NATIONAL LEGAL PROFESSIONAL REFORM

RESPONSE TO TASKFORCE DISCUSSION PAPER ON TRUST MONEY AND TRUST ACCOUNTING

1. This response to the Taskforce's 3 December 2009 paper on Trust Money and Trust Accounting has been approved by the following members of the Consultative Group:-

Tony Abbott – Lawyer, Law Society of South Australia

Barbara Bradshaw – CEO, Law Society, Northern Territory

Joe Catanzariti – President, Law Society of NSW

Harold Cottee – General Manager, Professional Standards, LIV

Noela L'Estrange – CEO, Queensland Law Society

Martyn Hagan – CEO, Law Society of Tasmania

Philip Selth – Executive Officer, NSW Bar Association

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

Context

2. With minor differences the regulatory regime introduced by the Model Bill has been adopted by most States and Territories and we now respond on the issues raised in the discussion paper as considered necessary.

Powers of the Board

3. We note also that this paper, similarly to others dealing with professional indemnity insurance; legal costs and fidelity cover, proposes that a National Legal Services Board will make "National Rules". In this case dealing with the management of trust money by law practices and which may include,

> *"...requirements for the receipt, handling and disbursement of trust money, trust accounting procedures, administration, software, auditing, inspection reporting, external examination of trust records and accounts and external intervention in the management of trust money and trust accounts."*

4. By a majority, we are opposed to this. We think that these requirements or standards should be in the draft legislation and draft regulations which are produced at the end of the COAG process which should contain the detail that the Taskforce appears to envisage the National Legal Services Board will provide by way of "National Rules". We also reiterate our reasons for our opposition as set out in paragraphs 19 and 20 of our response to the Task Force Paper on "Legal Costs".

5. We note also that these requirements are already the subject of current legislation in most jurisdictions and have been complied with by law

practices for some considerable time. To make these requirements now "National Rules" as set by a National Legal Services Board will only create uncertainty and have serious cost implications.

6. We also submit it is inappropriate for the Board to have rule making powers in respect to the approval of "software" (see paragraphs 16 and 17 below) and external intervention in the management of trust money and trust accounts when presently these "requirements" are not the subject of any legislation and no case for their addition has been made out.

7. We note that the reference to "auditing" appears to be superfluous, if, as it appears, it is same function as the external examination of trust account records. If it is proposed, however, that there be an additional auditing requirement for law practices' trust accounts beyond the current external examination process we are opposed to that requirement. It is both unnecessary, has little regulatory value and would increase compliance costs dramatically.

Proposed Regulatory Principles

Principle 1: Receipt of Trust Money

8. The requirement that a law practice not receive trust money unless a principal holds an Australian Practising Certificate authorising the receipt of trust money suggests that some principals will not be required to have that authorisation.

9. If this is the intention it will introduce a more complicated practising certificate regime than that which is already in place in some jurisdictions and may be at odds to having a uniform practising certificate classification across all States and Territories.

10. If, as proposed later in the discussion paper, all principals of a law practice are jointly and severally liable for compliance with the Act and Regulations relating to trust money and trust accounts then the separate classification is rendered nugatory anyway. Subject to the completion of satisfactory training all principals should have the authorisation to receive trust moneys.

Principle 3: Obligation to Report Irregularities

11. If the requirement to report to the "Board" is in fact a requirement to report to the regulator having that function in each State or Territory there is no objection. If it is to report to a National Legal Services Board we consider that requirement to be unworkable and that it will result in double handling, require additional infrastructure and personnel and come at much greater cost.

Principle 4: Failure to Comply

12. There are approximately 44 penalty provisions in Part 3.3 of the Model Bill. All carry pecuniary penalties excepting section 3.3.24 which is intended to attract a gaol term for having a deficiency in a trust account.

13. Offences of having a deficiency in a trust account aside, we question the efficacy of having a pecuniary penalty criminal prosecution regime for trust account compliance failures when, in practice, breaches of this kind have been more expeditiously dealt with as professional conduct issues. This is especially so given that the penalties and consequences of the disciplinary prosecution regime are expeditious, flexible and are capable of imposing appropriate conditions that impact upon the right of a legal practitioner to continue practise.

14. To establish and implement a parallel criminal prosecution regime with the current professional conduct disciplinary regime would be expensive and invite claims of double jeopardy and cause delay. It would also be at odds to the objective of ensuring that significant efficiencies and cost savings are gained and that compliance costs would be significantly reduced for the profession and consumers of legal services.

Principle 5: External Examination

15. Agree, however some of us question the frequency of the current external examination process; its high cost to law practices and clients; and, its regulatory value.

16. We are of the view that the National Law and National Rules must provide for:

    - one specific trust account report lodgement date;
    - one standardised trust account report pro forma to be adopted nationally;
    - the ability for law practices to change their external examiner in specified circumstances and/or with the approval of the regulator;
    - one annual visit of the external examiner to the law practice unless otherwise required by the regulator.

Principle 6: Investigation and Intervention Powers

17. Agree, with the exception of the proposal that the Board have the responsibility for external intervention in the business and professional affairs of law practices.

18. It is submitted that the present Model Bill regime is already effective and allows for the appointment of an identified and qualified external intervener who has extensive powers. However, while having reporting obligations to the Board, the external intervener is and must be independent of it. This is particularly important in the case of the receiver of the law practice who is an appointment of the Supreme Court.

Consistency of situations when trust account provisions do not apply

19. Agree, however it is recommended that a delegable exemption power should also be available to the Board to allow law practices to apply as and when necessary.

Whether Trust Money is "trust money" for the purposes of the Act

20. Agree, subject to there being a specific time deadline (e.g. 5 days) for the making of a determination.

Accounting procedures

21. The paramount obligation is that all law practices handling trust money are required to comply with the statutory trust accounting obligations regardless of the trust accounting software or system that is used. Law practices should not be compelled to adopt particular software or systems as a regulatory requirement.

22. The proposal that the Board approve particular commercial accounting software products is costly; will act to reduce the available number of trust accounting systems and, being effectively an endorsement, may be counter productive to its role. Indeed the skill set and time involved in such approval is not a matter that the Board should devote itself to.

External Examination of Trust Accounts

23. The external examination or trust account audit procedure has been in place for a considerable period of time however, while its cost to law practices and ultimately clients is very high, its regulatory value is very low.

24. External examiners of law practice trust accounts have failed to identify and report on serious trust account breaches and rarely have they identified instances of defalcation resulting in the appointment of a receiver or the initiation of criminal prosecution action.

25. Any steps to reduce the compliance burden and cost to both law practices and clients of the external examination procedure would be welcome. In this context reference is also made to paragraph 11 above.

Regulator initiated examinations, investigations and interventions

26. The discussion paper advises that a separate paper will deal with "external interventions" and also that a simplified version of the Model bill be adopted for "investigations".

27. It is understood that this material will not be available before a draft bill is circulated and note that this advice is made in the context of the statement that

> *"...there appears to be little evidence that random trust account inspections are of assistance in identifying major defalcations in relation to trust accounts and trust money. Accordingly, it may be preferable to focus more on the regime for external examinations of trust accounts as a more useful mechanism of independent oversight of compliance with the regime and consumer protection."*

28. We disagree. Not only is there no evidence provided to support this assertion but also no evidence to support the conclusion that the external examination procedure may be preferable. To the contrary, almost all defalcations have been identified by trust account inspectors which have then been acted upon promptly and efficiently.

29. In our view such a proposal would add a very significant and possibly uncontrollable cost burden on law practices and clients. A greater reliance upon focussed trust account investigations would be a far more preferable course. In that context it is essential that trust account inspectors be appropriately indemnified.

Jurisdictional Linkages and Single National Trust Accounts

30. We agree that a law practice that operates in several jurisdictions should have the option of maintaining only one trust account and note that the Taskforce was to deal with this proposal in a separate paper.