

25 May 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719
CANBERRA ACT 2601

By email: ascr@lawcouncil.asn.au

Dear Mr Smithers

REVIEW OF THE AUSTRALIAN SOLICITORS' CONDUCT RULES

I refer to the above Review and Consultation Paper, and thank you for the opportunity to provide comment.

The Law Society of Western Australia is generally content with the proposed rule changes, as summarised in the Consultation Paper, except for as is set out below as regards two distinct areas:.

1. Communication with opponents

The Law Society notes that as far as possible, the Australian Solicitors' Conduct Rules (**Rules**) are to be harmonised with the Barristers' Rules. It was therefore proposed to insert a new rule 22.9 to mirror the Barristers' Rule 53, as follows:

A solicitor must not confer or deal directly with any party who is unrepresented unless the party has signified willingness to that course.

However, this rule appears to be inconsistent with the obligation on solicitors to confer with the other side and to resolve disputes at an early stage. Often, such conferral is also ordered by the Court, and is required by O59r9 of the *Rules of the Supreme Court 1971 (WA)*. Additionally, as party to the proceedings with an address for service, the lawyer on the other side should be able to contact that party for any relevant matter. It is particularly noted that in family law, a high proportion of parties are self-represented litigants, and the lawyer on the other side may have to contact that person with unwelcome news, for example a request for a court ordered drug test.

Secondly, the Law Society notes that the new rule may have the potential for abuse by self-represented litigants, where it is used as a tool to avoid contact.

The Law Society therefore opposes the proposed rule.

Mental wellbeing

111. Where a solicitor forms a view that a fellow practitioner might be suffering a mental impairment, does that solicitor have an ethical duty to respond. If so, should that be a matter to be raised initially, and within a confidential setting, with the relevant professional association and addressed under a pastoral care program, or should the appropriate ethical duty be to report the issue to a regulatory authority?

The Law Society notes the above question necessarily invites consideration of whether a general duty should be imposed on solicitors to report instances of unsatisfactory professional conduct or professional misconduct, rather than a duty to report instances of mental impairment amongst solicitors. This is because the purpose of the Rules is 'to assist solicitors to act ethically and in accordance with the principles of professional conduct' (see r 2.1). The relevance of mental impairment to professional conduct is where such impairment either inhibits the solicitor's capacity to properly provide legal services, or contributes to the solicitor breaching conduct rules or other legal duties.

Seen in this way, a duty to report would be to protect against unsatisfactory professional conduct or professional misconduct due to mental impairment rather than to identify mental health issues generally. However, if this is accepted, the issue of whether a general duty should be introduced to report unsatisfactory professional conduct or professional misconduct arises. It may otherwise be seen as odd that a mental impairment giving rise to unsatisfactory professional conduct or professional misconduct should trigger a duty to report whereas other instances of unsatisfactory professional conduct or professional misconduct do not trigger such a duty.

As is noted at p 177 of the consultation paper, the issue of a general duty was considered by the Australian Law Reform Commission in 2007. A general duty to report raises important issues for consideration, including:

- (a) support and/or protection for lawyers that make reports against other practitioners,
- (b) safeguards against vexatious reports,
- (c) the threshold of conduct that triggers a duty to report,
- (d) the level of proof required to trigger a duty to report, and
- (e) to which bodies reports should be made.

It may be suggested a limited duty to report instances of mental impairment is justified in the absence of a broader duty to ensure that solicitors with such impairments receive appropriate support. If this is the case, then each of the issues at (a)-(e) above still arise. A further factor to consider is the appropriateness of a positive duty in circumstances where solicitors do not have professional training in relation to the identification of mental health issues.

If a general duty to report is to be considered, separate consultation may be necessary to canvass a broader range of views on the matter and to avoid a delay to the other conduct rules being amended.

In short, the Law Society opposes inclusion of such a requirement without further consideration.

If you wish to discuss the above further, please contact Mary Woodford, General Manager Advocacy, on (08) 9324 8646 or at mwoodford@lawsocietywa.asn.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'HC', with a long, sweeping flourish extending to the right.

Hayley Cormann
President