VICTORIAN BAR

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The Hon PD Cummins AM
Chair
Victorian Law Reform Commission
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By email: law.reform@lawreform.vic.gov.au

Dear Judge

VLRC Regulatory Regimes Consultation Paper

The Victorian Bar (***Bar***) thanks you for the opportunity to make a submission in response to the Use of Regulatory Regimes in Preventing the Infiltration of Organised Crime into Lawful Occupations and Industries Consultation Paper dated June 2015 (***Paper***).

We have had the benefit of reading a draft copy of the Law Council of Australia's submission in response to the Paper (***LCA Submission***), which we understand is yet to be provided to you. The LCA Submission notes that the legal profession is already subject to a significant level of regulation and independent oversight. The LCA Submission also observes that, in order to infiltrate the legal profession, a criminal would first have to satisfy the supervised eligibility requirements over a period of several years.

The Bar endorses those observations in the LCA Submission.

Further, the Bar submits that the Commission should in this area distinguish between solicitors and barristers. Many of the characteristics attributed in the Paper to lawyers (eg at [3.42]-[3.44], [3.55], [3.72]-[3.76], [3.78] and in Table 2) are not applicable to the barrister branch of the legal profession. For example, unlike solicitors, barristers do not hold or disburse trust money on behalf of clients. Accordingly, contrary to the suggestions in the Paper, the potential for barristers to be involved in obfuscation of criminal conduct (eg by intermingling lawful and unlawful revenue and property, or by managing investments and implementing business structures) does not arise.

The Law Council of Australia has previously expressed concerns about the impact on privilege, confidentiality and independence of the profession if anti-money laundering obligations were extended to require lawyers to report suspicions about clients.[1]

The Bar echoes these concerns, and wishes to record its opposition to any proposal to restrict or curtail legal professional privilege in the strongest possible terms.

Legal professional privilege is not merely a rule of law, but also an important – indeed, often described as a fundamental – common law right or immunity. Enactments to abrogate the privilege are rare and the courts will not lightly infer such an intention: *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 (***Daniels***) at [11], [39], [43], [88], [132]. The privilege promotes the public interest because it assists and

[1] Law Council of Australia Submission dated 30 April 2014 to the Statutory Review of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime in Australia http://www.ag.gov.au/Consultations/Documents/StatutoryReviewAnti-MoneyLaunderingAndCounter-TerrorismFinancingActCth200/law-council-of-australia-30april2014.pdf, see particularly at [7], [51]-[52].

enhances the administration of justice by facilitating the representation of clients by legal advisers: *Grant v Downs* (1976) 135 CLR 674 at 685.

There is no justification for any concern that the maintenance of the privilege might create a protected environment within which organised crime might be able to seek advice or guidance to further criminal activity (cf the Paper at [3.56]). If a client applies to a lawyer for advice intended to guide the client in the commission of a crime or fraud (even where the lawyer is ignorant of that purpose), the communication between them is not privileged. A communication the purpose of which is to seek help to evade the law by illegal conduct is not privileged: *R v Cox and Railton* (1884) 14 QBD 153; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 513; *Daniels* at [24].

Should you have any queries in relation to this submission, please contact Gabrielle Östberg, Policy Lawyer [redacted]

Yours sincerely

[redacted]

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President
The Victorian Bar