LSC LEGAL SERVICES COUNCIL | COMMISSIONER FOR UNIFORM LEGAL SERVICES REGULATION

Consultation paper on proposed amendments to the Legal Profession Uniform Law

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LEGAL PROFESSION Uniform Law

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Call for submissions

The Legal Services Council (**Council**) invites public comment on proposed amendments to the Legal Profession Uniform Law (**Uniform Law**). Submissions can be sent to the Council by email to: submissions@legalservicescouncil.org.au on or before 28 February 2020, and will be published on the Council's website unless you advise us otherwise.

Overview of the Uniform Law

The Uniform Law commenced on 1 July 2015 in Victoria and NSW. The objectives of the Uniform Law framework are to promote the administration of justice and an efficient and effective Australian legal profession through:

- interjurisdictional consistency in the law applying to the Australian legal profession
- ensuring legal practitioners are competent and maintain high ethical and professional standards
- enhancing the protection of clients and the public
- empowering clients to make informed choices about their legal options
- efficient, effective, targeted and proportionate regulation, and
- a co-regulatory framework with an appropriate level of independence for the legal profession.

The Uniform Law establishes a five member Council and the office of the Commissioner for Uniform Legal Services Regulation. The Council sets the rules and policy to underpin the Uniform Law, ensuring it is applied consistently across participating States. The Commissioner promotes compliance with and ensures the consistent and effective implementation of the dispute resolution and professional discipline provisions of the Uniform Law and Rules.

The Council's work is overseen by a Standing Committee, which comprises the Attorneys General of jurisdictions participating in the scheme, currently Victoria and NSW, and for specific functions under the Intergovernmental Agreement dated 28 February 2019 (**IGA**), Western Australia. Under the IGA, amendments to the Uniform Law must be agreed by the Standing Committee.

Designated local regulatory authorities (**DLRAs**) are responsible for day-to-day regulation of the legal profession. The DLRAs include:

- Victorian Legal Services Board and Commissioner
- NSW Legal Services Commissioner
- Law Society of NSW
- NSW Bar Association
- Victorian Bar Association
- Legal Profession Admission Board (NSW)
- Victoria Legal Admissions Board, and
- Civil and Administrative Tribunal of NSW.

Proposed amendments to the Uniform Law

The Uniform Law is now in its fifth year of operation. The Council observes that, in general, the provisions operate effectively. However, there are areas where opportunities for legislative improvement have arisen.

In September 2018, the Council held a Uniform Law Summit at which the DLRAs discussed specific areas for reform with the Council. The DLRAs that attended the Summit were the Victorian Legal Services Board and Commissioner, the Officer of the NSW Legal Services Commissioner, the Law Society of NSW, the NSW Bar Association and the Costs Assessment Scheme (Supreme Court of NSW).

Subsequently, the Victorian Bar Association and Victorian Supreme Court (Costs Court) were consulted on proposals of relevance to them. Other stakeholders have been consulted about proposals relevant to their work and constituents.

The Council considered these reform proposals at its meetings in March, April, June, September and November 2019. This consultation paper sets out the revised proposals that were approved by the Council after considering the likely effect on consumers and the profession, natural justice considerations and safeguards for lawyers where a regulator's powers were to be broadened, and the extent to which the proposal furthered one or more objectives of the Uniform Law.

This consultation paper also includes an amendment to section 70 which was approved by the Council prior to the Summit, as well as a proposal initiated by the Council in relation to the accreditation of law courses and providers.

The Council invites feedback on the proposed amendments to the Uniform Law detailed in recommendations 1 to 36 below.

Chapter 1 – Preliminary

Chapter 1 sets out the preliminary provisions of the Uniform Law including definitions of terms used in the Law. Amendments to Part 1.2 (Interpretation) are proposed to remove unintended consequences and enhance the protection of consumers of legal services.

Section 6: Definitions

Section 6 of the Uniform Law includes a definition of 'disqualified person'. Consequences flow from the classification of a person as a disqualified person. For example, a disqualified person must be approved before that person can be employed as a lay associate of a law practice.

Four issues have been identified in relation to the definition of 'disqualified person':

- Paragraph (a) of the definition provides that 'disqualified person' means 'a person whose name has been removed from a Supreme Court roll and who has not subsequently been admitted or readmitted by the Supreme Court of any jurisdiction'. This definition does not currently include a person whose name has been removed from the roll in any overseas jurisdiction.

- Paragraph (b) of the definition provides that 'disqualified person' means 'a person who has been refused the grant or renewal of an Australian practising certificate and who has not been granted an Australian practising certificate at a later time'. This definition unnecessarily captures a refusal to grant an application for a barrister's practising certificate under r 13(3) of the Legal Profession Uniform General Rules 2015 (**General Rules**) where the applicant has failed to successfully complete Bar examinations.

- Paragraph (c) of the definition provides that 'disqualified person' means 'a person whose practising certificate is suspended (for the period of the suspension)'. However, practising certificates end on 30 June each year. Therefore, on 1 July any period of suspension of the practising certificate automatically ends and the person who previously held that certificate ceases to be a 'disqualified person'.

- Paragraph (d) of the definition provides that 'disqualified person' means 'a person whose Australian practising certificate has been cancelled and who has not been granted an Australian practising certificate at a later time'. A practitioner may cease practice during the course of a year for reasons associated with health, retirement or change of career. Cancellation for these reasons should not bring the practitioner within the definition of 'disqualified person'.

Recommendation 1

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.

Section 6 of the Uniform Law defines a 'corporate legal practitioner' as an Australian legal practitioner (excluding a government legal practitioner) who engages in legal practice only in the capacity of an in-house lawyer for his or her employer or a related entity. For these purposes, 'related entity' is limited to bodies corporate as defined in s 50 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The current definition does not permit corporate legal practitioners to provide legal services to other entities commonly found within a corporate group. To address this, it is proposed that the definition should be extended to include:

- any entity which is controlled by the employer
- any entity which controls the employer, and
- any entity controlled by another entity which also controls the employer entity.

'Control' is to be defined in the same terms as s 50AA of the Corporations Act.

These changes would recognise the modern practice of in-house counsel and the array of contemporary business structures in which in-house counsel are engaged.

Recommendation 2
Amend the definition of 'corporate legal practitioner' to include:

- any entity which is controlled by the employer
- any entity which controls the employer, and
- any entity controlled by another entity which also controls the employer entity.

Recommendation 3
Include a new definition of 'control' in relation to the definition of 'corporate legal practitioner' which has the same meaning as in s 50AA of the Corporations Act except that an entity referred to in s 50AA has the same meaning as under the Uniform Law.

Chapter 2 – Threshold requirements for legal practice

Section 29: Accreditation of law courses and providers of practical legal training

Section 29 empowers the DLRA to accredit or reaccredit law courses or providers of practical legal training (PLT) in accordance with the Legal Profession Uniform Law Admission Rules 2015 (**Admission Rules**). It excludes the providers of law courses and PLT courses from accreditation or reaccreditation by the DLRA.

A review of previous legislation in NSW shows that distinctions were drawn between law courses and law course providers and PLT courses and PLT course providers. For example under the:

1. Legal Practitioners Admission Rules 1994 (*Repealed*) in r 4 defines 'PLT course'; in Part 3 r 15 notes that the Legal Qualifications Committee is 'to advise the Board in relation to the accreditation of academic and practical training courses'; and in Part 6 refers to Accredited Law Schools. Rule

45 obliges PLT providers to notify the Board of changes in curricula and in the Fourth Schedule, PLT providers are listed.

2. Legal Profession Admission Rules 2005 (*Repealed*) in Part 6 refers to the accreditation of law degrees; and in Part 6A to the approval of practical training courses.

Similarly in Victoria, for example under the:

1. Legal Practice Admission Rules 1999 the term 'accredited' is used in reference to a PLT provider, an 'approved' institution is a university and a 'recognised' course of study involves the completion of 'endorsed' subjects:
    - Rule 1.05(1): 'accredited PLT provider' means Leo Cussen Institute or any other institution accredited by the Council as the provider of PLT under r 3.01; 'approved institution' means the University of Melbourne, Monash University, La Trobe University, Deakin University or an institution designated by the Council under r (3)(a).
    - Rule 2.02: Recognised courses. (1) The courses of study for obtaining a Law Degree are recognised in Victoria as satisfying the tertiary qualification requirements for admission under r 2.01(a). (2) The courses of study recognised in Victoria as satisfying the tertiary qualification requirements for admission under r 2.01(b) are courses of study incorporating subjects endorsed by the Council under r 2.03 as providing understanding of and competence in the areas of knowledge specified in r 2.01(b).
    - Rule 3.01(1)(ii): The PLT requirements for admission in Victoria to be completed after obtaining a tertiary qualification referred to in r 2.01(a) are … (ii) completion, in accordance with these Rules, of a course of PLT at an accredited PLT provider.
    - Rule 3.01(2): The Council may accredit any institution as an accredited PLT provider for the purposes of these Rules.
    - Rule 3.04: A person is eligible to undertake a course of PLT conducted by an accredited PLT provider.

2. Legal Profession Act 2004 refers to an education or training body and to academic and practical training requirements.

3. Legal Profession (Admission) Rules 2008 definitions include:
    - 'approved academic institution' means an academic institution approved under r 2.02
    - 'approved course of study' means a course of study approved under r 2.04
    - 'approved PLT course' means a course approved under r 3.04
    - 'approved PLT provider' means an institution approved under r 3.02, and
    - 'approved subject' means a subject approved under r 2.05.

    Rule 7.02(2)(d) states that an accredited PLT provider within the meaning of the former rules is an approved PLT provider.

In summary, no empirical basis has been found for the current wording of s 29 to exclude from accreditation both the providers of law courses, and PLT courses.

The Council considers that the DLRAs should accredit or reaccredit law courses, whether academic or practical, and not the providers of either.

Recommendation 4
Amend s 29 to the effect that the DLRA may accredit or reaccredit law courses whether academic or practical in accordance with the Admission Rules.

Chapter 3 – Legal practice

Chapter 3 sets out the way in which legal services may be provided, the responsibilities and liabilities of principals, and the role and privileges of legal practitioner associates. It contains details of entitlement to, and grant or renewal of, practising certificates, as well as variation, suspension and cancellation of practising certificates. It also contains details about the rights of appeal and review.

Proposed amendments are sought to simplify and clarify Part 3.3 (Australian legal practitioners), Part 3.4 (Foreign lawyers) and Part 3.5 (Variation, suspension and cancellation of, and refusal to renew, certificates) so that the legislation can be applied confidently and consistently to enhance the protection of consumers of legal services and to clearly state the obligations of lawyers and legal practitioners under the various provisions.

Section 51: Statutory condition – to notify certain events

Section 51 of the Uniform Law provides that it is a statutory condition of a practising certificate that the holder must notify the DLRA within seven days of certain events, namely:

- if the holder has been charged with or convicted of a serious offence, a tax offence or an offence specified in the Uniform Rules
- the occurrence of a bankruptcy-related event, or
- the holder becoming the subject of disciplinary proceedings as a lawyer in a foreign country.

For the purpose of protecting clients, the public and the profession, there is a need for specific provisions to enable a DLRA, where appropriate, to deal with instances where Courts in any jurisdiction have made a determination relating to a practitioner's capacity for example, that an individual is unfit to plead or stand trial in relation to an alleged criminal offence or has been made subject to a financial management or guardianship order.

Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), an accused may be found unfit to stand trial if, because the person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be:

- unable to understand the nature of the charge
- unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury
- unable to understand the nature of the trial
- unable to follow the course of the trial
- unable to understand the substantial effect of any evidence that may be given in support of the prosecution, or

- unable to give instructions to his or her legal practitioner.

The *Mental Health (Forensic Provisions) Act 1990* (NSW) enables the Supreme and District Courts to make orders or determinations concerning a person's unfitness to be tried. In addition, a magistrate may make orders under that Act where a defendant in criminal proceedings is suffering from mental illness, a mental condition or cognitive impairment.

Such determinations and orders may be relevant to whether that person is fit and proper to hold a practising certificate or whether it may be necessary or appropriate to attach conditions to that person's practising certificate to enable him/her to engage in legal practice. The making of guardianship or financial management orders for a practitioner has similar implications.

Recommendation 5
Expand s 51 to include if the holder has been made subject to:
- a finding or order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) or the *Mental Health (Forensic Provisions) Act 1990* (NSW) or an equivalent Act of another jurisdiction, or
- a financial management or guardianship order.

Rule 15 of the General Rules specifies summary offences for the purpose of s 51 (excluding parking and the majority of traffic offences). However, the rule states that these summary offences are only prescribed in relation to convictions and not charges. Rule 15 adds further complexity to the interpretation of s 51.

If s 51 distinguished between charges and convictions, and r 15 prescribed offences in relation to which only convictions must be notified, the substance of a practitioner's obligation to disclose would be clearer.

Recommendation 6
Amend subs 51(1)(a) so that the criminal offences for which there is a requirement to notify charges and convictions respectively are separated into two discrete rules.

As noted above, section 51 requires a practising certificate holder to notify the DLRA about certain events. The requirement to give notice under s 51 does not apply to an offence to which s 86 applies.

Section 86 defines an automatic show cause event as:
- a bankruptcy-related event, or
- a conviction for a serious offence or a tax offence.

A serious offence means an indictable offence (whether or not the offence is or may be dealt with summarily).

Section 88 requires a practising certificate holder to notify the DLRA of an automatic show cause event within seven days.

The notice requirements of ss 51 and 88 are confusing. To address this, it is proposed that s 51 should be amended to provide that the notice requirement is satisfied or complied with if a notice has been provided under s 88 in relation to the relevant event.

The amendment would operate so that a practitioner who notifies a DLRA about any show cause event in accordance with the show cause event provisions in the legislation is not required to also notify the DLRA under s 51.

Recommendation 7
Amend subs 51(3) to provide that the notice requirement is satisfied or complied with if a notice has been provided under s 88 in relation to the relevant event.

Part 3.3: Australian legal practitioners

Section 94 provides that if the DLRA refuses to grant or renew, or cancels a practising certificate under Part 3.5, it may also decide that the person is not entitled to apply for a practising certificate for a specified period of time (not exceeding five years). There is no corresponding provision which applies when there is a refusal to grant or renew a practising certificate in accordance with Part 3.3.

It is proposed that a provision similar to s 94 should be added to Part 3.3 to permit the DLRA to decide that a person who has been refused the grant or renewal of a practising certificate may not apply for a practising certificate for up to five years. This would reduce repeat applications where there has been no change in circumstances or where a condition previously imposed has not been satisfied.

In these circumstances the practitioner would have the right to seek a review of the DLRA decision under s 100 (requiring a minor amendment to s 100(1)(c) which includes a specific reference to s 94).

Recommendation 8
Insert in Part 3.3 a provision to confer power on the DLRA, similar to that in s 94, to decide that the person concerned is not entitled to apply for a certificate for a specified period not exceeding five years; and consequentially amend s 100(1)(c).

Section 70: Form of practice

Section 70 provides that an Australian-registered foreign lawyer may, subject to any conditions to which their Australian registration certificate is subject, practise foreign law: on their own account; as a partner in a law firm; in partnership with one or more Australian-registered foreign lawyers; as a volunteer at a community legal service or otherwise on a pro bono basis; as a partner, director, officer or employee of an incorporated legal practice or unincorporated legal practice; or as an employee of a law practice or an Australian-registered foreign lawyer.

Section 70 does not provide for Australian-registered foreign lawyers practising foreign law in-house for corporations or governments. Foreign lawyers may be working in-house without being registered and therefore not subject to the requirements to:

- disclose certain events that may affect a DLRA's consideration of their suitability to practise foreign law in this jurisdiction
- declare on an annual basis their fitness to practise
- confirm that they are currently licensed to practise in the foreign jurisdiction, and
- be subject to the imposition of discretionary conditions on an Australian registration certificate.

The Council is of the view that, in our globalised legal services market, the number of foreign lawyers in Australia will continue to grow and the Uniform Law needs to be inclusive of corporate and government lawyers.

Foreign lawyers may also practice foreign law without being registered pursuant to one of the exemptions set out in s 60. The proposed amendment does not affect these exemptions.

Recommendation 9
Amend subs 70(1) to include Australian-registered foreign lawyers who wish to practice foreign law in-house as a corporate lawyer or as a government lawyer.

Section 77: Immediate variation or suspension before or during consideration of proposed action

Section 77 provides for a DLRA to immediately vary or suspend a practising certificate for up to 56 days after notice is given. This power is available if the DLRA is considering whether to start, continue or complete action under Part 3.5 and the DLRA considers it necessary in the public interest. It is imposed in only a small number of the most serious matters.

The 56 day timeframe is too restrictive because an immediate suspension under s 77 is often followed by action under s 82 (to vary, suspend or cancel a practising certificate). Section 82 requires the DLRA to give written notice to a certificate holder of the action it proposes to take and invite a response within 28 days as to why the proposed action should not be taken.

The 56 day timeframe is also problematic where it is necessary for the practitioner to undertake a medical examination or to obtain other relevant documents to assist the DLRA in its consideration, as provided for in s 95. Another scenario might involve a serious trust account misappropriation which requires detailed forensic accounting.

In addition, when a suspension under s 77 is stayed by the Court, the 56 day timeframe continues to run.

For these reasons, an increase to the maximum period of an immediate suspension, from 56 days to 90 days, is proposed. The 90 day timeframe would be an upper limit of the period of suspension.

Recommendation 10

Amend s 77 to:

- increase the maximum period of an immediate suspension from 56 days to 90 days, and
- provide that if the Court orders a stay of the suspension then the time set by s 77(2)(b) stops running.

Section 278 provides that the DLRA, during the investigation of a complaint (investigating DLRA), may recommend the immediate suspension of a practising certificate or registration certificate if that DLRA considers it warranted in the public interest because of the seriousness of the alleged conduct. The recommendation is made to the DLRA responsible for decisions about certificates (suspending DLRA) and that DLRA may take action under subs 82(1)(c) to suspend a practising certificate following a recommendation from the investigating DLRA. However, suspension under subs 82(1)(c) is not an immediate suspension as s 83 requires a minimum seven day notice period.

The aim of s 278 is to empower an investigating DLRA to alert a suspending DLRA to the need for an immediate suspension of a practising certificate. However, this intention is frustrated as the legislation does not enable the suspending DLRA to act immediately on the investigating DLRA's recommendation.

To effect an immediate suspension of a certificate, the suspending DLRA must still apply s 77 and must consider the issue afresh.

In addition, the test in s 77 is that suspension must be 'necessary in the public interest' while the test applied by the recommending DLRA in s 278 is that the suspension must be 'warranted in the public interest'. For consistency these tests should be the same, therefore it is recommended that ‘necessity’ replace ‘warranted’ in s 278. This will ensure all immediate suspensions under s 77 will rely on the same test.

A streamlining of the interface of ss 77, 82 and 278 is proposed by way of an amendment to s 77 to provide for immediate suspension of a certificate on the recommendation of the DLRA under s 278, by allowing the suspending DLRA to rely on the same test undertaken by that recommending DLRA.

Recommendation 11

Amend:

- s 77 to the effect that subs (2), (3) and (4) apply if a DLRA has made a recommendation under s 278 that a certificate be immediately suspended, and
- s 278 to substitute the word 'warranted' with the word 'necessary', and the note to s 278 by including a reference to s 77.

Section 82: Grounds for action under this Division

Section 211 prohibits practitioners from engaging in legal practice unless the practitioner holds or is covered by an approved insurance policy and the policy covers legal practice. This is to ensure that clients of law practices have adequate protection against the consequences of professional negligence.

Section 90 empowers the DLRA to create a designated show cause event by serving a notice on a practising certificate holder alleging that the holder, who is required to have professional indemnity insurance, does not have professional indemnity insurance cover or no longer has cover, and requiring the holder to provide a statement within 28 days outlining:

- why, despite the show cause event, the holder considers himself or herself to be a fit and proper person to hold a practising certificate, and
- why the DLRA should not take the action specified in the notice – to vary, suspend or cancel the certificate.

If the holder does not provide a statement or if the holder provides a statement that fails to satisfy the DLRA that despite being without professional indemnity insurance cover, the holder is a fit and proper person to hold a practising certificate, the DLRA can vary, suspend, cancel or refuse to renew the practising certificate under subs 92(2).

It is proposed to add such a power to s 82 which enables a DLRA to vary, suspend or cancel a practising certificate in the following circumstances:

- the holder has contravened a condition of the practising certificate
- a local regulatory authority recommends variation or suspension under ss 278, 299(1)(g) or 466(7)
- the DLRA reasonably believes the holder is unable to fulfil the inherent requirements of an Australian legal practitioner.

This proposed process under s 82 will be expeditious and will prevent legal services being provided when the practitioner does not have professional indemnity insurance cover. In addition, any action taken by the DLRA can be quickly reflected in the practitioner's status on public registers. This will afford greater protection to the public.

Recommendation 12
Expand the specific grounds of s 82 to provide the DLRA with the power to vary, suspend or cancel the practising certificate of a practitioner who is required to, but does not have and is not covered by, professional indemnity insurance.

There is limited action available during the practice year if a disclosure is made under s 51 which is not a specific ground under s 82 or a show cause event under s 86.

Disclosures of the type referred to in s 51 can raise fitness to practice issues but fall short of an inability to fulfill the inherent requirements of practice, covered by s 82. These disclosures may include convictions for drink driving and less serious drug or dishonesty offences. The practitioner might remain fit to practice but the events notified suggest that it may be appropriate to impose conditions on the holder's practising certificate to protect clients or assist the practitioner.

It is proposed that s 82 should be amended to enable the DLRA to vary a practising certificate (for example by adding or amending a condition) where the holder has given notice pursuant to s 51 or to suspend or cancel a practising certificate where the holder has given notice pursuant to s 51 and the DLRA reasonably believes that the holder is not a fit and proper person to hold a practising certificate.

The rights of a practising certificate holder in the face of these proposed amendments are preserved. Section 83 provides that the DLRA proposing to vary, suspend or cancel a practising certificate under s 82 must give the holder written notice of the proposed action, its reasons, and invite the holder to make submissions as to why the action should not be taken. Further, the practising certificate holder also retains a right of appeal under s 100.

Recommendation 13
Amend s 82 to enable the DLRA to take the following actions in relation to a notification under s 51:

- vary a practising certificate, or
- where the DLRA reasonably believes that the holder is not a fit and proper person to hold a practising certificate – suspend or cancel the certificate.

Section 87: Automatic show cause events – applicants

Section 87 provides that, where an automatic show cause event has occurred in relation to an applicant for the grant or renewal of a certificate, the applicant must provide the DLRA with a statement about the event. The statement must explain why, despite the event, the applicant considers himself or herself to be a fit and proper person to hold a certificate. Subsection 87(3) provides that the applicant does not need to provide the statement if they have previously provided details of the event or a statement to the same effect to the authority.

Issues may arise where the applicant discloses a show cause event but withdraws the application before the DLRA has made a determination as to whether the person is fit and proper to hold a practising certificate. Because there is no longer an application under consideration, a determination in relation to the show cause event is never made. When the lawyer later applies for a practising certificate, they are not required to provide a statement because subs 87(3) applies to remove the obligation. Therefore, no determination of the show cause event will take place, effectively defeating the purpose of the show cause provisions.

It is proposed that the exclusion should only apply where the DLRA has made a determination of the show cause event as opposed to the applicant having provided the statement.

Recommendation 14
Amend s 87 to provide that a statement about a previous show cause event need not be provided by an applicant for a practising certificate who has previously provided a statement to the DLRA explaining why, despite the show cause event, he or she is a fit a proper person to hold a practising certificate and the DLRA has made a determination in relation to the show cause event.

Section 89: Automatic show cause events – action by local regulatory authority

Section 89 provides that a DLRA may vary, suspend or cancel, or may refuse to renew a practising certificate if the applicant or holder:

- fails to provide a statement about the show cause event, or
- has provided a statement but the DLRA does not consider that the applicant or holder has shown in the statement that, despite the show cause event, he or she is a fit and proper person

to hold a certificate.

None of these remedies apply to an applicant for a grant of a practising certificate. This appears to be a legislative oversight because:

- section 87 relates to automatic show cause events as relevant to applicants for a grant of a practising certificate, and
- the words in subs 94(1) contemplate that the DLRA might refuse to grant a practising certificate under Part 3.5.

Recommendation 15
Amend subs 89(2) to allow DLRAs to refuse to grant a practising certificate to an applicant in each of the circumstances described in that subsection.

Section 95: Consideration and investigation of applicants or holders

Section 95 provides that the DLRA, in considering whether or not to grant, renew, vary, suspend or cancel a certificate, may by notice require the applicant or holder to do any of the following things:

- give the DLRA specified documents or information
- be medically examined by a medical practitioner nominated by the authority
- provide a police report as to whether or not he or she has been convicted or found guilty of an offence in Australia
- cooperate with any inquiries the authority considers appropriate.

Under subs 95(2), failure to comply with such a requirement is a ground for making an adverse decision in relation to the action being considered by the DLRA.

There is no scope under s 95 to seek information from third parties. In contrast, subs 371(2) provides that an investigator carrying out a complaint investigation may, by notice in writing, require any person who has or had control of relevant documents to give access to documents and/or information reasonably required by the investigator. Subsection 371(3) makes it a criminal offence to fail to comply with a requirement made under subs 371(2).

It is proposed that s 95 be amended to enable DLRAs to seek information from third parties when considering whether or not to grant, renew, vary, suspend or cancel a certificate. The provisions under which the DLRA may consider such action include ss 45, 82, 89 and 92.

Recommendation 16
Amend s 95 to enable DLRAs 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.

Chapter 4 – Business practice and professional conduct

Chapter 4 contains provisions regulating legal costs and their disclosure, billing and costs agreements and costs assessments. Amendments to Part 4.3 (Legal costs) are proposed to improve clarity of the operation of the provisions and consumer protection, as well as to resolve inconsistencies and remove the potential for perverse outcomes to arise.

Section 174: Disclosure obligations of law practice regarding clients

Subsection 174(1) requires a law practice to provide clients with written information disclosing the basis on which legal costs will be calculated and an estimate of the total legal costs, when or as soon as practicable after receiving initial instructions. The law practice must also disclose any significant change to matters previously disclosed under the subsection when or as soon as practicable after the change occurs.

Subsection 174(2) lists additional information that must be disclosed under subs (1). This includes information about the client's rights:

- to negotiate a costs agreement with the law practice
- to negotiate a billing method (for example, by reference to timing or task)
- to receive a bill and to request an itemised bill, and
- to seek the assistance of the DLRA in the event of a dispute about legal costs.

A client's right to apply for a costs assessment under s 198 is not included in subs 174(2)(a), so this right may be overlooked by consumers and/or by law practices. There are also other notification obligations related to costs and billing in jurisdictional legislation. For example, under s 99 of the *Legal Profession Uniform Law Application Act 2014* (Vic), a client has the right to apply to the Victorian Civil and Administrative Tribunal for determination of certain costs disputes.

It is proposed that there would be benefit to consumers if the disclosure obligations for law practices in relation to costs are clearly and comprehensively listed under one section of the Uniform Law. This would also require an amendment to the Uniform Standard Costs Disclosure Form in Schedule 1 of the General Rules, as prescribed by r 72 of the General Rules.

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.

Section 198: Applications for costs assessment

Section 197 provides that a costs assessment under Division 7 is not available in relation to legal costs that have been the subject of a costs dispute under Chapter 5, unless the DLRA is unable to resolve the costs dispute and has notified the parties of their entitlement to seek a costs assessment, or the DLRA arranges for a costs assessment under s 284.

Section 198 allows for applications for assessment of legal costs by clients, third parties and certain law practices. Beneficiaries are not third party payers within the meaning of s 171 and there is no disclosure required to a beneficiary under s 176. However, the beneficiaries will ultimately pay the legal costs which are borne by the estate.

Under the Uniform Law, beneficiaries have fewer rights than third party payers - disputes over costs payable by the executors do not fall within the definition of a 'costs dispute' in subs 269(2). Subsections 198(8) and (9) provide beneficiaries as 'any other person whom the costs assessor thinks it appropriate to notify' with the right to participate in the costs assessment process as a party once so notified. Beyond this, their only recourse is to apply to the Supreme Court under probate legislation for filing and passing of executors' accounts (including legal costs incurred by the executors).

Recommendation 18
Amend subs 198(1) to add beneficiaries of deceased estates or potential beneficiaries arising from intestacy.

Subsection 198(3) provides that applications for cost assessment must be made within 12 months after the bill was given, the request for payment was made, or the costs were paid without a bill or request for payment.

If a law practice does not apply for a costs assessment by the date a complaint about those costs is made, it may run out of time to do so while the complaint is being dealt with. As a result, some law practices have been precluded from applying for a costs assessment out of time. In NSW, even if a law practice applies for costs assessment before a complaint is made, once a complaint is made the costs assessment scheme takes the view that the costs assessment must be stayed until the DLRA has dealt with the complaint.

It is proposed that subs 198(3) should be amended to both preserve a costs assessment application lodged by a law practice and to ensure that a law practice that has not yet applied for a costs assessment is not prevented from applying for such an assessment, by reason of existing time limits, while a complaint about those cost is being dealt with by a DLRA.

Recommendation 19
Amend subs 198(3) to stop time running for an application by a law practice for an assessment of costs while a complaint about those costs is being dealt with by a DLRA.

Subsection 198(4) provides for costs assessors to deal with applications made out of time if the designated Tribunal determines that it is just and fair for the application to be dealt with outside the 12 month period. However, out of time applications may only be made by the costs assessor, the client or third party payer. It does not include law practices.

It is proposed that law practices should have the same ability as other parties to seek a costs assessment out of time. There are many good reasons for the application to be out of time, including because the law practice has given the client additional time to settle the legal costs.

Recommendation 20
Include law practices in subs 198(4) as a party entitled to apply for a costs assessment out of time.

Subsection 198(5) states that subs 198(4) does not apply to an application made out of time by a third party payer who is not a commercial or government client but who would be a commercial or government client if the third party payer were a client of the law practice concerned.

Subsection 170(1) provides that Part 4.3, which includes section 198, does not apply to:

- a commercial or government client, or
- a third party payer who would be a commercial or government client if the third party payer were a client of the law practice concerned.

Both subs 170(1) and subs 198(5) operate to exclude a "a third party payer who would be a commercial or government client if the third party payer were a client of the law practice concerned" from subs 198(4).

In addition, subs 170(1) excludes a "commercial or government client" from subs 198(4).

Recommendation 21
Delete subs 198(5) as it serves no purpose.

Section 204: Costs of costs assessment

Subsection 204(1) provides that, without affecting the powers of a Court or Tribunal to award costs in relation to a costs assessment, a costs assessor must determine the costs of a costs assessment and by whom they are payable. Subsection 204(2) sets out the circumstances where the costs of the costs assessment are payable by the law practice, including where the practice's costs have been reduced by 15 per cent or more on assessment.

Subsection 204(2) is worded with multiple negatives, and is accordingly confusing and difficult to understand.

Recommendation 22
Amend subs 204(2) to clarify the discretion of the costs assessor and the circumstances when a law practice is liable for costs assessment.

Chapter 5 – Dispute resolution and professional discipline

Chapter 5 deals with dispute resolution and professional discipline. It sets out how complaints about conduct may be made (whether they give rise to consumer matters or disciplinary matters or both), preliminary assessment and investigation of complaints, binding determinations by the DLRA, proceedings before a designated Tribunal and findings of unsatisfactory professional conduct or professional misconduct. There are provisions for compensation orders and appeal or review of

determinations of the DLRA.

Amendments to Part 5.2 (Complaints), Part 5.4 (Disciplinary matters), Part 5.6 (Appeal or review) and Part 5.7 (General duties of local regulatory authority) are proposed to clarify the effect of certain provisions and provide certainty as to how they operate, resolve inconsistencies, improve administrative efficiencies and extend consumer benefits.

Section 269: Consumer matters (including costs disputes)

Subsection 269(1) provides that a 'consumer matter' is a complaint about a lawyer or law practice relating to the provision of legal services to the complainant by the lawyer or law practice and as the DLRA determines should be resolved by the exercise of functions relating to consumer matters.

Subsection 269(2) defines a 'costs dispute' as a consumer matter involving a dispute about legal costs payable on a solicitor-client basis, where the dispute is between a lawyer or law practice and a person who is charged with those legal costs or is liable to pay them (whether as a client of the lawyer or law practice or as a third party payer).

Beneficiary complaints usually relate to the provision of legal services by the legal practitioner to the executors of the estate. As the legal services have not been provided to the complainant, the complaint does not fall within the definition of 'consumer matter'. This means the DLRA cannot exercise functions relating to consumer matters (e.g. attempt informal resolution, mediation), and the beneficiary cannot obtain relief that is available in consumer matters (e.g. making of a s 290 order or a s 292 binding determination about costs).

The complaint may be dealt with as a disciplinary matter if the conduct is so serious that, if established, it would amount to unsatisfactory professional conduct or professional misconduct. However, the DLRAs explain that this is rarely the case. More commonly, beneficiaries complain of delay, inaction or non-communication by the practitioner acting for the executors, or dispute the costs charged to the executors.

Under the previous NSW legislation, the regulator was able to make inquiries and obtain an explanation or progress report from the lawyer, which could be relayed to the beneficiary. Section 514 of the repealed *Legal Profession Act 2004* (NSW) defined 'consumer dispute' in that part as 'a dispute between a person and an Australian legal practitioner about conduct of the practitioner to the extent that the dispute does not involve an issue of unsatisfactory professional conduct or professional misconduct'.

The repealed Victorian *Legal Profession Act 2004* contained the following relevant provisions:

> **Section 4.2.2 Civil Complaints and Disputes**
> (1) A 'civil complaint' is a complaint about conduct to which this Chapter applies, to the extent that the complaint involves a civil dispute.
> (2) A 'civil dispute' is any of the following—
> (a) a dispute (costs dispute) in relation to legal costs not exceeding $25 000 in respect of any one matter —

(i) between a law practice or an Australian legal practitioner and a person who is charged with those costs or is liable to pay those costs (other than under a court or tribunal order for costs); or

(ii) **between a law practice or an Australian legal practitioner and a beneficiary under a will or trust** in relation to which the law practice or practitioner has provided legal services in respect of which those costs are charged; *(emphasis added)*

Arguments for including of beneficiaries in the definition of 'consumer matters' include:

- Objective of the Uniform Law – Expanding the definition is in line with the objective of the Uniform Law, i.e. enhancing the protection of clients of law practices and the protection of the public generally. Although a beneficiary sits outside the lawyer-client relationship, they will be part of a significant legal process during the administration of the estate, and due to their involvement with the legal profession during this time they should be extended the protections and rights afforded to other consumers under the Uniform Law.

- Removal of previous rights – Excluding beneficiaries from these provisions removed rights that existed in Victoria and NSW prior to the commencement of the Uniform Law, outlined above.

- Potential conflict of interest – When the solicitor who has charged the estate for work is also the executor of the estate they are effectively subject to no external accountability. This situation also arises where the solicitor is the executor and the firm with which they are associated acts in the matter on instructions from the solicitor/executor.

- Other remedies for beneficiaries may be costly and time-consuming – While equitable remedies may be available, commencing an equitable action is likely to be costly and time-consuming for many beneficiaries.

- Keep regulation of costs within one Act – It would also assist in reducing regulatory complexity if this statutory right to dispute legal costs was contained within the Uniform Law.

Arguments for excluding beneficiaries in the definition of 'consumer matter' include:

- Outside the scope of legal profession regulation – Given a beneficiary sits outside of the client-lawyer relationship this issue may be considered to fall outside the scope of legal profession regulation.

- Increased complaint handling workload for DLRAs – Allowing beneficiaries to make complaints may lead to increases in DLRA workload. An increase in workload may require extra resources and funding in order to process a higher number of applications.

- Equitable remedies may be available as an alternative to the Uniform Law – Beneficiaries may be able to take equitable action against the executor.

For the purpose of affording beneficiaries of deceased estates a cheap and quick resolution to their complaints, an amendment of s 269 is proposed to allow these complaints to be dealt with by DLRAs as consumer matters.

Recommendation 23
Expand the definition of 'consumer matters' in s 269 to include complaints by beneficiaries of deceased estates or arising from intestacy.

Section 277: Closure of whole or part of complaint after preliminary assessment

Subsection 277(1) provides that the DLRA may close a complaint, or part of a complaint, after preliminary assessment for one of a number of specified reasons. The reasons include that the complaint is vexatious, misconceived, frivolous or lacking substance, made out of time or the complainant has not adequately responded to a request for further information.

It is proposed that the word 'close' should be replaced with the word 'dismiss' as it would make it clearer to the person who made the complaint that the matter has been finalised. It would also provide a greater sense of finality to the practitioner.

Recommendation 24
Amend subs 277(1) to replace the word 'close' with 'dismiss'.

A concern has also arisen that these provisions do not adequately capture complaints about practitioners who have already been removed from the Supreme Court roll or where a practitioner is removed from the roll (in another matter) while the DLRA is dealing with the complaint against that person.

The DLRAs currently rely on subs 277(1)(j) which allows them to close a complaint, or part of a complaint, after preliminary assessment if the DLRA is satisfied that it is otherwise in the public interest to close the complaint. However, complainants may not consider that it is in the public interest for their complaints to be closed.

As such, it is proposed to include a specific provision which permits closure if the former lawyer's name has been removed from the roll. Adding this provision would not result in automatic closure of the complaint if the person has been removed from the roll.

Recommendation 25
Amend subs 277(1) to provide that a complaint may be closed/dismissed if the name of the practitioner has already been removed from the Supreme Court roll.

In addition, while subs 277(3) allows for a complaint to be closed without any investigation or without completing an investigation, it does not specify that a complaint may be closed after a full investigation. It is considered that this power should be explicitly stated in the Uniform Law.

Recommendation 26
Add a new section that empowers DLRAs to dismiss a complaint at the conclusion of an investigation.

Section 298: Conduct capable of constituting unsatisfactory professional conduct or professional misconduct

Disciplinary matters concerning lawyers are those capable of amounting to 'unsatisfactory professional conduct' or 'professional misconduct'.

Unsatisfactory professional conduct includes conduct occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (s 296). Unsatisfactory professional conduct is misconduct of a lower level than professional misconduct.

Professional misconduct includes unsatisfactory professional conduct which involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and conduct occurring in connection with the practice of law or otherwise that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice (s 297).

Section 298 provides examples of conduct capable of constituting unsatisfactory professional conduct or professional misconduct (including contraventions of the Uniform Law or the Uniform Rules, charging more than fair and reasonable costs, convictions for certain offences, insolvency, disqualification under the Corporations Act, and failure to comply with certain orders).

Section 298 does not include failure to comply with an order of the DLRA relating to a disciplinary matter under s 299 (e.g. an order requiring an apology). In contrast, subs 290(3) provides that failure to comply with the DLRA's orders made in consumer matter determinations is considered conduct capable of constituting professional misconduct or unsatisfactory professional conduct.

For consistency with consumer matters, it is proposed that the legislation provide that non-compliance with orders made by the DLRA in relation to disciplinary matters is capable of constituting unsatisfactory professional conduct or professional misconduct.

Recommendation 27
Amend s 298 to specify that failure to comply with an order made by a DLRA under s 299 is capable of constituting unsatisfactory professional conduct or professional misconduct.

Section 299: Determination by local regulatory authority – unsatisfactory professional conduct

Subsection 299(1) provides that the DLRA may, in relation to a disciplinary matter, find that unsatisfactory professional conduct has occurred and may determine the matter by making certain orders (caution, reprimand, require an apology, require work to be re-done at no or reduced cost, require training, education, counselling or supervision, impose a fine not exceeding $25,000, or recommend the imposition of a condition on a practising or registration certificate).

Currently under the Uniform Law, a DLRA cannot make a finding and determination of professional misconduct. However, in practice many complaints involve professional misconduct at the less serious end of the scale (e.g. isolated, albeit serious, lapses or errors of judgment such as single occurrences of false witnessing; misleading the Court overtly or by omission; failure to honour an undertaking). The types of orders a Tribunal may typically make in such matters are often the same as those a DLRA may already impose when dealing with a matter under subs 299(1) involving unsatisfactory professional conduct.

It is proposed that in certain cases, for example, where wrong-doing is less serious and fully admitted, it would be beneficial for all parties if the DLRAs had discretion to make a finding and determination of professional misconduct, rather than be required to apply to the Tribunal to make such a finding and determination. The respondent lawyer would retain the rights of appeal or review specified in s 314.

Subsection 77J(2) of the *Legal Practitioners Act 1981* (SA) permits the Legal Profession Conduct Commissioner in that State to deal with professional misconduct, if the practitioner consents, rather than having to automatically refer all such findings to the Tribunal.

The management of instances of less serious professional misconduct by DLRAs would allow public resources (both in relation to the DLRA and the designated Tribunal) to be allocated to more serious matters of professional misconduct in which a lawyer's right to practise may be restricted in the public interest. A designated Tribunal would continue to deal with matters in which the dispositive orders sought include restricting practice by way of cancelling a practising certificate or recommending that a person's name be removed from the roll, or imposing a fine exceeding $25,000.

In addition to the practitioner consenting to the DLRA determining the matter, it is proposed the practitioner should also admit the conduct and demonstrate contrition. This may involve voluntarily disclosing the misconduct, correcting misconduct involving false statements or omissions, making amends for the misconduct, or apologising. Finally, giving an undertaking to assist the DLRA in a related prosecution, if required, is a further opportunity for the lawyer to demonstrate a level of insight into the misconduct.

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.

A compensation order may be made under subs 290(2)(e), determination of consumer matters by DLRA, and subs 302(1)(k), determination by designated Tribunals. However, there is no power to make a compensation order under s 299.

This effectively requires proceedings to be initiated in the Tribunal for a compensation order to be available in complaints that are not consumer matters, and this is the only avenue for a complainant who is a non-client to obtain compensation. It is proposed that this distinction should be removed by permitting the DLRA to impose a compensation order under s 299.

Recommendation 29
Amend subs 299(1) to allow complainants to obtain redress by way of a compensation order in all matters, not just consumer matters and disciplinary matters heard by the Tribunal; and consequentially amend subs 306(1) by adding 'and section 299' after 'for the purposes of section 290'.

There is no power for the DLRA under subs 299(1)(d) to make orders to enable a full or partial refund of fees. In comparison, subs 308(3)(b) provides that a compensation order may include an order providing that the respondent lawyer or law practice must pay to the aggrieved person the whole or part of the amount charged for specified legal services.

As an alternative to recommendation 29 above, it is proposed that subs 299(1)(d) should be amended to also permit an order to be made for the refund, in part or in full, of fees paid.

Recommendation 30
As an alternative to recommendation 29 above, amend s 299(1)(d) to permit an order to be made for the refund, in part or full, of fees paid.

Section 313: Internal review of decisions of local regulatory authorities

Section 313 enables the DLRA, at its absolute discretion, to conduct an internal review of a decision to consider whether the decision was dealt with appropriately and was based on reasonable grounds. It is not intended to provide a general avenue of merits review of DLRA decisions, but will allow the DLRA to correct defects in its decisions, if required.

It is proposed to amend s 313 to reinforce the 'absolute' extent of the discretion as to whether or not an internal review should be conducted.

Recommendation 31
Confirm that the DLRA's decision whether or not to exercise absolute discretion on internal review decisions is final and cannot be challenged in any proceedings by the complainant or the respondent lawyer.

Section 313 refers to a 'decision' without any limitation and fails to identify any types of decisions which cannot be subject to internal review. It is proposed that internal review should not be available in relation to a decision to waive or refuse to waive a time requirement consistent with subs 272(4) relating to complaints.

Recommendation 32
Exclude from internal review, the DLRAs decisions to waive or to refuse to waive time limits for complaints in s 272.

Section 317: Duty to deal with complaints efficiently and expeditiously

Section 317 requires DLRAs to deal with complaints as efficiently and expeditiously as is practicable.

Complaints about practitioners are sometimes made where there are concurrent police investigations, civil or criminal proceedings or commissions of inquiry concerning an individual practitioner's conduct. Where such an investigation is taking place, often involving very serious conduct, it is appropriate for the DLRA to suspend the investigation pending the outcome of the other concurrent investigation or proceeding.

The concurrent matter may involve conduct that the Court may, in its general supervisory role, sanction directly. It may involve a criminal matter, in which case the DLRA's investigation may jeopardise the police investigation. There are also practical considerations regarding the efficient use of the DLRA's resources, where the outcomes and evidence presented in the concurrent criminal or civil proceeding may allow the DLRAs to narrow or even eliminate the matters remaining for DLRA investigation.

An amendment to s 317 is proposed to make it clear that it is not a breach of the duty to deal with complaints efficiently and expeditiously for the DLRA to suspend its dealing with a complaint if it reasonably believes that it is in the public interest to suspend the complaint. Any such decision would be subject to judicial review.

Recommendation 33
Amend s 317 to make it clear that it is not a breach of the DLRA's duty to deal with complaints efficiently and expeditiously for the DLRA to suspend its dealing with a complaint if it reasonably believes that it is in the public interest to suspend the complaint.

Chapter 6 – External intervention

Chapter 6 makes provision for external interventions in the business and professional affairs of law practices in certain circumstances, such as the death, insolvency or imprisonment of a practitioner; the failure to hold a current practising certificate; where the DLRA believes on reasonable grounds that the affairs of the law practice have not been attended to properly; or there have been irregularities in relation to trust money, trust property or trust accounts.

Section 353: Improperly destroying property etc

Section 353 provides that a person must not intentionally destroy, conceal, remove, deliver into the possession or place under the control of another person, any regulated property of a law practice for which a receiver has been or is likely to be appointed.

The s 353 prohibition applies only to receivers. In matters involving other external intervenors (managers and supervisors), regulated property has been removed from the premises of the law practice by a person to residences, sheds, storage units, and the boot of the legal practitioner's car, or destroyed.

An extension of the s 353 prohibition to all cases where an external intervener is appointed or likely to be appointed would limit the ability of a person to frustrate the performance by managers and supervisors of their functions.

Recommendation 34
Amend Chapter 6 to extend the s 353 prohibition to all cases where an external intervener is appointed or is likely to be appointed.

Chapter 9 – Miscellaneous

Chapter 9 contains a number of general provisions including provisions relating to disclosure, appeals and reviews, requirements to report, protection from liability and indexation. Amendments to Part 9.9 (General) are proposed to resolve inconsistencies and enhance protection of consumers of legal services.

Section 467: Protection from liability
Section 468: Non-compellability of certain witnesses

Section 467 protects the Council, the Commissioner and a local regulatory authority (and a committee member, delegate, staff member and certain other persons) from liability for acts done or omitted in good faith in the exercise or purported exercise of their functions under the Uniform Law, the Uniform Regulations and the Uniform Rules.

Subsection 468(1) provides that the persons referred to in s 467 are not compellable to give evidence or produce documents in any legal proceedings (including proceedings under Chapter 5) in relation to matters in which the person was involved in the course of administering the Uniform Law. Subsection 468(2) accommodates exceptions to this requirement that may be made by jurisdictional legislation, for example, in relation to Royal Commissions.

Section 468 adopts the definition of 'relevant person' in s 467 which does not include former staff members. The omission of former staff members from s 468 exposes them to being called as witnesses in legal proceedings to give evidence or produce documents in respect of matters they were involved in while employed by the DLRA.

The omission of former staff members from the non-compellability provisions in s 468 is inconsistent with s 462 which relates to the prohibition on a relevant person to disclose information. Subsection 462(3) contains a list from (a) to (j) of persons considered to be 'relevant persons' for the purpose of the section and then adds in subs 462(3)(k): 'a person who formerly held a position referred to in paragraphs (a) to (j)'.

It is proposed to amend s 467 so that former, as well as current members of staff are non-compellable to give evidence or produce documents in respect of matters they were involved in while employed by the DLRA.

Recommendation 35
Amend s 467 to provide former staff members with the benefit of non-compellability as witnesses.

Section 472: Supreme Court may order delivery up of documents etc.

Section 472 enables clients to apply to the Supreme Court to make orders for the giving of a bill of costs to a client or the delivery of other documents to a client of a law practice.

Subsection 472(3) excludes from the operation of the section a category of clients – clients of a law practice that has been retained on the client's behalf by another law practice. An example of such a situation is where a barrister is retained by a solicitor.

It is proposed to amend the section to enable these clients to seek orders from the Court in certain circumstances. The effect of the amendment will be that:

- clients with a costs agreement with their barrister (even though the barrister was retained on the client's behalf by a solicitor) will be able to apply to the Supreme Court for an order to obtain a bill of costs, and
- in cases where a barrister holds client documents in respect of legal services provided by the barrister (even though the barrister was retained on the client's behalf by a solicitor), the client will be able to apply to the Supreme Court for an order to obtain those documents.

Recommendation 36
Amend s 472 to remove the exclusion of clients of a law practice retained on the client's behalf by another law practice to obtain Supreme Court orders under:

- subs 472(1)(a), where there is a costs agreement between the client and the law practice retained on the client's behalf by another law practice, as contemplated by s 180(1)(b), and
- subs 472(1)(b) to deliver up any of the client's documents held by that law practice.

Submissions

Submissions can be sent to the Council by email to: submissions@legalservicescouncil.org.au on or before 28 February 2020, and will be published on the Council's website unless you advise us otherwise.