Law Council
OF AUSTRALIA

**26 March 2020**

Ms Megan Pitt
Chief Executive Officer, Legal Services Council
Commissioner for Uniform Legal Services Regulation
PO Box H326
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By email: submissions@legalservicescouncil.org.au

Dear Ms Pitt

**PROPOSED AMENDMENTS TO THE LEGAL PROFESSION UNIFORM LAW**

1. The Law Council of Australia appreciates the opportunity to provide a submission in response to the *Consultation paper on proposed amendments to the Legal Profession Uniform Law* (**Consultation Paper**).

2. The Law Council has consulted with its Constituent Bodies and is grateful for the assistance of the Law Society of New South Wales' Elder Law, Succession and Capacity Committee (**ESCC**), In-house Corporate Lawyers Committee and Costs Committee; the Law Society of Western Australia and the Law Council's National Elder and Succession Law Committee (**ESLC**) in the preparation of this submission.

**General comments**

3. We understand that submissions responding to the Consultation Paper will be considered in further discussions among the Designated Local Regulatory Authorities (**DLRA**) before the final recommendations that might be put to the Legal Services Council are settled. Accordingly, and in the absence of draft legislation, we have approached the Consultation Paper on the basis that the recommendations present preliminary views only, and our comments therefore focus on broad policy issues canvassed in the Consultation Paper.

4. The Consultation Paper refers to the objective, set out in section 3 of the Legal Profession Uniform Law **(Uniform Law**) to promote the administration of justice and an efficient and effective Australian legal profession by "providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession".

5. The Law Council notes that a significant number of the proposed amendments will increase divergence between Uniform Law provisions and the corresponding law of non-participating jurisdictions. Our concern is that too much divergence between provisions seeking similar regulatory policy outcomes could become barriers to interjurisdictional legal practice, increase compliance costs for multi-jurisdictional practitioners and law practices, and increase costs for consumers of legal services.

## Chapter 1 – Preliminary

Recommendation 1 – Disqualified persons

6. The Law Council supports the policy objectives underlying each of the four proposed changes to the definition of "disqualified person". Lawyers whose names are removed from a Supreme Court roll, or whose Practising Certificates are suspended or cancelled, for reasons other than contraventions of the Uniform Law or complaint and disciplinary action, should not be automatically characterised as "disqualified persons".

Recommendations 2 and 3 – Corporate legal practitioners

7. The Consultation Paper proposes to expand the scope of the definition of *corporate legal practitioner*. Presently the definition turns on the provision of legal services by the employee practitioner to the employer or a *related entity* of the employer. The proposal is to expand the entities a corporate legal practitioner may provide legal services to include other entities in the corporate group, by adopting the *control* tests in section 50AA of the *Corporations Act 2001* (Cth) (**Corporations Act**).

8. While the Law Council supports the policy objective of a less restrictive approach to the circumstances in which a corporate legal practitioner can provide legal services to other entities within a corporate group, we raise the following issues for further consideration:

   (a) The *control* test in subsection 50AA(1) of the Corporations Act is a subjective test based on the "capacity to determine the outcome of decisions about the second entity's financial and operating policies". There will need to be guidance available to the profession on what might and might not be appropriate indicators of the requisite degree of "capacity".

   (b) The definition of "entity" in section 9 of the Corporations Act differs from the definition of "entity" in section 6 of the Uniform Law. It is not clear from the Consultation Paper which entities other than companies commonly found in a corporate group are in contemplation, noting that the "array of contemporary business structures in which in-house counsel are engaged"[1] might include partnerships, trusts, individuals, joint ventures, unincorporated bodies and other organisations. Section 32 of the Uniform Law provides that legal services may be provided under any business structure, subject to the Uniform Law and Uniform Rules. Also, section 258 provides that a law practice or related entity must not provide a service or conduct a business of a kind specified in the Uniform Rules. We suggest further consideration be given to whether there might be particular kinds or entities, or particular kinds of services within a corporate group where it would not be appropriate for a corporate legal practitioner to provide legal services.

   (c) Corporate legal practitioners may need additional guidance on the application of professional conduct rules, particularly those dealing with confidentiality and conflicts of interest, if the range of entities to which they can provide legal services are expanded.

   (d) Consideration will need to be given to whether a corporate legal practitioner providing legal services to other entities (and potentially customers and employees) within the employer's corporate group should be required to hold professional indemnity insurance.

[1] Consultation Paper, 8.

## Chapter 2 – Threshold requirements for legal practice

Recommendation 4 – Accreditation of law courses and Practical Legal Training providers

9. Section 29 of the Uniform Law provides that a local regulatory authority may accredit or reaccredit law courses or providers of practical legal training. We understand the differentiation recognises that tertiary academic institutions are quality assessed as institutions through other mechanisms external to Admitting Authorities. Nevertheless, the Law Admissions Consultative Committee (**LACC**) and the Council of Australian Law Deans have been working closely for some years in the development and application of the LACC Accreditation Standards for law courses.

10. In contrast, there are a range of separate institutions, providers and mechanisms by which PLT can be delivered, but no overarching common and independent framework for assessing PLT providers at an institutional level. In light of this, the Law Council recommends caution in legislative changes that would remove the ability of an Admitting Authority to accredited or reaccredit providers of PLT.

## Chapter 3 – Legal Practice

General comments

11. Recommendations 5-16 deal with a number of practising certificate issues, including the notification of particular matters, grounds for varying, suspending or cancelling practising certificates and requirements for practitioners to provide statements in response to contemplated regulatory action.

12. Many of the recommendations in the Consultation Paper would, if adopted, expand the grounds in section 82 of the Uniform Law under which a Designated Local Regulatory Authority (**DLRA**) may vary, suspend or cancel a practising certificate, and to call upon a practitioner to provide a show cause statement as to why, despite the grounds for the contemplated action, the practitioner nevertheless considers himself or herself to be a fit and proper person to hold a practising certificate.

13. As a general observation, the Law Council would be concerned at extending the circumstances where a practitioner is to be compelled to provide a show cause statement beyond the specific circumstances already set out in the Uniform Law (and the equivalent legislation in non-participating jurisdictions).

14. We note that the continuous disclosure regime in relation to automatic show events is directed to matters of bankruptcy and convictions for serious offences or tax offences which, by their nature, go immediately to the question of whether the holder is a fit and proper person to hold a practising certificate. The designated show cause event regime is directed to matters involving practising outside of the authority granted by the practising certificate or practising without professional indemnity insurance which, by their very nature go immediately to protection of consumers of legal services.

15. However, exercise of the power to vary, suspend or cancel practising entitlements can have immediate and long-term consequences for practitioners, Australian-registered foreign lawyers and their clients. There is a need to balance regulatory action with the reasonable interests of the practitioner and the interests of clients in not experiencing delays if their matters are put on hold, or in not incurring additional costs in engaging

another legal practitioner, particularly where the possibility of variation or suspension of a practising certificate is only in contemplation.

16. The Law Council also notes that Part 3.5 of the Uniform Law applies to both Australian legal practitioners and Australian-registered foreign lawyers; however, it is not clear from the Consultation Paper whether the Chapter 3 proposals are intended to apply to legal practitioners, foreign lawyers, or both.

Recommendation 5 – Statutory condition to notify mental health findings.

17. The Law Council has not received any responses from its Constituent Bodies in relation to Recommendation 5, but notes that the 7 day period stipulated in section 51(1) may not be appropriate in the context of mental health findings.

18. The Law Council does not comment on the appropriateness and utility of the following thresholds:
    - 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.

19. However, the Law Council raises the following matters for further consideration:
    - the question of whether or not a person is a fit and proper person to hold a practising certificate is a conduct-related question, whereas a mental health issue is more relevant to the question of whether or not the person is able to fulfil the inherent requirements of an Australian legal practitioner – see section 82(1)(d) of the Uniform Law;
    - to specifically prescribe as a statutory condition of a practising certificate an obligation to notify particular mental health findings or orders would tend to stigmatise practitioners with mental health issues compared to other health issues or disabilities;
    - further, it would represent a view that a mental health issue is to be regarded as an issue related to professional conduct, unlike other health issues;
    - it would be somewhat incongruous to, on one hand, recognise a person's mental health incapacity, and on the other expect that same person to have the presence of mind to notify the designated local regulatory authority (**DLRA**) within 7 days; and
    - failure to disclose a matter pursuant to section 51 of the Uniform Law is a breach which, in and of itself, is capable of constituting unsatisfactory professional conduct or professional misconduct and may lead to refusal to grant a practising certificate, or the cancellation or suspension of a practising certificate. There are accordingly considerable potential consequences attached to a person, otherwise deemed to be without sufficient capacity, failing to have the capacity to notify their DLRA.

20. While one would hope that the relevant DLRA would manage such situations sensitively, there are significant policy implications when tying mental health conditions to a process reserved for serious acts ostensibly incompatible with the expectations of the profession and community, with all the attached imputations. Noting the documented discrimination

in the legal profession on the basis of mental health[2] and the prevalence of mental health issues within the legal profession,[3] the Law Council notes that there is a strong policy basis for addressing mental health in a manner that does not potentially contribute to ongoing discrimination within the profession.[4]

21. However, the Law Council recognises the need to balance the important policy objective of protecting the public interest with the interests of the practitioner and his or her clients. There are nonetheless alternative, and arguably more appropriate, ways to address this issue.

22. For example, noting that the persons subject to the findings or orders outlined in the proposal have necessarily been subject to Court interventions, this issue may be better addressed through the Court exercising its discretionary power to refer practitioners to the DLRA. This shifts the onus from the mentally unwell individual, to the Court who are best placed to make such decisions when:

    a. the Court is privy to all the necessary facts and information to make such a decision; and

    b. the Court is already making significant decisions in respect of other aspects of the subject individual's life.

Recommendation 6 - Statutory condition to notify charges or convictions

23. Section 51(1) of the Uniform Law imposes a statutory condition on practising certificate holder to notify certain events, including where:

    51(1)(a) the holder has been charged with or convicted of a serious offence, a tax offence or an offence specified in the Uniform Rules for the purposes of this section...

24. Rule 15 of the *Legal Profession Uniform General Rules 2015* (the **General Rules**) currently sets out a range of summary offences for which there is (and is not) a requirement to notify a conviction, but not a charge.

25. The Law Council agrees with the proposal that section 51(1)(a) be suitably amended to clarify that the disclosure obligation applying to summary offences specified in the General Rules only applies to convictions for those offences.

Recommendation 7 – Notification of automatic show cause events

[2] Sharon Medlow, Norm Kelk and Ian Hickie, 'Depression and the Law: Experiences of Australian Barristers and Solicitors' (2011) 33 Sydney Law Review 771, 789.
[3] See Patrick J Schiltz, 'On being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession' (1999) 52 Vanderbilt Law Review 871, 874–881; Jerome M Organ, 'What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being' (2011) 8 University of St Thomas Law Journal 225, 268; Norm Kelk, Georgina Luscombe, Sharon Medlow and Ian Hickie, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain & Mind Research Institute, 2009) 42.
[4] For more information on the Law Council's policy positions in relation to mental health in the legal profession, please see the following submission to the Productivity Commission on the Social and Economic Benefits of Improving Mental Health.

26. The Consultation Paper proposes to amend section 51 of the Uniform Law (statutory condition that a practising certificate holder is to notify certain events) to clarify that this notification obligation does not apply where a practising certificate holder has previously notified a statutory show cause event pursuant to section 88 of the Uniform Law.

27. The Law Council agrees there is duplication of some (but not all) of the matters giving rise to notification obligations under both sections 51(1) and section 88 of the Uniform Law and that section 51(1) should be amended to clarify that notification of these events pursuant to section 88 satisfies the notification obligation under section 51(1).

28. It is noted that similar disclosure requirements can apply to Australian-registered foreign lawyers, but these are not canvassed in the Consultation Paper.

<u>Recommendation 8 – Time period within which an application for a practising certificate may not be made</u>

29. Section 94 of the Uniform Law deals with automatic and designated show cause events and provides that where a DLRA refuses to grant or renew, or cancels a certificate in response to a show cause event, the DLRA may also decide the person is not entitled to apply for a certificate for a period not exceeding 5 years.

30. Section 76 of the Uniform Law deals with variation, suspension and cancellation, or refusal to renew certificates in response to matters other than show cause events. The Consultation Paper proposes that a power to decide that a person is not entitled to apply for a certificate for a period not exceeding 5 years should also be provided for when a DLRA refuses to grant or renew, or cancels a certificate pursuant to section 76.

31. The power under section 94 to prevent a certificate holder from applying for a certificate turns on the question of whether or not the holder is a fit and proper person to hold a certificate, or that the holder has failed to cooperate with, or committed an offence in connection with, the investigation of the show cause event. However, the power under section 76 to vary, suspend or cancel a certificate encompasses a broader range of grounds that do not necessarily go the question of whether the holder is a fit and proper person to hold a practising certificate.

32. Accordingly, the Law Council questions why it is appropriate that a practitioner whose certificate has been cancelled for reasons other than a conduct issue arising from a show cause event should be prohibited from applying for the grant or renewal of a subsequent certificate for a period of years.

<u>Recommendation 9 – Foreign lawyers employed as in-house counsel or government lawyers</u>

33. The Law Council agrees with the proposal that Australian-registered foreign lawyers who wish to practise foreign law in-house or as a government lawyer should hold an Australian registration certificate.

<u>Recommendation 10 – Immediate suspension or variation of a practising certificate</u>

34. The Consultation Paper proposes extending from 56 days to 90 days the maximum period specified in section 77(1) for which a practising certificate may be varied or

suspended pending consideration by the DLRA whether to start, complete or continue action, where that variation or suspension is in the public interest.

35. The power to vary, suspend or cancel practising entitlements can have immediate and long-term consequences for practitioners, Australian-registered foreign lawyers and their clients. The period of 56 days currently provided for represents a reasonable balance between the time needed for a DLRA to make a decision about whether to start, complete or continue action, and the reasonable interests of the practitioner (who has not had the matter that gave rise to the suspension or variation determined) and the interests of clients in not experiencing delays if their matters put on hold, or in not incurring additional costs in engaging another legal practitioner.

Recommendation 11 – Recommendations to immediately suspend a certificate

36. The Consultation Paper notes that where a complaints-handing DLRA considers that a conduct complaint warrants the immediate suspension of a certificate, in the public interest, the complaints-handing DLRA can, pursuant to section 278(2) of the Uniform Law, recommend that course of action to the practising certificate DLRA. The Consultation Paper also notes that pursuant to section 82(1), the practising certificate DLRA can act on that recommendation, however, section 83 requires the holder of the certificate to be given written notice of the proposed suspension and a period of 7-28 days to respond as to why the proposed action should not be taken.

37. The Consultation Paper states that the period of time required under section 83 for notification and response frustrates the aim of section 278, which is to immediately suspend a practising certificate, and that a practising certificate DLRA must also apply section 77 (immediate variation or suspension before or during consideration of proposed action) and consider the issue afresh.

38. A change to the Uniform Law to effect a suspension of a practising certificate immediately upon receipt of a notice to the holder, in response to the recommendation of a complaints-handling DLRA under section 278 raises the same issues addressed in paragraph 34 above – i.e. the need to fairly balance regulatory action in the public interest, with the interests of the certificate holder concerned and his or her clients. The Law Council considers that the period of 7-28 days provided in section 83 for the certificate holder to respond with reasons why the suspension should not take place represents a reasonable balance between the interests involved.

Recommendation 12 – Grounds for variation, suspension or cancellation of a practising certificate.

39. The Consultation Paper recommends expanding the specific grounds set out in section 82 of the Uniform Law "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 and is not covered by, professional indemnity insurance."

40. The context for this recommendation appears to be that a DLRA which becomes aware that a practitioner does not have appropriate professional indemnity insurance can serve the practitioner with a notice of a designated show cause event under section 90 of the Uniform Law, but this process takes some time to be completed, and requires written responses from the practitioner as to why the proposed action should not be taken and why the practitioner considers, despite the show cause event, he or she is a

fit and proper person to hold a practising certificate. Against this background, the Consultation Paper states that the "proposed process under s82 will be expeditious and will prevent legal services being provided when the practitioner does not have professional indemnity insurance cover."

41. The Law Council questions whether the proposal to amend section 82 will achieve a more expeditious outcome, noting that notification to the practitioner is required under both section 82 and section 90, and that similar time periods for a response from the practitioner apply under both approaches. Further, given that engaging in legal practice without professional indemnity insurance is an offence under sections 211-214 of the Uniform Law, the additional requirement under section 90 (the designated show cause event provision) to provide a statement as to why the practitioner considers, despite the show cause event, he or she is a fit and proper person to hold a practising certificate appears to be the appropriate outcome.

42. The Consultation Paper also proposes further changes to section 82 to apply a same show cause requirement:
    - to any contravention of a condition of a practising certificate;
    - in response to a reasonable belief by a DLRA that the holder of a practising certificate is unable to fulfil the inherent requirements of an Australian legal practitioner; and
    - in response to the making of an order under 299(1)(g) that a specified condition be imposed on a practising certificate where a complaints-handling DLRA has made a determination of unsatisfactory professional conduct.

43. The Law Council does not consider it reasonable or proportionate that in every circumstance where a DLRA might be considering varying, suspending or cancelling a practising certificate, the practitioner concerned needs to provide a written statement as to why, despite the proposed action, the practitioner considers himself or herself to be a fit and proper person to hold a practising certificate. As mentioned previously in this submission, not all matters that can give rise to consideration of whether to vary, suspend or cancel a practising certificate necessarily go the question of whether the holder is a fit and proper person to hold a practising certificate.

<u>Recommendation 13 – Actions in response to automatic show cause events</u>

44. The Consultation Paper states that there is "limited action available during the practice year if a disclosure is made under section 51 which is not a specific ground under section 82 or a show cause event under section 86"[5]. It is proposed that section 82 (general power to vary, suspend or cancel a practising certificate in specified circumstances) be amended to enable a DLRA to vary, suspend or cancel a practising certificate in response to a notification made by a practitioner under section 51 and the DLRA reasonably believes the holder is not a fit and proper person to hold a practising certificate.

45. The Law Council has not received any responses from its Constituent Bodies in relation to Recommendation 13, but notes that specific events that must be notified as a statutory condition of a practising certificate pursuant to section 51 of the Uniform Law, are essentially the same events that must be notified as automatic show cause events

[5] Consultation Paper, 15.

pursuant to sections 86-88. It is suggested that consideration be given to the utility of requiring similar events to be notified as both a statutory condition and an automatic show cause event.

Recommendation 14 – Previously notified show cause events

46. The Law Council supports a technical amendment to subsection 87(3) of the Uniform Law to overcome the possibility that an applicant for a certificate might avoid the disclosure obligation by withdrawing an application for a certificate and subsequently making a fresh application.

Recommendation 15 – Automatic show cause events – action by local regulatory authority

47. The Law Council supports a technical amendment to subsection 89(2) of the Uniform Law to clarify that a DLRA may refuse to grant a practising certificate to an applicant in each of the circumstances described in that subsection.

Recommendation 16 – Consideration and investigation of applicants or holders

48. The Consultation Paper proposes to amend section 95 of the Uniform Law to enable a DLRA 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.

49. The effect of the Recommendation will very much depend on the precise wording of the proposed amendment. It is accordingly difficult to respond to the Recommendation without further information as to, for example:
    (a) how broad the powers would be and what information could be requested;
    (b) what safeguards and oversight would be put into place to protect against inappropriate requests and the inappropriate use of information; and
    (c) the review mechanisms proposed, particularly since non-compliance is proposed to attract criminal charges.

50. It is also unclear why a potential criminal charge would be warranted in this context from a policy perspective, when the clear avenue (and deterrent) available to the DLRA would be the refusal to grant or renew a certificate, or the variation, suspension or cancellation of an existing certificate.

## Chapter 4 – Business practice and professional conduct

Recommendations 17, 19, 20, 21 and 22 – Costs and costs disclosure

51. The Law Council notes that the Law Society of New South Wales' Costs Committee supports the amendments proposed.

Recommendation 18 – Beneficiaries or potential beneficiaries of deceased estates

52. Section 198 of the Uniform Law allows for applications for assessment of legal costs by clients, third parties and certain law practices. The Consultation Paper proposes to amend subsection 198(1) to add beneficiaries of deceased estates or "potential beneficiaries" arising from intestacy.

53. The Law Council's ESLC has made the following comments in respect of the proposed amendments:

    (a) The statement [in the Consultation Paper] that "*the beneficiaries will ultimately pay the legal costs which is borne by the estate*"[6] is both too broad and potentially incorrect – for more information, please see the discussion in relation to Recommendation 23 below.

    (b) The statement that "*the only recourse*"[7] is to apply for an accounting, overlooks a number of other options, including action against a legal personal representative for *devastavit*[8] and the ability of a person with standing to take derivative action on behalf of the estate.

    (c) The reference to "or potential beneficiaries arising from intestacy" is superfluous, as a person is either a beneficiary or not.

54. The Law Society of Western Australia supports the above position and emphasised in relation recourse that beneficiaries who have an interest in the estate can both request a passing of accounts and a taxation of costs. These remedies can be used, including when the executor is a member of the firm who is acting for the executor.

55. The Law Society of New South Wales' ESCC similarly does not support recommendation 18. The Law Society of New South Wales' Costs Committee is also concerned about the impact of recommendation 18, noting that some matters can include many beneficiaries.

## Chapter 5 – Dispute resolution and professional discipline

### Recommendation 23 – Consumer matters (including costs disputes)

*General comments*

56. The Law Society of Western Australia submitted that, should solicitors be answerable to a beneficiary regardless of their interest in the estate, it may result in some experienced estate lawyers discontinuing this work, to the disadvantage of the community. It was also noted that Western Australia has never had equivalent legislation that in New South Wales and Victoria, and yet has never perceived such issues to be a problem in Western Australia.

57. The Law Council's ESLC has made the following further comments in respect of the proposed amendments in Recommendation 23.

*Delay, inaction or non-communication*

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[6] As stated on page 19 of the Consultation Paper.

[7] As stated on page 19 of the Consultation Paper.

[8] *Devastit* is an action against an Executor for his or her mismanagement of an estate, contrary to their duties, such that the will be personally liable for the losses resulting from that mismanagement. See: Perram, Justice Nye, "The operations and present operation of the action in devastavit" (FCA) [2012] FedJSchol 23,1 (available online: http://classic.austlii.edu.au/au/journals/FedJSchol/2012/23.html ).

58. The explanation on pages 20-23 of the Consultation Paper in respect of this Recommendation appears to overlook that a practitioner would not communicate with the beneficiary, because the beneficiary is not the client. Rather, the *legal personal representative*[9] is the client. Unless the legal personal representative has otherwise instructed the practitioner to do so, communicating with the beneficiary could amount to a breach of professional ethical obligations.[10]

59. This means that any delays or inactions in a matter are likely to derive from the inactions of the legal personal representative, rather than the practitioner. In this context, it is not apparent how allowing a beneficiary to dispute the legal costs will remedy the problem of "*delay, inaction or non-communication*".[11]

60. The Law Society of New South Wales' ESCC similarly noted that it is the legal personal representative who communicates with the beneficiaries, rather than the solicitor. In those circumstances where the legal personal representative is also a solicitor, the ESCC posited that the appropriate remedy is to require the passing of accounts for every grant.

*Beneficiaries*

61. The ESLC further notes that allowing every beneficiary to dispute the legal costs charged by a practitioner to the legal personal representative could render the practitioner responsible to persons without a legitimate interest in the payment of those costs. This is because:
    (a) All legal personal representatives (whether executor or administrator) are equally liable for the proper administration of the estate.
    (b) A legal personal representative has a duty to pay the estate's funeral, testamentary and administrative expenses, debts and liabilities.
    (c) Legal personal representatives are generally personally liable for the estate's debts and expenses, but are entitled to an indemnity from 'the estate' in relation to the payment of debts and testamentary expenses, so long as they are prudent in nature and reasonable in amount. Should the payments not be prudent or reasonable, the legal personal representative may lose (or partially lose) the indemnity and become personally liable.
    (d) On this basis, Legal personal representatives who incorrectly pay debts or testamentary expenses, or fail to pay the debts or expenses, are personally liable for those debts and expenses.[12]

62. The issues above are resolved by many legal personal representatives by seeking legal advice about the extent of their duties.[13] There are number of factors informing the extent of the legal personal representative's duties and any advice sought, including:

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[9] That is, the person appointed to administer the estate of another person, whether by probate of will of the deceased, letters of administration of the estate of the deceased, or any such grant.
[10] It is further noted that, even when a legal practitioner is instructed to communicate with the beneficiaries, the legal personal representative may not be indemnified for costs incurred from doing so. This is because such communications can be done without legal assistance. There are accordingly sound reasons for legal practitioners to not communicate with beneficiaries.
[11] As noted on page 21 of the Consultation Paper.
[12] It is noted that in some circumstances, the Supreme Court can relieve the legal personal representative from that liability.
[13] In some instances judicial advice should be, and sometimes is, obtained.

(a) Is the debt secured or unsecured?

(b) Is the estate testate or intestate?

(c) If the estate is testate, does the will specify the assets from which debts and testamentary expenses are to be paid?

(d) If the will does not specify the assets from which debts and testamentary expenses are to be paid, is the estate solvent or insolvent?[14]

(e) If the estate is insolvent, does the *Bankruptcy Act 1966* (Cth)[15] affect the relevant statutory order?

(f) If the estate is solvent, how is the relevant statutory order applied given the terms of the will and the nature of the assets in the estate?

63. It is only by undertaking the process set out above that the persons who have a legitimate interest in the actions of the legal personal representative can be identified. Only the persons identified in this process have the 'standing' to challenge the legal personal representative's actions or omissions. This could be a beneficiary of a particular asset or sum of money, a residuary beneficiary, a creditor, or the State. This process requires consideration of the specific details of each particular estate and it is not conducive to a standardised approach.

64. The Law Society of New South Wales' ESCC also noted that the existing avenues available for beneficiaries to challenge costs appropriately consider, on a case by case basis, whether the beneficiary has a legitimate interest in challenging the conduct of the legal personal representative and any costs incurred. The ESCC is concerned that Recommendation 23 would lead to an influx of costs disputes, many of which would be borne out of a misunderstanding of the relevant roles.

*Inconsistencies*

65. The ESLC further notes that Recommendation 23 suggests that one type of testamentary expense, being legal costs, should be treated differently from other testamentary expenses. In proposing costs assessment by way of resolution, it is not clear whether is proposed to replace the usual judicial processes relating to testamentary expense, or whether it allows the judicial process to continue unaltered. If the latter is correct, then there is a risk of inconsistent determinations between costs assessments on one hand and Court judgments on the other.

66. The final issue raised by the ELSC is that there is a practical problem that may arise in some jurisdictions, such as NSW. In NSW, disputed legal costs are dealt with by costs assessors, who are considered an organ of the executive government.

67. However, practitioners and legal personal representatives are answerable to the Court for issues around payment of legal costs. There is a further risk of consistency in this circumstance when the decision of a costs assessor (in relation to a dispute between a beneficiary and the practitioner, as would be possible if the recommended changes are made) differs from the decision of the court (in relation to a dispute between the legal personal representative and the practitioner).

[14] The answer to this question determines which statutory order for the payment of debts and testamentary expenses is to be used.
[15] *Bankruptcy Act 1966* (Cth).

68. In this circumstance, the ELSC notes that the beneficiary is not the privy of the legal personal representative, or vice versa, so there will be no issue estoppel when the first decision is given, even if such estoppel can arise between decisions of the executive and judicial arms of government, which in any event is uncertain.

Recommendation 28 – Minor professional misconduct

69. Subsection 299(1) of the Uniform Law 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. The LSC proposes to amend section 299 to enable a DLRA to make a finding and determination of professional misconduct in certain cases.

70. It is noted in the Consultation Paper that:[16]

> 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.

71. The Law Council notes the concept of 'professional misconduct at the less serious end of the scale' was introduced in the *Legal Profession Act 1987* (NSW). Section 134 of that Act referred to *"minor professional misconduct*" which could be resolved by the Law Society Council or Bar Association Council reprimanding the legal practitioner (with his or her consent) or by referring the matter to the Professional Standards Board. The term "minor professional misconduct" was not defined in the Act, but the *Legal Profession (Amendment) Act 1987* (NSW) saw the development of 'minor professional misconduct' into 'unsatisfactory professional conduct', with the insertion of the following definitions into section 127:

> (1) For the purposes of this Part, ***professional misconduct*** includes:
>
> (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence;
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> (b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of barristers or the roll of solicitors; or
>
> (c) conduct that is declared to be professional misconduct by any provision of this Act;
>
> (d) a contravention of a provision of this Act or the regulations, being a contravention that is declared by the regulations to be professional misconduct.
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> (2) For the purposes of this Part:

[16] Noted on page 25 of the Consultation Paper.

> ***unsatisfactory professional conduct*** includes conduct (whether consisting of an act or omission) 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 legal practitioner.

72. The policy rationale for the new definitions was explained in the Second Reading Speech[17]:

> Schedule 8 contains a number of amendments to Part 10 of the Legal Profession Act relating to professional misconduct. I am pleased to note that the Law Society has accepted the Government's view that the regulatory bodies must be able to take action in cases where conduct falls short of a standard that a member of the public is entitled to expect. This development is fundamental to the new legislation regulating the legal profession in New South Wales…
>
> The Law Society has suggested the definition of professional misconduct might be clarified by restricting the concept of professional misconduct to serious cases of incompetence and cases justifying a person's removal from the roll of barristers or solicitors, and by introducing a new definition of unsatisfactory professional conduct for cases where the conduct falls short of a reasonable standard.
>
> This suggestion recognizes the distinction made in the Act between cases of minor professional misconduct provided for in division 5 of part 10 and serious professional misconduct provided for in division 7. In the case of minor professional misconduct, or unsatisfactory professional conduct, as it will now be known, proceedings will continue to be taken before the Professional Standards Board, and the board will have the power to make a range of orders where it is satisfied a complaint has been made out. The Disciplinary Tribunal will continue to deal with matters of serious professional misconduct.

73. This Second Reading Speech provides a clear delineation between the 'minor' types of conduct warranting handling by the relevant regulatory authority, and the more serious conduct warranting referral to the Tribunal. While the Law Council appreciates that there may be costs-related arguments in favour of the proposal, we nevertheless query the policy benefit in introducing a third, middle tier of conduct into existing disciplinary processes.

74. The Law Council further notes that, in the absence of specific draft amendments, it is difficult to consider what is proposed by: "*if required, undertakes to assist the regulator*".[18]

Recommendations 29 and 30 – Compensation orders

75. The Consultation Paper notes that one of the remedies in relation to a consumer complaint is the making of a compensation order by the DLRA. Compensation orders may also be made by the Designated Tribunal as a remedy in relation to a disciplinary matter involving unsatisfactory professional conduct or professional misconduct.

76. The Consultation Paper recommends amending section 299 of the Uniform Law to enable a DLRA to make a compensation order as part of the determination of a complaint involving unsatisfactory professional conduct.

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[17] NSW Legislative Assembly Hansard, 18 November 1987 [17624] – [17626].
[18] As noted on page 25 of the Consultation Paper.

77. The Law Council does not support recommendation 29. While the quantum of a compensation order in relation to consumer disputes might be relatively easy to determine (and is statutorily limited by paragraph 308(2)(a)), a compensation order arising from unsatisfactory professional conduct or professional misconduct is a response to more complex issues (and can be an unlimited amount) that warrants independent determination by a designated tribunal.

78. The Consultation Paper proposes, as an alternative to recommendation 29, a recommendation that section 299 be amended to enable the remedies in response to a determination by a DLRA of unsatisfactory professional conduct to include a refund of legal fees paid. The Law Council notes there is no apparent reason evident in the Consultation Paper explaining why a refund of fees should be an alternative to a compensation order.

Recommendation 31 – Internal review of DLRA decisions

79. The Law Council does not agree with the recommendation that section 313 of the Uniform Law be amended to reinforce the "absolute" extent of the discretion as to whether an internal review should be conducted' or the observation that internal reviews of decisions "are 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".[19]

80. The Law Council has long opposed the existing limitations on the rights of review of determinations of complaints by a DRLA, especially in relation to compensation orders of less than $10,000. The Law Council view is that a regulatory body having a power to make determinations about legal costs of less than $10,000, without a practitioner being entitled to an independent administrative review and appeal rights, supplants the proper role of costs assessments and administrative and judicial review safeguards.

Recommendation 32 – Internal review of decisions under section 272

81. The Consultation Paper notes that section 313 of the Uniform Law "fails to identify any types of decision which cannot be subject to internal review".[20] It is recommended that an internal review should not be available for a decision made under section 272(4) to either waive, or refuse to waive, time limits making complaints.

82. The Law Council notes there is no apparent policy reasoning evident in the Consultation Paper as to why such an amendment to deal with one particular administrative decision should be made.

Recommendation 33 – Dealing with complaints efficiently and expeditiously

83. The Law Council does not support the recommendation that section 317 of the Uniform Law be amended to declare it is not a breach of a DLRA's duty to deal with complaints efficiently or expeditiously, if the DLRA decides to suspend its dealing with a complaint if it reasonably believes it is the public interest. The Consultation Paper does not discuss how such an amendment would align with, for example, section 77 of the Uniform Law, which sets a maximum period of time within which a DLRA may suspend or vary a practising certificate while the DLRA decides whether to start, continue or complete action under Part 3.5 of the Uniform Law.

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[19] Consultation Paper, 26.
[20] Ibid.

84. As mentioned in paragraph 34 above, the power to vary, suspend or cancel practising entitlements can have immediate and long-term consequences for practitioners, Australian-registered foreign lawyers and their clients. The period of 56 days currently provided for represents a reasonable balance between the time needed for a DLRA to make a decision about whether to start, complete or continue action, and the reasonable interests of the practitioner (who has not had the matter that gave rise to the suspension or variation determined) and the interests of clients in not experiencing delays if their matters put on hold, or in not incurring additional costs in engaging another legal practitioner.

**Chapter 6 – External intervention**

Recommendation 34 – Dealing with complaints efficiently and expeditiously

The Law Council supports the recommendation that the prohibition on a person intentionally destroying, concealing, removing, etc., any regulated property of a law practice when a receiver is likely to be appointed should be extended to cover situations were a manager or supervisor is likely to be appointed.

**Chapter 9 – Miscellaneous**

Recommendation 35 – protection from compellability as a witness

The Law Council supports the proposed amendments.

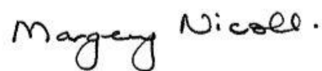
Recommendation 36 – Applications to Supreme Court for orders

The Law Council does not support the proposed amendments.

**Contact**

Should you have any queries, please contact Murray Hawkins on 02 6246 3734 or Tarryn Gaffney on 02 6246 3752 or Tarryn.Gaffney@lawcouncil.asn.au .

Yours sincerely



**Margery Nicoll**
**Acting Chief Executive Officer**