

# THE LAW SOCIETY OF SOUTH AUSTRALIA

## MEMORANDUM

**TO:** Mr Tony Abbott  
Ms Margery Nicoll  
Mr Harold Cottee

**FROM:** Richard Mellows, President

**DATE:** 14 December 2009

**SUBJECT:** COAG National Legal Profession Reform Project  
Discussion Paper: Professional Indemnity Insurance

Please find below the Law Society of South Australia's comments in relation to COAG's Discussion Paper on Professional Indemnity Insurance.

Generally speaking, the Society has no issue in relation to the general premise upon which the Discussion Paper proceeds, namely uniformity and mobility of insurance for the legal profession.

However the Society does have the following specific comments in relation to the paper.

We strongly recommend that any policy position to be adopted by the Task Force is discussed with a number of underwriters at the outset to ensure that it is possible to obtain cover for any proposed model.

### **Proposed framework**

The Society strongly supports the view that the Board should not have any role in approving PII Schemes. Responsibility for such approval should remain with the legislative prescriptions. Principles 1, 2 and 10 refer to the Board having a role in approving PII arrangements.

The Board should not have any role in ensuring compliance with the national standards or Rules as these are considered to be operational matters.

The Board should have no role in the granting or renewing of Australian practising certificates as inferred in Principle 3.

### **Principle 3**

Principle 3 would appear to suggest that a Practising Certificate could be issued before a practitioner has in fact obtained PI Insurance. This is because of the use of the words "or will be" appearing in the second line. The concept of Professional Indemnity Insurance being a prospective rather than an actual occurrence will be a regulatory nightmare and fraught with danger as it presupposes that either the practitioner will proceed with the application for cover or more importantly that cover will be granted. It also

places a burden on the regulator to chase up a practitioner to whom a Practising Certificate has been granted for confirmation that the insurance is in place. It should be mandatory that evidence of insurance should be provided before the Practising Certificate is issued.

#### ***Principle 4***

Principle 4 deals with the exemption of certain classes of Australian legal practitioners. It is noted, however, that the Discussion Paper does not advocate for the prescribing of the classes of professional who could be exempt in the legislation. However, no suggestion is put forward as to where the relevant classes of legal practitioners will in fact be defined and who has the power in effect to grant this exemption.

#### ***Principle 5***

We note the proposal that where exempted from PII there is a potential to "impose a condition limiting the scope of legal services provided". This is undesirable. If we go back to the principle that PII cover is a consumer protection measure then it follows that an exemption should be available to any practitioner not providing legal services to the public. The law should be emphatic on the consequences for a practitioner and firm if a practitioner delivers legal services to the public whilst uninsured. Exemptions are currently granted to government and corporate employees, legal aid and community legal centre employees and to practitioners holding a Practising Certificate but not currently practising.

#### ***Principle 7***

The language used is ambiguous. The Society believes it should follow the Practising Certificate requirement as currently used in the National Model Legislation and state that a legal practitioner must **not** have Professional Indemnity Insurance in more than one jurisdiction.

#### ***Principle 8***

Principle 8 has the potential to introduce "forum shopping" for insurance cover. This is commented upon in the second and third paragraphs. It is noted that the solution to this dilemma is to give the Board a discretion to determine whether legal practices are in fact practising in "several jurisdictions". It would be far better for the issue of forum shopping to be dealt with by some definitive definition of "home jurisdiction" in the Legislation. This probably then ties in with principle 6.

A preferable criteria would be one biased to where the firm principally practises; ie insurance be taken out in the jurisdiction where most of the lawyers principally practise (that is, have their Practising Certificates). Under the current criteria of this principle, if a firm had offices in New South Wales, Victoria and a single partner in South Australia, and the premiums in South Australia were the cheapest, there appears no impediment to the firm seeking to insure the whole practice in South Australia. This is not a desirable outcome.

#### ***Principles 9 & 10***

A combination of principle 9 and principle 10 appears to create a situation where the professional indemnity cover conforms with the national rules, but the professional indemnity cover may still not receive the approval of the Board because the discretionary word "may" is used in principle 10.

## **National Rules for Professional Indemnity Insurance**

The Society noting that the proposed National Rules have been adopted by the LCA does not intend to make any further comment other than in relation to Rules 5 and 11.

### ***Rule 5 - Level of national cover***

Whilst noting that there appears to be some consensus to setting the minimum cover at \$1.5M this appears to be a compromise. The Taskforce invites comment as to an appropriate level. A number of jurisdictions including South Australia, where barristers insure under the Law Society's Scheme, have already negotiated \$2M as the required level of cover. Generally we would see a lesser level of cover as a retrograde step in terms of protection for consumers as well as practitioners. In saying this we are conscious of some of the particular issues pertaining to barristers where only \$1M of cover is necessary due to State Professional Standards Legislation such as in Victoria. If the minimum standard were set at \$2M it would appear that some barristers may be forced to purchase insurance at a level considerably in excess of the limit of their liability. Has consideration been given to having 2 minimum levels of cover, one for practitioners who practise solely at the independent bar and a higher level (\$2M) for those practitioners who directly deal with the public? Barristers such as those practising in SA could continue to insure through the SA Scheme and any other similar arrangements in other jurisdictions could continue to operate.

### ***Rule 11 - No Known Circumstance***

We understand that the Law Council had rejected this rule as no commercial insurance provider in Australia will write a policy which would satisfy this rule. The Law Society has raised this rule with its broker and has been advised that underwriters would not be prepared to insure on this basis. We strongly urge that this Rule now be struck out as inoperable.

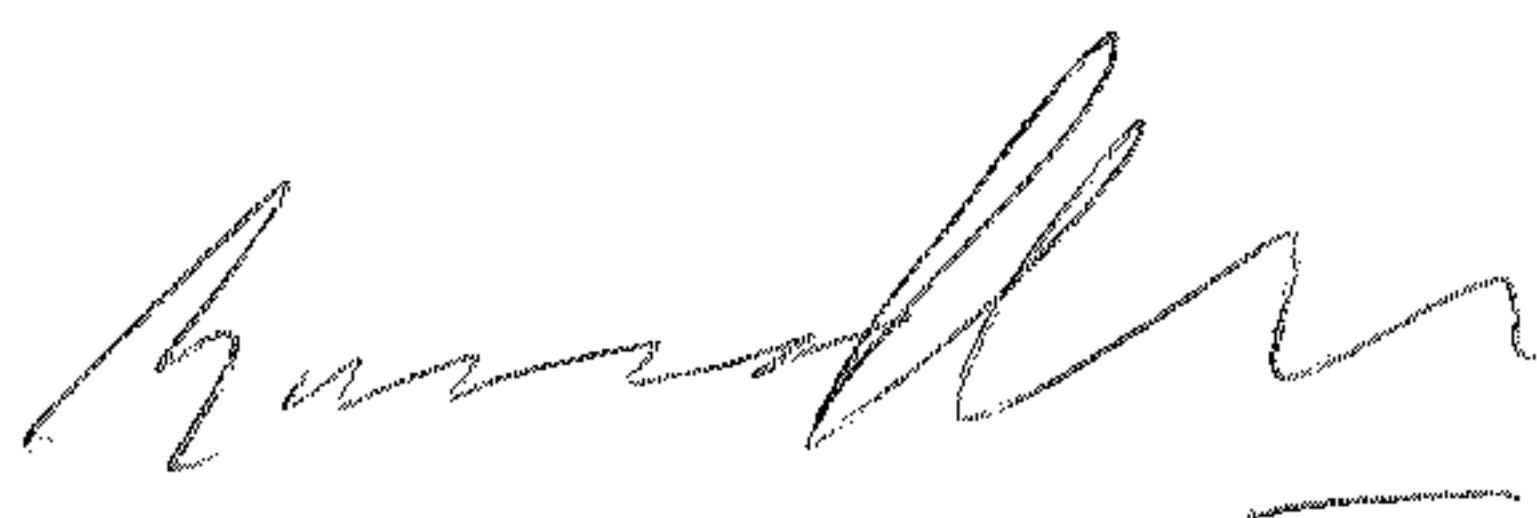
## **Multijurisdictional Law Practices**

The problems that the individual State based insurers will have in insuring interstate practices is recognised in the fifth paragraph where comments made in relation to risk profiling appear. This will increase if forum shopping is not in some way regulated. It may be that work needs to be done on the amount of information sought by the insurers in the proposal on application for cover or renewal. Further consideration needs to be given as to whether or not the individual State body has an ability to decline to insure a practitioner or firm.

## **Terms of conditions of Professional Indemnity Insurance policies**

It is noted that there may well be consideration at the Board level to prescribe new Rules for coverage for people such as consultants (refer paragraph 3). This would in some circumstances amount to an expansion of the level of cover that would be offered and regard needs to be had to the particular wording of the coverage clause in any current policy. This will obviously be a matter that underwriters will need to be involved in and could have the potential to have an impact on premiums.

Yours sincerely



Richard Mellows  
**PRESIDENT**