Queensland Law Society

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Office of the President

Your ref: Access to Justice Arrangements

Our ref: 328 – 15 – Access to Justice

3 June 2014

Commissioner Angela MacRae
Access to Justice
Productivity Commission
PO Box 1428
Canberra City ACT 2601

By email: access.justice@pc.gov.au

Dear Commissioner

PRODUCTIVITY COMMISSION DRAFT REPORT - ACCESS TO JUSTICE ARRANGEMENTS

Thank you for the opportunity to provide our views on the Draft Report. The Society commends the efforts of the Productivity Commission in relation to the Public Inquiry on Access to Justice Arrangements. The subject matter of the Inquiry is important, relevant and worthy of extensive review.

While we are appreciative of the enormous undertaking of this task, we note that due to the time allocated to respond to the Draft Report, we have been unable to undertake a comprehensive review of the document. Therefore, there may be issues of importance to the legal profession in Queensland to which we have been unable to respond. We reserve the right to make further comment on these issues.

This letter is written with the assistance of the Queensland Law Society's Access to Justice and Pro Bono Law and Litigation Rules Committees.

1. Preliminary comments

Our view

The Society believes everyone, without exception, should have access to legal services and that access to justice is a fundamental right for all.

Promoting access to justice is a constant feature of QLS's advocacy and education to the profession. Our recent advocacy work has included:

- Sustainable legal assistance for disadvantaged persons;
- Queensland state election platform from 2012, which sets out general positions from QLS on access to justice (**attached**);
- Involvement with both state (LPITAF) and federal (NPA) reviews of legal assistance sector funding; and
- Advocating for Queensland to retain the right to access common law compensation schemes (such as with regard to disability care and workers compensation schemes).

We will now address key aspects of the Draft Report.

1. Chapter 4: A policy framework

The Society acknowledges the excellent discussion about the role of government featured in Chapter 4 of the Draft Report. However, the Society considers that this discussion could have been linked better to the discussion about legal assistance funding in the later chapters. The Commission would be well placed to apply its Chapter 4 analysis to a consideration of the cost of unmet legal need and the overall funding required to provide an adequate legal safety net.

2. Chapter 7: A responsive legal profession

Draft Recommendation 7.3
State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority.

In response to draft recommendation 7.3 we note the following.

Current Arrangements in Queensland

Lexon Insurance Pte Ltd ("Lexon"), a wholly owned subsidiary of the QLS, is a captive insurer providing the compulsory professional indemnity insurance required to be carried by all law practices carrying on business in Queensland which are not otherwise exempted.

Lexon currently insures over 1,600 law practices; which equates to over 5,650 practitioners (plus their staff). Similar entities exist in the major markets of New South Wales (LawCover) and Victoria (LPLC); both of which provide coverage of a comparable nature for all practitioners carrying on practice in NSW and Victoria respectively (which are not otherwise exempted).

Previous Review of the Current Structure

In a COAG National Legal Profession Reform Project Discussion Paper dated 11 November 2009, the Taskforce noted national competition policy principles provided legislation should not restrict competition unless it could be shown that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.

Having considered that proposition, the Taskforce:

- Recalled previous, detailed, reviews of the "captive" professional indemnity arrangements in both New South Wales (2001) and Victoria (2004) which did not establish a case for moving away from the "single supply arrangements".
- ***Concluded that neither the fundamentals of the insurance market nor the arrangements for professional indemnity insurance have changed to warrant a re-examination of this position[1].***

Nothing has changed since November 2009 to suggest the Taskforce conclusion is now invalid.

Rationale for Current Arrangements

The current structure provides significant benefits to the Queensland profession, including:

No practice left out

Lexon has an obligation to insure each and every practice in Queensland, irrespective of size or claims history. Unlike the commercial insurance market, where insurers can "pick and choose" the risks insured so as to maximise shareholder returns, Lexon cannot refuse coverage to what could be seen as uncommercial risks.

Consumer protection

This universal insurance philosophy reflects ideals of access to justice and consumer protection by:

- Guaranteeing that small practices (sole principal firms represent over 80% of Queensland practices) can obtain insurance which may not otherwise be available

[1] COAG National Legal Profession Reform Discussion Paper: Professional Indemnity Insurance – 11 November 2009.

at an affordable price – thereby permitting them to continue to serve the community.
- Providing comfort to consumers that should a claim need to be made against a Queensland practitioner, a comprehensive insurance policy sits behind each Queensland practice.

Broad Coverage

Lexon's policy is formulated in conjunction with QLS to provide greater coverage than would be generally found in the commercial market. Particular examples of this are:

- Free run off cover for former practitioners.
- The waiver, in most circumstances, of any entitlement to reduce or avoid a claim because of any non-disclosure or misrepresentation.
- Innocent party coverage as of right.
- General per claim coverage to $2 million – which is beyond the mandated minimum of $1.5 million.
- The proposed introduction in 2014/15 of coverage for certain investigations undertaken by the Legal Services Commission.

Again, this coverage benefits both the profession and the community at large by reducing the circumstances in which a claim under the policy may be declined (which could lead to a consumer having no real recourse in the event of a legitimate claim).

Other benefits

A core goal of Lexon is to assist its members in managing their risk and, to that end; 3 full time risk staff have been employed who work closely with the entire profession to educate and assist on risk issues. This service is provided at no cost to recipients and represents a substantial commitment by Lexon which is not, to our knowledge, replicated by any commercial insurer.

The proactive management of risk – with the goal of reducing claims – is again a strategy which is beneficial both for insured practices and the community at large. Indeed, the success of this program has seen a ***62.1% fall*** in rate of insurance files per 1000 solicitors opened by Lexon since 2002/3.

Independent reviews of the single supplier schemes

The single supplier arrangements in the states have been periodically reviewed and the recent review findings include:

- Queensland – Aon Risk Services has conducted regular reviews of the Queensland scheme since 2008 and has concluded that:
    - Commercial insurers are not willing to participate at the single partner to three partner levels. Practices with up to 15 partners would be considered on a

case by case basis at premium costs they could commercially justify and which would be substantially higher than the captive pricing model.
    - Commercial insurers have traditionally focussed only on the large national law firms where they can derive multi layered programs that generate large premiums which can support one off placements.
    - Unlike commercial insurers, Lexon is not required to distribute profit to shareholders and therefore Lexon is not required to factor a profit margin into its financial considerations.
    - The Lexon model allows insurance to be provided to all members, with the most benefit being to the majority of smaller practitioners, who if otherwise left to the retail insurance market would not be able to obtain insurance, or if they could it would be at an unreasonable cost.

- NSW – Taylor Fry Consulting Actuaries carried out a review in 2001 and supported the continuation of the LawCover single supplier arrangement. Relevantly, they concluded that:

    - In the long term, premium rates in an open market could be expected to be in the order of 25% higher than those that would prevail in a monopolistic market structure.
    - Competitive market forces in an open market would probably lead to significantly wider fluctuations in premium rates over time.
    - An open market would tend to reduce coverage to a minimum with certain features (notably unlimited "free" run off cover to members ceasing practice and limited avoidance rights) being removed.
    - The failure of HIH provides a first-hand view of how the failure of an insurer affects solicitors and consumers. The risk to solicitors and consumers of an insurer failure (i.e. that valid claims for indemnity will not be met by the insurer) can be suitably contained due to the current structure and the power to levy the profession.

- Victoria - PricewaterhouseCoopers (PwC) conducted a review in 2004 on behalf of the Victorian Department of Justice into the single supplier arrangement in Victoria for solicitors' compulsory professional indemnity insurance. After considering the costs and benefits of the existing arrangement and competitive alternatives, PwC recommended the continuation of the existing single supplier arrangement for solicitors and its extension to Victorian barristers, which has subsequently occurred.

Potential adverse outcomes of removal of the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers

As noted above, the implementation of recommendation 7.3 may be detrimental to small practices (which represent the vast bulk of Queensland insured practices) and may ultimately increase costs.

This experience has been borne out recently in the UK lawyers' professional indemnity scheme which is underwritten by commercial insurers. Since 2008 it has experienced significant volatility in premiums and been by uncertainty – particularly for small practices.

In October 2008, insurance premiums were volatile and it was expected that around 500 legal practices (approximately 5% of all UK practices) would be forced to join an assigned risk pool ("ARP") because they could not secure insurance coverage in the commercial market.

The ARP then required that these practices pay up to 27.5% of their fee income in insurance premiums if they enter the scheme in time or 47.5% if they did not[2]. Ultimately 150 were forced to join the ARP[3] - with an undisclosed number simply choosing to close their doors. The subsequent renewal in October 2009 saw similar issues with more than 340 practices then in the ARP.[4]

Despite a number of changes to the model in England and Wales, the process remains one which is dogged by uncertainty. Issues in recent times include questions regarding the ongoing viability of insurers to underwrite the scheme and last minute decisions by insurers to withdraw from the market.

Even when commercial insurers may offer cheaper one off premiums from time to time, it is important to recognise that commercial rates can be cyclical and volatile (being based on many factors unrelated to an individual practitioner's circumstances). A benefit of QLS having a captive insurer is that long term planning is possible so as to avoid much of the volatility otherwise experienced.

2. Chapter 10: Tribunals

Draft Recommendation 10.1 Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

The Society does not support Draft Recommendation 10.1. In our view, restrictions on the use of legal representation in tribunals should be removed and parties should have access to legal representation if requested. We consider that this is important due to the power imbalances that may exist between parties. For example, experienced property managers might appear against vulnerable tenants facing eviction and people with disabilities might appear against experienced clinicians, etcetera. In our view, ensuring parties are able to access appropriate advice, representation and support is vital if they are to access just processes and outcomes. The Society's concern is that parties may decide not to enforce their rights at the prospect that they may have to face the tribunal alone.

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[2] Source - The Law Society of England and Wales Law Society Gazette 2 October 2008.

[3] Source - The Law Society of England and Wales Law Society Gazette Supplement July 2009.

[4] Source - The Law Society of England and Wales Law Society Gazette 19 October 2009.

3. Chapter 13: Costs awards

The Society agrees that parties represented on a pro bono basis should be entitled to seek an award for costs.

In relation to chapter 13, we note the work of the Society following the decision of *King v King* [2012] QCA 81. In the matter of *King v King* the successful party was represented on a pro bono basis. The party subsequently sought to recover costs from the unsuccessful party. Ultimately the Queensland Court of Appeal declined to award costs to the successful party on the basis that the matter had been conducted on a pro bono basis and the attempt to subsequently amend the costs agreement between the solicitor and the client was considered artificial.

To overcome the issues identified in the case of *King v King*, the Society has formed a working group with the Bar Association of Queensland and is liaising with the Rules Committee led by Justice Muir. The focus has been on educating the profession on the impact of *King v King* through various QLS publications. Currently, the Society is drafting a template cost agreement to deal with the issue of pro bono legal costs and is considering how this might apply where pro bono representation is appointed by the Court. We continue to work with Bar Association of Queensland and Justice Muir on these issues.

The Society agrees that the situation in relation to costs awards for pro bono clients requires clarification.

4. Chapter 19: Bridging the gap

Draft Recommendation 19.1

The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single set of rules that explicitly deal with unbundled legal services, for adoption across all Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address:

- how to define the scope of retainers
- the liability of legal practitioners
- inclusion and removal of legal practitioners from the court record
- disclosure and communication with clients, including obtaining their informed consent to the arrangement.

Draft Recommendation 19.2

The private legal profession should work with referral agencies to publicise the availability of their unbundled services.

The Society supports Draft Recommendations 19.1 and 19.2 and supports measures to facilitate greater unbundling of legal services (referred to as discrete task assistance).

Although discrete task assistance is already occurring within the existing regulatory framework, some minor rule changes to the Australian Solicitor Conduct Rules could expand the use of discrete task assistance. The American Bar Association Model Rules for Professional Conduct Rule 1.2 provides a good model where it states:

> (c) *a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.*

An amendment of this nature might alleviate the concerns of legal practitioners in undertaking unbundled legal services.

Extensive and detailed rules may be counter-productive if any new regulatory framework impedes, rather than facilitates, greater use of discrete task assistance.

The Society is in a position to develop materials and factsheets which would provide guidance on issues related to undertaking discrete task assistance. Such materials, along with the recommended change to the Rules would facilitate greater use of discrete task assistance models.

The Society supports Draft Recommendation 19.2 and encourages collaboration between the private legal profession and referral agencies to publicise the availability of their unbundled services. The Society has a number of communication methods that would be helpful in publicising and encouraging the profession to engage in unbundled legal services. We appreciate that publication and awareness-raising of these unbundled legal services is important to raise the profile such options.

5. Chapter 21: Reforming the legal assistance landscape

Information Request 21.2 The Commission seeks views on the appropriate relationships between legal aid rates and market rates for the provision of legal services. What might be the cost of altering the relationship between the two rates?

We note that there is great disparity between legal aid rates and market rates for the provision of legal services. It is the view of the Society that legal aid rates should be increased to make the undertaking of legal aid work viable for the private profession. In order to ensure that legal aid rates are in line commercial rates, these rates should be regularly reviewed and increased.

The effect of the reductions of legal aid rates of pay to private practitioners (in real inflation-adjusted terms) has been felt incrementally, as the proportion of private practitioners who are unwilling to do work at legal aid rates reduces. Previous research has identified the "juniorisation of legal aid" as an effect of the reduced rates of payment for legally aided work. The effect is also felt in particular geographical areas where no private practitioners are prepared to undertake work at legal aid rates.

6. Chapter 23: Pro bono services

Draft Recommendation 23.1

Where they have not already, all jurisdictions should allow holders of all classes of practising certificate to work on a volunteer basis.

Further, those jurisdictions that have not done so already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a Community Legal Centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland.

The Society supports Draft Recommendation 23.1 and thanks the Commission for the commendation in relation to the volunteer practicing certificate model administered by the Society. In Queensland, free volunteer practising certificates are issued to those solicitors who are not employed but who volunteer at a community legal centre. This is particularly important for the participation of retired and career break lawyers in pro bono work. The Society's Access to Justice and Pro Bono Law Committee is also investigating ways in which we can promote the engagement of these practitioners with the legal assistance service sector.

Through its Access to Justice and Pro Bono Law Committee, the Society is also investigating ways to better involve in-house lawyers in pro bono work and is addressing necessary changes to practising certificate restrictions in order to facilitate this.

Draft Recommendation 23.2

The Commonwealth Government, and the remaining states and territories, should adopt the Victorian Government's use of a pro bono 'coordinator' to approve firms undertaking pro bono action. The coordinator should be situated within the Department with primary responsibility for legal policy.

Information Request 23.2

The Commission seeks views on the potential for industry pro bono 'coordinators' to alleviate conflicts of interest for pro bono providers. Which, if any, industries should this apply to? Where should the 'coordinators' be housed? What should their relationship be with the industry? Are there barriers that would limit or prevent their effectiveness? If so, can they be circumvented or removed without affecting the relationship between law firms and their corporate client?

The Society agrees that it is important to look at models which will overcome conflicts as a barrier to the performance of pro bono work and agrees that in particular, a pro bono coordinator within government would be an option to address that issue.

The Society has some concerns with the practical utility of pro bono coordinator appointments within industry bodies.

Information Request 23.3
The Commission invites views on whether other larger jurisdictions beyond the Commonwealth and Victoria, such as New South Wales, Queensland and Western Australia, should adopt a pro bono target, with conditions tied to government tender arrangements. What prevents the use of a single target by multiple jurisdictions? What approaches should be adopted by smaller jurisdictions to pursue similar objectives?

The Society does not support this recommendation. Pro bono work is by its nature voluntary. It is also independent of government. Therefore, we do not support the proposal to tie pro bono targets to government tender arrangements.

Pro bono targets disadvantage firms that do not have the administrative capacity to record their pro bono efforts in a systematic way. Therefore targets may have the unintended effect of excluding the firms that do not record their pro bono work. The Society is concerned that smaller, rural, regional and remote Queensland firms may currently face significant barriers to performing pro bono work. Therefore, the linking of pro bono targets to government tender arrangements, might negatively impact these types of firms.

Information Request 23.5
The Commission is seeking views on methods to implement data collection on pro bono services without increasing unnecessary reporting burdens. Are there ways to better utilise existing sources? Can reporting be standardised? Are there existing social impact metrics (or categories of outcome) that should be adopted? How would data collection best be done in a systemic manner? Who should collect the data?

Queensland legal practitioners provide a significant amount of pro bono and reduced fee services but there has been limited (if any) quantification of pro bono services at a state level and particularly in relation to small firms and sole practitioners. The Society is attempting to address this issue by introducing a request for feedback on the amount of pro bono work undertaken by individual practitioners upon the renewal of practising certificates.

Thank you for the opportunity to provide our comments on the Draft Report. We look forward to presenting our view at the public hearing on 18 June 2014.

Yours faithfully

Ian Brown
President