28 January 2010

NATIONAL LEGAL PROFESSION REFORM

SUPPLEMENTARY RESPONSE TO TASK FORCE DISCUSSION PAPER ON LEGAL COSTS

1. This is a supplement to the response dated 6 January 2010 (**Initial Response**) to the Task Force's 4 November 2009 paper on legal costs (**Paper**) and, like the Initial Response, has been approved by the following members of the Consultative Group:-

   Tony Abbott – Past President, Law Society of South Australia

   Barbara Bradshaw – CEO, Law Society of NT

   Joe Catanzariti – Immediate Past President, Law Society of NSW

   Harold Cottee –General Manager of Professional Standards, LIV

   Noela L'Estrange – CEO, Queensland Law Society

   Martyn Hagan – CEO, Law Society of Tasmania

   Philip Selth – Executive Director, NSW Bar Association

   Dudley Stow – Immediate Past President, Law Society of Western Australia

2. The supplementary response incorporates points that have occurred to the above members since 6 January 2010, and attaches some recent comments by the ACT Law Society.

<u>Context of paper – NSW focus</u>

3. In relation to the general context of the paper, and its NSW focus, in amplification of Initial Response para 5 it appears that Queensland, Victoria, Western Australia and South Australia all retain, and some in those jurisdictions have reservations about the abandonment of, scales for solicitor/client costs assessment, notwithstanding the abandonment of the scales in NSW in the 1990s.

<u>Role of Board - Costs regulation should be in legislation not in rules made by a Board</u>

4. As mentioned, the Paper appears to contemplate that the National Board will make Rules, which will be binding, which will provide much of the detail to flesh out the "principles" which will be the only content of the proposed national regulations, and we have expressed reservations about this. As the ACT Law Society President observed, the Taskforce papers *"indicate that substantial detail will be deferred to the National Rules, thereby leaving significant detail as yet unspecified. How can the profession be meaningfully consulted on significant issues, and presumably be expected to accept the imposition of a new draft bill, when so much detail is apparently intended to be left to the National Rules? Also, I cannot see how simplification will be achieved if the outcome of this reform process is to simply*

divide the existing Model Bill into a new bill and separate National Rules but without an overall reduction in regulation of the profession."

5. We have also since the Initial Response noticed that it is also proposed (Paper p4) that the Rules will have the very significant implications that:-

   5.1 "A breach of the national rules will be conduct capable of constituting unsatisfactory professional conduct or professional misconduct" i.e., conduct which could amount to the ultimate sanction of striking off, with most severe reputational and financial consequences for a practitioner; and

   5.2 "In the case of law practices, a breach without reasonable excuse may constitute an offence", i.e. a criminal offence.

6. The content of any Rules is therefore very important. Much will depend on the exhaustiveness and precise content of the national bill and the accompanying Initial Rules, and on the manner and circumstances of exercise of any Rule-making power of the Board. Fundamental principles, and matters affecting the profession and, importantly clients, should to the maximum extent possible be in legislation, not in rules made by an administrative body.

7. We will make more specific suggestions when we see the specific content of the proposed national legislation and Rules on costs.

<u>Complexity of costs law, complexity of costs reform proposals</u>

8. Supplementary comments we have received reinforce the complexity and harshness of the current law and practice of costs, onto which the current and proposed costs regulation is grafted.

9. One experienced Victorian practitioner commented, *"I have always thought that costs are ridiculously complex and should anyway be rationalised."* This would complement the proposed simplification of statutory costs regulation being undertaken as part of the National Legal Profession Reform process.

10. It is suggested that it is time for governments, professional associations and clients to have a thorough review of the current technical law and procedures as to taxation of costs.

11. Also, as we submitted in the context of the Paper's brief discussion of "Court management of costs" (Initial Response paragraphs 117-120), proposals for reform in one area cannot be really considered without taking into account all other areas.

12. The law of costs is found not only in legal profession legislation but also in the common law, other State and Territory legislation and rules of most Courts. Other sources of costs "law" are conduct rules. With these various sources, and given the complex law about costs, care must be taken to ensure that any new costs regulation which is contained in any new national legal profession regulation legislation (as we would prefer) or Rules, (which we do not prefer) is not inconsistent with existing law or does not when combined with that law have unintended consequences.

13. We make some comments about this factor in subsequent sections of this Supplementary Response.

Proportionality in assessing reasonableness of costs

14. This is also another area where making general provisions in legal profession legislation to reflect a desire for "proportionality", when there are other provisions in other sources of costs law which have similar, if not the same effects, can be dangerous and produce inconsistent results in a jurisdiction.

15. First, in all the courts of South Australia, and in most other states and territories, and with the Federal Court, court rules provide that if in certain types of action less than a nominated dollar amount is recovered, the court is required, in the absence of special circumstances, not to award costs in favour of the "successful" plaintiff. In South Australia, the limits under Supreme and District Civil Court Rule 263(2) are, for the Supreme Court and District Court respectively, $150,000.00/$30,000.00 in motor accident claims, $25,000.00 and $75,000.00 in defamation claims, and $75,000.00 and $15,000.00 with all other monetary claims.

16. Secondly, under existing law, judges when making costs orders, and taxing masters when assessing the amount of costs, already take into account a comparison of the result obtained from the legal effort expended, when applying the "necessary and reasonable" criterion.

Liability of principals for over-charging

17. In amplification of our comment at paragraph 47 that "we very much doubt that, in cases of gross over-charging, there would not be a lawyer or lawyers who could not be identified as being personally involved in the overcharge" i.e., sufficient for professional sanctions to apply, we refer to the case of *Nikolaidis v Legal Services Commissioner [2007] NSWCA 130*, relied on in the Paper at page 6 to justify the proposed new regulation, and point out that:-

    17.1 the NSW Court of Appeal there certainly suggested that the practitioner could have been found liable if charged either with failure to supervise or with unsatisfactory professional conduct, rather than, as he was, professional misconduct;

    17.2 the more serious charge of professional misconduct requires deliberate overcharging, and the evidence was not sufficient in that case to establish that;

    17.3 however, it is reasonably clear that a lesser charge might well have been successful – Mr Nikolaidis was a sole practitioner, he knew that a bill was going to be sent, and he knew that the client was unhappy about the legal services.

18. Conduct rules, including new ASCR rule 37, make it clear that practitioners have a professional obligation to supervise staff properly.

19. Apart from the conduct rules mentioned in our Initial Response, existing court rules often give courts powers to affect costs outcomes because of delay, for example, SA 2006 SCR 275, and their different provisions and operation also need to be taken into account.

Alternatives to time billing

20. Event-based costing is topical. However, it will be difficult for most lawyers to implement satisfactorily in many matters. The difficulty in litigation is that, with some exceptions, it is as mentioned almost impossible to predict the exact volume of work and therefore the amount of costs that will be encompassed by a particular stage of a legal dispute. Also, it will work best, and probably has the most application to, sophisticated clients.

21. Time billing is likely to remain the dominant method of billing for non-sophisticated clients.

Contingency fees

22. It is noted that contingency fees are not supported by the ACT Law Society, as well as others. It is a controversial policy area which should be left at this stage of legal profession reform.

Multiple charging for the same work

23. In reinforcement of paragraph 94 of the Initial Response and of our observation that costs law has multiple sources all of which need to be considered, it is noted that some Rules of Court, for example, SA Supreme and District Court 2006 Rule 274 (3)(c), already prohibit on both a solicitor-client and party and party assessment charging of multiple clients the same amount, being the entire cost, for the same work.

Disbursements

24. The ACT Law Society agrees that lawyers should not make a profit on disbursements, and should charge the actual cost, but notes that most court scales include a figure for photocopies and facsimiles and that these figures fluctuate widely around the country. We agree with the Society that lawyers should not be criticised for charging at the rate that a court scale has.

25. In relation to one of the Victorian Law Reform Commission's recommendations for reducing and rationalising the costs of litigation outlined on page 13 of the Paper, like the ACT Law Society we do not fully understand the reason for the suggested exemption which appears to allow law firms to make a profit from disbursements provided the clients are "of reasonably substantial means who agree to pay them". This seems discriminatory on its face, and we doubt whether the effect was intended. We reserve our position on this until a better understanding of the suggested exemption is obtained.

Costs assessment

26. We clarify the comment in paragraph 115 of the Initial Response to the effect that we supported a power in the Ombudsman, or the local embodiment of the Ombudsman, to deal with the complaints about legal costs up to $100,000.00, but with reservations as to whether expertise existed. This was not intended to comment in favour of the Ombudsman as a separate regulatory organ – we remain opposed to that. Our comment was directed solely to the power - we thought then that it could be a useful power, subject to the reservation of expertise, for existing Legal Services Commissioners and other complaints handling bodies to deal with costs complaints up to a certain limit. Since then, our Ombudsman response dated 13 January 2010 (para 19) has drawn attention to further problems with the proposal.

Conclusion – simplification not yet achieved

27. We agree with the observation of the President of the ACT Law Society that *"the Taskforce's proposals, on the whole, do not appear to suggest simplification at all. An example would be the legal costs proposals, which appear to instead be a continuation of the existing overly complex and burdensome obligations on legal practitioners without tangible benefit to clients who will only be confused by the overwhelming documentation required by law. The overall theme of the Taskforce's proposals this far appear to be:*

    27.1 *additional layering of regulation;*

    27.2 *uncertainty as to the future roles of existing legal services commissioners and professional bodies in terms of their current roles;*

27.3 *additional costs or, at the very least, an absence of costing of new proposals: and*

27.4 *unnecessarily splitting regulation between a new bill and National Rules simply for the sake of enabling the new bill to be finalised within an unduly ambitious timetable and without all details of reform having been worked through."*

28. We would be grateful for the opportunity to make further comments when the text of the proposed national bill, and the Rules on costs, are known.