

29 August 2019

Ms Megan Pitt
Chief Executive Officer, Legal Services Council
Commissioner for Uniform Legal Services Regulation
PO Box H326
AUSTRALIA SQUARE NSW 1215

By email: submissions@legalservicescouncil.org.au
Cc: Cora.Groenewegen@legalservicescouncil.com.au

Dear Sir/Madam

Deterring promoter conduct by legal practitioners

The Taxation Committee of Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity of commenting on the Commissioner of Taxation's (**Commissioner**) submission to the Legal Services Council (**LSC**) of 25 June 2019.

Broadly, the proposal from the Commissioner seeks amendment of the Legal Professional Uniform Law (**Uniform Law**) and / or the General Rules to include certain civil penalty proceedings under the tax law as a notifiable event, or a matter relevant to the granting or renewal of a practising certificate (the **Proposal**).

Overview

1. Our comments on the Proposal are set out below.
2. We have 3 fundamental concerns with the submission made by the Commissioner.
 - a) The threshold for notification, being investigation, is contrary to standard, established legal protections and principle.
 - b) The nature of the concern is not commission of an offence, but a matter only of civil dispute.
 - c) The results will include disadvantage to a litigant, by forcing their lawyer to self-report a matter of civil concern, at the instance of the opposing party. The disruption to a litigant's case, where the Commissioner's solicitors would thereby be shielded from the consequences of breach of Rule 32 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCR)*¹ would be significant.

¹"A solicitor must not make an allegation against another Australian legal practitioner of unsatisfactory professional conduct or professional misconduct unless the allegation is made bona fide and the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it."

Investigation is a premature point of report

3. Legal practitioners are not presently required to notify the designated local regulatory authority under section 51 of the Uniform Law of the mere commencement of an investigation. That is principled, and correct.
4. The commencement of an investigation is the first part of the process of an investigation. The purpose of an investigation is to ascertain whether there is something serious enough to require a further step.
5. Investigations by law enforcement authorities include processes by which persons are eliminated from the scope of the investigation. This may include eliminate, as a person of interest, someone with a similar name or someone who drives a car with a similar licence plate.
6. Commencement of an investigation is too unreliable a threshold for a requirement to report.

Civil dispute

7. Section 51 is calibrated to deal with offences, not civil disputes.
8. The Commissioner does not suggest that the matters he mentions under Division 290 *Taxation Administration Act 1953* (Cth) constitute criminal offences, though they do attract civil penalties. The signal given by the Legislature, by treating these matters as subject to civil penalty, is that they are not of the same class as offending under a criminal statute.
9. The Commonwealth thereby gets certain procedural advantages (including a lower standard of proof) in dealing with an allegation.
10. The calibration of section 51, as a whole, would be affected by including this type of civil dispute. It could lead to calls for all kinds of civil disputes to be notifiable.
11. The Committee does not accept, nor consider appropriate, the statement made by the Commissioner² that our members would not oppose this measure if we were doing the right thing. That seems to pre-suppose, contrary to basic legal protections and principle, that if someone is accused of, or investigated for something, they are presumed to have done it.
12. If the calibration of a pivotal provision, section 51, is to be changed, this should not be done piecemeal. It should be done only once the policy signals and wider policy implications have been considered.
13. At present, only policy implications in relation to one narrow class of activity is dealt with in a submission by the Commissioner.
14. Also, the wider legal community would be unaware of the proposed recalibration of section 51.
15. Finally, any current difficulties that the Commissioner may be facing, for example where a lawyer continues to represent a client in circumstances where the lawyer

² Commissioner of Taxation's proposal, response to panel entitled "Consultation".

apparently has a conflict between their own interests, and their duty to the client, can be resolved in other straightforward ways.

16. Changing the calibration of a pivotal provision of the uniform law, to meet a narrow class of difficulty which can be addressed in another way, does not represent good policy.
17. We set out a few more details below, but that is the nub of our submission.

Detailed Submissions

18. We set out section 51 from the Uniform Law for reference:

51 Statutory condition—to notify certain events

(1) It is a statutory condition of an Australian practising certificate granted in this jurisdiction that the holder must notify the designated local regulatory authority in writing within 7 days that—

(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; or

(b) a bankruptcy-related event has occurred in relation to the holder; or

(c) the holder has become the subject of disciplinary proceedings as a lawyer in a foreign country.

(2) The Uniform Rules may specify circumstances in which a notice need not be given under subsection (1).

(3) Subsection (1) does not apply to an offence to which section 86 applies.

Note

Section 86 deals with automatic show cause events. Section 88 provides notification procedures for automatic show cause events for holders of Australian practising certificates.

19. Section 51 only contemplates notification **prior** to conviction if charges are laid in specific criminal cases.
20. The Commissioner departs from this policy. Importantly, his proposal would involve notification:
 - a) of a civil penalty proceeding; and
 - b) at a point in time before that proceeding is finalised.
21. Such departures from a carefully calibrated policy setting would require strong policy justification.
22. Were any such justification to exist, the question could be equally raised as to why notification should not be required of any investigation in respect of a civil proceeding, including a civil penalty or regulatory investigation, such as ASIC matters concerning directors who happen also to be lawyers.

23. The Commissioner's rationale for the amendment needs to be weighed against other factors, such as the presumption of innocence, the adverse impact on the lawyer pending conclusion of proceedings (or indeed pending conclusion of investigation, since the Commissioner proposes that any investigation be notified), and the lack of any precedent or broader policy justification for notifying civil matters before their conclusion.
24. The Commissioner's proposal is over-reach since it apparently requires a lawyer to notify a concern, where their firm is the subject of proceedings, but the individual is not personally involved in the conduct which is the subject of the proceeding.
25. It would require notification of an investigation or proceeding in which the defence of the lawyer may succeed on the ground that they were merely providing advice. This aspect of the proposal attacks the recognised public interest in lawyers providing legal advice.
26. There is an advice exemption in Division 290.³ The Committee fears that the current proposal places further pressure on lawyers simply doing their job in providing their honest opinion to a client.⁴
27. Finally, this proposal will put legal regulatory bodies in the invidious position of being notified of a matter in which other proceedings are on foot. Those proceedings may be civil penalty proceedings against a practitioner. But we understand that the Commissioner is also concerned about lawyers representing their clients in litigation against the Commissioner, where complaint would be most disruptive.
28. Complaints to legal regulators have, unfortunately, become more common in civil proceedings. One side complains about the conduct of a practitioner on the other side, apparently in an attempt to deprive the other side of legal representation.
29. It would be unfortunate if the amendment sought were to circumvent Rule 32 of the ASCR. This is the main check on such complaint.
30. The practical problems that arise when a legal regulatory body is notified, during civil litigation, of a complaint by one party against the other party's adviser, are well known.
31. The legal regulatory body will not have the full facts, yet the notification implies that the body may be expected to undertake further investigation of an ongoing proceeding.
32. This in turn may interfere with the conduct of the proceeding. It will put an undue burden on the lawyer involved, by having to contend with two proceedings at once.
33. This tends to deprive a client of its chosen representative, in circumstances where a more proportionate response would have been expected.
34. It may be that some of the concerns underlying the Commissioner's proposal could be addressed, but by different measures:

³ Division 290 of Schedule 1 to the *Taxation Administration Act 2953 (Cth)*

⁴ Section 290-60(2) provides that an entity is not a promotor of a tax exploitation scheme merely because the entity provides advice about the scheme.

- a) a requirement to notify imposition of a penalty, the grant of an injunction, or the giving of a mandatory undertaking might be notified, where that conduct relates to the conduct of a named lawyer;
 - b) continued marketing of a scheme alleged to be a tax exploitation scheme in a proceeding, should cease, pending the outcome of the proceedings. This would be similar to an interlocutory injunction, where the Commissioner gives the usual undertaking as to damages. The Commissioner would thus have achieved the outcome sought, by using powers under the *Taxation Administration Act*, without any need of change of the current regulatory laws.
35. The Commissioner has a secondary proposal, concerning amendment to tax secrecy provisions to permit him to disclose the commencement of a civil investigation to a designated local regulatory authority. We address it briefly below.
36. The rationale given by the Commissioner is that amendment of tax secrecy provisions to permit greater disclosure about practitioners' non-compliance requires careful scrutiny. This is not a matter for the LSC, but something that the Commissioner would need to take up with the Commonwealth Government. It does however indicate that the proposals, taken as a whole, ought to be rejected as off-point, an over-reach, and as inconsistent with principled policy settings.

Law Institute of Victoria (LIV) Submission

37. We have been provided with a draft of the intended submission by the Law Institute of Victoria. It deals with the practical consequences of the Proposal to make, as notifiable events, the giving of a voluntary undertaking, and the imposition of a civil penalty or injunction.
38. We oppose those aspects of the Proposal, for the additional practical, and pragmatic, reasons given by the LIV. There is no need to duplicate that material here.

Should you wish to discuss further any aspects of the submission please do not hesitate to contact Clint Harding, Chair of the Committee (charding@abl.com.au or 02 9226 7236).

Yours Sincerely,



Rebecca Maslen-Stannage
Chair, Business Law Section