“Legal practitioners and conveyancers: a model for regulation under Australia’s anti-money laundering and counter-terrorism financing regime”

A client’s submission

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Summary

Recommendations are:

1. That the nature and extent of public participation in the consultation process be evaluated and if not considered representative of public opinion that further consultation, which is representative, be conducted.
2. That the structure and functions of lawyers trust accounts be reviewed with consideration given to recommending that a system of either single state/territory trust accounts or a single, national trust account be created similar to France’s CARPA and to BARCO in England and Wales the abolition of trust accounts or recommendations

Author

I am a journalist, communication (public relations) practitioners and social and market researcher. Principal appointments have been: federal parliamentary correspondent of The Sydney Morning Herald; Director of Public Relations and Information at the former Aboriginal Development Commission; private communication consultant; private research consultant, mainly to several federal government agencies and departments principally the then Australian Institute of Health and Welfare and the Department of Health.

Since becoming in 2005 one of 250 victims of trust account fraud at the Adelaide firm of Magarey Farlam Lawyers (SA civil list, SC 1152/2005), I have been advocating for substantially improved clients’ rights under legal regulation legislation in SA and “nationally” (see under “Public consultation”).

More recent, and current, advocacy has covered and is covering campaigns for:

- improved lessees’ rights under South Australian residential tenancies and strata titles legislation
- stronger creators’ rights under copyright laws
- public and private sector participation in decision-making by governments and major service organizations, particularly through a public advocacy council and most recently promoted during development of Australia’s

application for the Open Government Partnership which was conducted with an abject lack of public participation...

Qualification

This submission has been prepared in haste because the consultation process only became evident less than a week ago and other intervening commitments have prevented a more detailed submission.

Public consultation

Legal professional privilege, as the consultation paper states, belongs to the client (Page 17).

It is therefore imperative that clients' opinions be widely canvassed to extent that the results are representative of the public and reliable and valid.

This suggests that public consultation in this matter has not been adequate. It is conceded that this is an assumption but given the apparent lack of publicity and past advocacy experience, it is an educated assumption.

Pubic consultation by governments, state and federal, is often non-existent or negligible or token or where it is of any substance it often is methodologically flawed.

This, of relevance to this matter, has been the case during the development of much legal regulation legislation e.g.

- there was no pubic consultation during development of the, subsequently lapsed, (SA) Legal Profession Bill 2007 which was designed to align the state with all other states and territories a national model regulatory law
- there was only token consultation with the public during the deliberations of the National Legal Profession Taskforce (2009-11) with: only two non-lawyers, one of whom was a consumer representative, on a 19-person Consultative Group; only 12 members of the public included in a research project; a small group of community legal centre personnel; and a fatally flawed on-line survey
- there was a three-week public consultation period for the (SA) Legal Practitioners (Miscellaneous) Amendments Bill 2013 – Easter intervening
- there was no public consultation about the NSW and Victorian Legal Profession Uniform Law (LPUL) Bills 2014 – and each Bill was guillotined after it second reading stage in each of the four houses of the parliaments – in short, there was no consultation and no debate.

The result has been legislation which has been developed by a monopoly of lawyers – attorneys-general and lawyer organizations – and then marshalled through the parliaments by attorneys-general backed by the many lawyers in parliaments. Democracy has been damaged.

And the results of that are lawyer-controlled regulatory systems containing provisions contrary to clients' interests. It is not "co-regulation" as it is commonly described and as has been referred to in the Consultation Paper: the major stakeholder group – clients - are not party to the system's development and administration.

The system is in almost total contrast to that of England and Wales where, since the Legal Services Act 2007 came into force, legal regulation has been lay controlled. It is a system which should be replicated in Australia.

There is a lay-controlled arch-regulator, the Legal Services Board, which oversees nine "front-line", lay-controlled regulatory bodies for: solicitors, barristers, legal executives, licensed conveyancers, patents attorneys, trade mark attorneys, costs lawyers, notaries and chartered accountants. (Contrary to Footnote 28 on Page 14 of the Consultation Paper, the Law Society of England and Wales has no regulatory role – it is solely a representative organization).

The principal regulatory system concerns for clients under the LPUL include a lack of independence – compliance auditing, trust account auditing and the disciplinary systems are, effectively, lawyer-controlled, even though in some states and territories there are (currently unfulfilled) provisions for lay-controlled disciplinary systems. Caesar audits Caesar. Caesar judges Caesar.

The concerns are expressed at length in the attached paper by former Queensland Legal Services Commission, Mr John Briton.

To them can be added: a lack of involvement in the determination of legal education courses and standards; and an extraordinary, arrogant costs agreement regime under which lawyers have the power to determine when clients understand an agreement.

It will be disturbing if this consultation results in a similar lack of public involvement and similar results which principally reflect lawyers' interests.

Trust accounts

The following sections outline the trust account system and include key points made in the attached paper by Dr (now Professor) Adrian Evans of Monash University. The paper, which criticizes, and argues against retention of, the trust account system, was submitted in 2010 to the National Legal Profession Reform Taskforce in 2010.

The states' and territories' legal regulatory laws provide for unjust trust account systems.

The systems, which essentially are variations on the same theme, have two main components (three, if transit money is included):

- general trust accounts

- controlled money accounts.

General trust accounts

General trust accounts are held by lawyers with authorized deposit institutions (ADIs) and contain up-front funds they require SMC's to pay to them for certain services and to cover certain costs e.g. court costs and transactional funds including home purchases/sale money, but:

(1) There is no security attached to the accounts

  (a) meaning clients are forced to put money where it is not safe

    (i) an astonishingly perverse law which should never have been enacted and one which is highly unlikely to be mirrored anywhere.

(2) The interest earned on the funds is stripped and used to

  (a) fund the bulk of the regulatory systems

    (i) making Australia one of only two common law countries (South Africa is the other) in which lawyers do not fund regulation

  (b) provide compensation for victims of trust account frauds

    (ii) through fidelity funds which can be highly restrictive

  (c) mainly, prop legal aid budgets

    (i) about 15% of legal aid commission budgets nationally is funded from general trust money - $1.6b (inflation adjusted) during the past 20 years.

    (ii) this is double-dipping because lawyers' SMCs' already contribute to legal aid via government general revenues, and is inequitable because

      - no other group is double-dipped
      - lawyers' SMCs are unlikely to seek legal aid because they have their lawyers
      - and if they do they are unlikely to satisfy the restrictive means tests.

Professor Evans argues that lawyers act unethically and in breach of their fiduciary duties to clients because of the interest-stripping.

He says that the reasons for establishment of the 60-year-old systems - predictable economic growth and difficulty in calculating interest earned on trust money, no longer exist.

Controlled money

Controlled money is money which a law practice controls exclusively, under a written direction, in a dedicated ADI account which is not a general trust account.

(1) Interest earned on the funds deposited in them accrues to the client - it is not stripped

(2) There is no requirement for lawyers to tell their SMCs about controlled accounts and they don't

(3) But major clients do know about them and use them, channelling their mega-millions of dollars through them.

(4) Therefore, major clients, do not contribute to regulatory costs, fidelity funds or legal aid

    (a) and lawyers are happy that their big-fee paying clients are not unhappy.

Money laundering and terrorism funding

The current trust account structure should be revised.

There apparently are no known cases of money laundering or terrorism funding through lawyers' trust accounts.

But experience in other countries indicates that crimes may be being committed.

France 30 years ago established the CARPA system under which regional bar associations created single accounts into which lawyers deposit trust funds – one account for each client.

The main account is controlled by a "batonier" with the power to investigate any suspicious transactions and to block them.

Hence, lawyers are relieved of their client confidentiality constraints.

The French claim that the system has eliminated money laundering.

http://www.unca.fr/images/stories/pdf/actu/Carpa_a_means_of_self-regulation_for_lawyers_and_a_tool_in_the_fight_against_money_laundering.pdf

A similar system has been established in recent years by The Bar Council in the UK for barristers in England and Wales.

http://www.barcouncil.org.uk/supporting-the-bar/barco/

Australia could follow suit – with either state/territory or a national trust account.

Or, trust accounts could even be abolished, given the ease with which electronic funds transfer now allow transactions to be effected.

End note

Consistent with recommendations to other federal and state government departments and agencies, the Department is asked to adopt recognized Plain English standards for its reports.

For example, the report on which this submission is based consists of lines which are up to about 112 characters long whereas the recommended length is between 50 and 70 characters for 12pt type.

There also are many lengthy paragraphs which could be broken into several parts.

Readability would be far easier if these suggestions are adopted.

Further explanations are given in “Writing in Plain English” by the late Professor Robert D Eagleson, of the University of Sydney, and a former adviser to the Commonwealth.