



Email

28 February 2020

Chelly Milliken
Senior Principal Policy Officer
Legal Services Council
Level 3, 19 O'Connell Street
Sydney NSW 2000

Dear Ms Milliken

Proposed amendments to Legal Profession Uniform Law

Law Firms Australia (**LFA**) appreciates the opportunity to provide a submission on the Legal Services Council (**LSC**) consultation paper on proposed amendments to the Legal Profession Uniform Law (**the Consultation Paper**).

LFA represents Australia's leading multi-jurisdictional law firms, Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison and Norton Rose Fulbright Australia. LFA is also a constituent body of the Law Council of Australia, the peak representative organisation of the Australian legal profession.

The Consultation Paper contains 36 recommendations. LFA makes comment on three of those recommendations, being: recommendation 1 (s 6 of the Uniform Law); recommendation 16 (s 95 of the Uniform Law), and; recommendation 17 (s 174 of the Uniform Law). Please note that references to legislative provisions that follow are references to the Uniform Law unless otherwise specified.

1. Recommendation 1 (s 6)

1.1 Recommendation 1 is to:

Amend the definition of 'disqualified person' to:

- include a person whose name has been removed from a foreign roll and who has not subsequently been admitted to a foreign roll or an Australian roll,
- exclude a refusal of a practising certificate for a barrister where the applicant has failed to successfully complete Bar examinations,
- provide that a person whose practising certificate is suspended at the time the practising certificate expires remains a disqualified person until he/she is granted a new practising certificate, and
- exclude practitioners who have their practising certificate cancelled for reasons associated with health, retirement or change of career during the course of the year.

Include a new definition of 'foreign roll' to mean a roll or register of practitioners (however described) maintained by any foreign authority with responsibility under law for the admission, readmission or right to practice of legal practitioners.

1.2 LFA appreciates the intent of the first limb of the proposed amendment; that is, to define as a disqualified person a person whose name has been removed from a foreign roll and who has



not subsequently been admitted to a foreign roll or an Australian roll. However, LFA submits that this should only apply to persons that have been removed from a foreign roll for reasons related to professional conduct. It should not affect practitioners who have had their name removed from a foreign roll for reasons not related to misconduct, such as a change in jurisdiction or career.

1.3 Although LFA is not aware of Australian practitioners applying to remove themselves from Australian rolls, such applications are provided for, and made, in other jurisdictions (such as the United Kingdom).¹

2. **Recommendation 16 (s 95)**

2.1 Recommendation 16 is to:

Amend s 95 to enable DLRA's to seek information from third parties when considering whether or not to grant, renew, vary, suspend or cancel a certificate; and make it a criminal offence to fail to comply with this requirement.

2.2 LFA understands the importance of regulators being able to review comprehensive, accurate and relevant information regarding the ability or suitability to practise of a practitioner, particularly in relation to show cause events. However, the breadth of the proposed power and the proposed criminal offence warrants further consideration. This is particularly so when, as is acknowledged by the Consultation Paper, regulators may already require a practitioner to produce specified information pursuant to s 95.

2.3 If the LSC is minded to recommend the making of such a power, it should consider:

- (a) whether it is appropriate that local designated regulatory authorities may, in effect, demand records from third parties without judicial oversight (such as by subpoena),
- (b) whether medical practitioners should be required to produce confidential medical records without client consent, and
- (c) whether the power should be limited to show cause events.

2.4 The LSC should also consider the appropriateness of attaching a criminal offence to the proposed power. It may be seen to be disproportionate and unfair that it will be a criminal offence for third parties to fail to comply with a request to produce documents from a regulator, whereas it is not a criminal offence for a practitioner to fail to comply with a similar request to produce documents under the extant s 95(1).

2.5 Finally, it does not appear from the summary at pp 5-6 of the Consultation Paper that professions and industries other than the legal profession have been consulted on the proposal. If this is the case, LFA submits that members of relevant professions or industries who may be subject to requests from regulators under the proposed power (such as members of the medical profession) should also be consulted.

¹ See, for instance, Solicitors Regulation Authority, *FAQs about keeping of the roll*, <<https://www.sra.org.uk/mysra/roll/faqs>>.



3. Recommendation 17 (s 174)

3.1 Recommendation 17 is to:

Expand the disclosure obligations in subs 174(2) to include the right to apply for a costs assessment; as well as disclosure obligations of law practices that relate to costs and are provided for in the Legal Profession Uniform Law Application Act of the relevant jurisdiction and the Uniform Law.

3.2 LFA notes does not oppose expanding the disclosure obligations at s 174(2) to include the right to apply for a costs assessment. However, references to a gamut of jurisdiction specific rights should be avoided. The use of general language is consistent with the existing list of requirements in s 174(2), and s 192 already requires that bills must include a statement of the avenues open to the client in the event of a dispute.

3.3 For instance, the narration at p 18 of the Consultation Paper suggests that s 99 of the *Legal Profession Uniform Law Application Act 2014* (Vic) may be one of the jurisdiction specific rights to be disclosed under an amended s 174(2). That section provides that a party to a complaint that involves a costs dispute may apply to the Victorian Civil and Administrative Tribunal (**VCAT**) to determine the costs dispute. However, the right to apply to VCAT only applies to limited matters, being those matters where:

- (a) the total amount of legal costs in dispute is not more than \$25,000 (plus indexation), and
- (b) the parties have been informed by the Victorian Legal Services Commissioner under s 291(2) or s 293(1) of the Legal Profession Uniform Law (Victoria) of their right to apply to VCAT.

3.4 The reason that an application to VCAT is conditional upon notification from the Victorian Legal Services Commissioner, and indeed the reason the notification obligation rests with the Commissioner, is because small costs disputes are, in the first instance, to be dealt with by the Commissioner.

3.5 To include such a right in the disclosure obligations at s 174(2) may increase confusion for consumers, given that it may only be exercised in relation to a certain category of matters and upon notification by the Victorian Legal Services Commissioner.

4. Conclusion

4.1 As noted above, LFA appreciates the opportunity to provide comments on the Consultation Paper. In summary, LFA submits:

- (a) that the proposed amendment to the definition of 'disqualified person' should not include foreign practitioners who, for reasons other than professional conduct, have had their names removed from a foreign roll,
- (b) that the LSC should consider the appropriateness or otherwise of the proposed amendment to s 95, including the creation of a criminal offence and its application to a broad range of issues,
- (c) that the LSC should undertake further consultation with relevant professions and/or industries on the proposed amendment to s 95 if such consultation has not occurred, and



(d) that the proposed amendment to s 174 should avoid including references to specific jurisdiction rights.

4.2 Please do not hesitate to contact me if the points above require clarification or if LFA can provide further information that will be of assistance.

Yours faithfully

Mitch Hillier
Executive Director
Law Firms Australia