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By email: xvolkmer@liv.asn.au

Taskforce on Legal Regulation
Law Institute of Victoria

Dear Secretariat

Role of LIV in regulation of the profession

In the June edition of the *Law Institute Journal*, the Law Institute of Victoria asks “who should regulate the profession”?

It is the view of consumer and community lawyers that any modern regulatory framework for the delivery of business services must hold independence of the regulator as a core principle. This independence ensures the public interest is the focus of regulation, rather than the needs or interests of the particular industry or profession.

Among the six objectives of the Legal Profession Uniform Law (**LPUL**) are the following:

- to ensure lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and
- to enhance the protection of clients of law practices and the protection of the public generally; and
- to empower clients of law practices to make informed choices about the services they access and the costs involved.ⁱ

The achievement of objectives of protection and empowerment of clients and the public are supported by an independent regulator. Independence requires objectivity and decision-making free from financial or other interests. Bias in regulation can serve to frustrate the achievement of public interest aims.

The LPUL’s objectives also refer to co-regulation and the independence of lawyers from the executive arm of government. We support lawyers contributing to regulatory decision-making, and believe the LIV is well placed to advance the interests of its members. However, it would be inappropriate for professional associations to again become ‘regulators’ if we are to have a modern and independent regulatory system for lawyers. A professional association that stands for the interests of its members is conflicted in any regulatory task that is to promote the public interest. Further, regulators overseeing the profession are independent from the executive arm of government.

The promise of professions is that they will work to raise standards of conduct, so that the client and the public interest will be better served.ⁱⁱ However, it is our experience that the interests of lawyers can be put before the interest of the public where lawyers are responsible for regulation.

We provide two examples from the recent development of the Australian Solicitors' Conduct Rules (**Conduct Rules**).

First, in submissions made to the consultation on the Conduct Rules, consumer advocates noted that the rules were deficient when compared to general consumer protections under the Australian Consumer Law (**ACL**). In submissions to the consultation for these rules, consumer advocates noted that rules 22 and 34 regarding solicitor communication with opponents and other persons.ⁱⁱⁱ The standards required by these provisions fall short of the standard required by the prohibition on misleading conduct in section 18 of the ACL. For example, rule 34 of the Conduct Rules appears to allow a lawyer or law firm to engage in conduct which is likely to mislead a debtor but falls short of being grossly excessive.

Second, community lawyers have raised concerns with rule 33 regarding communication with another solicitor's client.^{iv} This rule is problematic for community lawyers and their clients in civil disputes against legally represented providers of financial, insurance or investment services, local councils, utilities, or debt collection agencies. The ability of a community lawyer to contact the other lawyer's client directly will commonly save unnecessary costs and allow a vulnerable client to attempt to resolve a matter through alternative or internal dispute resolution. The rule is often very difficult to comply with when a debt collection lawyer's letterhead contains the telephone number or email address of a debt collection agency or credit provider. This rule appears to be established for the benefit of the mainstream profession rather than for the interests of low-income and vulnerable debtors.

Finally, we are not convinced that self- or co-regulation has adequately appreciated or dealt with significant risks arising from issues such as 'referral conflict'.^v

In conclusion, we reiterate that consumer and community lawyers across Victoria support the existing independent regulatory authorities, including the Victorian Legal Services Commissioner and Board. We would also like to see the LPUL reformed so that the Legal Services Council is responsible for developing the Conduct Rules, with input from lawyer representatives, to ensure there is independence in the setting of important professional standards.

Yours sincerely



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and on behalf of
Katie Fraser, Acting Executive Officer, Federation of Community Legal Centres
Denis Nelthorpe, CEO, WEstjustice

ⁱ Legal Profession Uniform Law, section 3(b), (c) & (d).

ⁱⁱ Rogers, J, Kingsford-Smith, D, Clarke, T & Chellew, J, 'Modern professional practice and its future', *The promise of professionalism in the 21st century*, 3 March 2016, available at: <http://www.psc.gov.au/sites/default/files/The%20Promise%20of%20Professionalism%20in%20the%2021st%20Century.pdf>

ⁱⁱⁱ Consumer Action Law Centre & Financial Rights Legal Centre, Submission on LCA Consultation on Uniform Rules, 16 January 2015, available at: <http://consumeraction.org.au/wp-content/uploads/2015/01/Submission-to-LCA-FINAL-160102015.pdf>

^{iv} Ibid.

^v 'Lawyers and Referral Conflict—an underrated risk', 30 May 2016, available at: <http://consumeraction.org.au/lawyers-referrer-conflict-underrated-risk/>