Queensland Law Society

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Office of the President

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The Legal Services Council
19 O'Connell Street
Sydney NSW 2000

By email: submissions@legalservicescouncil.org.au

Dear Sir/Madam

Consultation paper on proposed amendments to the Legal Profession Uniform Law

Thank you for the opportunity to provide comments on the Consultation paper on proposed amendments to the Legal Profession Uniform Law (**consultation paper**).

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

The *Legal Profession Act 2007* (QLD) (**LPA**) provides for the regulation of legal practice in Queensland. However, the Legal Profession Uniform Law (**Uniform Law**) nonetheless has an impact on many of our members. Accordingly, we have reviewed the consultation paper and make the following comments.

Recommendation 17

This recommendation is supported as it aligns with the disclosure requirements in the LPA

Recommendation 18

This recommendation has been considered by members of the QLS Succession Law and Litigation Rules legal policy committees.

On a preliminary point, the amendment recommended here is significant and will have significant implications on solicitors and parties. However, the discussion of the recommendation in the consultation paper is limited and does not contain sufficient consideration of all the relevant issues. For example, it is unclear whether the recommendation proposes to entitle a beneficiary to join in on a notice of a costs assessment or to seek one as of right.

Accordingly, on the limited material provided, and based on the expertise and experience of our members, QLS does not support the recommendation. The rationale for our position is as follows.

First, we note that beneficiaries are not on the same level as a third party payers. Beneficiaries do not have contractual rights with the solicitor. A solicitor will have contractual obligations and responsibilities to third party payers and clients. The client is generally the executor/administrator/trustee. The rights of a beneficiary are between the beneficiary and the executor/administrator/trustee, not the solicitor. It is incorrect to liken an estate or a trust fund to a third party payee because this is the fund, from which costs are paid.

The proposal treats beneficiaries as having rights of control over an executor/administrator, who is often also the trustee, and who under trust law is the decision maker and who must act as an independent fiduciary.

There is a legal duty for the executor/administrator/trustee to act in the best interests of the beneficiary. Given the fiduciary duties of the executors/administrators and trustees and the requirements for executors/administrators and trustees to act impartially, transparently and in the best interests of the beneficiary, it does not seem necessary for a beneficiary to have the proposed additional rights.

The ability for a troublesome or difficult beneficiary to obtain, as of right, a costs assessment, which by its nature results in the file being made available so that costs can be assessed, will more likely than not compromise client confidentially and legal professional privilege. These principals are enshrined in our legal system and are sacrosanct.

We are also unsure about what practical benefit or better outcome this right will give a beneficiary. Again, the consultation paper does not proffer an explanation. Our concern is that additional processes would be created which will lead to delays and increased legal and other costs, where there is no actual benefit to a beneficiary. The consequence of such a proposed amendment is the potential for a much longer, drawn out dispute process.

The recommendation suggests that the amendment will apply to all potential beneficiaries, again without clear justification as to why. If this is the case, then a beneficiary who may receive a small (in value) specific gift will have the same right as other beneficiaries who may receive large sums of money or assets. This conflicts with the law that recognises a hierarchy of beneficiaries for all other purposes. We consider that opening up such a right would be highly problematic, particularly where an estate is spread over multiple jurisdictions. The time and cost in determining who may be a beneficiary on intestacy would be difficult and inherently costly.

A further issue is that testamentary discretionary trusts (**TDT**) are routinely drawn to ensure that the trustee of the trust has recourse to the widest possible array of beneficiaries. It is inherent in the nature of a TDT to be as flexible as possible to deal with uncertainties of family situations and new developments in the law. For the most part, most of those potential beneficiaries never take in the trust. If the amendment proceeds, the situation may arise where a trustee seeks to undertake a costs assessment in respect of a TDT that has been running for years. The trustee must then involve a potential beneficiary who never takes in the trust, but might decide to utilise the costs assessment process to pry into the decisions of the

trustee and the affairs of beneficiaries who do take. Further this again raises issues in respect of legal professional privilege and confidentiality.

Finally, the proposed amendment fails to appreciate the overarching principle of finality of litigation and the position that an executor/administrator/trustee client has 12 months after the issuance of a bill to seek a costs assessment. If a beneficiary has concerns about the costs of administration of an estate or trust, the beneficiary currently has the right to dispute the costs with the executor/administrator/trustee whereupon that person would need to give serious consideration to the rights available to review the position.

There are already processes in place (in Queensland and in the Uniform Law jurisdictions) for genuinely aggrieved beneficiaries to avail themselves of. For example, beneficiaries have rights to estate account assessing. In New South Wales, by and large an executor must obtain a grant of probate. In doing so they must depose in an affidavit that they will pass and file estate accounts and have them approved by the court. While that is not a cost assessment as such, it involves scrutiny of expenditure in an estate. A beneficiary has a great deal of recourse there, as that process is designed to protect beneficiaries from errant executors running up costs.

Further, an executor/administrator/trustee should speak with beneficiaries about who they are engaging, what costs are involved (where appropriate) and other relevant matters. Even though it is the executor/administrator/trustee that has the power to, and does make the decisions (including regarding the costs they are paying), there are various times when they may need to consult the beneficiaries. The decision of *Cain v Cain* [2007] NSW SC 623 at 23 provides useful authority on what 'consult' means.

Assuming that this proposal is to give beneficiaries the right to seek a costs assessment (which we strongly oppose) and this is adopted despite our significant concerns, we suggest that:

- There be further consultation on the drafting of the amendment;
- It be limited to a residuary beneficiary.
- It is limited to a situation where a sole practitioner is acting as an administrator/executor/trustee as in those circumstances, there is an inability contract with one's self.
- The amendment is drafted to recognise the legal difference between an *executor*, *administrator* (formal and informal) and *trustee of a deceased estate*. Currently the recommendation uses the term, "executors", only.

Recommendation 22

Recommendation 22 suggests amendment to section 204 to clarify the discretion of the costs assessor and the circumstances when a law practice is liable for costs assessment. QLS considers that this section does need to be clarified. This section should only apply in circumstances where the solicitor's entitlement to costs is reduced by 15% and not in the situation where a non-associated third party payer is to indemnify a client in respect of their liability under an agreement, contract or otherwise. In that situation, it is the same as

recovering costs in litigation between parties where there is no "15% rule". QLS would be pleased to recommend drafting for this amended provision.

Recommendation 28

QLS does not support recommendation 28. This recommendation suggests an amendment to the Uniform Law which will allow a designated local regulatory authority (**DLRA**) to make findings of professional misconduct in what it considers are "less serious" cases. The assessment of what is less serious is subjective and difficult to determine because what one person might consider as being less serious, may not be for another.

At common law, professional misconduct is any conduct by a lawyer in his or her professional capacity that would reasonably be regarded as disgraceful or dishonourable by fellow lawyers of good repute and competency. See *Allinson v General Council of Medical Education & Registration* (1894) 1 QB 750 at 761; *Prothonotary of the Supreme Court v Costello* (1984) 2 NSWLR 210 at 207.

Professional misconduct at common law is conduct related to a practitioner's professional activities or sufficiently connected to those activities. It might relate to a breach of duty to the client, the courts, other practitioners or the public. The categories and instances of professional misconduct are not closed, since what constitutes disgraceful or dishonourable conduct, or the standard of conduct observed or approved by members of the profession, may change over time.

Common law professional misconduct, at least of the kind described in Allison's case, frequently involves an element of what is referred to as "moral turpitude". Examples are:

- stealing a client's trust funds;
- deliberate and systematic overcharging;
- lying to a client;
- deliberately misleading a court.

It may be considered that conduct, regardless of its severity, if it satisfies the tests, should not be determined outside of a judicial setting given the severity of the conduct. If it is considered to be of a "lesser scale", it would more rightly be considered to be unprofessional conduct.

Recommendation 31

This recommendation seeks to amend section 313 to reinforce that a decision whether or not to exercise the absolute discretion of a DLRA on internal review is not able to be challenged in any proceedings. QLS does not support this recommendation. We question whether this is an attempt to oust the jurisdiction of the courts. In terms of the separation of powers, this should not be adopted. See: *Anisminic Ltd v. Foreign Compensation Committee* [1969] 2 AC 147; *Deputy Federal Commissioner of Taxation v. Richard Walter Pty Ltd* [1995] HCA 23; *Refugee Review Tribunal, ex parte Asla* [2000] HCA 57.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policv@qls.com.au or by phone on

Yours faithfully

Luke Murphy
President