The Law Society of Western Australia
The voice of the legal profession in Western Australia

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Dear Dr Popple

PROPOSED REFORMULATION OF AUSTRALIAN SOLICITORS' CONDUCT RULE 38 (RETURNING JUDICIAL AND COURT OFFICERS)

I refer to the invitation to participate in consultation on the preferred model for the *Proposed Reformulation of Australian Solicitor's Conduct Rule 38 (Returning Judicial and Court Officers)* (**ASCR 38**), received from the Law Council of Australia on 11 October 2022.

The Law Society considers the formulation of this rule a complex matter that requires balancing various interests. The following principles guide the Law Society's approach:

- Justice must be done and seen to be done.
- Apprehended bias can erode the 'seeing' of justice being done.
- When a person who has previously worked in a Court appears (as counsel) for a party before that Court, that can plainly give rise to a legitimate apprehension on the part of disinterested observers (and the other party).
- As a general rule, a person who was a ***member*** of a Court should not 'appear' before that Court as counsel, at least for a period of time after the person left the Court. Reasonable minds will differ on whether the moratorium should be 2 years, 5 years or something in between.
- Judges and Masters ***are*** members of a Court.
- Registrars are ***not*** 'members' of a Court. They are employed by the executive to assist (in very important ways) the functioning of the Court.
- Registrars (even judicial Registrars, however described) do not, as a rule, make determinations on the ultimate merits of cases. Although there are exceptions to this (such as summary judgment applications) they are the exception rather than the rule. Importantly, a party adversely effected by a decision of a Registrar can appeal and the appeal is usually conducted by way of a hearing de novo.
- There is not, in the Law Society's view a strong policy justification for a rule that prevents former Registrars from appearing before the Court.

- An analogy can be made with Judge's associates. Associates are often newly graduated lawyers. They have very close access to their judge in particular, and to varying degrees the other judges. At the conclusion of their associateship they often go on to practice in litigation and many go on to careers at the bar. It would be most undesirable to suggest that they should be subject to any moratorium.

- The Law Society accepts that the situation is not as clear cut with Registrars.

- Nevertheless, on balance, the Law Society is opposed to a moratorium for former Registrars appearing before the relevant Court (with the potential consequences for practitioners that flow as a result of that moratorium being imposed by the Conduct Rules). We consider that the general rules about apprehended bias should be applied on a case by case basis in the event that an opponent (or the presiding officer) has a concern.

- The Law Society considers that harmonisation of the rules for barristers and solicitors is appropriate. There is no good policy reason for a different rule, particularly for jurisdictions such as Western Australia where the legal profession is an amalgam. We stress though, we consider all rules in this area should apply to "appearing as counsel" before a Court that the advocate was previously a member of. Thus we do not consider that if a judge retired from the bench, and took up practice as a solicitor, that should automatically prevent the former judge from instructing another practitioner to appear as counsel before their former Court during their moratorium.

- There are 2 specific scenarios that call for exemption or modification of the general rule:

  - The rule should expressly not apply to a person who is an acting or auxiliary judge, nor to a person who is appointed for a finite term as a Commissioner or similar of the Court. Courts need flexibility to recruit, and a rule that was thought to limit the career of a person who took on such a commission would clearly reduce the field of candidates.

  - If a general moratorium of longer than 2 years is felt appropriate, there should be a carve out for people who retire from judicial life early in their judicial career. There will from time to time be Judges who decide that judicial life is not for them, and who wish to return to private practice. If a person is a member of a Court for less than 2 years, then a further 2 years would appear to the Law Society to be an adequate moratorium. 5 years could be financially crushing. It is not in the interests of justice to 'force' an unhappy judge to remain a judge to earn an income.

WA State Administrative Tribunal

- The WA State Administrative Tribunal (**SAT**) appoints sessional members, some of whom are legally qualified, and engaged in practice as solicitors, and can be called upon (should the occasion arise) to sit on panels in final hearings. The SAT has this jurisdiction under the *Legal Profession Uniform Law* in respect of legal practitioners who may have engaged in unsatisfactory professional conduct or professional misconduct and these final hearings most commonly concern

disciplinary proceedings. The SAT also has jurisdiction in respect of a number of other vocational areas, including in relation to medical practitioners and other health professionals. Legally qualified sessional members who sit on panels, especially in disciplinary matters, tend to be listed infrequently, and in some years may not be listed at all. But it is very important that the Tribunal is able to call on such sessional members when the need arises. The SAT does not assign sessional members to sit only in particular lists or streams, but rather sessional members are simply appointed as sessional members, and may be listed on matters as specified by the President.

The two-year moratorium period in proposed rule 38.5.2, is very likely to dissuade solicitors who are still in practice from agreeing to appointment as sessional members. There is a real concern that the consequence of the proposed rule could adversely affect the SAT's ability to hear and determine applications in its vocational regulation jurisdiction. Further, one of the objectives of the SAT in s 9 of the State Administrative Tribunal Act 2004 (WA) is to make appropriate use of the knowledge and experience of SAT members. This statutory objective will be undermined if the SAT is unable to attract practising solicitors to appointment as sessional members. The effect of rule 38.5 is that a solicitor who is a sessional member of the SAT (regardless of whether, how often, and in what matters they have been listed) would be obliged to refuse all instructions to appear in the Tribunal, irrespective of the nature of the matter, and that prohibition would continue for two years after the sessional appointment ceased.

It is accepted that practising solicitors, who have been or are sessional members of a tribunal, should be subject to a professional conduct rule that requires them to avoid placing themselves in a position that might give rise to a reasonable apprehension of bias in relation to the disposition of an individual matter before the relevant tribunal. However, in so far as the proposed rule will require solicitors to refuse any and all instructions to appear in the SAT, if they are, or have been within the previous two years, a sessional member of the SAT, is an unnecessary and disproportionate response to the objective of avoiding the apprehension of bias in tribunal proceedings.

Conclusion

The Law Society favours close review of these rules. Unfortunately, in the limited time available for consultation, the Law Society has not been able to reach a concluded view on how the rules should be drafted.

The key features of the rules should be:

1. that they apply to permanent Judges, Masters and Magistrates only;
2. that they do not apply to Registrars or Tribunal members;
3. that they certainly should not apply to sessional Tribunal members, or fixed term contract Registrars;
4. harmony between barrister and solicitor conduct rules is desirable; and
5. that only appearance as counsel is subject of moratorium. Solicitor work need not be the subject of moratorium. To be clear, a solicitor should not appear as an advocate if they are the subject of the moratorium.

The Law Society is concerned that if amendments are rushed there could be unforeseen consequences, particularly for Tribunals such as SAT, and perhaps for the recruitment of Registrars.

Please let me know if the Law Society could provide further assistance to you in your consideration of this matter. 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

Rebecca Lee
President