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21 May 2021

Ms Christine Bierbaum
Deputy Chief Executive
South Australian Productivity Commission
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By email: sapc@sa.gov.au

Dear Ms Bierbaum

Inquiry into reform of South Australia's regulatory framework

1. I refer to the South Australian Productivity Commission's Issues Paper in relation to the above.
2. We note the Premier engaged the South Australian Productivity Commission ("SAPC") to undertake an inquiry into South Australia's regulatory framework on 29 January 2021. We note the terms of reference for the Inquiry can be summarised as follows:
 - 2.1 To report on reform of South Australia's institutional framework for making and administering regulations to better enable employment, investment and productivity growth.
 - 2.2 To make recommendations to:
 - 2.2.1 *improve the efficiency and effectiveness of regulators in the administration and enforcement of regulations and institutionalise ongoing improvement and better practice; and*
 - 2.2.2 *improve the architecture, including systems and processes for designing, making, reviewing and sunseting of regulations.*
 - 2.3 To identify:
 - 2.3.1 *significant instances of regulatory overlap, duplication or inconsistency between regulators within the State or between South Australia and other jurisdictions; and*
 - 2.3.2 *specific areas for potential deregulation including the removal of redundant regulations, the simplification and streamlining of regulatory processes and the harmonisation or coordination of different areas of regulation.*
3. I advise the issues paper was considered by the Society's Ethics and Practice Committee which formed a general agreement that there is no need to reform South Australia's regulatory framework for South Australian legal practitioners to better enable investment, employment and productivity growth.

4. The Society's Director of Ethics and Practice has informed the Society's observations as to the form and content of legal services regulation in South Australia, relevant regulatory bodies and underlying principles below.

Form and Content of Legal Services Regulation in SA

5. The regulation of legal services in South Australia utilises all of the forms of regulation in South Australia as identified at Figure 1.1 of the Issues Paper (page 13).
6. The primary legislation is the *Legal Practitioners Act 1981 (SA)* ("the Act"). The main form of subordinate legislation is the *Legal Practitioners Regulations 2014 (SA)* ("the Regulations"). The Act and Regulations contain statutory provisions for the regulation of the following matters:
 - 6.1 The establishment of certain regulatory bodies (see below).
 - 6.2 The establishment and management of the Litigation Assistance Fund and the Legal Practitioners Fidelity Fund.
 - 6.3 Admission to practice.
 - 6.4 The issue and maintenance of practising certificates and professional indemnity insurance.
 - 6.5 Interstate practitioners.
 - 6.6 Foreign lawyers.
 - 6.7 Community Legal Centres.
 - 6.8 Incorporated legal practices.
 - 6.9 Costs disclosure and adjudication.
 - 6.10 Appointment of Managers and Supervisors.
 - 6.11 Handling of trust money and operation of legal practitioner trust accounts.
 - 6.12 Investigations, inquiries and disciplinary proceedings.
 - 6.13 Applications of certain revenues.
7. Other statutory instruments are the various Court Acts and Rules which include provisions for court processes and the requirements for legal practitioners and parties engaged in litigation, the *LPEAC Rules* (see below), and the Mutual Recognition Acts which provide for recognition of legal practitioners from other Australian jurisdictions and New Zealand.
8. Quasi legislation and self-regulation include the Australian Solicitors Conduct Rules and the Barristers Conduct Rules, which provide for codes of conduct and guidance notes for solicitors and barristers, and protocols/memorandums of understanding between regulatory bodies which provide for exchange of information and procedures for the exercise of certain functions which involve more than one body (such as between the Society and the LPCC, and the Society and LPEAC and the Board of Examiners).

9. There is also an extensive field of general or common law which establishes and provides guidance on most of the rules and codes of conduct to be observed by legal practitioners. The main areas from which these rules spring are contract, tort and fiduciary law. The predominant subject matter of those rules is as follows:

8.1 Primary obligations to the court and administration of justice.

8.2 Obligations to clients and other members of the profession such as:

8.2.1 Conflict of interest.

8.2.2 Confidentiality.

8.2.3 Client privilege.

8.2.4 Communications between practitioners and clients, other parties and courts.

10. Other Acts/Regulatory Instruments which are relevant to the practice of law in SA include:

10.1 *Trustee Act 1936* (SA).

10.2 Financial Services Regulation.

10.3 Corporations Law.

10.4 Unclaimed Moneys.

10.5 *Oaths Act 1936* (SA)

Regulatory Bodies

11. The regulatory bodies established by the Act, and their functions, are as follows:

11.1 The Society, which exercises a number of regulatory functions, that are either directly delegated under the Act and Regulations or are the subject of assignment by the Supreme Court, and include the following:

11.1.1 Functions in relation to the processing of applications for admission.

11.1.2 Issue of practising certificates.

11.1.3 Administration of the Professional Indemnity Insurance Scheme.

11.1.4 Administration of the Fidelity Fund and Litigation Assistance Fund.

11.1.5 Trust account compliance and investigation.

11.1.6 External intervention.

11.1.7 Incorporated legal practice audits.

11.1.8 Determination of claims against the Fidelity Fund.

11.2 The Legal Practitioners Education and Admission Council (LPEAC) which, through its Rules (the *2018 LPEAC Rules*), provides for the educational and practical requirements for admission in SA, the mandatory continuing professional development (MCPD) rules, requirements for the supervision of junior practitioners, requirements for practitioners wanting to practise and principals, the establishment of practising certificate categories, and the issue of practising certificates in certain circumstances.

11.3 The Board of Examiners (BOE), which reports to the Supreme Court on whether applicants for admission have satisfied the educational and practical requirements for admission and have demonstrated fitness for practice, and also determines applications brought by practitioners and prospective practitioners under the *2018 LPEAC Rules*.

11.4 The Legal Profession Conduct Commissioner (LPCC) who receives, investigates and determines (in certain circumstances) complaints against legal practitioners and former legal practitioners, and refers matters in which a finding of misconduct is made to the Legal Practitioners Disciplinary Tribunal and the Supreme Court.

11.5 The Legal Practitioners Disciplinary Tribunal (LPDT) which conducts disciplinary proceedings against legal practitioners.

12. The Supreme Court, which is established under its own Act, has inherent jurisdiction with respect to the regulation of legal practitioners and also exercises administrative and disciplinary functions delegated to it under the *Legal Practitioners Act 1981 (SA)*.

13. The Government Minister with primary responsibility for the regulation of legal practitioners, provision of legal services and the operation of the courts in SA is the Attorney-General. The Attorney-General is a member/appointee of the Society's Council, LPEAC and the BOE, and has governance over the operation of the State courts and tribunals.

14. The functions of the regulatory bodies are well-defined by the various regulatory instruments with no unnecessary repetition or duplication. They are a product of many years of jurisprudence and development of underlying principles governing the provision of legal services and the operation of the judicial system.

The Underlying Principles

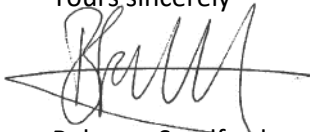
15. The legal regulatory framework in SA is notable for its responsiveness to the changes in the way on which legal services are delivered and the needs of consumers of legal services.

16. As the guardians of the Rule of Law, and the primary vehicle through which members of society can assert their legal rights, legal practitioners enjoy a privileged position in society. This means that they are subject to a wide range of onerous professional responsibilities that must be navigated both in the provision of legal services and, in some instances, their private lives. Breaches of such responsibilities have ramifications for consumers of legal services and also the reputation of the legal profession. This is why the issue of "fitness to practice" is the fundamental threshold to being entitled to provide legal services.

17. Most of the professional obligations applicable to legal practitioners are the subject of conduct rules. Such rules are not law in themselves but provide context and interpretation for the observance of the underlying principles in contract, tort and equity which underpin the professional and fiduciary obligations of lawyers. These rules are organic and in constant review by all key stakeholders to ensure they keep up with the expectations of the profession and the community and technological change.
18. Some professional obligations are also the subject of statutory regulation which refine the application of the underlying obligations in contract, tort and equity. Those instruments are also in constant review by stakeholders so they respond to and reflect the expectations of the profession and the community, and technological change.
19. The regulatory regime for SA practitioners does not unduly fetter the cross-jurisdictional practice of the law or carrying out of legal business but merely provides a framework by which legal practitioners can practise across different jurisdictions. Mutual recognition ensures that the admission and practising certificate status of legal practitioners are recognised and duplicated in other Australian jurisdictions and New Zealand.
20. The regime also permits legal practitioners to provide legal services in a variety of contexts which include via corporate entities.
21. Significant differences in regulatory requirements between Australian jurisdictions are few. While such differences can be troublesome, especially for large law practices providing legal services in multiple jurisdictions, they can be managed and do not appear to actively discourage or minimise interstate investment in the South Australian legal profession.
22. Consideration by the Society as to whether to support South Australia's participation in the Legal Profession Uniform Law has been underway for some time. The Society is presently considering a number of specific concerns relating to the Uniform Law, however intends to recommend to the Attorney-General some amendments to the *Legal Practitioners Act 1981 (SA)* in the interests of increased national consistency.

Should you have any queries, please do not hesitate to contact me.

Yours sincerely



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