

29 January 2015

Legal Services Council
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submissions@legalservicescouncil.org.au

Dear Sir

**LEGAL PROFESSION UNIFORM LAW – LEGAL PROFESSION PROPOSED
UNIFORM GENERAL RULES**

The Law Society of Western Australia (Society) is the peak professional association for lawyers in Western Australia. The Society is pleased to make this submission in response to the consultation on the Legal Profession Proposed Uniform General Rules under the Legal Profession Uniform Law (LPUL).

As you are aware, Western Australia is not presently a participating jurisdiction under the LPUL. The Society has recommended to the Western Australian Attorney General that Western Australia become a participating jurisdiction (subject to certain conditions). As such, the Society makes this submission in the interests of achieving sufficiently harmonised rules so as to easily facilitate Western Australia, as well as other jurisdictions, becoming participating jurisdictions in the near future.

Please note that reference throughout this submission to the "LCA Submission" is a reference to the submission made by the Law Council of Australia dated 19 January 2015 and titled "Legal Profession Uniform General Rules 2014 under the Legal Profession Uniform Law: Response to Consultation draft November 2014".

Legal Profession Proposed Uniform General Rules 2014

Rule 5 Definition of "Supervised Legal Practice"

The Society endorses the recommendations at page 6 of the LCA Submission regarding the need to clarify aspects of the definition of "supervised legal practice".

Rule 10 Entitlement to certain titles

The Society endorses the recommendations at page 7 of the LCA Submission regarding proposed Rule 10.

Rule 11 Exemption from prohibition on engaging in legal practice

The Society endorses the recommendations at pages 7 and 8 of the LCA Submission regarding proposed Rule 11.

Rule 14 Consideration of application for grant or renewal of Australian practising certificate

Proposed Rule 45 prescribes certain matters that the local regulatory authority may have regard to for the purpose of considering whether an applicant is a fit and proper person to hold an Australian practising certificate.

Pursuant to section 38(4) of the *Legal Profession Act 2008* (WA), if a matter was:

- a) disclosed in an application for admission to the legal profession in this or another jurisdiction; and
- b) determined by the Supreme Court or by the Board or a corresponding authority not to be sufficient for refusing admission,

the matter cannot be taken into account as a ground for refusing to grant or renew or for cancelling a local practising certificate.

There is no equivalent provision in proposed Rule 45. The Society recommends a similar provision be included in the Uniform General Rules.

Rule 18 Applicant for grant or renewal of Australian practising certificate not intending to practise in Australia

The Society endorses the recommendations at page 8 of the LCA Submission regarding proposed Rule 18.

Rule 34 Maintenance of general trust account

The Society endorses the recommendations at page 8 of the LCA Submission regarding proposed Rule 34.

Rule 35 Withdrawal of trust money

Save for the objection in the LCA submission to proposed Rule 35(2), which the Society does not adopt, the Society endorses the recommendations at page 9 of the LCA Submission regarding proposed Rule 35.

Rule 38 Computerised accounting systems – printed or other copies of trust records

The Society endorses the recommendations at pages 10 and 11 of the LCA Submission regarding proposed Rule 38.

Rule 42 Method of payment

The Society endorses the recommendations at page 11 of the LCA Submission regarding proposed Rule 42.

Rule 45 Journal transfers

The Society endorses the recommendations at page 11 of the LCA Submission regarding proposed Rule 45.

Rule 50 Notification requirement regarding each trust account

The Society endorses the recommendations at pages 11-12 of the LCA Submission regarding proposed Rule 50.

Rule 56 Authority to receive trust money

The Society endorses the recommendations at page 12 of the LCA Submission regarding proposed Rule 56.

Rule 57 Disclosure of accounts used to hold money

The Society endorses the recommendations at page 12 of the LCA Submission regarding proposed Rule 57.

Rule 59 Receipt of controlled money

The Society endorses the recommendations at page 12 of the LCA Submission regarding proposed Rule 59.

Rule 62 External examiners

Paragraph (1) of Rule 62 provides that, for the purposes of Part 4.2 of the Uniform Law, the designated local regulatory authority may, in writing, designate persons (including persons employed or engaged by the regulatory authority) as eligible to be appointed as external examiners.

No minimum qualifications or other requirements are specified in Rule 62 for appointment as an examiner.

The Society recommends that, in order to ensure examiners have the appropriate qualifications and experience to discharge their role, there should be a requirement to the effect of that in section 235 of the *Legal Profession Act 2008 (WA)* that only an accountant who is either:

- (a) a registered company auditor; or
- (b) an employee or agent of the local regulatory authority,
be eligible for designation by the local regulatory authority as an external examiner.

Rule 66 External examiner's report

The Society endorses the recommendations at page 13 of the LCA Submission regarding proposed Rule 66.

New Rule Retainers

The Society endorses the recommendations at page 13 of the LCA Submission regarding the need for a new rule to address the classification of retainers as trust money.

PART 4.3 LEGAL COSTS

Pursuant to section 174(4) of the Uniform Law, costs disclosure is not required if the total legal costs in the matter are not likely to exceed the amount specified in the Uniform Rules for the purposes of subsection 174(4) (the "lower threshold").

The proposed General Rules do not presently specify any amount for the purpose of section 174(4). Consequently, the "lower threshold" remains set at \$750 pursuant to section 18(3) of the Uniform Law.

The Society considers that this threshold is unreasonably low and would have little or no effect on reducing the administrative burden of costs disclosure obligations for law practices. The Society recommends that the lower threshold be set at \$1500 in line with section 263(2)(a) of the *Legal Profession Act 2008 (WA)*.

Rule 68 Alternative disclosure for legal costs below higher threshold

The Society endorses the recommendations at pages 13-16 of the LCA Submission regarding Rule 68 and emphasises that if the issues raised in the LCA Submission are not resolved, the attractiveness to Western Australia in becoming a participating jurisdiction would be significantly diminished, especially from the point of view of legal practices operating solely within Western Australia.

Rule 69 Giving bills

The Society endorses the recommendations at page 16 of the LCA Submission regarding Rule 69.

New rule Commercial and government clients

The Society endorses the recommendation at page 16 of the LCA Submissions regarding the need for a new rule extending the definition of a commercial or government client.

New rule Reasonable steps

The Society endorses the recommendation at page 17 of the LCA Submission regarding the need for a new rule to clarify the steps a practitioner is required to take to comply with section 174(3) of the Uniform Law.

PART 4.4 PROFESSIONAL INDMENITY INSURANCE

Rule 73 Minimum standards for professional indemnity insurance

To be classified as an “approved insurance policy” for the purposes of the Uniform Law, a professional indemnity insurance policy must, among other things, comply with the “minimum standards” specified in the Uniform Rules for the purposes of section 210 of the *Uniform Law* (section 210(1)(b)(i) of the *Uniform Law*).

These “minimum standards” are found in proposed Rule 73.

Rule 73(4)

Paragraph (4) of proposed Rule 73 requires that professional indemnity insurance must extend to civil liability incurred in connection with the legal services of the insured and persons engaged by the insured in the provision of legal services. However, professional indemnity insurance policies around the country exclude certain specific areas or types of liability within the broad concept of civil liability. As such, the existence of such exclusions and limitations on these policies needs to be incorporated into the minimum requirements.

In addition, the use of the term “engaged” in the proposed rule has the potential to capture a broad group of persons not intended to be insured including consultants engaged as independent contractors engaged by a legal practice whom should be the subject of their own separate insurance policy. The term “employed” is more appropriate.

For these reason, the Society recommends the following draft rule in place of the existing Rule 73(4):

Professional indemnity insurance must extend to civil liability incurred in connection with the legal services of the insured and person employed by the insured in the provision of legal services subject to the permitted limitations and exclusions set out in [Schedule 1 to this letter].

Rule 73(6)

Paragraph (6) requires that professional indemnity insurance provide minimum coverage of \$1.5 million for each and every claim, or each and every loss, inclusive of the claimant’s costs and defence costs.

This proposed rule is unclear as to whether it does or does not permit the aggregation of claims, such as where claims arise out of one course of conduct with a single client, single course of conduct of the same nature with multiple clients or similar. Such provisions operate to cap liability but also serve to reduce the excess payable by a practitioner on claims. Accordingly, the Society proposes the following, alternative, wording for paragraph (6):

Professional indemnity insurance must provide minimum coverage of \$1.5 million for each and every claim, or each and every loss, inclusive of the claimant's costs and defence costs, subject to terms permitting the aggregation of claims and losses as a single claim or loss.

Rule 73(7)

Paragraph (7) requires that professional indemnity insurance provide indemnity for any former principals of, or those formerly "engaged" by, the insured and by any prior law practice of the insured. The use of the term "engaged" in the proposed rule, has the potential to capture a broad group of persons not intended to be insured including consultants engaged as independent contractors engaged by a legal practice whom should be the subject of their own separate insurance policy.

The Society recommends this paragraph be redrafted as follows:

Professional indemnity insurance must provide indemnity for any former principals of, or those formerly employed by, the insured and by any prior law practice of the insured in respect of their provision of legal services as a principle or employee of the insured.

Rule 73(9)

Paragraph (9) provides:

In the case of a claim arising from dishonesty or fraud, professional indemnity insurance must not exclude indemnity of a principal of, or person engaged by, the insured who was not knowingly connected with any dishonesty or fraud related to the claim.

The use of the term "engaged" in the proposed rule has the potential to capture a broad group of persons not intended to be insured including consultants engaged as independent contractors engaged by a legal practice whom should be the subject of their own separate insurance policy. The Society proposes the following, alternate wording, for paragraph (9):

In the case of a claim arising from dishonesty or fraud, professional indemnity insurance must not exclude indemnity of a principal of, or person employed by, the insured who was not knowingly connected with any dishonesty or fraud related to the claim.

Rule 73(11)

Paragraph (11) presently provides:

Professional indemnity insurance must not provide the insurer with a right to avoid or cancel cover because of any innocent or non-fraudulent non-disclosure or misrepresentation by the insured.

As presently worded, the proposed paragraph (11) contains no restrictions on insurers reducing cover because of any innocent or non-fraudulent non-disclosure or misrepresentation. Further, there is presently no allowance made in the proposed Rule for insurers to be indemnified by law practices to the extent of any prejudice suffered as a result of any non-fraudulent misfeasance.

The Society proposes the following, alternate, wording:

Professional indemnity insurance must not provide the insurer with a right to avoid, reduce or cancel cover because of any innocent or non-fraudulent non-disclosure or misrepresentation by the insured but may allow an insurer to be indemnified by the law practice to the extent of any prejudice.

The policy must provide that it cannot be cancelled and is not transferable. The policy can cease from the date that the practitioner or law practice ceases to practise.

The proposed re-drafted wording allows for Insurers to be indemnified to the extent of any prejudice and allows for the policy to cease once a practitioner or law practice ceases to operate. The policy cannot be cancelled as it provides valuable run off cover for any acts or omissions which may have occurred during the policy period. Under the *Legal Profession Act 2008 (WA)* the Society is required to make professional indemnity insurance arrangements for practitioners and former practitioners. This is achieved through Law Mutual (WA) which was established (and is administered) by the Society pursuant to Regulations authorised under s 328 of the *Legal Profession Act 2008 (WA)* to effect compulsory insurance arrangements for the insureds. This legislation should be unaffected by the proposed uniform general rules.

New rule Multi-jurisdictional practices

The Society endorses the recommendation at page 17 of the LCA Submission regarding the need for a new rule to clarify that multi-jurisdictional firms which are fully integrated but structured as separate partnerships in particular jurisdictions be treated as a single practice for PII purposes.

PART 4.5 FIDELITY COVER

Rule 79 Defaults to which Uniform Law does not apply

The Society endorses the recommendations at pages 17-18 of the LCA Submission regarding Rule 79.

PART 4.6 BUSINESS MANAGEMENT AND CONTROL

Rule 90 Other registers

Save for the comments on "Registers of powers and estates" on page 18 of the LCA Submission, which the Society does not adopt, the Society endorses the recommendations at page 19 of the LCA Submission regarding proposed Rule 90.

Compliance audits and management system directions

The Society endorses the recommendations at page 20 of the LCA Submission regarding the need for further clarification in the rules regarding compliance audits and management system directions.

Yours sincerely



Matthew Keogh
President

Schedule 1 – proposed exclusions to be included in proposed rule 73(4)

(a) the indemnity provided under professional indemnity insurance does have to include (but may include) an indemnity in respect of:

- (i) a liability which arises from any circumstance which may give rise to a Claim against the Insured of which the Insured is aware or ought reasonably to be aware before 1 July 1995 or in the case of a Barrister, 30 June 2010;
- (ii) a liability which directly or indirectly arises out of the Insured acting as a public officer, company director, company secretary or other company officer (other than a claim arising from the Legal Practice's provision of legal services through any of its directors or officers who are lawyers);
- (iii) a liability which arises out of or in connection with a contract other than a contract to provide legal services in connection with the Practice;
- (iv) a liability to repay to a client fees or disbursements (other than the fees of experts and counsel) charged by the Insured to the client;
- (v) a liability for costs incurred by the Insured in relation to a dispute as to fees or disbursements charged by the Insured to the client;
- (vi) a liability for damages for death or injury other than mental distress or anxiety arising out of legal services provided by the Insured in connection with the Practice;
- (vii) a liability for physical loss or damage to property unless the property was in the care, custody and control of the Insured in connection with the Practice and for which the Insured is responsible, not being property occupied or used by the Insured for the purposes of the Practice;
- (viii) the payment of a trading debt incurred by the Insured;
- (ix) a liability for any:
 - (1) fine;
 - (2) civil penalty;
 - (3) punitive, exemplary, aggravated, additional or like damages; or
 - (4) costs or expenses incurred or ordered to be paid by any Insured in connection with any complaint against, or investigation into, the professional misconduct of any Insured;
- (x) a liability directly or indirectly caused by or contributed to by, or arising from, ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (xi) a liability directly or indirectly caused by or contributed to by, or arising from, the radioactive toxic explosive or other hazardous property of any explosive nuclear assembly or nuclear component;
- (xii) a liability which arises from war, invasion, acts of foreign enemies, hostilities (whether war is declared or not), civil war rebellion, revolution, insurrection, military or usurped power;

- (xiii) a liability for any costs awarded against an Insured where the Insured is not a party to proceedings, but is acting on behalf of a party to proceedings;
- (xiv) a liability incurred by the Insured in his or her capacity as an insurance agent;
- (xv) except where such liability is in relation to the provision of legal services as an Insured:
 - (1) a liability arising out of death, injury, illness, loss, damage, cost or expense directly or indirectly caused by, contributed to by, resulting from or arising out of or in connection with:
 - (A) any Act Of Terrorism regardless of any other cause or event contributing concurrently or in any other sequence to the loss; and
 - (B) any action in controlling, preventing, suppressing, retaliating against, or responding to any Act Of Terrorism;
 - (2) a liability arising out of any actual or alleged liability whatsoever for any Claim or Claims in respect of loss or losses directly or indirectly arising out of, resulting from or in consequence of, or in any way involving asbestos, or any materials containing asbestos in whatever form or quantity other than where such liability is in relation to provision of professional services as a legal practitioner;
 - (3) any Claim directly or indirectly based upon, attributable to, or in consequence of insolvency, bankruptcy or liquidation of an Incorporated Legal Practice or an Insured;
 - (4) a liability in relation to a dispute between the Partners, the directors, the shareholders or the shareholders and directors of a Legal Practice;
- (xvi) a liability in relation to an employment related dispute brought by an employee of a Legal Practice against the Insured;
- (xvii) a liability which arises directly or indirectly out of the Insured being an Exempt Practitioner or a partner or employee of an Exempted Firm, a partner or employee of a Legal Practice conducted in Western Australia and at least one other State or Territory prior to or during the Period of Insurance, if the Insured is entitled to claim under another mutual fund or insurance policy for the same liability, and such liability arose predominantly from:
 - (1) an act or omission committed by a person who was, at the time of the act or omission, residing in a Territory or a State other than Western Australia; or
 - (2) acts or omissions committed by a person or persons who was or were, at the time of the acts or omissions, a resident or residents of a Territory or State other than Western Australia.