹⁰ This added text makes the specific reference mentioned in footnote 9 above.

¹¹ The LPLC suggests that this figure be \$2M. That figure better reflects contemporary damages and costs levels.

¹² This begs the question of what is a claim – is it a claim against the practitioner/law practice or a claim under the policy. All policies aggregate claims against the insured to some degree when defining what amounts to a single claim under the policy. For this reason, the LPLC suggests the wording it has proposed.

¹³ LPLC suggests that this be both 'current and former' – per the comment in footnote 7 above.

¹⁴ The reference to 'those' is unclear. It could include independent contractors engaged by the relevant law practice, but all policies exclude independent contractors.

¹⁵ This begs the question of who is 'the insured'? In fact the definition of the insured should include all present and former principals and employees engaged in the practice.

¹⁶ This begs the question of what is a prior law practice of the insured? The issue of cover for prior law practices is a somewhat complex one and is necessarily linked to the requirement for run-off cover for law practices which have ceased.

¹⁷ Again, query what this means – see footnote 5 above.

¹⁸ From when? From when the conduct occurred or from the date of death/cessation or from expiry of the period of insurance of the policy?

¹⁹ And what are 'run-off liabilities'. It is the cover which is in run-off, not the liabilities.

<p>event that the insured dies or ceases to exist or to provide legal services for any reason²⁰.</p>	<p>applicable legislation of the jurisdiction, the policy must provide for the cover under the policy to continue (but in run-off) for a minimum of seven years from:</p> <ul style="list-style-type: none"> (a) the date (during the period of insurance) that the practitioner or law practice ceases to practise; or (b) the date of expiry of the period of insurance, if the practitioner or law practice is not covered from that date by a further policy which complies with these minimum standards, including the requirement for run-off cover under this rule²¹.
<p>(9) In the case of a claim arising from dishonesty or fraud, professional indemnity insurance must not exclude indemnity of a principal of, or person engaged by, the insured²² who was not knowingly connected with²³ any dishonesty or fraud related to the claim.</p>	<p>The policy may exclude liability arising from fraud or dishonesty, but not the liability of any person who was not knowingly engaged in such fraud or dishonesty.</p>
<p>(10) Professional indemnity insurance need not but may²⁴ provide indemnity to the extent that the subject matter of the claim entitles a claimant to claim and receive compensation from a fidelity fund, guarantee fund or similar cover provided under jurisdictional</p>	<p>Notwithstanding preceding rule, the policy may exclude all liability for a defalcation or default, irrespective of whether a claim lies against any fidelity fund.</p>

²⁰ This sets up a test of 'the insured dies or ceases to exist or to provide legal services for any reason'. The requirement for run-off arises in all circumstances in which there is no continuing cover for liabilities for past conduct, including the situation in which a practitioner has their practicing certificate cancelled. This is better captured by the wording suggested by the LPLC.

²¹ This paragraph (b) captures the requirement for run-off to be triggered if a practitioner does not renew their cover. This is an essential requirement unless run-off cover is being provided by a single scheme (as it is for the solicitors schemes and for barristers in Victoria). Without it, the last-on-risk insurer will not remain on risk and there will be no run-off cover, to the detriment of the former clients of the relevant practitioner.

²² Again, this begs the question of who is the insured?

²³ 'Connected with' is perhaps not conceptually recognised to the same extent as the 'engaged in' wording suggested by LPLC.

²⁴ 'Need not but may' means that this is not a requirement at all. This rule should recognise that the policy can exclude overlap between professional indemnity insurance and fidelity fund covers. The LPLC's suggested wording does this.

legislation.	
(11) Professional indemnity insurance must not provide the insurer with a right to avoid or cancel cover because of any innocent or non-fraudulent non-disclosure or misrepresentation by the insured.	<p>The policy must provide that the insurer is precluded from avoiding the policy or reducing its liability under the policy by reason of any failure to comply with the duty of disclosure or by reason of any misrepresentation (whether fraudulent or not)²⁵.</p> <p>The policy must provide that it cannot be cancelled other than with effect from the date that the practitioner or law practice ceases to practise²⁶.</p>
(12) Professional indemnity insurance must provide retroactive cover except for claims arising out of fraud or dishonesty ²⁷ .	
<p>76 (1) For the purposes of section 215 (8) of the Uniform Law, the following are exempt from the requirement to hold or be covered by an approved insurance policy:</p> <p>(a) a corporate legal practitioner or government legal practitioner who:</p> <p>(i) provides legal services only as an employee to the practitioner's employer in the course of employment²⁸; and</p> <p>(ii) does not receive a fee, gain or reward other than</p>	<p>For the purposes of sub-section 215(8) of the <i>Legal Profession Uniform Law</i>, the following categories of persons are exempt from the requirement to hold or be covered by an approved insurance policy:</p> <p>(a) a corporate legal practitioner;</p> <p>(b) a government legal practitioner;</p> <p>(c) a holder of a statutory office of the Commonwealth or of a jurisdiction;</p> <p>(d) a person holding an office or position, or acting as,</p>

²⁵ This drafting uses essentially the same language as the *Insurance Contracts Act 1984* (Cth) for the concept of avoidance of cover for misrepresentation or non-disclosure

²⁶ This recognises that cancellation is conceptually different to avoidance, and that cancellation is permissible when the practitioner or law practice ceases to practise.

²⁷ The LPLC suggests that this rule is undesirable as it probably means that new cover cannot be phased into effect. For example, if an insurer currently excludes claims arising out of the provision of all financial services, but wanted to provide cover in the future for particular services provided on or after a particular date, that may offend the 'no retroactive date' requirement.

²⁸ This requirement flies in the face of the common practice that corporate practitioners advise related entities, directors and officers, members of their employer's association and others in addition to their employer. This requirement has been dropped from the Act and in the LPLC's view should not be reinstated through the rules. The undesirable outcome (which caused problems in Victoria when we had this requirement) is that corporate practitioners are forced to take out principals practising certificates.

<p>the practitioner's ordinary remuneration as an employee²⁹;</p> <p>(b) a holder of a statutory office of the Commonwealth or of a jurisdiction;</p> <p>(c) a person holding an office or position, or acting as, parliamentary counsel, legislative counsel or legislative drafter (however described) under a contract of service, or contract for services, with the Crown;</p> <p>(d) an incorporated legal practice³⁰ or community legal service (or class of incorporated legal practices or class of community legal services) determined by the designated local regulatory authority, on any grounds that the regulatory authority considers sufficient, as warranting exemption.</p>	<p>parliamentary counsel, legislative counsel or legislative drafter (however described) under a contract of service, or contract for services, with the Crown;</p> <p>(d)(e) <u>a community legal service (or class of community legal services) determined by the designated local regulatory authority, on any grounds that the regulatory authority considers sufficient, as warranting exemption³¹.</u></p>
<p>(2) Subrule (1) does not affect the requirement for an Australian legal practitioner to have professional indemnity insurance when engaging in</p>	<p>Sub-rule 1 does not affect the requirement for an Australian legal practitioner to hold or be covered by an approved insurance policy in connection with:</p>

²⁹ LPLC suggests that this requirement also be dropped. How a corporate lawyer is remunerated is not a matter which should affect insurance requirements.

³⁰ This reference to incorporated legal practices is wholly inappropriate. It evidently stems from the mistaken belief that s215(6) contemplates that a local regulatory authority can exempt Australian legal practitioners as it sees fit. This is not the case - s215(6) only permits the exemption of a specified Australian legal practitioner, where the particular circumstances of that specific practitioner warrant special treatment (such as a practitioner who is based in Australia but only provides legal services to overseas clients). It does not contemplate a general discretion for a local regulatory authority to exempt a law practice (whether incorporated or not) from the requirement to have an approved policy and the LPLC would strongly oppose any such discretion as potentially threatening the integrity and viability of the local schemes. The LPLC insures around 3,600 law practices and sole practitioners, of which approximately 700 are incorporated practices. There is no justification for treating incorporated practices differently to unincorporated practices.

³¹ We have added this to our previous draft to reflect paragraph (d) in the draft rules to the extent that it relates to community legal services.

<p>legal practice as a volunteer at a community legal service or otherwise on a pro bono basis.</p>	<p>(a) engaging in private legal practice on their own behalf³²; or</p> <p>(b) engaging in legal practice as a volunteer at a community legal service or otherwise on a pro bono basis.</p>
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³² This paragraph (a) is suggested to reinforce the requirement for the holder of a corporate or government lawyer practising certificate, or anyone else to whom sub-rule (1) applies, to hold a principal's practising certificate and an approved policy if they engage in legal practice in their own right.

Draft Exemption Policy

1. Introduction

- 1.1 Section 215 of the Legal Profession Uniform Law provides for a designated local regulatory authority to exempt an Australian legal practitioner or an incorporated legal practice from the requirement to obtain an 'approved insurance policy' for the jurisdiction.
- 1.2 Under sub-section 215(2) of the Legal Profession Uniform Law, a designated local regulatory authority may exempt an Australian legal practitioner:
- (a) who is a legal practitioner associate of a law practice which maintains a permanent office in the jurisdiction: and
 - (b) the law practice maintains another permanent office in one (and only one) other jurisdiction; and
 - (c) at least one principal whose home jurisdiction is that other jurisdiction engages solely or principally in legal practice at that other office; and
 - (d) the practitioner is covered by an approved insurance policy for that other jurisdiction.
- 1.3 Similarly, sub-section 215(4) provides that a designated local authority may exempt an incorporated legal practice which maintains a permanent office in the jurisdiction and only one other jurisdiction, provided that it is covered by an approved insurance policy for that other jurisdiction.
- 1.4 Under sub-section 215(6), a designated local regulatory authority may also exempt a 'specified' Australian legal practitioner on grounds that the authority considers sufficient and may, as a condition of exemption, impose a discretionary condition on his or her Australian practising certificate limiting the scope of legal services that may be provided by the holder of that certificate.
- 1.5 The purpose of this policy is to guide the designated local regulatory authority in the exercise of its discretion as to whether to grant an extension, or whether to impose a discretionary condition on a practising certificate.

2. Policy

- 2.1 The Legal Profession Uniform Law reflects broad acceptance that mandatory insurance schemes approved under applicable local legislation are designed to achieve consumer protection objectives and meet the needs of the legal profession by ensuring that high quality, comprehensive cover is universally available at an affordable cost. This model contemplates that the benefits of mandatory schemes outweigh the restriction on competition between insurance providers.
- 2.2 In considering an application for exemption under sub-sections 215(2) or (4), the designated local regulatory authority will consider:

- (a) whether the permanent office in the other jurisdiction is maintained for the genuine purpose of serving clients in that jurisdiction or, alternatively, whether it is maintained for the purpose of acquiring an approved insurance policy at a cheaper price or some other ulterior purpose;
- (b) the public policy rationale for the mandatory requirement for Australian legal practitioners and incorporated legal practices to obtain an approved insurance policy under the scheme approved for the jurisdiction (per paragraph 2.1 above);
- (c) the views of the insurer or other provider approved under, or selected in accordance with, applicable legislation of the jurisdiction; and
- (d) any other consideration which the designated local regulatory authority regards as relevant.

2.3 In considering an application for exemption under sub-sections 215(6), the designated local regulatory authority will consider:

- (a) the public policy rationale for the mandatory requirement for Australian legal practitioners and incorporated legal practices to obtain an approved insurance policy under the scheme approved for the jurisdiction (per paragraph 2.1 above);
- (b) whether the specified Australian Legal Practitioner concerned will be protected by insurance which complies with the minimum standards specified in the Uniform Rules, including the requirement for run-off cover;
- (c) the views of the insurer or other provider approved under, or selected in accordance with, applicable legislation of the jurisdiction;
- (d) whether the particular Australian legal practitioner who is specified for the purposes of the application is in circumstances sufficiently distinguishable from those of other Australian legal practitioners to warrant specific consideration; and
- (e) any other consideration which the designated local regulatory authority regards as relevant.