



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM
Direct Line: 9926 0216

13 August 2010

Mr Roger Wilkins AO
Chairperson
National Legal Profession Reform Taskforce
Attorney-General's Department
CANBERRA ACT 2600

Dear Mr Wilkins

Re: Response to consultation on proposed national legal profession reforms

I am writing to provide the response of the Law Society of NSW to the national legal profession reform consultation package released by the Taskforce on 14 May 2010. The Law Society welcomes the opportunity to take part in the consultation.

The Law Society represents over 21,000 solicitor members and has co-regulatory responsibilities in NSW, including licensing solicitors to practise, setting and enforcing professional standards, administering the Fidelity Fund, conducting trust account investigations, arranging the appointment of external interveners (supervisors, managers and receivers) and investigating and prosecuting disciplinary complaints. In considering the proposed reforms, the Law Society has had input from Councillors, policy and regulatory committees, regional law societies and regulatory staff.

The Law Society of NSW is the largest direct membership legal profession association in Australia and a constituent body of the Law Council of Australia. The Law Society has worked with other constituent bodies of the Law Council in developing the Law Council's response to the proposals in the consultation package. Many of the issues raised in that response reflect the concerns of Law Society members and the Law Society commends it to you.

The Law Society of NSW supports regulation of the legal profession which is effective and affordable from the perspectives of those who consume, provide and regulate legal services. In particular, the Law Society agrees that there should be a national framework for regulation, with common standards applied consistently by State and Territory regulatory bodies operating locally. We believe that this is the most effective and efficient model for delivering a truly national system for legal services regulation.

There are, however, a number of areas where the Law Society believes the Taskforce's proposals fall short of the objectives set for and by the Taskforce. These areas of concern are set out in detail in the response submitted by Law Council and will not be repeated here. Some, including the need to maintain the independence of the legal profession from control by executive government have already been the subject of extensive debate. However, there are three particular areas to which the Law Society wishes to draw your attention.

1. The regulatory burden on solicitors

The provision of legal services is an industry which is extensively regulated. While regulation is necessary, it must also be effective. This means it must respond proportionately to identified regulatory need and must impose requirements with which it is practicable to comply. Ineffective or unjustifiably burdensome regulation reduces productivity and increases the cost of regulation and the price of legal services. Accordingly, the Law Society was pleased to see that high among the objectives set for the project was the delivery of "a system of regulation that is efficient and effective" by way of "simplified uniform legislation and regulatory standards". However, the Law Society is concerned that some elements of the proposals do not simplify regulation and will result in an unjustifiable increase in the regulatory burden on solicitors.

In particular, the proposed provisions in relation to costs have given rise to significant concerns amongst solicitors. The Law Society believes that a number of the proposals are unreasonably onerous and the Society supports the proposition that consumers would be better protected by restoring the primacy of the costs agreement. If the subjective test in relation to the client's consent to the costs and course of action is to be retained, the Law Society agrees that clear guidance should be provided on the "reasonable steps" which a legal practitioner should take to satisfy him/herself that the client understands and consents to what is proposed.

The proposed reforms also increase liability for regulatory non-compliance by extending the responsibility of principals of law practices and increasing the number of criminal and civil penalties under the regulatory regime.

2. The framework for regulation

The Law Society of NSW is in favour of a unified system of regulation in which standards are set at a national level. The Law Society agrees with proposals which provide for regulatory operations to be carried out at the local level and welcomes the entrenchment of functions with State and Territory bodies. However, improvements to the proposed structure are still required and the Law Society strongly submits that operational functions currently reserved to the National Board should be devolved to local representatives (for example, administering requirements in relation to incorporated and unincorporated legal practices). The Law Society is also concerned about the "take over" powers proposed for the national authorities and supports their omission from the draft National Law.

The identification of the local representatives to whom regulatory functions are to be devolved has largely been left to individual States and Territories to determine. The current arrangements for solicitors in NSW see the Law Society sharing co-regulatory responsibilities with the Office of the Legal Services Commissioner. For the past 15 years, this framework has delivered regulation

which is cost effective, efficient and timely and we are keen to see this continue under the proposed reforms.

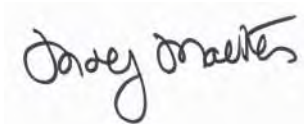
In this context, it is helpful to refer explicitly to the Law Society's role in carrying out trust account investigations. The Law Society's program of trust account investigations has been developed and refined over many years to constitute a systematic and disciplined approach to the review of practice records in order to detect fraudulent activity. Investigations may be of either a routine or a specific nature, with around 35% of all trust account misappropriations identified through routine investigations. Routine investigations are also conducted on practices which have declared they have not dealt with trust monies. A number of large defalcations have been discovered or prevented during this type of routine investigation, where practitioners have ceased to maintain a general trust account in an attempt to avoid discovery. The Law Society strongly supports the continued existence of routine investigations as a compliance tool which maximises the protection of the public from trust account defalcations. While we maintain that the National Law as currently drafted does not preclude these types of investigations we agree with other constituent bodies of Law Council that they should be expressly provided for.

3. Funding

Cost is a critical element of any regulatory system and it is disappointing that recommendations on funding have not been available for consideration alongside the Taskforce's proposed reforms. The Law Society of NSW supports the proposition that the cost of regulation should not exceed current funding levels, however, it is not apparent to the Law Society how this can be achieved based on the proposals as drafted. The Law Society would be concerned about any increase in the cost of regulation, particularly if the increase is expected to be borne by legal practitioners and their clients. It is also important that funding proposals take into account the likely growth of the profession in future years, with a typical annual increase of around 1000 in the population of solicitors in NSW alone.

The Law Society would be very happy to discuss any aspects of the national legal profession reform proposals as they relate to the regulation of solicitors in NSW. The Law Society looks forward to considering the Taskforce's proposals on funding and its revised legislative proposals for national regulation of the legal profession.

Regards

A handwritten signature in black ink, appearing to read 'Mary Macken', is written over a light grey rectangular background.

Mary Macken
President