PROPOSED AMENDMENTS TO THE LEGAL PROFESSION UNIFORM LAW

Submission to the Legal Services Council, Commissioner for Uniform Legal Services Regulation

Prepared by: Law Institute of Victoria

Date: 12 March 2020

Contact:
Gemma Hazmi
GM Policy, Advocacy & Professional Standards

W: www.liv.asn.au

TABLE OF CONTENTS

Executive Summary 2

Responses to Recommendations 3

- Chapter 3 – Legal Practice 3
- Chapter 4 – Business practice and professional conduct 3
- Chapter 5 – Dispute resolution and professional discipline 11
- Other issues – outside this consultation paper 12

EXECUTIVE SUMMARY

The Law Institute of Victoria (LIV) welcomes the opportunity to provide a submission to the Legal Services Council Consultation paper on proposed amendments to the Legal Profession Uniform Law (Uniform law).

The LIV is Victoria's peak professional association for lawyers and represents about 19,000 people working and studying in the legal sector in Victoria, interstate and overseas. Its members are legal professionals from all practice areas, and work in the courts, academia, policy, state and federal government, community legal centres and private practice.

The LIV has consulted broadly with its members in collating responses to these recommendations. We have also consulted with the Victorian Legal Services Board + Commissioner during the drafting of this submission.

The LIV submits that many of the recommendations are relatively uncontentious and seek to simplify regulatory practice under Uniform Law. We have therefore limited our responses to recommendations relating to specific issues raised by our members. We also raise additional issues reported by our members, specifically:

- the application of costs disclosure provisions;
- unqualified legal practice provisions;
- supervised legal practice conditions; and
- the definition of 'law firm' under Uniform law.

The LIV believes that the application of these provisions is at times unclear, does not account for the pressures, compliance burden and hectic pace of modern legal practice, and fails to address circumstances where law firms based in different States and Territories established under different structures seek to merge as one firm.

The LIV suggests that there is a need for a much broader review of the operation of the Uniform Law given that it has been in operation since 2015, and would welcome the opportunity to be involved in further consultation about these broader issues.

RESPONSES TO RECOMMENDATIONS

Chapter 3 – Legal Practice

The LIV broadly supports the recommendations under this Chapter. However, there are some further anomalies relating to unqualified legal practice and unsupervised legal practice under Uniform law which do not necessarily reflect the current pace and pressures of modern legal practice.

Unqualified Legal Practice

As it is currently drafted, the Uniform law unqualified legal practice provisions seem to take a strict compliance approach whereby a practitioner who may have inadvertently failed to renew their practicing certificate is required to refund to clients all fees earned during the period of non-compliance. There appears to be no discretion available to the Commissioner to allow retrospective renewal of a practicing certificate in exceptional circumstances. The LIV suggests that it may be worthwhile considering incorporating such discretion into Uniform law to address circumstances where a practitioner can demonstrate that the non-renewal was an inadvertent error, a practising certificate would have been issued if the error had not occurred, and there has been no material detriment suffered by the client.

Supervised Legal Practice

Currently Uniform law provides for a restriction on unsupervised legal practice which lapses after a set period of supervised legal practice being completed. In Victoria, the Legal Services Commissioner requires a practitioner to apply and provide evidence to determine that this condition has been met before the restriction is lifted. Whilst the rationale for this administrative process is understood and accepted, it is unclear whether the restriction on unsupervised legal practice is lapsed by virtue of the statute which would assist junior lawyers applying for positions in circumstances where an application may be in the process of being considered by the Commissioner.

Chapter 4 – Business practice and professional conduct

The LIV acknowledges that Chapter 4 contains provisions regulating legal costs and their disclosure, billing and costs agreements and costs assessments. The consultation paper notes that the amendments to Part 4.3 of the Uniform Law are proposed to "improve consumer protection and to remove the potential for perverse outcomes to arise". The LIV has received substantial feedback on this issue from members which is not limited to the recommendations listed under this chapter.

Recommendation 17

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.

As it currently stands, the Uniform law costs disclosure provisions provide for serious penalties for non-compliance. The rationale for this is generally understood and accepted. However, given the penalties involved, it is important that such provisions are able to be applied consistently and with a clear purpose to ensure they capture those for whom they are intended whilst not imposing a high administrative burden on practitioners overall. LIV members have therefore reported below the following issues for consideration by the Legal Services Council.

Range of Estimates of Costs

The previous Victorian law explicitly provided the ability for firms to indicate a range of estimate of costs for a matter, but this provision appears to be absent from the Uniform law. Whilst this does not of itself mean that firms are prohibited under Uniform law from providing a range of costs, rulings that recommend the giving of a single figure cost estimate do not appear to be realistic and are often misconstrued by clients (deliberately or otherwise) as binding quotations. It is submitted that firms providing clients with a range of estimate of costs where there is a limit on the degree of range able to be provided, enables firms to explain to clients the various factors which may impact on the final costs figure within the specified range. Enhanced understanding by a client of how costs are finally calculated may also lead to fewer complaints.

Incorporated Associations versus Public Companies

It is not clear why the requirements for costs disclosure differ between incorporated associations and public companies. In this sense, it is worth noting that incorporated associations are not exempted regardless of their size and level of sophistication. However, all public companies, which include companies limited by guarantee (which can include small not-for-profit organisations) are exempted regardless of their size. As there is not always a direct correlation between the structure of an entity and its size, complexity, and level of sophistication, it may be worth reviewing these provisions to take these factors into account.

Large Proprietary Companies

Large proprietary company clients established under the *Corporations Act 2001* (Cth) are considered Commercial or Government clients and therefore exempt under Uniform law for cost disclosure. However, the thresholds for large proprietary companies doubled on 1 July 2019[1] meaning that many more law practices' company clients are now covered by the cost disclosure provisions. It is also worth noting that the Corporations Act definition of large proprietary companies depends on the turnover and assets of the company and the number of employees. For most firms, this information about their clients is not publicly available and may change over time. This means that a firm with such clients would need to rely on the information provided by their clients and monitor this status throughout the course of a matter. We therefore suggest that firms who represent such clients be afforded some protection after making reasonable enquiries, should the information provided by the client not be accurate. After initial disclosure, the onus should then be placed on the corporate client to notify the law practice of any change of status. An exemption from disclosure should also apply

[1] Definition of a large proprietary company - financial years commencing on or after 1 July 2019, Australian Securities and Investments Commission <https://asic.gov.au/regulatory-resources/financial-reporting-and-audit/preparers-of-financial-reports/are-you-a-large-or-small-proprietary-company/>

where a group comprises a number of “small” proprietary companies (each of which is potentially a client), but taken together, form a “large group” exhibiting the new thresholds introduced by ASIC last year.

Costs threshold

The current costs threshold of less than $750 before GST and disbursements has not changed in several years and, in light of the larger law practices and mergers which have taken place in the last 10 years, the LIV suggests that it may be worthwhile reviewing this to ascertain the extent of matters which fall under this threshold and the benefits for such types of matters in being exempt from costs disclosure. We suggest a revised threshold of not less than $3,000, ex GST, in line with the next level of disclosure.

Repeat clients opting out

The previous Victorian law provided an ability for clients who may be repeat clients with regular matters ongoing with a particular law practice to ‘opt out’ of receiving a full costs disclosure every time a new matter was commenced. This provision is absent from today’s Uniform law and we submit that there would be merit in examining whether a client with regular ongoing similar matters would benefit from the ability to opt out, subject to certain limitations. In addition to repeat clients, all clients which are proprietary companies and all proprietary companies of which the legal practitioner is a director, should also be permitted to “opt out” after an initial disclosure, given their likely level of sophistication, and in the latter case, given the legal practitioner also holds broad fiduciary duties as a director to act in good faith and not misuse their position, under the Corporations Act.

Client as consumer

As noted above and in the Consultation paper, a key objective of the Uniform law is to protect “consumers” of legal services. To be consistent with the test prescribed in the *Competition and Consumer Act 2010* (CCA), a client (being natural person) should only be entitled to receive disclosure if they were a “consumer” within the meaning of the CCA. For example, it is doubtful that a high net worth individual or a sophisticated or professional investor (within the meaning of the Corporations Act) would benefit from, or even need, protection under LPUL.

Group Costs Orders

The Justice Legislation Miscellaneous Amendments Bill 2019, recently introduced into Victorian Parliament allows lawyers to receive a fee that is calculated as a percentage of the settlement of damages (contingency fee), as recommended by Victorian Law Reform Commission’s (VLRC) Access to Justice report (2018). The LIV has supported the Bill, which will enable the Supreme Court to make group cost orders in class actions. If the Supreme Court makes a group costs order in a class action, plaintiff lawyers will receive a percentage of the amount recovered for their costs, as determined by the Court, and all class members will share liability for those costs.

We note the provisions concerning contingency fees under section 183 of the Uniform Law does not directly prohibit lawyers from being paid a contingency fee. Rather, it prevents a law practice from entering a costs agreement under which a contingency fee is payable. If enacted, the Victorian Bill will enable the Court to make ‘group costs orders’ in class actions. This is far more limited than removing the prohibition on contingency fees. The proposed laws will have strict oversight by the

Supreme Court, and will enable the Court to address some of the significant costs risks which impede access to justice.

Recommendation 18

Amend subs 198(1) to add beneficiaries of deceased estates or potential beneficiaries arising from intestacy.

The LIV submits that the addition of "beneficiaries of deceased estates" is too broad. The stated reasoning behind the proposed amendment is that "beneficiaries will ultimately pay the legal costs which are borne by the estate". Members report that in fact, it is generally only the residuary beneficiaries of deceased estates who are impacted by the legal costs paid by the estate as per s 39A of the *Administration and Probate Act 1958* ("the APA") which deals with the application of assets in solvent estates for the payment of debts, including testamentary and administration expenses.

If one of the aims of the proposed amendment is to assist those who "will ultimately pay the legal costs" of a deceased estate, then the wording of the current recommendation goes well beyond the stated purpose and should, at a minimum, be limited to residuary beneficiaries only. This distinction would become particularly important in estates where the Will of the deceased included many specific bequests to multiple beneficiaries in addition to nominating residuary beneficiaries. To grant a right to beneficiaries' other than those that receive the residuary estate provides little to no practical benefit in achieving that outcome or to any of the other beneficiaries. In fact, if the wording is left broad, it could be used for mischievous purposes where there are disputes between beneficiaries and those who have no interest in the residuary estate wish to, for example, cause delays.

If changes are to be made as proposed, the wording used of "potential beneficiaries" as a class entitled to seek an assessment of costs should be revised. Technically, any relative of a testator could be a "potential beneficiary" of that testator. A relative in the class that takes upon an intestacy will always be a "potential beneficiary". As a result, any amendments should be limited to "beneficiaries" once a grant of Letters of Administration has been issued because the class of residuary beneficiaries can then be determined by the executor.

General comments - Unique Characteristics of Executor's Position

It is recognised that the beneficiaries of deceased estates who are not executors may, depending on the actions of the executor, feel somewhat excluded from the administration process, particularly if the relationship between the beneficiaries and the executor is tense or is the subject of "hostile" litigation between an executor and one or more of the beneficiaries.

However, it is submitted that the proposed amendments in their current format do not achieve the outcome anticipated by the Legal Services Council and will not provide a "cheap and quick resolution" for complainant beneficiaries.

A stated objective of the proposed amendments is to "empower clients to make informed choices about costs". The LIV points out that the key word is "clients". A beneficiary of a deceased estate is not a "client" of the law practice. The client is the executor and a law practice already has disclosure obligations to its client under the LPUL in relation to legal costs. In addition, the law practice and the executor are entitled to enter a legally binding costs agreement (enforceable in the same manner as

any other contract (s. 184 of the LPUL)) subject to the law practice having complied with its disclosure obligations and a client's right to have the costs assessed.

A question must be raised as to the relevance of the parties entering any costs agreement if a person, such as a beneficiary of a deceased estate, who is not a party to the costs agreement can then challenge the costs charged notwithstanding that they have been charged pursuant to a validly entered and legally enforceable legal contract. It is acknowledged that the current provisions of the LPUL enable a "third party" to challenge an assessment of costs but the position of the executor (and the legal practice engaged by the executor) and beneficiaries needs to be distinguished from the position of "third party payers".

A law practice cannot require every beneficiary to sign a costs agreement as the beneficiaries are not the clients of the law practice. Further, even if beneficiaries were placed into the same category as third-party payers, there are a number of significant issues that would flow as a consequence.

The current rationale under the Uniform law in dealing with third party payers (both associated and non-associated) cannot be easily applied to beneficiaries of a deceased estate for the following reasons:

a) The definition of a "third party payer" under the Uniform law requires there to be a legal obligation on the third party (i.e. the beneficiary) to pay the legal costs. Depending on whether the third party is associated (i.e. the legal obligation is owed to the law practice) or non-associated (ie the legal obligation is owed to a person other than the law practice) determines what rights the third party has (including on costs reviews) and what obligations (including disclosure) that the law practice has.

b) It is noted that a beneficiary could not be said to owe a legal obligation to a law practice to pay legal costs and it is rarely the case that a beneficiary is under a legal obligation to the executor to pay the legal costs incurred by the executor but it can arise in the context of litigation and costs orders made by a Court. Fundamentally, a beneficiary of an estate is not obligated to accept a disposition to them under a Will and it would therefore be a perverse outcome if a beneficiary was under a legal obligation to pay legal costs incurred by an executor.

c) The Uniform law has extensive provisions dealing with the rights of third party payers. The Uniform law also includes provisions that contemplate the option for a costs agreement being entered between an associated third-party payer and a law practice. The clear intention of such a provision is to enable the law practice and the third-party payer to reach agreement on the basis upon which legal costs are to be charged and to create a legally enforceable agreement between them.

The LIV submits that it would be practically impossible for a law practice to be required, in order to have certainty over the basis for charging costs and their recovery, for the law practice to enter costs agreements with beneficiaries. The class of beneficiaries may still be open, there may be beneficiaries that are minors or under a disability, the beneficiaries may not yet be located, issues of conflict may arise and beneficiaries (or at least one beneficiary in a class of many) may simply refuse to enter an agreement especially if hostilities with the executor already existed or develop. Further, issues of conflicts and confidentiality would arise if the law practice was required to enter costs agreement with the executor (as client) and beneficiaries, especially in any hostile litigation with the beneficiaries.

Even if the position of a beneficiary was dealt with separately and independently from the current category of "third party payers" under the Uniform law, the following underlying principles (some of which are reflected in the current provisions of the Uniform law applying to third party payers) and issues need to be carefully considered:

a) The Uniform law recognises that where a legal practice is not in a direct legal relationship with a third-party payer (i.e. a non-associated third-party payer), the assessment of costs at the instigation of that third-party payer does not impact upon the amount of legal costs payable by the client (s. 198(10)). This preserves the privity of contract between the law practice and its client, recognises the fact that the arrangements reached between a client and law practice should be upheld and addresses the implications of a costs review where the law practice is not in any legal relationship with the party seeking the review.

b) Generally, an executor has no pecuniary interest in the quantum of legal costs charged. An executor will rely on the general right of indemnity in respect of costs and expenses incurred by him or her. However, if a beneficiary of an estate is granted a right to make an application for an assessment of costs, it would be prudent for all executors to hold back assets to meet any costs orders or increased costs assessments and refrain from distributing the estate in full until after the time period for making such applications has expired (currently the Uniform law permits assessments up to 12 months after a bill was served or paid). This will add to the delay in the administration of deceased estates. Private executors and the law practices they have engaged would be entitled to "wait out" this period in order to avoid being "out of pocket" especially if the assessment resulted in a higher costs assessment.

c) There are many estates that involve tension and/or conflict between an executor and the beneficiaries. This is especially the case where an independent executor or administrator has been appointed as a result of disputes between beneficiaries and/or executors named in the Will. In addition, in many deceased estates beneficiaries are often unrepresented.

d) This can result in extra communication between the law practice and the beneficiaries, by email, telephone, attendance at the office etc., thereby increasing legal costs to the estate. This could be necessitated at the request of the executor including as a result of the executor's unwillingness to communicate with the beneficiaries for reasons unconnected to the solicitor and client relationship.

e) The additional costs involved may prompt any one or more of the beneficiaries to apply for a costs assessment which, even if the costs assessed are found to be fair and reasonable, will involve significant time and resources of the law practice and the executor and with little or no initial costs or costs risk on the beneficiary bringing the application.

f) The preparation of an itemised bill or a bill of costs in taxable form can be an extremely time consuming and costly process. Currently, the commercial rates charged by costing firms to prepare a bill of costs in taxable form are around 10% of the total professional fees in the bill. In the event that a beneficiary is provided with a right to seek a costs assessment, the Uniform law should be amended to require the beneficiary to be liable for such costs. Without such a provision, it would create a substantial and unjust burden on the legal practice in circumstances where the client (i.e. the executor) has accepted the costs and considers them to be reasonable and appropriate.

g) This costs review process is open to abuse which could cause an extended delay of 14 months or more in administering the estate and making a final distribution of estate funds (which can

occur only after all debts and expenses of the estate have been paid), perhaps motivated by reasons outside the solicitor/client relationship particularly in estates where the relationship between the executor and the beneficiaries or amongst the beneficiaries themselves is acrimonious. This would result in great cost and inconvenience to the legal practice who is acting for the executor in such litigation.

h) Further, it is generally an obligation of an executor to report to beneficiaries and keep them informed and in large or complex estates, it can be the case that beneficiaries, even with regular updates, fail to acknowledge or understand the amount of work involved or work undertaken by an executor. In our experience, it is the unfortunate reality that many estates are not straightforward. Again, to provide a beneficiary with a right to have all of the legal costs assessed, without any initial cost obligation being placed on that beneficiary would create fertile ground for the provisions to be abused and at great expense to the law practice.

i) Regulation 74 of the Legal Profession Uniform General Rules 2015 provides that when an itemised bill is higher than the lump sum bill, the additional costs may be recovered by the law practice only if the law practice made appropriate disclosures when giving the lump sum bill and the costs have been the subject of an assessment. In the event that a beneficiary has a right to seek a costs assessment, the following questions arise:

   1. Who will be liable for the additional costs? How can these be recovered by a law practice?

   2. What if the estate has been fully distributed before an assessment is made or determined?

   3. The Uniform law includes provisions (section 198(10)) that the outcome of a costs assessment by a third party does not impact on the legal obligation of a client to pay the legal costs. However, given that a private executor (i.e. not a trustee company) generally has no pecuniary interest in the legal costs charged to the estate, is an executor entitled to rely on his/her indemnity from the estate to pay legal costs charged by the law practice under its costs agreement with the executor?

   4. Is the executor or law practice required to chase or take action against the residuary beneficiaries to recoup the additional monies owing to the law practice?

j) An executor stands in a fiduciary relationship to the estate and the beneficiaries so an executor has an obligation to review all costs incurred and if considered appropriate, initiate and prosecute any costs review process as expeditiously as possible in order to finalise the administration of the estate. However, a beneficiary has no such fiduciary obligations and so they could, arguably, use the review process to delay the finalisation of the estate for their own purposes.

   We understand that the majority of beneficiaries would presumably not abuse the costs review process in this manner. However, the possibility would still exist for “perverse outcomes” such as the above to arise.

k) Beneficiaries have a wide range of existing rights and remedies against executors including seeking an Administration Account or, depending on the conduct of the executor, seeking removal of the executor and the appointment of a replacement. Further, in practice the Supreme Court of Victoria Trusts Equity and Probate List is taking a very proactive, practical, inquisitorial and prudent approach in matters in that List to the incurring and quantum of legal costs by executors and beneficiaries pursuant to the powers available under the *Civil Procedure Act 2010* (Vic) and s65 of the *Administration and Probate Act 1958* (Vic).

Recommendation 23

Expand the definition of 'consumer matters' in s 269 to include complaints by beneficiaries of deceased estates or arising from intestacy.

The consultation paper notes that the purpose of the amendment proposed in Recommendation 23 is to afford beneficiaries of deceased estates "a cheap and quick resolution to their complaints". In our view, it is doubtful that this amendment, as drafted, will achieve that outcome.

- The addition of "beneficiaries of deceased estates" is too broad and should be limited to residuary beneficiaries and those entitled on intestacy only. See comments for Recommendation 18 which are equally applicable here.
- In our members' experience, it is usually in estates where the beneficiaries and the executor do not have a good relationship that the beneficiaries seek additional information regarding the legal costs charged to the estate over and above the information disclosed in the Administration and Distribution Statement that is usually provided. In such instances, the motivation of the beneficiary may be frustration with the executor or other matters unrelated to the law practice. It is submitted that in such cases the beneficiaries would have alternative equitable remedies open to them against the executor particularly given the fiduciary relationship between the executor and the beneficiaries.

The LIV submits that there are adequate protections in place, including the substantive rights provided to executors to review legal costs charged by the law practice they have engaged. The executors are obliged to act in the best interest of the beneficiaries. Given the executor's role as a client and working relationship with the law practice, and as a result the knowledge of all of the legal work performed, the executor is the person with the requisite knowledge and understanding to make an assessment on any decisions relating to a costs assessment. The proposed amendments do not appropriately balance the costs and inconvenience involved in a costs assessment, including the substantial costs and delays in preparing a bill of costs in taxable form. Further, the proposed amendments seek to place a beneficiary out of reach of costs consequences of any costs assessments notwithstanding that the client of the law practice already has extensive rights to do so.

The proposed amendments fail to adequately address the consequences that an assessment commenced by a beneficiary could have to the legally enforceable contract that the law practice will have entered in good faith with its client, the executor, in relation the manner and basis for which the law practice intends to charge legal costs.

Lastly, if any amendments are to be implemented, they should be limited to a beneficiary only having the right to seek a costs assessment:

a) where the beneficiary is a residuary beneficiary (including intestate estates after an administrator has been appointed); and

b) only where the law practice has sought to base its costs other than on the scale set out in the Appendix to Supreme Court (Administration and Probate) Rules 2014; and

c) only where the law practice has not had its file assessed for costs by a Costs Lawyer and/or not provided a copy of the assessment to the executor client and beneficiary with the invoice.

We note that in Victoria, costs in probate matters can be costed with a valid cost agreement, in accordance with the Supreme Court Scale and the practitioner remuneration order. In NSW, there are no statutory scales for the estate administration, however there is a statutory scale for the application for the grant of probate/ letters of administration. There should be some consideration for work associated with the estate administration will be calculated on a time basis in accordance with a particularly hourly rate potentially in accordance with the relevant retainer.

We acknowledge that in a situation where the executor client is an associate of the law practice then there is a perception that this situation may require greater scrutiny. In that situation, members suggest that the above could apply but it could be made mandatory, that is the law practice be required to:

a) have their costs calculated on the scale set out in the Appendix to Supreme Court (Administration and Probate) Rules 2014; or

b) have their file assessed by a Costs Lawyer or similar and a copy of the assessment be provided to the executor client and beneficiary with the invoice.

Chapter 5 – Dispute resolution and professional discipline

Recommendation 28

Amend s 299 to enable a DLRA to make a finding and determination of professional misconduct, and make any of the orders referred to in subs 299(1), in cases where the lawyer: admits the conduct and demonstrates contrition consents to the DLRA determining the matter, and if required, undertakes to assist the regulator, e.g. by way of giving evidence before a Tribunal or Court in a related prosecution.

LIV members report that practitioners normally have to make a decision about whether to consent to a reprimand or take their chances. The way the choice is presented to them, they usually conceive of it as a choice between:

(a) public prosecution in an environment where it is difficult to get a costs order against the Commissioner if they succeed and have to pay the Commissioner's costs of the disciplinary prosecution (including those of the Commissioner's employed solicitors) on County Court scale if they lose; or

(b) a private reprimand.

We note that reprimands for both unsatisfactory professional conduct and professional misconduct made under sections 299 and 301 are all placed on the public register of disciplinary action in accordance section 150B of the Application Act.

Members report that prior to the introduction of Uniform law, the 'take no further action' option was only available where the Commissioner was satisfied that the practitioner is generally competent and diligent and 'there has been no substantiated complaint' within the 5 years prior to the decision. The Commissioner takes 'substantiated complaint' to include any complaint at the end of the investigation of which the Commissioner is satisfied that there is a reasonable likelihood of VCAT finding the legal practitioner guilty of conduct warranting discipline, even if the result of reaching that state of mind is

that he takes no further action. The Supreme Court has agreed in relation to a similar provision in *Styant-Brown v Legal Ombudsman* [2001] VSC 164.

Members report that the Commissioner does not usually say 'I have decided to prosecute you unless you consent to a reprimand' but rather invites practitioners to indicate whether they would be prepared to consent to a reprimand in default of which they will have to consider prosecuting. Refusal to consent to a reprimand may also be interpreted as a lack of insight into the disciplinary offending and/or a lack of remorse, which might be taken into account in deciding to prosecute.

A practitioner might refuse to consent on the basis that there has been an inadequate investigation to date such that the Commissioner could not yet properly be satisfied that there is enough to warrant reprimand, or on the basis of a reasonably arguable view of the applicable law, rather than on the basis of a denial of the conduct.

It has been reported that disciplinary tribunals have accepted into evidence, letters from the Commissioner communicating the fact that they have been satisfied that there is a reasonable likelihood that if they prosecuted the practitioner, there is a reasonable likelihood that they would be found guilty of conduct warranting discipline. These are relied on in the disposition phase of the hearing as 'priors'. It may be assumed that this is on the basis that the Commissioner's opinion is evidence that there is a 'reasonable likelihood' of conviction and tends to prove that the conduct which would be the subject of the conviction in fact occurred and, in where a reprimand was administered, the solicitor's consent to that course is an admission which also tends to prove that fact.

The Commissioner's reaching of a state of satisfaction that it is reasonably likely that VCAT would find the lawyer guilty of conduct warranting discipline is a 'decision' in the sense that it is amenable to judicial review even if the result of reaching that state of mind is that the Commissioner takes no further action: *SPB v Law Institute of Victoria* [2005] VSC 509. For this reason, members report that any review will be made more difficult if a practitioner has consented to the reprimand.

The LIV submits that this places pressure on practitioners in Victoria to consent to reprimands when offered the option and so it is important that the regulator ensures fairness is afforded to the practitioner at this stage of an investigation.

Other issues – outside this consultation paper

Law Firm Structures and Mergers

Currently, the differences in the definition of 'law firm' under Uniform law in Victoria and New South Wales may give rise to difficulties when mergers of different structures of firms between these States is considered. This can lead to firms seeking to merge having to adopt dual registration in different States which often brings additional administrative burdens and complexities across the firm and does nothing to support integration of the firm between the two States. The examples in support of this view are set out below:

1. Victorian Law Firm New South Wales Registration

A Victorian law firm which is registered in Victoria as a partnership of both Incorporated Legal Practices (ILP) and Australian Legal Practitioners (being natural persons who are partners in

their own right) has sought in the past to be registered under New South Wales Uniform law but was not accepted by the New South Wales regulator. The practice sought to register the Partnership in New South Wales as an Unincorporated Legal Practice (ULP) under section 6(1). It was proposed that the Partnership could not be registered as it provides external legal services and is not specifically excluded by the law or the Uniform Rules from being a ULP. In addition, section 32 of the Uniform law provides that legal practices can be conducted under any structure that is lawfully available and that is not specifically excluded under Uniform law.

2. Position of New South Wales Law Society

The LIV understands that the New South Wales Law Society has indicated that it is unable to register the Partnership noted above as a ULP because the Uniform Law does not permit a partnership that includes one or more ILP's as partners to be a qualified entity in New South Wales. The position of the New South Wales Law Society is that an ILP can only be registered as a single entity and cannot be a partner in a partnership. The Law Society also found that it would be sufficient for the Victorian ILP to simply to register as an ILP in New South Wales and there would be no need for a separate registration of the Victorian Partnership. It was acknowledged that the ILP would be able to hold the practice assets as trustee of a trust, the beneficiaries of which are the firm's partners.

To address the administrative burden and complexities indicated above, the LIV submits that it would be beneficial in such circumstances to have registration of a law practice that has merged between Victoria and New South Wales be able to register in one State and operate across both States. It would also be beneficial to consider amending the definition of 'law firm' so in the future it is the same across all states which adopt Uniform Law. We note that under Uniform Law s 130, a trust account must be opened in the jurisdiction that trust money is received if it has an office in that jurisdiction.

Further consultation and contact

The LIV would be pleased to work with the Legal Services Council and Victorian Legal Services Board and Commissioner to improve the Uniform law for all practitioners and would welcome the opportunity to discuss these issues further.

Please feel free to contact me or if you wish to discuss any aspect of this submission.

Sam Pandya
President
Law Institute of Victoria