Attorney General; Minister for Corrective Services

Our Ref: 35-08318

Mr Mark Warner
Committee Clerk
Standing Committee on Uniform Legislation and Statutes Review
PARLIAMENT HOUSE WA 6000

Dear Mr Warner

RESPONSE TO REPORT 42 OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW – PROFESSIONAL STANDARDS AMENDMENT BILL 2009

I have a received a copy of Report 42 of the Standing Committee on Uniform legislation and Statutes Review in relation to the Professional Standards Amendment Bill 2009 and my response to the individual recommendations is contained in the attachment.

Yours sincerely

C. Christian Porter MLA
ATTORNEY GENERAL; MINISTER FOR CORRECTIVE SERVICES

Attach: *Response to Report 42 of the Standing Committee on Uniform Legislation and Statutes Review of the Professional Standards Amendment Bill 2009.*

12 MAR 2010

Level 29, Allendale Square, 77 St Georges Terrace, Perth Western Australia 6000
Telephone: +61 8 9220 5050 Facsimile: +61 8 9221 4665 Email: Minister.Porter@dpc.wa.gov.au

ATTACHMENT

RESPONSE TO REPORT 42 OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW OF THE PROFESSIONAL STANDARDS AMENDMENT BILL 2009

Recommendation 1: The Committee recommends that the responsible Minister advise the Legislative Council whether the Bill has any impact on, or ramifications for, the provisions of the *Civil Liability Act 2002.*

The only connection between the *Professional Standards Act 1997* (WA) and the *Civil Liability Act 2002* is that both pieces of legislation were introduced as part of a total package aimed at limiting liability and reducing insurance premiums. The Professional Standards Amendment Bill 2009 has no impact on, or any ramifications for, the provisions of the *Civil Liability Act 2002.*

Recommendation 2: The Committee recommends that the responsible Minister provide a cogent explanation for the amendments, which justifies the change in the balance of the Principal Act noted by the Committee.

This recommendation arose from the observation that the Bill will amend the Principal Act by permitting cost-inclusive policies, which the Committee notes may erode the measures designed to protect concerns of inability to satisfy judgments, one of the justifications for the imposition of a cap on liability by the Principal Act in the first place.

It is generally accepted that professional indemnity insurance (PII) available commercially will satisfy the insurance reference in the Principal Act. Commercially available PII can be either costs-in-addition or costs-inclusive, and some may also be partially costs-in-addition (where the policy will provide some, but not unlimited, cover towards defence costs). The availability of each type will vary according to the life cycle of insurance business. Costs-in-addition insurance, which is preferred, becomes scarce when the insurance market hardens, particularly for larger policies.

The Professional Standards Council (PSC) recognises the significance of defence costs, and in this regard, the third category of matters to be considered by the Council as stated in the Council's *Policy Statement on Professional Indemnity Insurance*, will be the insurance standards of the Association applying for a scheme, i.e. whether the standards require a costs in addition PII policy or allow a costs inclusive PII policy. The *Policy Statement* is available from the Councils' homepage but is attached here for convenience.

In relation to the Bill, it can be seen that the Bill attempts to provide certainty that in the event a PII policy purchased by a professional with the benefit of a Scheme is held not to be fully costs-in-addition. Such a professional is not deprived of the benefit of the Scheme if the other requirements have been complied with. Removal of this potential uncertainty improves the achievement of an objective of the Principal Act, that being

the creation of Schemes that limit the civil liability of professionals. Protection of consumers of the services provided by the professional can be achieved by setting appropriate levels of capping, monitoring claims and implementing risk management strategies in accordance with sections 47 and 48 of the Principal Act.

In the absence of the amending Bill, a professional who purchased PII exceeding the level of the cap remains unsure if the defence costs component may cause the benefit to paid by the policy to be lower than the cap, thus depriving the professional of the benefit of the Scheme. It will also mean that professionals can only remove this uncertainty with costs-in-addition PII policies. This uncertainty is a disincentive to participation in the Scheme, which in itself subjects the professional to significant compliance costs (insurance, continuing occupational education and professional development).

It will be noted that despite the uncertainty of benefit the Committee recognises, there are three professional standards schemes in Western Australia:

(1) The Institute of Chartered Accountants (WA) Scheme
(2) The CPA Australia (WA) Scheme and
(3) The Engineers Australia (WA) Scheme.

However, it should be noted that these three occupational associations have members throughout the Commonwealth of Australia.

At the same time, other associations in Western Australia, for example the Western Australian Bar Association, have not applied for any professional standards scheme. It is not certain how much of an impact the Bill will make except that the changes from the Bill will mean a professional may choose between costs-inclusive and costs-in-addition PII policies and still enjoy the benefit of a Scheme.

The amending Bill recognises the potential shortfall for the client resulting from "defence costs". The Bill includes clause 8 which inserts a new section 40A to the Principal Act. The new section 40A ensures that no defence costs will erode the benefits (to the level of the cap) available to a claimant. This protects consumers.

The Bill implements a Standing Committee of Attorneys General (SCAG) decision to enable professionals who are members of Schemes under Professional Standards Legislation to hold either costs-inclusive or costs-in-addition PII policies.

Recommendation 3: The Committee recommends that the responsible Minister:

- **Clarify whether under Professional Standards Council guidelines there will be a blanket increase in the cap on liability for schemes that permit cost-inclusive insurance policies or different caps for the different types of insurance policies;**
- **Explain how the Professional Standards Council guidelines suggesting an increase in the liability cap for schemes permitting cost-inclusive policies will be enforced; and**
- **Respond to the question of whether an occupational association will be able to challenge (in a court or tribunal) a decision by the Professional**

Standards Council not to approve a scheme permitting cost-inclusive policies because that scheme does not comply with a Professional Standards Council requirement to impose a higher cap on liability for professionals holding such policies.

As noted by the Committee, before approving a Scheme, the PSC must consider the matters in section 23 of the Principal Act. Subsection (f) requires the PSC to consider the cost and availability of insurance against occupational liability for members and subsection (g) requires the PSC to consider the insurance standards determined by the association.

In relation to the first dot point above, whilst the *Professional Standards Council Guidelines* do not impose a blanket increase in the cap on liability for schemes that permit cost-inclusive insurance policies or different caps for the different types of insurance policies in view of all the matters to be considered in section 23 of the Principal Act, *ceteris paribus*, insurance standards that permit cost-inclusive insurance policies may result in Schemes that have higher caps. The PSC has not specified different caps for different types of insurance policies in any one scheme but, depending on the advice by its appointed consultant actuary and other aspects of the application received, specifying different caps for different types of insurance policies may be appropriate in some circumstances. Section 46(4) of the Principal Act envisages that the association may specify different standards of insurance for different classes of members or for different kinds of work or on the basis of other differing circumstance that it considers relevant.

In relation to the second dot point above, the PSC has not, in any one scheme, specified different caps for different types of insurance policies. However, where the insurance standards of an association allow for cost-inclusive policies, the opinion of the consulting actuary will be sought on whether the historical claims information mandated by the PSC's *Application Guidelines*, and additional advice from insurance brokers regarding historical defence costs, will support the capping proposed in the application. If advice is received that the level of the capping is inadequate, or barely adequate, then the association is requested to provide additional support the absence of which will mean the proposal will not be accepted by the PSC. It is the experience of the PSC that associations are usually responsive to the PSC's advice and therefore, where the insurance standards of an association permits cost-inclusive policies, and a higher level of capping is required, the proposal will be revised to reflect the higher levels.

In relation to the third dot point above, associations have continued to work cooperatively with the PSC to lift the professional standards of their members. To date, no decision of the PSC has yet been challenged in a court of law or a tribunal. However, the Principal Act does not prevent a dissatisfied party, including an association, from challenging any decision of the PSC. Section 28 of the Principal Act provides that a person who is or is reasonably likely to be affected by a Scheme may apply to the Supreme Court. It is the experience of the PSC that associations typically have more issues with providing the PSC with sections 13 (information reasonably required by the PSC to perform its functions) and 48 (risk management strategies) reports.

Recommendation 4: The Committee recommends that the responsible Minister clarify whether "*defence costs*" for the purposes of clause 4(2) of the Bill will vary with the characterisation of costs in a particular insurance policy.

The term "defence costs" is understood, generally, in the insurance industry to refer to the costs incurred for the insured in answering or defending a claim. The term, which is also used in section 68 of the *Legal Professions Act 2008* (WA), is sufficiently well accepted in the industry to include such costs. It is possible that the insurance industry may, in the future, have stricter or broader definitions as to what is included in the "defence costs" which may vary the characterisation of the term.

The Principal Act, with members of the PSC appointed from diverse backgrounds including insurance, requires that consumers be protected and section 29(3) of the Principal Act allows the PSC to review any Scheme in the event such a possibility eventuates.

The removal of ambiguity in the Principal Act by the Bill in recognising and isolating the "defence costs" element is not inconsistent with the existing legislation in Western Australia, namely the *Legal Professions Act 2008* (WA).

Recommendation 5: The Committee recommends that the responsible Minister advise the Legislative Council whether there is any requirement under: the Principal Act; the Bill; or regulations, for a professional to advise a client whether the professional holds a cost-inclusive or cost-in-addition (or some other type) of occupational liability insurance policy.

If there is no such requirement, the Committee recommends that the Legislative Council considers inserting an amendment to the Bill requiring a professional to provide that advice to a client.

Under the Principal Act, the Bill and the regulations, there is no requirement for the professional to advise the client whether the professional holds a cost-inclusive or costs-in-addition (or some other type) of occupational liability insurance policy.

What is required to be disclosed by the professional who has the benefit of a professional standards Scheme is a statement to the effect that the professional's occupational liability is limited (section 45(1) of the Principal Act). The Regulation prescribes a form of statement for the purpose:
"Liability limited by a Scheme approved under Professional Standards Legislation."

Other than font and size requirement, the brevity of the prescribed statement:

(1) alerts a reader, presumably the customer or client of the professional, to the fact that the liability of the professional is limited;
(2) does not confuse the reader with too much information which may include technical terms and conditions of particular types of occupational liability insurance;

(3) allows groups of professionals who operate in more than one jurisdiction, to have common stationery; and
(4) allows efficient monitoring by Scheme Administrators in relation to members' disclosure requirements.

Section 45(1) also provides that it is an offence if the professional failed to disclose and the penalty of $5,000 is significant.

The brevity of the prescribed statement may avoid potential litigation in relation to the adequacy and accuracy of the disclosure.

Whilst the prescribed statement may in future be amended to provide more details to consumers, any such measure will be undertaken co-operatively with the other States and Territories with Professional Standards Legislation in place. The aim is to ensure that professionals in Western Australia will be able to work seamlessly in other jurisdictions with minimum compliance costs. Consumers in Western Australia will also have the benefit of more professionals from other States and Territories offering their services with minimum compliance costs without compromising on professionalism.

Recommendation 6: The Committee recommends that the responsible Minister advise the Legislative Council whether there is any legal requirement, in the event a professional holds a cost-inclusive occupational insurance policy applicable to the work being performed/services provided to a client, that the professional inform the client:

- **As to the effect of that policy on the monies that may be available to satisfy a client's claim; and**
- **What constitutes "defence costs" for the purposes of that policy.**

In the event a professional holds a cost-inclusive occupational insurance policy applicable to the work being performed / services provided to a client, the professional is not required to specifically inform the client that the amount payable under the policy may be reduced by the "defence costs" for purposes of the policy.

Recommendation 7: The Committee recommends that the responsible Minister clarify how clause 27 will, if enacted, interact with sections 24(2), 31(3) and 32(2) of the Principal Act.

Clause 27 of the Bill reflects section 20A of the *Professional Standards Act 1994* (NSW). It is intended to amend the Principal Act with the insertion of a new section 34A that extends the liability limitation to other persons specified in the new section.

Section 20A was drafted to complement and clarify sections 18, 19 and 20 of the NSW legislation (sections 31, 32, 33 respectively of the Principal Act). The rationale contained in Drafting Note 3.4 for the *Professional Standards Amendment Bill 2004* (NSW) is reproduced below:

The mismatch between sections 18 and 19 (and 20) of the Act and the definition of "occupational liability" is not solved by an amendment to that definition.
It is not appropriate that a scheme simply "also apply" to a partner, officer, employee or associate of a professional to whom a scheme applied. This would have two unintended results:

(a) *in order to have liability limited, the partner, officer, employee or associate would have to satisfy the tests set out in sections 21, 22 and 23 relating to insurance cover, business assets or multiple charges. In many or most cases this would not be possible to do.*

(b) *The scheme should not provide any independent protection from liability for something that partner might do independently of the person who is actually a member of the scheme. For example, a multidisciplinary partnership consisting of lawyers and accountants, the protection of a lawyers' professional standards scheme should not limit liability for something an accountant does in the course of professional practice as an accountant just because the accountant happens to be the partner of a lawyer who is a member of a professional standards scheme.*

The real purpose of sections 18, 19 and 20 is to protect a partner, officer, employee or associate from liability that arises from the same event as that which gave rise to the liability of the person who is the actual member of the scheme. Otherwise, the policy of the Act is thwarted by allowing a plaintiff to pursue a defendant whose liability is not limited by the scheme for a cause of action that is essentially the same as a cause of action limited by the scheme. This is particularly important in the case of employees who have an entitlement under the Employees Liability Act to be indemnified by their employer in respect of their tort liability (that right of indemnity not being limited by the scheme).

Recommendation 8: The Committee recommends that the responsible Minister clarify the difference between the concepts of a "*single claim*" in the Principal Act and that of a "*principal cause of action*" and "*related cause of action*" in the proposed sections 34A(2) and 34A(3) and advise whether those proposed sections widen the ambit of claims included within the cap on liability. If so, the responsible Minister also explain the reasons for these amendments.

Please see the response to Recommendation 7 above.

Recommendation 9: The Committee recommends that the words "*national model legislation*" be deleted from the heading to Part 4 of the Bill and the words "*legislation in other jurisdictions*" be inserted in their place.

This recommendation is a drafting issue for the House to consider.

Recommendation 10: The Committee recommends that the responsible Minister clarify the effect that clause 15, if enacted, would have in the event that clauses 4(2) and 8 of the Bill were not enacted.

Clauses 4(2) and 8 of the Bill are intended to address the issue of "defence costs". Clause 15 relates to the additional matters for the PSC's consideration in the event that an application indicates an intention to operate as a scheme of both WA and another jurisdiction.

If clauses 4(2) and 8 of the Bill are not enacted, there will remain an ambiguity whether a professional who is a member of an association administering a Scheme benefits under the Scheme in limiting his or her liability, unless full costs-in-addition PII policies are purchased. The same professional would continue to face such ambiguity even in jurisdictions that do not have such ambiguity, for instance NSW, even if the WA Scheme operates in NSW because clause 19, which amends section 28 of the Principal Act states that the Court may make an order that an interstate scheme is void for want of compliance with the provisions of the law of the jurisdiction in which the scheme was prepared.

As a consequence WA professionals may be at a disadvantage if clauses 4(2) and 8 of the Bill were not enacted.

Recommendation 11: The Committee recommends that the responsible Minister advise the House whether there is any administrative process for the Ministers of different jurisdictions to resolve any differences that may arise in decisions to gazette schemes operating in more than one jurisdiction.

The national framework for professional standards legislation is being improved. In so far as the decision to gazette is concerned, the Office of the Professional Standards Councils (OPSC) advises that it works closely with the policy officers of the respective jurisdiction to iron out differences, if any, before any application for Scheme is approved by the PSC. Policy officers of affected jurisdictions have access to the officers at the OPSC charged with responsibility of any application and issues are resolved as soon as they arise if they relate to Schemes.

The OPSC advises that such co-operation can be seen from the commencement date of Schemes. A process has been put in place to ensure such similar Schemes operating in more than one jurisdiction commence at the same time despite the different gazettal dates, for example, the various Engineers Australia Schemes. However, the process is not perfect and policies are being developed within the OPSC for improvement. Through the co-operation of the Departments of Attorneys General, the OPSC has managed to ensure consistent commencement dates for New South Wales, the Australian Capital Territory, the Northern Territory, Queensland and WA. In reference to the example of the Engineers Australia Schemes, the EA Schemes in the respective jurisdiction all commenced on 1 January 2009 (except for NSW where the association already had a scheme in place dating from 16 February 2007). The OPSC continues to work with the officers in South Australia, Victoria and Tasmania with the goal of resolving differences that may arise in terms of commencement dates.

Recommendation 12: The Committee recommends that the responsible Minister clarify the effect of Item 10 of Schedule 4 proposed by clause 29 of the Bill.

Item 10 of Schedule 4 proposed by clause 29 of the Bill merely clarifies the impact of the legislation on associated defendants and provides that they will be affected after the commencement date.

Recommendation 13: The Committee recommends to the Legislative Council that, in the absence of a cogent reason being provided for retrospectivity, the Bill should not have retrospective effect.

Noted.