THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:PWlb1289152

1 May 2017

Planning Legislation Update 2017
NSW Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

By email: legislativeupdates@planning.nsw.gov.au

Dear Sir/Madam,

***Environmental Planning and Assessment Act 1979* ("Act") legislative updates: section 149 certificate reform**

The Law Society of NSW appreciates the opportunity to participate in the consultation on the proposed amendments to update the Act.

The Law Society's submission on the draft Environmental Planning and Assessment Amendment Bill 2017 is enclosed. We note in the enclosed submission that, apart from the renumbering of the section, there is no proposal to amend section 149 of the Act, which deals with planning information certificates.

The Law Society is very interested in improving the delivery of planning information through the section 149 certificate. We have a long standing interest in this area and consider that there is potential to update the certificate and make it an appropriate and relevant document for use by all stakeholders in the conveyancing process as well as providing an opportunity for developers and other users to obtain reliable information about a range of issues in the planning process.

The Law Society's Environmental Planning and Development Committee contributed to this submission and the Property Law Committee supports it.

Amendments to section 149

There are two areas which have caused confusion arising from the current wording of the section.

1. Section 149(2)

Subsections (1) and (2) currently provide:

> (1) A person may, on payment of the prescribed fee, apply to a council for a certificate under this section (a ***planning certificate***) with respect to any land within the area of the council.

> (2) On application made to it under subsection (1), the council shall, as soon as practicable, issue a planning certificate specifying such matters relating to the land to which the certificate relates as may be prescribed (whether arising under or connected with this or any other Act or otherwise) (underlining added).

The Law Society notes that councils take differing approaches to the operation of these subsections where an application relates to multiple lots. Some councils issue a single certificate relating to all the land the subject of the application. Other councils will issue one certificate for each lot or lots contained in a rating notice. Still others will issue one certificate per lot. Where multiple certificates are issued, it is often the case that the only detail which differs between certificates is the lot number. It is inefficient to attach copies of multiple certificates to contracts for sale to comply with vendor disclosure obligations. It is also costly, as councils which issue multiple certificates will charge multiple fees, which can add significantly to the cost of contract preparation.

The Law Society considers that section 149(2) should be amended to clarify that only one certificate is to be issued. Consideration will need to be given as to whether the prescribed fee should be adjusted to address, for example, circumstances where the Schedule 4 prescribed matters differ across the parcels.

2. Section 149(5)

Subsection (5) currently provides:

> (5) A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.

This section also creates difficulties in practice. The quantity and utility of additional information varies markedly from council to council. In some cases, members of the Law Society have reported that the additional information provided was limited to a statement that council had resolved not to provide any additional information pursuant to section 149(5).

The inability to obtain the additional information without also applying for a section 149(2) and (5) certificate is frustrating to purchasers whose vendors have complied with their disclosure obligations by obtaining the certificate issued under section 149(2). In many cases, information provided under subsection (5) after exchange of contracts will provide no remedy to a purchaser.

The Law Society would prefer that all key information of relevance to applicants for certificates be included in the certificate issued under subsection (2). Section 149(5) would, in this event, become redundant and should be repealed.

Content and format of certificate

The certificate is the delivery system for planning information for many members of the local community. It is the means by which a potential purchaser obtains information about strategic planning and development controls applying in their new area.

A potential purchaser will not have participated in the community consultation that set the parameters for planning controls in their new local area and will not have objection rights in relation to most development that may affect his or her property.

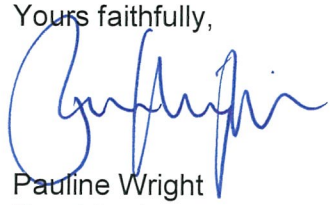
We have given detailed consideration to the content and the format of the certificate and would be keen to pursue reform in this area directly with the Department. The relevant amendments will be a matter for the Regulations.

Conclusion

We would be happy to participate in a working group with the aim of developing a certificate that represents the delivery of the benefits of the reformed planning system and the development of the NSW Planning Portal.

Please do not hesitate to contact Liza Booth, Principal Policy Lawyer, on (02) 9926 0202 or by email at liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours faithfully,



Pauline Wright
President

Encl.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:PWlb1270761

31 March 2017

Planning Legislation Update 2017
NSW Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

By email: legislativeupdates@planning.nsw.gov.au

Dear Sir/Madam,

Draft Environmental Planning and Assessment Amendment Bill 2017

The Law Society of NSW appreciates the opportunity to comment on the draft Environmental Planning and Assessment Amendment Bill 2017 ("Bill"). The Law Society's Environmental Planning and Development Committee and the Property Law Committee have contributed to this submission.

Background to the reforms

The NSW Government is proposing to update the *Environmental Planning and Assessment Act 1979* ("Act") by introducing a number of wide-ranging amendments.

The Bill builds on the significant consultation undertaken in 2013 by the NSW Government in its efforts to implement transformative change to the planning system. While the 2013 Bills ultimately did not pass the Parliament, many of the current updates have been proposed previously in some form.

The stated objective of the 2017 updates is to promote confidence in our state's planning system with four underlying objectives:

- Enhancing community participation
- Promoting strategic planning
- Increasing probity and accountability in decision-making
- Promoting simpler, faster processes for all participants.

If passed by Parliament the Bill will:

- update the objects and restructure the Act
- require new Community Participation Plans and local strategic planning statements
- clarify minimum exhibition periods

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- reform state and local decision-making panels
- continue the current removal of appeal rights when a public hearing is held by the Independent Planning Commission
- provide for transferrable conditions of development consent
- strengthen deterrence of unauthorised works
- repeal the Part 3A 'transitional' pathway for modifying major projects (although the ongoing effects of 'any outstanding concept plans' will be preserved).

The updates have been divided into 10 themes set out in the NSW Government's *Planning Legislation Updates, Summary of proposals, January 2017* ("Summary of proposals"):

1. Enhancing community participation
2. Completing the strategic planning framework
3. Better processes for local development
4. Better processes for State significant development
5. Facilitating infrastructure delivery
6. Fair and consistent planning agreements
7. Confidence in decision-making
8. Clearer building provisions
9. Elevating the role of design
10. Enhancing the enforcement toolkit

Overview

This submission is organised into the same 10 themes, although we do not comment on every issue. We have used, for ease of reference, many of the subheadings from the Summary of proposals. We comment on some key issues in the Bill, as well as identifying other issues that we suggest need to be addressed before the Bill is introduced to Parliament.

Rule of law

Given the "broad church" represented by the Law Society's membership, we have chosen to focus on whether the legislative updates are guided by rule of law principles, particularly the requirements for transparency and certainty.

The Law Society stated in earlier submissions[1] to the 2013 review that public confidence in the Australian legal system rests in part on the "rule of law". The Law Society's comments focus on whether the core attributes of the proposals align with rule of law principles. These include:

- The continued right to approach the Land and Environment Court ("LEC") to restrain a breach of the planning laws by any person (open standing)
- The continued role of the LEC both as a court of judicial review and in respect of merit appeals for planning decisions

[1] Law Society of NSW submission, *A New Planning System for New South Wales – White* Paper (June 2013) available at: http://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/752431.pdf.

- The planning laws (and subordinate provisions, regulations, State policies, local plans) should be readily available, understandable and applied consistently by consent authorities
- Where there is proposed to be a change in the planning laws or provisions then generally there should be advance notice and an opportunity to comment on these changes.

Key concerns

We support many of the proposed changes, but identify some key concerns in our submission.

One key concern is that the Bill continues the practice of removing appeal rights when a public hearing is held by the Independent Planning Commission (formerly named the Planning Assessment Commission). The Law Society supports merit appeal rights for all planning decisions.

Other key concerns, set out in more detail below, relate to the objects of the Act, notifications in relation to complying development and proposals in relation to concurrences and transferrable conditions. The Law Society also does not support the preservation in regulations of the effect of outstanding Part 3A concept plans or a further two-month transitional period for proponents to make new applications, once the Bill is passed.

Schedule 1 - Objects

The Bill proposes to update and simplify the current objects in the Act,[2] with some important changes. The Summary of proposals states that it is proposed to modernise the objects of the Act and that the updates do not change the intent or effect of the objects except for the inclusion of the object to promote good design in the planning system.

We do not agree. The removal of the object in section 5(a)(ii) "the promotion and coordination of the **orderly** and **economic** use and development of land" (incorporated in the Act since its introduction) and its replacement with "to promote the **timely** delivery of business, employment and housing opportunities (including for housing choice and affordable housing)"(emphasis added), does in our view, change the intent of that object.

Ecologically sustainable development ("ESD")

The Act's current objects include "to encourage...ecologically sustainable development" which is defined by reference to the long standing ESD principles in s 6(2) of the *Protection of the Environment Administration Act 1991*. The Bill proposes to change this to:

> ...facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision making about environmental planning and assessment (clause 1.4(b)).

[2] NSW Government, Summary of proposals, 5.

The Law Society submits that the references to economic and social considerations should be removed from this object. These considerations are already provided for in the clause 1.4(a):

> To promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources.

This would give full effect to the principles of ESD and be consistent with references to ESD in the objects of the *Protection of the Environment Operations Act 1997* (section 3(1)(a)).

This object is worded differently to the other objects, where the term 'promote' is used. We query the reason for this difference and prefer that the term 'promote' be used instead of 'facilitate', or alternatively that 'encourage' be reinstated.

We recommend that an amended object, "to promote (or 'to encourage') ESD" be the over-arching objective of the Act.

Good design

We support references in the new objects clause to 'good design in the built environment' (clause 1.4(f)) and 'to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)' (clause 1.4(e)).

Climate change

The Law Society is concerned that the opportunity has not been taken to update the objectives of the Act by inserting an object requiring the impacts of climate change to be considered in the administration of the Act.

We support the inclusion of an object which promotes the consideration of climate change impacts.[3]

Ten themes

1. Enhancing community participation

Community participation plans

The Bill introduces significant new requirements for each planning authority to prepare and exhibit a community participation plan. Each plan will set out how and when the planning authority will undertake community participation on a range of planning functions. In preparing the plan, the planning authority must consider the community participation principles in the Bill.

The Law Society supports the adoption of community participation plans and principles. However, we note that there is no guarantee that the principles will be reflected in the plans, as planning authorities are only required to *consider* the principles when formulating the plan, not implement them or demonstrate compliance with the plan.

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[3] We support the recommendation made in the submission by the NSW Young Lawyers Environment and Planning Committee for a new object: "to promote the consideration, minimisation, mitigation and management of climate change impacts".

In addition, the provisions of a community participation plan are not necessarily mandatory, unless identified as such in the plan. We suggested plan obligations should be mandatory by default, unless identified as discretionary in the exhibition of the draft plan.

Although this requirement also applies to the Secretary of the Department, there is no mandatory requirement to exhibit a draft State Environmental Planning Policy ("SEPP"). This should be rectified. Any increase in community participation in relation to State Significant Development major projects or planning proposals is welcome.

Minimum timeframes for public exhibition are proposed for a range of planning matters. This includes a proposal to require every development application to be publicly exhibited for 14 days. We support this proposal. This will enhance transparency and certainty for the community about the time within which they are able to make comments on these plans. This is particularly important as not all public participation provisions are mandatory.

Complying development certificate applications

The Law Society strongly supports the introduction of a requirement to publicly exhibit all complying development certificate ("CDC") applications for a minimum period of 14 days, to be consistent with other development consents (or at least 7-10 days). It is not sufficient, in our view, to notify adjoining owners and to inform the council, of a certifier's intention to issue a CDC.

The Law Society considers it important that, if complying development is to be extended to more contentious areas, such as low rise medium density housing, community members, (and in particular adjoining landowners), need to be provided with more information about the proposed development. There should be a specified minimum period allowed between the issue of the CDC and the commencement of work. During this period neighbours should be able to examine the approved plans.

The notification requirements initially in place for complying development in residential and rural areas did not include access to the plans that have been approved. If complying development is to be extended, as proposed, the plans should be made available when notifications are made. Although notifications are advisory only, there should be the ability to challenge the development if the plans disclose that the development should not have been approved under the relevant Code provisions.

Once a CDC issues, there should be a sufficient period allowed, prior to the commencement of work, to allow the scrutiny of plans. This will allow adjoining owners to satisfy themselves, before work commences, that the plans comply with the relevant Code provisions.

Statement of reasons for decisions

The Law Society strongly supports decision-makers being required to give reasons for their decision, (see Schedule 2.1[2], cl19(2)(c) on page 21 of the Bill) as this accords with the transparency required of a 'rule of law' framework for decision-making.

Consultation for major projects

We strongly suggest that minimum timeframes should also apply to proposed SEPPs and amendments, instead of leaving their exhibition entirely to the Minister's discretion under section 38 of the Act.

Exhibition requirements for strategic plans, State Significant Development, major projects or planning proposals, should be supported by the requirement for decision-makers to give due consideration to public submissions before finalisation of the plans.

Major projects, including State Significant Development and State Significant Infrastructure, should continue to be exhibited for a minimum of 30 days, rather than 28 days as is proposed.

2. Completing the strategic planning framework

Strategic planning at the local level

There is no current requirement for a strategic plan at the local level. It is now proposed that councils will be required to develop and publish new local strategic planning statements on the NSW Planning Portal.

It is noted on page 10 of the Summary of proposals that this is an opportunity to establish a mechanism under the Act to complete the "line of sight" in strategic planning from the regional to the local level, while at the same time drawing on local land use values and priorities set out in the community strategic plans.

The Department, and the Greater Sydney Commission in relevant cases, must endorse each council statement before it is published. This poses some risk of top-down determinism, particularly where councils are, in any event, taking account of regional and district plans in outlining their priorities.

It is also noted that there are no mandatory community participation requirements relating to the local strategic planning statements provided for in the Bill.

More consistent development control plans ("DCPs")

The Law Society supports the proposal to introduce a standard DCP format. We note, however, that "the devil will be in the detail" and that:

> The standard format will be developed in consultation with councils to ensure that DCPs have the right balance of consistency and flexibility to capture local contexts...
>
> The Government will work with councils to develop an approach to how the standard format DCP could be implemented...
>
> The working group will include Government, council and industry representatives.[4]

We suggest that there may need to be some funding provided to councils for this project, which is likely to be a major task.

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[4] NSW Government, Summary of proposals, 14.

While we support the proposal for a standard DCP format, we would not support a proposal to mandate the content of DCPs.

3. Better processes for local development

Efficient approvals and advice from NSW agencies (concurrences)

The Law Society does not support empowering the Planning Secretary to act in place of another agency to give advice, concurrence or general terms of approval where the agency has not met statutory timeframes or where two or more agencies are in conflict.

The Law Society does not support bypassing approval bodies that can provide expert specialised and relatively independent consideration of specific aspects, particularly environmental effects, of integrated development.

Modifications of consent

The Law Society supports the proposed new section 96(3A) which specifies that modifications cannot be made to authorise development that is carried out in contravention of development consent. We agree with the rationale for this proposal, as set out on pages 20 and 21 of the Summary of proposals, to strengthen deterrence of unauthorised works. This change supports a fundamental principle of the Act, while still allowing a modification mechanism to be used to authorise minor departures from the original consent.

Improving the complying development pathway

The Law Society supports measures proposed to strengthen the regulation of complying development including the introduction of:

- categories of development for which only a council certifier is authorised to issue a CDC
- deferred commencement certificates in certain circumstances (see Schedule 4.1 [8], on page 49 of the Bill).

Ensuring the development meets the standards

The Law Society supports the proposal to amend the Act to make it clear that, where a CDC does not comply with the relevant standards in the state policy, it can be declared invalid (Schedule 4 item [9], on pages 49 to 50 of the Bill).

It is noted that this amendment is needed to address an issue identified in recent case law.[5] The proposed amendments address the results of this case by allowing CDCs to be tested for legislative compliance by the Court.

Ongoing concerns about code based assessments

The proposed amendments to the Act have not addressed a number of ongoing concerns with code-based assessment. These include:

[5] Ibid, 44.

- assessing, avoiding and accounting for cumulative impacts of code based approvals, especially on environmentally sensitive areas[6]
- improving enforcement and governance of private certifiers.

We note that in September 2016 the government released its response to an independent review of private certification. Among other things it proposes a rewrite of the *Building Professionals Act 2005* during 2017.[7]

Powers and resources for councils

It is proposed that councils receive a new investigative power where a CDC has been issued to issue a temporary stop-work order and also to establish a compliance levy to support councils in their role in enforcing complying development standards (Schedule 4.1 item [9], on page 51 of the Bill). We strongly support these amendments. Councils must be appropriately resourced in order to properly function as a monitoring and enforcement body, particularly given proposals to expand the categories of complying development.

4. Better processes for state significant development

Transferrable conditions

It is proposed that consent may be granted subject to specified conditions that cease to have effect on the issue of an authorisation under another Act relating to the development, if the consent authority is satisfied that the consent condition will be adequately addressed in conditions later imposed under other approvals. This proposal aims to reduce potential duplication.[8]

The Law Society does not support the proposal for transferrable conditions contained in the Bill.

Where a consent authority has chosen to impose certain conditions, then clearly the parameters contained in those conditions are necessary, in the consent authority's view, to the consent granted. It is therefore appropriate that the consent authority retains the power to ensure compliance with those conditions.

Discontinuing Part 3(A)

The Law Society welcomes the removal of the transitional provisions relating to Part 3A approvals. We agree that it is appropriate, given that it is more than five years since the repeal of Part 3A, that proponents should no longer be able to apply for modification under Part 3A, noting that the modifications process under the former section 75W is significantly different than what is permissible under the current section 96. Section 96 requires the modified project to be 'substantially the same development' as was originally approved and provides a more transparent and consistent process for assessing applications.

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[6] See Law Society of NSW submission, *Draft State Environmental Planning Policy (Coastal Management) 2016* (February 2017) available at: https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1263725.pdf; EDO NSW submission, *Draft Coastal Management SEPP* (January 2017) available at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/3657/attachments/original/1488778490/Planning_Reform_Bill_2017_EDO_NSW_submission_Mar2017.pdf?1488778490.

[7] NSW Government, *Response to the Independent Review of the Building Professionals Act 2005*, September 2016, 2.

[8] NSW Government, Summary of proposals, 27.

We do not support a further two months transitional period allowing proponents to launch new modification applications under the Part 3A modification process once this Bill is passed. There is no justification for providing for this additional "window" for proponents to utilise the Part 3A process. We also do not support the preservation, in regulations, of the effect of outstanding Part 3A concept plans (Schedule 10, item [7], on page 110 of the Bill).

5. Facilitating infrastructure delivery

We support the proposal to introduce infrastructure corridors.

6. Fair and consistent planning agreements

We support the strengthening of the Minister's power to make a direction in respect of the methodology to be used in a voluntary planning agreement.

7. Confidence in decision making

Local planning panels

The Bill proposes to update the current provisions dealing with independent hearing and assessment panels ("IHAPs") by replacing these with updated provisions governing local planning panels. These will have a standardised constitution, membership and functions.[9] We support this proposal.

We suggest, however, that rather than providing for a panel comprised of three members with two independent experts and a community representative, the local planning panel could consist of four members, being three independent experts and a community representative. In our members' experience of the operation of IHAPs, the chair is often a legally qualified expert. The chair, in such cases, would find it very useful to have two other independent experts, such as a planner and an urban designer, or two planners, to assist in determining complex and contentious applications. In the event of a split vote, the chair could have the casting vote.

We also suggest that the Act itself contain the provisions giving the Minister the power to direct a council to appoint a local planning panel rather than leaving this to the regulations.

At page 36 of the Summary of proposals, it states that the regulations may require the Minister to consult with specific parties before making such a direction. We suggest it should be mandatory to consult with the council concerned and allow it an opportunity to be heard.

Proposed new thresholds for regionally significant developments

We support the proposals.

Model codes of conduct for planning bodies

We support, in principle, model codes of conduct, which will be adopted by regulation, to be developed in consultation with the Independent Commission Against Corruption.

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[9] Ibid, 35.

Reviews and appeals

Appeals against decisions of the Independent Planning Commission

The Law Society notes that there continues to be no merits appeal rights against decisions of the Independent Planning Commission (formerly the Planning Assessment Commission) which have been the subject of a public hearing. The Law Society supports a right of appeal to the LEC for all planning decisions, in order to preserve the rule of law and avoid natural justice issues. We do not consider the holding of a public hearing to be an adequate substitute for merits appeal rights.

We suggest that the test for whether a merits appeal right is available should not be determined by the category of the development. We support a right of independent review by the LEC for all developments.

Enforceable undertakings

The Law Society supports the introduction of a system of enforceable undertakings under clause 19.1 of the Bill.

8. Clearer building provisions

We support the introduction of a clear statutory requirement that a construction certificate must be consistent with the development consent. The proposal to amend the Act, for the reasons set out at page 44 of the Summary of proposals, is supported.

9. Elevating the role of design

We support the references in the updated objects clause of the Bill to promoting:

- "good design in the built environment" (clause 1.4 (f))
- "the sustainable management of built and cultural heritage (including Aboriginal cultural heritage"(clause 1.4(e)).

We query whether this can be achieved, however, in an environment which strives to grow code-based development. We note that a design competition has been launched to demonstrate how the draft *Medium Density Design Guide* and *Medium Density Housing Code* can deliver design-led planning. It seems to us, however, that these two objectives are at odds.

Section 97B Costs

The Law Society does not support the proposal to exclude the mandatory "costs thrown away" provisions currently contained in section 34AA of the *Land and Environment Court Act 1979*, as a result of non-minor amendments in residential development appeals. Many of these appeals relate to significantly expensive developments, with appeals conducted at great expense, to maximise the development potential for the applicants.

10. Enhancing the enforcement toolkit

We support the inclusion of enforceable undertakings as an additional tool for use together with the enforcement provisions in the current legislation.

Other matters

Key details in regulations

Some key details in relation to a number of important reforms will ultimately be contained in the regulations. These include the details of the regulations prescribing the types of development which will be subject to a restriction to council certifiers; the form of enforceable undertakings and circumstances in which they can be enforced, model codes of conduct for planning authorities and many more.

There are also matters which we do not support, which, if pursued, will be the subject of regulations. These include the proposed regulations allowing for a two month "window" in which former Part 3A approvals can be modified under the former section 75W of the Act and making some provision for 'any outstanding concept plans'.

These are important matters affecting stakeholders' rights but are not part of this consultation as the regulations have not been finalised or made available for comment at this stage. As a result, stakeholders are not in a position to consider or evaluate the reforms as a whole.

Section 149 certificate reform

The Law Society notes that, apart from the renumbering of the section, there is no proposal to amend section 149 which deals with planning information certificates.

That certificate is the delivery system for planning information for many members of the local community. It is the means by which a potential purchaser obtains information about strategic planning and development controls applying in their new area. A potential purchaser will not have participated in the community consultation that set the parameters for planning controls in their new local area and will not have objection rights in relation to most development that may affect his or her property.

The Law Society is very interested in improving the delivery of planning information through the section 149 certificate. We have a long standing interest in this area. We consider that there is potential to update the certificate and make it an appropriate and relevant document for use by all stakeholders in the conveyancing process as well as providing an opportunity for developers and other users to obtain reliable information about a range of issues in the planning process.

There are two areas that cause confusion with the current wording of section 149(2). Section 149(5) also creates difficulties in practice. We propose writing to you separately in relation to these issues and in relation to the content and format of the certificate.

Conclusion

The Law Society appreciates the opportunity to participate in the reform process and looks forward to the opportunity to comment further during the transitional and implementation phases.

Please do not hesitate to contact Liza Booth, Principal Policy Lawyer, on (02) 9926 0202 or by email at liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours faithfully,

Pauline Wright
President