

4 February 2022

Rachel Stelfox
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Department of Justice and Community Safety (Victoria)

Email: Rachel.Stelfox@justice.vic.gov.au

Dear Ms Stelfox

MANDATORY REPORTING REQUIREMENT FOR LAWYERS

Thank you for your letter dated 22 December 2021.

I refer to paragraph 4 of 'Attachment A' of your letter. The position of the Law Society of Western Australia is that the mandatory reporting requirement recommended by the Victorian Royal Commission should be introduced by amendment to the *Legal Profession Application Act 2014* (Vic), rather than in the Uniform Law itself.

Given the reservations expressed towards a mandatory reporting requirement for the legal profession, it is the Law Society's view that it would be instructive to the profession in Western Australia to monitor the implementation of the mandatory reporting requirement in Victoria, as a pilot jurisdiction, prior to the requirement being applied to all Uniform Law jurisdictions.

If the reporting requirement is to be introduced into the Uniform Law, the Law Society reserves its final position until it has had the opportunity to consider the proposed draft clauses of the legislation.

The Law Society has no issue with its views (set out below) being circulated to relevant stakeholders, including the Attorneys-General of New South Wales and Western Australia, The New South Wales Department of Communities and Justice, Western Australian State Solicitor's Office, and the Legal Services Council.

The Proposal

Below are some further comments on elements of the Proposal. The Law Society has only set out comments it has in relation to the main elements of the Proposal.

Reportable person

The Law Society has no issues with the definition being limited to individuals (and not including law practices).

Reportable conduct

The Law Society considers that the threshold is appropriately limited to serious misconduct and notes the nexus to the existing self-reporting requirements under the Uniform Law. However, the Law Society considers the ground of 'conduct in the practise of law capable of

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seriously prejudicing the administration of justice' as too nebulous and open to differing interpretations to be appropriate.

Reasonable persons may differ in what amounts to conduct of this kind and the ambiguity may lead to incessant reporting by lawyers who adopt an 'if in doubt, report' approach for fear of adverse consequences for themselves. The magnitude of reports would in turn place the Designated Local Regulatory Authorities under strain (DLRAs).

Furthermore, there are well established processes and powers for dealing with ethical failings of practitioners. Lawyers already owe a paramount duty to the administration of justice. Courts have the power to make orders if they have been misled or deceived. Conflicts of Interest are commonplace in the profession and there are well established protocols for dealing with them.

For example, a solicitor may have a client's informed consent to act in a conflict situation, such as acting for both a vendor and purchaser in a transaction, however this may be unbeknownst to another solicitor who feels compelled to make a report. This is not a desirable outcome.

Threshold

Given the seriousness of mandatory reporting for both the reporter and the subject of the report, the Law Society considers that the objective standard of 'reasonable belief' may be too low. Although this threshold exists in other Uniform Law obligations, such as the duty to report trust account irregularities, and is also the threshold in the Health Practitioner Regulation National Law, the seriousness of a mandatory report for lawyers and the wide range of reportable conduct warrants a higher threshold given the consequences for a practitioner who fails to report, and to resist a deluge of reports which, as noted earlier, could potentially inundate a DLRA.

Further consideration should be given to any negative consequences of the "reasonable belief" threshold experienced by those professions that currently have that threshold for their mandatory reporting requirements.¹

Timeframe

The Law Society supports the flexibility that a timeframe of 'as soon as practicable' affords.

Legal Professional Privilege and Confidentiality

The Law Society is uncomfortable with the deleterious effect that allowing access to privileged and confidential information will have on fundamental principles of legal practice. Notwithstanding the threshold set for reportable conduct and existing Uniform Law Provisions, the Law Society is of the view that legal professional privilege and confidentiality should not be further eroded by the reporting requirement. It is worth observing that a breach of client privilege was the crux of the Lawyer X conduct which culminated in the Royal Commission.

Regarding the confidentiality of a person making a report in the first instance, given the broad spectrum of reportable conduct, notwithstanding the protections against malicious reports, the anonymity of reports could still result in the 'weaponization' of the reporting requirement, and it could be difficult to prove that a report was made for a strategic reason.

¹ For example as stated by one prominent medical practitioner at the time of the National Law: 'these new provisions are likely to deter doctors from seeking help' Breen K, 'Doctor's Health: Can We Do Better Under National Legislation' (2011) 194 MJA 205

Exemptions

The Law Society has previously recommended that professional indemnity insurance service providers should be exempt from the requirement and notes that this feedback has been incorporated.

The Law Society also notes the exemption for those providing ethical advice as part of a professional associations ethical support service. While it is appropriate that ethical advice services are excluded from the reporting requirement, limiting the exemption to ethical advice services only could erode collegiality and comity in the profession, as a lawyer could not freely and informally discuss issues with their colleagues and learned friends if they are not, for example in WA, listed as ethical guidance panel members.

Collegiality is an important feature of any profession, and the mandatory reporting requirement could engender a culture of fear, suspicion and mistrust in an industry which already struggles with mental health issues.

Protections

The Law Society considers the protections in the proposal appropriate. The protections should also apply for those that voluntarily make reports.

Regulatory Response

The degree of flexibility afforded to a Designated Local Regulatory Authority (DLRA) in how to deal with reports is appropriate.

The Law Society notes that it may be difficult for a DLRA to prove in practice that a lawyer has failed to make a mandatory report when required.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on (08) 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely

A handwritten signature in black ink, consisting of the letters 'DL' followed by a period, with a horizontal line underneath the letters.

David Price
Chief Executive Officer