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Our reference: Michael Abbott AO QC
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Date: 10 July, 2014

Hon Jay Weatherill MP
Premier of South Australia
Parliament House
North Terrace
ADELAIDE 5000

Dear Premier, *Jay*

Boards and Committees Reform: Legal Services Commission of South Australia

I refer to your email dated Tuesday 8 July 2014.

I write to urge you to retain the board of the Legal Services Commission of South Australia. The board performs an essential role in the efficient management of legal assistance services and ensures transparency and independence in the distribution of public monies for legal matters brought before the South Australian and Federal courts.

Governance

The board of the Commission is established under the *Legal Services Commission Act 1977*. It is made up of representatives nominated by the Attorney-General, the Law Society, SACOSS and the staff of the Legal Services Commission. The Director of the Legal Services Commission is also a board member. Board members are chosen so as to include persons with legal, financial and management expertise.

The board of the Legal Services Commission is an efficient one. Meetings are held after hours, once a month at the Commission's head office and focus on major decisions affecting the Commission's ongoing functions and financial viability. Out of session decisions are often necessary and are conducted by email and telephone. Board members are required to represent the Commission on other occasions as needed and participate on a variety of subcommittees. The workload and responsibilities of the Chairman in particular are onerous, far beyond attendance at the monthly meetings, and well exceed in value the amount of the annual stipend.

In addition to attendance at monthly meetings, board members are required, as rotating subcommittees of three, to decide appeals against the refusal of legal aid in individual cases. Appeals subcommittees meet out of hours, twice monthly and require board members to make decisions that will have a significant impact on the lives of disadvantaged individuals.

If board members were not available to form appeals subcommittees, such matters would need to be referred to a judicial body with all the attendant expenses of that process.

The board provides an important advisory function for the Director in financial, legal and administrative matters and greatly reduces the need for the Commission to resort to expensive consultants for specialist advice.

Independence

It is essential that the Commission remain at arm's length from government. Under the *Legal Services Commission Act 1977*, the Commission is specifically excluded from being an instrumentality of the Crown in order to preserve its independence. The board provides an appropriate layer of separation between the Commission and other government agencies such as the DPP, police and courts.

The Commission believes that its independence would be severely compromised were its functions and staff subsumed within a government department. Each grant, or otherwise, of aid must be, and must be seen to be, independent from any possibility of influence. If it is clear that each decision is independent of influence, the government, litigants and the Commission are all protected from accusations of possible interference. In the New Zealand Court of Appeal case, *Criminal Bar Association of New Zealand Inc v Attorney-General (2013 NZCA 176)*, a fixed fee system for complex criminal cases was found to interfere with the statutory independence of the New Zealand Legal Aid Commissioner and was contrary to the administrative law principle of dictation which requires a statutory decision-maker to exercise his or her decision in a real and genuine manner and not act under the direction of anyone else.

If the Legal Services Commission was to be subsumed within a government department, albeit with some form of statutory independence, a significant burden, currently shouldered by the board, would shift to the relevant Minister. The Minister would have the ultimate responsibility for decisions on applications for legal aid. With almost 20,000 applications received per year, the political reality of this task should not be taken lightly.

The statutory independence of the Legal Services Commission is reflected in all other Australian jurisdictions, with each Act providing for the governance of Commissions through Commissioners or Boards and with the Boards or Commissioners determining the policies, priorities and strategies for the Commissions.

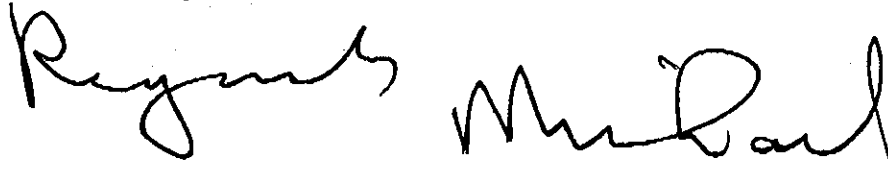
The functions of the Legal Services Commission are not limited to South Australian laws, nor is its funding provided exclusively from the State. The Commission offers extensive legal assistance services in the Commonwealth jurisdiction and is accountable via a National Partnership Agreement for the expenditure of Commonwealth funds. As a matter of good corporate governance, the Commission needs an independent board to ensure equal responsibility to both the State and Commonwealth governments. Board members are chosen to ensure their mix of legal skills includes persons with experience in either State or Commonwealth jurisdictions.

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During the original passage through Parliament of the *Legal Services Commission Bill* it was clear Parliament was very concerned that the Commission be and remain independent. One Member of the Legislative Council stated, "Obviously, it is desirable that the Commission is independent of the government. A very considerable proportion of applicants for assistance will require legal assistance which could be said to be in a general sense against the government. It would be most improper if the government could stifle legal assistance against itself." And further on, "The independence of the Commission is essential." (*South Australian Parliamentary Debates, Legislative Council, 26 April 1977, p 3706*)

I appreciate the opportunity you have provided for input into this reform process. I would be happy to provide further information about the board of the Legal Services Commission or to meet with you at any time.

Yours sincerely,



Michael Abbott AO QC

Chairman

Legal Services Commission of South Australia