

## CONSULTATIVE GROUP – SUMMARY OF KEY ISSUES

**NOTE 1:** There is a general comments table at the end of this document.

**NOTE 2:** Submissions received at 23 July 2010, from Australian Corporate Lawyers Association, Carolyn Bond (including a submission made by Catriona Lowe and Jennie Mack), John Briton, Justice Tobias (including submissions made by Justice Slattery, Garry McGrath and Robin Szabo), Noela L'Estrange, Peta Spender and Robert Milliner.

### LEGAL PROFESSION NATIONAL LAW

#### PART 1.1

##### ISSUE: Objectives

John Briton	<ul style="list-style-type: none"><li>• Suggests that the National Law objectives should be amended to commence with the words 'The objectives of this Law are to promote and protect public confidence in the legal system, the administration of justice and the rule of law, and to... [etc]', and should include a specific sub-section which reads 'promoting and protecting the independence of the profession.' Additional changes in relation to facilitating the professions' compliance with regulatory responsibilities are detailed within the submission.</li></ul>
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#### PART 1.3

##### ISSUE: Exercise of special functions

##### National Legal Services Board – further commentary on the Board is at Part 8.2

Robert Milliner	<ul style="list-style-type: none"><li>• The Bill will entrench the roles of state and territory regulatory bodies (at least in relation to the special functions) through the delegation structure. The Bill itself does not do anything to mandate or facilitate a rationalisation of the number of regulatory bodies at the state and territory level. We cannot comment on the efficiency of that structure until the local representatives of the Ombudsman and Board are identified. It is difficult to see that cost savings can be made without some rationalisation of existing regulatory resources. The ACIL Tasman report is heavily qualified and is not convincing about expected savings. It is therefore critical that there be a rationalisation plan and the efficiency of the structure be assessed. Consultative Group members should have the opportunity to review and comment on the</li></ul>
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	<p>local representatives nominated and the Inter-governmental Agreement to ascertain whether this provides an adequate rationalisation plan and necessary efficiencies.</p> <ul style="list-style-type: none"> <li>• There is a general issue of whether the balance of functions as between the Board and the Ombudsman is appropriate. Consideration should be given to whether certain functions of the Ombudsman should more properly be performed by the Board. For example, query whether it is more appropriate for the Board to be responsible for determining whether a compliance audit of a firm should be conducted.</li> <li>• The mandatory delegation of the special functions back to the states suggests the status quo will prevail after the Law is implemented. It is unfortunate that the Bill does not contemplate the possibility that, over time, the special functions might be performed on anything other than state-based lines. For example, over time, there may be efficiencies in delegated functions being performed on a more national basis, ie wherever the capability and resources resided, rather than necessarily in the state where an issue arises. It would be useful to have a review point a few years after implementation to re-assess whether the system is operating as effectively as possible and whether uniformity is being achieved.</li> </ul>
<p><b>National Legal Services Ombudsman</b> – further commentary on the Ombudsman is at Part 8.3</p>	
<p>Noela L’Estrange</p>	<ul style="list-style-type: none"> <li>• It is unclear from the current draft whether the delegation of the special functions from the local representative to a professional association would operate as a sub-delegation (section 1.3.10(2)).</li> </ul>

**Part 2.1**

<p><b>ISSUE: Unqualified legal practice</b></p>	
<p><b>General comments</b></p>	
<p>Carolyn Bond</p>	<ul style="list-style-type: none"> <li>• This is an area where conflict of interest can be an issue, and these matters should be dealt with at arm’s length from profession (and not delegated to a professional body).</li> </ul>

**PART 2.2**

<b>ISSUE: Admission</b>	
<b>General comments</b>	
Peta Spender	<ul style="list-style-type: none"> <li>• These provisions seem to work very well and I don't have any suggestions for changes.</li> </ul>
Justice Tobias	<ul style="list-style-type: none"> <li>• I have already made some comments in relation to the proposal that admission of all applicants to be an Australian lawyer should be centralised with the Board. The submission of Robin Szabo, the Executive Officer of the LPAB, should be taken into account under this heading. From the perspective of the Supreme Court, the ultimate admitting authority, I reiterate the issue with respect to compliance certificates and the Supreme Courts being satisfied that those certificates have been properly issued, particularly with respect to the question of a particular applicant being a fit and proper person to be admitted. Certainly, those courts would not have the necessary confidence in accepting such a certificate of compliance at face value even if it was issued by the Board itself (and more so if its issue had been delegated to a member of the Board's staff), if the Board is to be constituted as presently proposed in the draft Law. This is a serious matter and should in no way be underestimated. The Supreme Courts (or at least the NSW Supreme Court) is unlikely to accept at face value a certificate of compliance unless it is able to be completely satisfied that it has been properly issued and that any question as to whether a particular applicant is a fit and proper person to be admitted has been properly considered and determined by appropriately qualified people. As the draft Law is presently proposed, that confidence could not be assumed.</li> <li>• Clause 2.2.3(1)(c) provides that a prerequisite for the issue of a compliance certificate is that the applicant is a fit and proper person to be admitted having regard to the matters provided within the National Rules for the purposes of that section. As the National Rules are promulgated by the Board, the issue of its composition again raises its head.</li> </ul>
Justice Tobias (comments made by Robin Szabo, Executive Officer, LPAB)	<ul style="list-style-type: none"> <li>• One admission and one practicing certificate is a positive outcome, as are other reforms that eliminate duplications and simplify the proposal to centralise the assessment of applications for admission and registration of foreign lawyers, however, raises serious concerns as does conditional admissions. Under the Draft Law the newly established Board will issue a compliance certificate for persons who satisfy the academic and practical legal training requirements for admission and who are, in the Board's opinion, fit and proper to be admitted. An applicant must nominate the jurisdiction where he or she seeks to be admitted and that jurisdiction is specified on the compliance certificate. Any subsequent appeal must be made to the Supreme Court in that jurisdiction.</li> <li>• A foreign lawyer, or a person who has obtained the whole or part of his or her qualifications, skills or experience overseas, and "it is appropriate to do so" may also be required to establish his or her proficiency in the English language</li> </ul>

	<p>(Draft Rules). In addition he or she may be exempted from academic or practical legal training requirements based on qualifications or legal skills or experience irrespective of whether obtained in practice wholly or partly in Australian or overseas.</p> <ul style="list-style-type: none"> <li>• An applicant with a compliance certificate “in force” (2.2.2) may apply to the Supreme Court specified in the nominated jurisdiction for admission. The Draft Law provides for revocation of a compliance certificate issued on false or misleading information and states that it does not itself affect the person’s admission if already admitted. The Supreme Court will be reliant upon compliance certificates and will have no knowledge of disclosures or other suitability matters; the Board can revoke a certificate irrespective of whether or not admission has occurred; it is not known if the certificate will specify a time in which admission must occur (it is also possible that a certificate could be issued in error).</li> <li>• The Draft law introduces conditional admission of foreign lawyers. Admission could be for a limited period of time, subject to the imposition of restrictions on practise or a requirement to undertake post admission academic or practical training.</li> <li>• This will introduce substantial additional administration across several authorities and require a mechanism for monitoring and actioning compliance or non-compliance and “on” and “off” admissions.</li> </ul>
<p>Justice Tobias (comments made by Garry McGrath, Secretary of the NSW Bar Association)</p>	<ul style="list-style-type: none"> <li>• Section 2.2.2 (1) provides for the Board (by issue or failure to issue) a compliance certificate to make the decision in respect of admission or non-admission of a person as a legal practitioner. The Court can, however, even if the Board gives a certificate of compliance still refuse to admit a person and, if the Board fails or refuses to issue a compliance certificate (2.2.11) there is a right of appeal to the Court. That may be sufficient to ensure that the Court has the ultimate decision concerning admission or non-admission of persons.</li> </ul>
<p><b>Centralisation of the admissions process</b></p>	
<p>Justice Tobias (comments made by Robin Szabo, Executive Officer, LPAB)</p>	<ul style="list-style-type: none"> <li>• The proposal for centralisation appears to be based on the misconception that there are significant differences in the assessment of applicants by admitting authorities.</li> <li>• Differences are essentially procedures and rules that prescribe forms, attachments, publication of intention to apply and the format of the actual ceremonies. The proposal appears not to have fully considered the total number of applications received each year - approximately 5,500 in 2009 and that majority are personally lodged; some jurisdictions do not accept lodgement by mail in order that they may have preliminary checks. <ul style="list-style-type: none"> <li>○ in NSW an estimated 80%-85% are lodged in person</li> <li>○ an estimated 30%-35% of all applications require rectification of deficiencies</li> </ul> </li> </ul>

- many, in particular those with disclosures, require interaction with applicants
- an intending applicant may request a meeting to discuss sensitive matters relating to their application or disclosure
- a substantial number of telephone enquiries and emails are received from persons enquiring about whether or not matters should be disclosed, how they should be presented and what documentation should be submitted (approximately 800 email enquiries have been received for period ended 31 May 10 with admission or academic assessment related enquiries)
- deadlines are imposed to coincide with Board meetings and processing times are strictly adhered to in order to prepare agendas and perform all requisite tasks
- short term temporary assistance is engaged at relevant times to assist Board staff with certain admission related tasks
- local pro bono assistance is provided eg Legal Representation Office assists with character checks to maintain costs and minimise processing times
- current processing follows strict procedures and are efficient
- ceremony dates for each year are pre-arranged and the number of admittees are set and known within sufficient time to set the number of admission ceremonies and co-ordinate resourcing
- removal of the control and co-ordination of the number of applicants for admission will create difficulties for the courts and local representative
- the contribution and expertise of the judiciary, local profession and other Board and Committee representatives on a voluntary basis is an important and valuable part of the current system
- increased administration, inefficiencies, delays and increased costs will almost certainly occur under the proposed new arrangements
- exchanges of information about admissions, breach of conditions, removal due to expiration of conditional admissions will cause additional work and increase the risk of errors
- there will be a separation of documents relating to a person's admission
- current historical records and exchanges of information between admitting authorities with respect to refused applications or persons who have had long association with multiple authorities are a valuable resource, and
- current provisions relating to admission via Trans Tasman mutual recognition do not appear to have been considered

	<ul style="list-style-type: none"> <li>• Another option for consideration could be the adoption of similar arrangements to those in place for assessing the qualifications of overseas applicants i.e. that applications for smaller jurisdictions be processed by the jurisdictions who presently assess the majority NSW, Vic, Qld and WA or even NSW and Vic.</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>• It is difficult to see where there are any cost savings in the proposed national approach to seeking and issuance of a compliance certificate. There will be significant costs in establishing the necessary IT infrastructure, and ensure that there is an appropriate turn-around time to meet Court Admission dates.</li> <li>• Query – do the papers supporting the application for a compliance certificate also need to be filed in the relevant Supreme Court? If so, there is no saving in this area. If not, where is the public record of the Court application?</li> </ul>
<b>Admission ceremonies and relationship with the Supreme Court</b>	
Justice Tobias (comments made by Robin Szabo, Executive Officer, LPAB)	<ul style="list-style-type: none"> <li>• Each Supreme Court has its own procedures for the conduct of admission ceremonies and arrangements with local admitting authorities facilitate the planning, organisation and conduct of ceremonies.</li> <li>• In NSW the ceremony dates are set each year and the number of ceremonies on those days are determined by the number of applications received before set deadlines.</li> <li>• Closing date are predetermined to permit the performance of all the required of administrative tasks</li> <li>• All applicants are listed for Board approval.</li> <li>• Certificates of admission must be ordered prior to the Board meeting (certificates for refused applicants are destroyed).</li> <li>• Although there appear to be some similarities in the conduct of ceremonies, each is the subject of tradition and historical significance to each jurisdiction.</li> <li>• In NSW the Chief Justice presides at each admission ceremony with two or more Supreme Court Judges. In some jurisdictions, court rules permit a person to object to an admission with leave of the court, others permit objections to be made prior to ceremonies. In Queensland it is possible for the Court to object to an admission in open court.</li> <li>• Dates and procedures for the holding of admission ceremonies differ in each jurisdiction. For example, in Queensland disclosures can be raised in open Court. It appears that procedures for ceremonies either are contained in part in admission or court rules or formal procedures established over a significant period of time by Chief Justices.</li> <li>• It is difficult to imagine how all of the requisite tasks could be co-ordinated under the proposed reforms.</li> </ul>

<b>Application process (including compliance certificates, appeals, early assessment)</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>We note that concerns have been expressed by the judiciary about the ability of a body other than the courts to determine whether a person is a fit and proper person to be admitted. Whatever system is implemented, it is important that there be a single determination of whether a person is fit and proper. If the proposal that the Board perform this function is not acceptable, perhaps consideration could be given to whether a committee of judges could be formed for this purpose.</li> </ul>
Justice Tobias	<ul style="list-style-type: none"> <li>Clause 2.2.3 and 2.2.4 of the draft Law reflect s 36 of the <i>Legal Profession Act 2004 (NSW)</i>. Clause 2.2.9 provides for rights of appeal. In my view it would be appropriate for clause 2.2.9 to be amended to reflect s 36(6) of the NSW Act which is in the following terms:  “For the purposes of section 28(1), the Admission Board is taken to have refused to give a compliance certificate for an applicant if a compliance certificate has been neither given nor refused for the applicant within 6 months after: <ul style="list-style-type: none"> <li>a) the application for admission was lodged, or</li> <li>b) if the Board has given the applicant a notice under section 37(1) – the applicant has complied with the notice to the Board’s satisfaction.”</li> </ul> </li> <li>It seems to me that it would be appropriate for a similar provision to be inserted in clause 2.2.9 of the draft Law, perhaps as a new sub-section (2). The expiration of the six month period (or whatever other period is chosen) should not prevent the Board from determining the application and, if refused, the appeal right under clause 2.2.9(1) would apply. For abundance of caution, it may be appropriate that if a provision such as s 36(6) is inserted, there should also be a provision to the effect that:  “Nothing in this sub-section prevents the Board from granting or refusing an application for a compliance certificate after the expiration of the said period of six months.”</li> </ul>
Justice Tobias  (comments made by Justice Slattery, Deputy Chair of the NSW LPAB and LACC member)	<ul style="list-style-type: none"> <li>Clause 2.2.4 creates a regime with respect to the issue by the Board of compliance certificates. However, the regime does not adequately cover what might happen in the event that the Board changes its mind and determines pursuant to clause 2.2.4(5) to revoke a compliance certificate in the circumstances there referred to. The draft Law does seek to preserve the Supreme Court’s power to decide about the continuation of a legal practitioners admission by providing that “revocation of a compliance certificate under this section does not of itself affect the person’s admission if he or she is already admitted”: clause 2.2.4(6). But this raises a difficulty for although under the Supreme Court’s inherent powers it may in effect revoke a lawyer’s admission by striking that person from the role, it may not have the opportunity to do so unless it becomes aware that the Board has revoked a compliance certificate on the ground that it</li> </ul>

	<p>was issued on the basis of false, misleading or incomplete information in a material particular. Accordingly, clause 2.2.4 should be amended (and that not should be left to the Rules) so as to obligate the Board to immediately inform the Supreme Court of the revocation of a compliance certificate with respect to a particular legal practitioner including the grounds upon which that revocation has taken place. Furthermore, the Board should probably issue a warning to the Court beforehand that it is about to revoke the certificate so as to ensure that the Supreme Court is not left in the position that there is a time delay between the revocation or proposed revocation of the certificate and the Supreme Court becoming aware that a certificate has been revoked for misconduct in respect of a practitioner who is still practising within the Court's jurisdiction.</p>
<p>Justice Tobias (comments made by Robin Szabo, Executive Officer, LPAB)</p>	<ul style="list-style-type: none"> <li>• Under the current process disclosure documents for substantive matters and a summary of all minor matters are included in the Board agendas; in some instances, if a disclosure is complex, a Board member is asked to prepare a written report to assist the Board in its determination.</li> <li>• Applications for re-admission are far more complex and require use of a different form (applicants generally apply in the jurisdiction of removal); in NSW after receiving the views of the professional bodies a Board member is nominated to prepare a report to assist the Board in its determination (the Draft Law or Rules do not appear to distinguish between admission or re-admission although different forms may be prescribed).</li> <li>• What happens if an applicant desires to be admitted in a jurisdiction that differs from the one specified in his or her compliance certificate?</li> <li>• What happens to the paper oath? Under the current process all documents relating to a person's admission is kept on the one file.</li> <li>• Current legislation (s 36 &amp; 10 LPA) requires the issue of an information notice to an applicant setting out the reasons for its refusal to issue a compliance certificate (the proposed draft rules (3.4.3) provides that the NLSB must give the applicant written notice of its decision.</li> <li>• Under the draft law an applicant may appeal the NLSB's refusal to issue a compliance notice to the Supreme Court of the jurisdiction nominated by the applicant in their admission application.</li> <li>• It is usual for the Board not to act as contradictor in a matter, and to be available to assist the court, in some instances the Bar or Law Society will assume that role (if there was no local involvement in the decision would the NLSB have to assume that role in all appeals regardless of the location).</li> <li>• A number of telephone enquiries are made about early suitability, they are usually all dealt with by the Executive Officer or the Legal Officer. Calls are often complicated, lengthy and due to their nature extremely sensitive. On a few occasions persons have requested face to face meetings to discuss their individual circumstances.</li> <li>• Many applicants do not fully understand the process and upon receiving further information elect to make a disclosure</li> </ul>

	<p>upon admission.</p> <ul style="list-style-type: none"> <li>• Some applications are lodged and following discussion with the applicant are subsequently withdrawn.</li> <li>• Numbers received are on average 4 each year and applications can be complex.</li> <li>• Current Board Rules (r39) require an applicant to serve copies of his or her application on the Law Society and Bar Association and impose a period in which both bodies must inform the Board of its view (there does not appear to be any similar provisions in the proposed law or rules).</li> <li>• A Board member is nominated to review all the material and prepare a report for the Board's consideration.</li> <li>• Under current rules an applicant or either of the professional bodies may request an oral hearing (there does not appear to be any similar provision in the proposed law or rules).</li> </ul>
Noela L'Estrange	<ul style="list-style-type: none"> <li>• Query – will there be new national rules for the process, including forms, payments, need for local advertising? How is this evidenced – as part of the supporting documentation in the application for a compliance certificate?</li> </ul>
<b>Conditional admission of foreign lawyers</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• LLFG supports the proposals regarding conditional admission of foreign lawyers.</li> </ul>
Peta Spender	<ul style="list-style-type: none"> <li>• I think this is an excellent idea.</li> </ul>
Justice Tobias	<ul style="list-style-type: none"> <li>• Clause 2.2.5(1) would require the Supreme Court Acts of the various States and Territories, and certainly NSW, to be amended to give the Court the power to impose the conditions referred to. As no lawyer, foreign or domestic, can practice without a practicing certificate, I suggest the following:</li> <li>• First, that foreign lawyers, if otherwise qualified, should be admitted unconditionally so far as their admission is concerned;</li> <li>• Second, that any conditions of the nature of those referred in 2.2.5(1) and, in particular, sub-paragraphs (b) and (c) should be imposed upon that practitioner's practising certificate and that the professional bodies issuing the certificate should be required to impose those conditions where they are recommended in a compliance certificate. This would provide a much more flexible approach in the event that, in the circumstances of a particular case, a foreign lawyer wishes to have a condition removed even though it has not been fully complied with. It would be much easier to apply to the professional body issuing the certificate than to make a formal application to the Court which would otherwise be the only body capable of amending, varying or omitting a condition once it has been imposed upon a foreign lawyer's</li> </ul>

	<p>admission: see clause 2.2.5(3).</p> <ul style="list-style-type: none"> <li>• If the above proposal was adopted then clause 2.2.5(3) would be unnecessary and could be deleted.</li> <li>• Alternatively, clause 2.2.5(2) could be amended to read as follows: <ul style="list-style-type: none"> <li>“The admission of a foreign lawyer shall be deemed to be subject to the conditions (if any) recommended by the Board in the compliance certificate without the necessity of any order of the Supreme Court of this jurisdiction in posing such conditions.”</li> </ul> </li> </ul> <p>This would avoid having to amend the Supreme Court Act which would otherwise be required to give the courts the power to impose conditions upon a practitioner’s admission. However, it would not obviate the necessity to comply with clause 2.2.5(3), which would not be the case if the relevant condition was imposed on the foreign lawyer’s practising certificate. Furthermore, as conditions may be imposed on the practising certificate of a local lawyer, why not a foreign lawyer?</p> <ul style="list-style-type: none"> <li>• Clause 2.2.9(1) should also provide for an appeal to the Court against the recommendation in a compliance certificate to impose a condition referred to in clause 2.2.5(1) irrespective of whether it is to be imposed on admission or a practising certificate.</li> </ul>
<p>Justice Tobias (comments made by Justice Slattery, Deputy Chair of the NSW LPAB and LACC member)</p>	<ul style="list-style-type: none"> <li>• Clause 2.2.5(1) might (subject to the exercise of the Court’s inherent jurisdiction) require the Supreme Court Acts of the various States and Territories, and certainly NSW, to be amended to give the Court the power to impose the conditions referred to. As no lawyer, foreign or domestic, can practice without a practicing certificate, I suggest the following:</li> <li>• Traditionally the placing of conditions on the modes of practice of legal practitioners has been achieved by the imposition of conditions on practising certificates rather than at the point of admission. Hence, first, that foreign lawyers, if otherwise qualified, should be admitted unconditionally so far as their admission is concerned.</li> <li>• Upon the basis that the proposed new statutory structure is adopted which links a process of conditional admission by Supreme Courts to compliance certificates issued by the Board, then Clause 2.2.5(3) imposes an unnecessary and inappropriate constraint upon the power of the Supreme Courts by transferring control of foreign lawyers admitted by the new process back to the Board rather than keeping it with the Supreme Courts. This is because the Court’s power after admission of a foreign lawyer to “vary or revoke a condition to which a foreign lawyer’s admission by the Court is subject” is exercisable “on the recommendation of the Board”. Although the draft Law does not say “<i>only</i> on the recommendation of the Board”, that appears to be its intention. Thus the Court loses the power to vary an admission condition on a foreign lawyer in its own jurisdiction unless the Board agrees. The performance of a foreign lawyer after admission may have the Supreme Court take either a more restrictive or a more liberal view of the practising structure required for that lawyer than is taken by the Board. Accordingly, the Court may wish to vary the condition. It cannot do so under clause 2.2.5(3) as presently drafted. This appears to be a significant direct constraint upon the Supreme Court’s power to supervise legal practitioners within its own jurisdiction. The draft Law is careful to preserve the</li> </ul>

	<p>Supreme Court’s inherent jurisdiction to refuse admission: clause 2.2.2(3), but there is nothing in clause 2.2.5 in relation to the conditional admission of foreign lawyers that provides the same comfort that the draft Law is not intended to interfere with the inherent jurisdiction of the Supreme Court to control legal practitioners once they are admitted through the imposition of appropriate conditions on their admission.</p> <ul style="list-style-type: none"> <li>• There are some further problems with clause 2.2.9 and its operation which have been flagged by Robin Szabo of the LPAB in her submission to the Task Force. Its provisions are unworkable without a clear supporting structure to empower the Supreme Court to examine the subject matter of the appeal. The Court or any contradictor on the appeal will be without any adequate information to assess the merits of the appeal unless the Board is required to place all information in its possession about the relevant legal practitioner before the Court. That obligation should be placed on the Board by the draft Law to ensure that the Supreme Court does not have difficulty in gaining access to the information required to make a decision on the appeal.</li> <li>• There is a further fundamental problem with clause 2.2.9 in that it does not indicate who is to be the contradictor on the appeal. It is equally clear who would fund that contradictor. Under local NSW legislation that funding would come from the Public Purpose Fund enabling the NSW Bar Association or the Law Society of NSW to oppose the application. The bare right of appeal without the supporting structures in place is likely to be difficult to administer and risks promoting bad decision-making.</li> </ul>
<p>Justice Tobias (comments made by Robin Szabo, Executive Officer, LPAB)</p>	<ul style="list-style-type: none"> <li>• Some or all conditions imposed on admission would presumably also have to be relayed to the local representative for specification on a practising certificate</li> <li>• How would conditions be monitored and defaults dealt with?</li> <li>• If a post admission academic or other training condition was complied with, there would also need to be a process to change the status of the admission and make similar amendment to the practising certificate</li> <li>• Item 2.2.7 requires maintenance of with names and particulars of persons whether conditionally or without the roll to identify admissions with or without conditions - would admission certificates and rolls have to specify conditions, and if so need to be replaced?</li> <li>• Would certificates of admission for a fixed period have to reflect that period, and if so would replacement certificates have to be prepared and issued?</li> <li>• If there were provisions for extension of time, would this result roll updates, the issue of new certificates?</li> <li>• It appears that there would be considerable amount of additional administrative work and overheads introduced that would involve the NLSB, professional bodies and courts, this is certainly not a simplification of process</li> </ul>

<p>Justice Tobias (comments made by Garry McGrath, Secretary of the NSW Bar Association)</p>	<ul style="list-style-type: none"> <li>The conditional admission of foreign lawyers provisions (2.2.5(3)) limit the Courts powers to varying or revoking conditions, rather than preserving to the Court that ultimate decision concerning the admission or non-admission of foreign lawyers.</li> </ul>
<p><b>Registration</b></p>	
<p>Justice Tobias (comments made by Robin Szabo, Executive Officer, LPAB)</p>	<ul style="list-style-type: none"> <li>The current method of assessment of overseas qualified applicants has regard to Uniform Principles and the Board’s rules. There does appear to be any reference to the Uniform Principles of equivalent in the draft. Schedule 1 to the draft rules refer to the “synopsis of areas of knowledge” which is described as the “LACC synopsis of Areas of Knowledge” and is presumably the “Priestly 11” subjects.</li> <li>Under the proposed law the Board may exempt a person from having to meet the usual requirements for academic qualifications and practical legal training if it is satisfied that the person has sufficient qualifications, skills or experience (whether obtained wholly or partly overseas) so as to render the person eligible for admission. This is the equivalent to the current s24(4) LPA discretionary powers exercised by the Board in NSW that has now been supported by LACC and other admitting authorities. The example repeatedly cited of the German and UK qualified applicant having to undertake 13 undergraduate subjects in order to qualify is no longer relevant. That person was exempted from all further academic and PLT requirements.</li> </ul>
<p><b>Objections / refusals</b></p>	
<p>Justice Tobias (comments made by Robin Szabo, Executive Officer, LPAB)</p>	<ul style="list-style-type: none"> <li>The Draft Law provides for persons to object to the issue of a compliance certificate and publication of a person’s application for admission will appear on the Board’s website for that purpose.</li> <li>Some jurisdictions have specific provisions for persons to object. In NSW, if the Board were to be informed about a matter that it did not consider to be frivolous, it may request further details from an applicant. At the last Admitting Authorities conference, representative from jurisdictions where publication of intention to apply for admission were published agreed that it served little purpose, resulted in few objections and those that were lodged were generally from disgruntled former spouses.</li> </ul>

## “Fit and proper” determination and disclosures

Justice Tobias  
(comments made by  
Robin Szabo,  
Executive Officer, LPAB)

- Under current arrangements an applicant for admission is required to satisfy the local admitting authority that he or she is a fit and proper person for admission and must state whether any of the suitability matters set out in s9 of the LPA apply and disclose any other matter or circumstance that is likely to reflect adversely on their good fame and character and affect their suitability for admission.
- The Draft Law states that applicants for admission may also be required to provide police and/or medical reports. Although not all of the rules in each jurisdiction may specifically require both reports, authorities are able to request.
- Any additional information required to assist with the determination of an application.
- Current legislation (s37A LPA) permits the Board to communicate with other authorities to seek or obtain information it considers appropriate to assist in its determination and there are also protocols in place to exchange details of refusals and removals.
- Each admitting authority considers a considerable number of minor and serious disclosures. Under the current system in NSW, the three NSW Supreme Court Judges who sit on the Board, have knowledge of all disclosures made by applicants and participate in the decision as to whether an applicant is a fit and proper person to be admitted. As the Board membership comprises nominees of the Law Society, Bar Association, Law Deans and Attorney General, it also has access to the views of the nominating bodies and the benefit of local knowledge. Under the Draft Law it appears that the Courts will have no knowledge of any disclosures made by an applicant.

## PART 3.2

<b>ISSUE: Business structures</b>	
<b>General comments</b>	
Robert Milliner	<ul style="list-style-type: none"><li>The Bill does not advance the real issues relating to alternative business structures. The absence of a limited liability partnership (LLP) model and tax/stamp duty obstacles are not addressed. This is a major shortcoming of the Bill. The Bill does not deliver on the claim that it provides law practices with flexibility to adopt alternative business structures, as the impediments to these structures remain. Australia lags the common law world by failing to recognise the need for a LLP model or to legislate for it.</li></ul>
<b>Obligations applying to all business types</b>	
Robert Milliner	<ul style="list-style-type: none"><li>The extension of the compliance auditing and business system direction powers to practices other than incorporated legal practices is unwarranted and highly intrusive. These powers should not be exercisable without cause. They should also remain exercisable only in relation to incorporated legal practices. No case has been made out to justify the expansion to unincorporated practices- there is no justification for allowing this intrusion into management of a business by principals who have unlimited liability for that business.</li></ul>
John Briton	<ul style="list-style-type: none"><li>See General Comments under 3.7: Incorporated and Unincorporated Legal Practices, below.</li></ul>
<b>Responsibility and liability of principals</b>	
Robert Milliner	<ul style="list-style-type: none"><li>The Bill goes too far in expanding the liability of principals for conduct in their practices as it imposes liability on principals in certain circumstances regardless of those vicarious liability principles (for example, sections 3.2.3, 3.2.4, 4.3.7, 4.3.11, 4.3.13). The expansion is not justified. It is not realistic to expect that principals are in a position to control all behaviour that may give rise to a liability under the Bill, especially in larger practices.</li><li>The Model Law (section 8.1.2) sets out established principles of vicarious liability for principals of law practices, which should be adopted in the new Bill.</li><li>In questions posed to the Taskforce representatives at a briefing in Sydney on 19 May 2010, Mr Laurie Glanfield indicated that it was not intended that any greater liability be imposed on principals, so we query whether the drafting of certain provisions will give rise to unintended consequences.</li></ul>

John Briton	<ul style="list-style-type: none"> <li>• It would be helpful if 3.2.3(1) made it plain that a principal’s obligation to ‘take all reasonable action’ to ensure that the practice and its legal practitioner associates comply with the Law, the Rules and the applicable obligations includes an obligation to ensure that the practice keeps and implements management systems appropriate to enable the provision of legal services by the practice consistent with the Law, the Rules and the applicable professional obligations. This wording reflects section 117(3) of the Queensland <i>Legal Profession Act 2007</i> which in turn reflects section 2.7.9(3) of the 2006 National Model Laws.</li> <li>• Sections 3.2.3 and 3.2.4 impose an unreasonable burden however on the principals of all but small law firms that operate as partnerships and an increasingly unreasonable burden the larger the number of partners. The reality in all but small law firms is that the partners have varied and different management responsibilities, and some of them little if any operational management responsibility at all. The Law should recognise this reality and enable law firms to limit their partners’ liabilities for these regulatory purposes. Section 3.2.4 does just this but inefficiently and arguably harshly, by deeming all the partners to be equally liable but enabling those partners who have only limited management responsibilities to establish a defence. There are more efficient and better ways to achieve the same purpose. One way to limit the liability of principals for these regulatory purposes and at the same time to ensure appropriate accountability for these matters within law practices would be to: <ul style="list-style-type: none"> <li>a) enable and indeed require law firms like all other law practices to nominate one or more of their partners to be the firm’s supervising legal practitioner(s) pursuant to section 3.7.4, and</li> <li>b) delete the word ‘principal’ in sections 3.2.3 and 3.2.4 and replace it with the words ‘supervising legal practitioner’, and hence remove responsibility under section 3.2.3 and liability under section 3.2.4 from partners other than the partners the firm nominates to be its supervising legal practitioner(s).</li> </ul> </li> </ul> <p>That solution would serve other useful purposes also – see Part 5.2: Complaints, below.</p>
<b>Approval of business structures</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• As mentioned above, there is a need for an LLP model for Australia to keep pace with other common law jurisdictions.</li> <li>• The definition of a “partnership” should be extended to include LLPs. This would mean that an LLP formed under the laws of Australia or another country, and a general law partnership that is not a “law firm” as defined because it includes partners who are not Australian legal practitioners or Australian-registered foreign lawyers, would be eligible to be an unincorporated legal practice. No separate Board approval for the structure should be required.</li> </ul>

**PART 3.3 AND 3.5**

<b>ISSUE: Australian practising certificates</b>	
<b>General comments</b>	
Robert Milliner	<ul style="list-style-type: none"><li>• On the face of the Bill, there is no guarantee that there will be any advances in the simplification or uniformity of practising certificate processes. The process will be delegated to the state bodies, but there seems to be no requirement or plan for simplified or uniform forms and processes. While the Board may issue Rules in relation to these matters, it is not clear from the Bill whether uniform processes and forms will be mandated. Cost savings and efficiencies around practising certificate applications and renewals will not flow to law firms unless uniform processes and forms are adopted and technological efficiencies (such as online applications) are implemented. We would like to see some confirmation of the intention here.</li><li>• The practising certificate provisions need to provide for Australian lawyers who work overseas. There needs to be provision for an Australian lawyer to be a principal or employee of an overseas law practice (i.e. not of a “law practice” as defined) while holding an Australian practising certificate. This is a gap in the Model Law which requires correction.</li></ul>
ACLA	<ul style="list-style-type: none"><li>• The regulatory regime should recognise an in-house lawyer owes the same professional duties to his/her client as any other lawyer, particularly in the area of legal professional privilege, regardless of any employment relationship that may exist between the in-house lawyer and the ‘client’.</li></ul>

<b>Conditions on practising certificates</b>	
ACLA	<ul style="list-style-type: none"> <li>All lawyers engaged in legal practice in Australia should be required to obtain a standard form of practicing certificate as a minimum requirement, which is subject to a common disciplinary regime.</li> <li>The practicing certificate could be coded to signify the type of practice the certificate holder is engaged in – similar to the NSW model (ie private practice, unrestricted, government, supervised etc).</li> <li>There is possibly a fundamental issue with section 3.3.6. If someone is qualified to practice as a lawyer, why should there be restrictions on that person’s ability to practice law generally? And what happens if a lawyer wishes to move between categories (e.g. private to in-house; or government to barrister)? Presumably, they would have to apply to vary the condition on their practicing certificate? There does not appear to be any provision in the Law or Rules regarding the transition process. The imposition or variation of practicing conditions is merely left to the discretion of the National Legal Services Board.</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>For clarity, a principal’s practising certificate should entitle the practitioner to manage a trust account, as that is an inherent part of being a principal. Any special conditions should operate to reduce the general entitlement. This might also obviate the need for 3.3.8(2). Whether the practitioner chooses employment in a capacity other than a principal is irrelevant to the PC. A principal PC carries other obligations and costs. The holder of any specific PC other than principal may practice only in the area for which they hold a PC.</li> </ul>
<b>Costs</b>	
ACLA	<ul style="list-style-type: none"> <li>Lawyers newly required to obtain a practicing certificate as a result of the reforms should not be required to incur the costs of obtaining such a certificate in the initial transitional phase of two years.</li> </ul>
<b>Government and in-house lawyers</b>	
Peta Spender	<ul style="list-style-type: none"> <li>The introduction of practising certificates for government lawyers and in-house counsel is an excellent idea and the focus upon the provision of legal advice as opposed to legal policy advice sufficiently differentiates between the various functions undertaken by government lawyers.</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>ACLA is keen to see in-house and government lawyers be left no worse off in their ‘licence’ to practice as a result of these reforms.</li> <li>ACLA believes in-house counsel must retain the right of appearance as solicitor advocate in the courts – notwithstanding</li> </ul>

	<p>that for some government lawyers (eg first law officers), that right is subject to legal services directions.</p> <ul style="list-style-type: none"> <li>• ACLA supports the classification approach used in the regulation of practicing certificates as currently operates in New South Wales, and firmly believes an exemption for in-house lawyers from the Fidelity Fund contribution must continue to apply.</li> <li>• ACLA strongly advocates for the principle that all in-house counsel should be free to undertake pro bono work and is committed to working with the National Legal Services Board and other relevant national organisations to agree upon appropriate rules for the conduct of pro bono work by in-house lawyers across Australia.</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>• The Task Force has asked whether the definition of ‘government lawyer’ in the National Law appropriately capture those practitioners working for government authorities who should be required to hold a practising certificate?” Section 1.2.1 of the National Law defines “government lawyer” as follows:   <p>“<b>Government lawyer</b> means an Australian legal practitioner who engages in legal practice only for or at the direction of a government authority.”</p> <p>There is then a definition of “government authority” as follows:   <p>“<b>Government authority</b> includes a Minister, government department”</p> <p>This definition of “government authority (as including a <u>public authority of the Commonwealth, a State or a Territory</u>) may prove problematic because (1) it is a non-exhaustive definition; and (2) the scope of the particular words underlined. There is no definition of what is a “public authority” in either the National Law or in the <i>Acts Interpretation Act 1954</i>.</p> <p>Whilst it would be easy for government lawyers determine whether they are working for a Minister or in a government department, it may not be that clear if they are working for a “public authority”. The case law appears to indicate that there are “attributes” for a “public authority” which include the performance of statutory duties and the exercise of public functions, and possession, as a result of statute, of powers or duties to be exercised for public objects.</p> <p>Suggest that the intent of the Bill could be clarified by including a definition of a public authority.</p> </p></li> <li>• There is some concern from Government lawyers about the extent of the application of the regulatory regime, particularly in relation to management systems.</li> </ul>
<b>Barristers</b>	
ACLA	<ul style="list-style-type: none"> <li>• With respect to practicing as a barrister in ‘fused’ and ‘non-fused’ jurisdictions, ACLA believes practitioners in a fused jurisdiction should be able to freely transfer to practice as a barrister in a ‘non-fused’ jurisdiction. Western Australia for</li> </ul>

	example, has a 'fused' jurisdiction, which creates difficulties for in-house lawyers working for a client with interstate offices and used to appearing as barristers in WA Courts, but unable to transfer to practice in a non-fused jurisdiction's courts.
<b>Show Cause Events – Automatic and Designated</b>	
Noela L'Estrange	<ul style="list-style-type: none"> <li>• The show cause events outlined in 3.5.8 (b) should be clarified. Is it intended that a conviction be the basis for a show cause? As currently drafted the section is ambiguous – conviction should be a prerequisite.</li> <li>• There is an assumption in the current drafting that any tax offence (eg late lodgement) could be a show cause event. Is this the intention? If so, why is tax law being so specifically identified?</li> <li>• Unclear why there are criminal penalties relating to show cause events.</li> </ul>

#### **PART 3.4**

<b>ISSUE: Foreign lawyers</b>	
<b>General comments</b>	
ACLA	<ul style="list-style-type: none"> <li>• ACLA's main concern with the centralisation process is the cost and efficacy in the administration of supporting administrative processes. A centralised repository or Register is supported.</li> </ul>

#### **PART 3.7**

<b>ISSUE: Incorporated and unincorporated legal practices</b>	
<b>General comments</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• It is unrealistic and inappropriate that the obligation that each partner, director, officer or employee of the law practice, who is an Australian legal practitioner, must ensure that certain disclosures are made be personally imposed upon all of the stated persons.</li> </ul>

John Briton	<ul style="list-style-type: none"> <li>• Part 3.7, Division 1 should apply not only to incorporated and unincorporated legal practices but to all law practices. This would solve a range of problems about the responsibility and liability of principals in relation to both the compliance audit power and complaints about law practices (as opposed to individual lawyers). Please note in this regard my comments under the earlier sub-heading Part3.2: Responsibility and Liability of Principals.</li> <li>• Section 3.7.3 should be amended to require entities to notify the Board not only of their intention to engage in legal practice but also their actual commencement. Experience tells us that some entities delay realising, and others never realise their intention to engage in legal practice and that this creates otherwise administrative uncertainties and inefficiencies. There should be a corresponding change to the Rules, at section 6.2.1.</li> </ul>
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## PART 3.8

<b>ISSUE: Community legal services</b>	
<b>General comments</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• To allow greater flexibility, there may be benefit in amending the definition of “community legal service” to allow the Board to approve other organisations which satisfy paragraphs (a) and (b) of the definition, but do not necessarily satisfy paragraph (c).</li> </ul>
Carolyn Bond	<ul style="list-style-type: none"> <li>• I sought some comments from the Public Interest Law Clearing House (PILCH) in Melbourne on these issues. PILCH supports inclusion in the national Law at 3.3.6(b)(iv) the provision of a practicing certificate with a condition that the holder is authorized to engage in legal practice as a volunteer in a community legal service or centre. This will allow all holders of certificates to volunteer at a CLC, whether they are in private, corporate or government practice. Further, career break, retired, policy or non-practicing lawyers will be able to apply for a CLC certificate, presumably at free or law cost (per COAG National Legal Profession Reform Taskforce Consultation Report April 2010).</li> <li>• PILCH accepts that a CLC must have a supervising solicitor, and that the supervising solicitor is the principal of the practice.</li> <li>• The Rule at 3.8.2(2) that “a community legal service contravenes this section if it or its governing body does not have any supervising legal practitioners for a period exceeding 7 days” could be onerous. We would advocate allowing 14 days at the minimum. The Board might satisfy itself by requiring notification in the event there is no supervising solicitor</li> </ul>

## PART 4.2

ISSUE: Trust accounts	
Single national trust account	
Robert Milliner	<ul style="list-style-type: none"><li>• A multi-jurisdictional law practice can choose to maintain a trust account in one jurisdiction only. This is a positive change. However, if a practice chooses to have a single trust account for two or more jurisdictions, it cannot also have another trust account in any jurisdiction. The choice therefore appears to be between having a single trust account for all jurisdictions or having trust accounts in every jurisdiction. It is not clear why this should be the case and greater flexibility should be introduced.</li></ul>

## PART 4.3

ISSUE: Legal costs	
General comments	
John Briton	<ul style="list-style-type: none"><li>• These are significant and welcome reforms which will benefit consumers and I have little to add.</li></ul>
ACLA	<ul style="list-style-type: none"><li>• ACLA's members are sophisticated purchasers of legal services and will negotiate by contract. Nevertheless, it is recommended that 'minimum requirements' for what should be contained in a legal bill should be prescribed.</li></ul>
Noela L'Estrange	<ul style="list-style-type: none"><li>• The Bill has created a structure:<ul style="list-style-type: none"><li>○ where there is greater uncertainty created;</li><li>○ increases steps for compliance together with the regulatory and administrative burden for law practices; and</li><li>○ intrusion into areas of practice where regulation is not warranted.</li></ul></li><li>• Whilst no issues exist with fostering informed decisions by clients and protection of vulnerable consumers, the draft increases the regulatory burden without delivery of benefit to meet the stated purposes. This is especially the case in relation to the application of the costs regime to commercial and government clients (where it does not currently apply) and the prohibition on those clients contracting out of certain provisions.</li></ul>

- The creation of disciplinary consequences for failure to meet a positive obligation of fair and reasonable costs, is problematic in its lack of objective bounds and fails to have regard to the other safeguards imposed such as disclosure, reporting, billing, costs assessment to determine fair and reasonable costs and excessive costs is already subject to disciplinary sanction.
- These general observations are compounded by disjointed drafting in the costs provisions in that:
  - a) the requirements of a costs agreement and what is to be contained in them are set out in the draft at section 4.3.10;
  - b) the requirements of a conditional cost agreement being contained in the national rules at rule 8.2.1 to 8.2.3;
  - c) billing is provided for in the proposed legislation at item 4.3.16; and
  - d) the requirements for delivery of the bills contained in the rules at 8.3.1 to 8.3.2.
- The legislation does not specifically deal with lump sum costs agreements and the effect of the fair and reasonable concepts will call the viability of this arrangement into question. Consider for example simple conveyancing matters. Commercial reality suggests that the costs of compliance with the contemplated regime will create excessive paperwork for simpler matters where a client is prepared to accept a lump sum fees for a service.
- When assessing costs the costs agreement is no longer paramount in that under the current legislation the assessor must assess the fees by reference to the costs agreement and decide only if it was reasonably carried out the work to which the costs relate and whether the work was carried out in a reasonable way (section 341(1)(a) and (b) LPA 2007 (Qld)). Under the proposed legislation the costs agreement is only prima facie evidence the fees are fair and reasonable which means the assessor has power to vary the rates and to determine whether or not a costs agreement is valid (section 4.3.26).
- The legislation specifically refers to the assessor back to section 4.3.4(ii) to decide whether the fees charged are fair and reasonable (section 4.3.28). The assessor is not clothed with the appropriate powers to determine whether an agreement is valid or to set it aside wholly or partially if the costs agreement is not fair or reasonable. Is it intended by the legislation that the grounds to set aside the costs agreement are now only restricted to statutory requirements as an assessor is not clothed with judicial discretion to consider whether the agreement was unconscionable or not. Assessors are not a court nor are they clothed with Judicature Act powers. Further the assessor is not in a position to call evidence or make transcripts available for the purposes of any appeal. The assessor would need to be clothed with judicial discretion to carry out the functions contemplated by the legislation particularly when those findings are the subject of an appeal (see section 4.3.32). This is an unworkable section. Lack of transparency will no doubt be the subject of public criticism of such a system. Why shouldn't the costs agreement be set aside like any other agreement at law.
- The draft does not include any reference to the 50/50 rule (Qld LPA s345-347) which is a consumer protection

	<p>mechanism.</p> <ul style="list-style-type: none"> <li>The legislation does not deal with preservation of confidentiality privilege or immunity to assessors (section 350 to 352 of LPA 2007 (Qld)). It is doubtful whether assessors will undertake an assessment process under this legislation unless immunity is granted. Some of the findings contemplated by the legislation which if not supported on appeal will leave assessors exposed particularly where those findings are published.</li> </ul>
<b>Definition of commercial or government clients (including whether they should be excluded from costs assessment regime)</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>Under the Model Law, disclosure is not required to “commercial or government clients”, but under the Bill, there must be formal contracting out of the costs provisions. No case has been made that the Model Law position in this regard was flawed or that there is a greater need for protection of commercial or government clients. The Model Law clearly accepted a policy stance that commercial or government clients were not in need of the protection offered by the costs provisions. We are not aware of any evidence that justifies a departure from that established policy position. There was no discussion of the issue in the Legal Costs Discussion Paper. The change to require commercial or government clients to contract out of the disclosure requirements places additional and unnecessary cost and administrative burden on firms who deal with commercial or government clients. The change is also contrary to the objective of simpler regulation. The Bill should revert to the Model Law position.</li> <li>The concept of “commercial and government clients” should be extended to certain other sophisticated clients. For example: <ul style="list-style-type: none"> <li>a) high net-worth individuals;</li> <li>b) subsidiaries of large proprietary companies;</li> <li>c) all legal practitioners and law practices, regardless of its size, including all foreign legal practitioners and foreign law practices; and</li> <li>d) any other entity of class of client prescribed by the Rules.</li> </ul> </li> <li>Certain other exceptions in the Model Law should continue to apply. For example, where the costs are below a certain threshold (e.g. \$750 or \$1500); where the client has received previous disclosures; where the client has waived its entitlement to further disclosures; or where the client will not be required to pay the legal costs or they will not otherwise be recovered by the law practice.</li> <li>Generally speaking, where an exception is provided for commercial or government clients, that exception should also extend to third party payers who would be regarded as commercial or government clients if they were clients of the practice concerned. The same principles apply.</li> </ul>

## Fair and reasonable

Robert Milliner

- The new obligation on law practices not to charge costs that are more than “fair and reasonable”, with potential disciplinary consequences for doing so, is unnecessary, onerous and problematic in its application. It also contrasts with the current provisions which provide that the charging of “excessive” costs is capable of being unsatisfactory conduct. Clients are already protected adequately under the Model Law provisions through:
  - a) disclosure, reporting, billing, costs assessment and complaints provisions and the right to negotiate a costs agreement;
  - b) the ability of a costs assessor to determine fair and reasonable costs where there is no costs agreement; and
  - c) the fact that the charging of excessive costs is capable of attracting disciplinary sanction.
- If a law practice is subject to a “fair and reasonable” costs test, it may mean that it is compelled to maintain detailed written records of everything it does on a matter (eg every issue discussed in a meeting or the reasons for changing a document) in order to justify the fairness and reasonableness of the costs. This will add substantially to all legal costs. It may also impede the trialling of alternative charging methods- how will a lawyer know what is fair and reasonable?
- The imposition of a “fair and reasonable” test is also inconsistent with the regulation of other professionals and service providers (eg the accounting profession) and we see no justification for the different treatment.
- While a “fair and reasonable” test may be appropriate for the assessment of costs in a costs assessment process, it is not appropriate to apply that same test in a disciplinary context. The test should be limited to the costs assessment context.
- The “proportionality” test which has been introduced as an element of assessing what is fair and reasonable is problematic and should be removed. It creates significant uncertainty, undermines the primacy of the costs agreement between lawyer and client and ignores the role played by client instructions and other factors in the progression of a matter.
- The difficulty of defining what is fair and reasonable has been noted by the Taskforce. It is inappropriate that the test for disciplinary sanction be the same as that applied by a costs assessor, so that any adjustment of a bill by an assessor requires a referral for disciplinary action. This does not give any consideration to whether the adjustment is minor, whether it was a one-off incident or whether there was an intention to overcharge.

Peta Spender

- In my view the obligation to charge no more than fair and reasonable costs is sufficiently clear to provide guidance to lawyers and protection to consumers. The inclusion of the criterion of proportionality under 4.3.4 (2) allows a balance to be struck between the needs of both parties to the transaction. Moreover, 4.3.4 (3) provides further balance by stating that a costs agreement is prima facie evidence that the costs disclosed in the agreement are fair and reasonable, particularly in combination with the power to contract out of these provisions for commercial or

	government clients.
Carolyn Bond	<ul style="list-style-type: none"><li>• This is a good start, but an assessment of whether costs are "fair and reasonable" should take into account whether informed consent was obtained.</li></ul>

## Disclosure obligations – informed consent

Robert Milliner	<ul style="list-style-type: none"> <li>• LLFG supports measures that promote informed decisions by clients and protection of vulnerable consumers. However, the draft Bill takes a number of retrograde steps in the area of costs which increase the regulatory burden on firms without any demonstrable need being established. This is especially the case in relation to the application of the costs regime to commercial and government clients (where it does not currently apply) and the prohibition on those clients contracting out of certain provisions.</li> <li>• The onus is put on law practices to take all reasonable steps to ensure the client “understands” and gives consent to the conduct of the matter and the costs. It is not clear what this will require of lawyers. How will a lawyer satisfy himself that the client in fact understands? This is a higher onus than exists in the LCA Solicitors’ Conduct Rules (see 7.1). There is no need for any obligation additional to that in the Solicitors Conduct Rules.</li> <li>• If the obligation does remain, in light of the severity of the consequences of contravention, the areas of uncertainty must be clarified in the Bill or the National Rules so that a law practice knows what steps it must take to help compliance with this onerous provision.</li> </ul>
Peta Spender	<ul style="list-style-type: none"> <li>• The test of informed consent is a significant improvement on the previous disclosure regime. I consider that the obligation placed upon the law practice to take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action is not unduly onerous to the profession and provides an important safeguard for consumers.</li> </ul>
Carolyn Bond	<ul style="list-style-type: none"> <li>• The "informed consent" obligation is an important one - failure to obtain informed consent, and to inform clients of potential costs and risks is key cause of problems and disputes. However, whether informed consent was obtained must clearly be taken into account in any assessment regarding whether costs are "fair and reasonable".</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>• Disclosure is not required to “<i>commercial or government clients</i>”, but only after a formal contracting out of the costs provisions. The provisions currently operating accepted a policy stance that commercial or government clients were not in need of the protection offered by the costs provisions and no material suggests a departure justified from the established current practice. Commercial or government clients will be required to contract out of the disclosure requirements with a consequent additional administrative burden for no perceivable advantage.</li> <li>• Without any logic being expressed, the concept of “commercial and government clients” curtails other groups out of the former sophisticated clients group including all legal practitioners and law practices, regardless of its size, including all foreign legal practitioners and foreign law practices and ought be extended to subsidiaries of large proprietary companies.</li> </ul>

	<ul style="list-style-type: none"> <li>• Commercial client or government clients should be expanded to include other sophisticated clients based on net worth and value rather than being restrictive. It is illogical to suggest that the law practice with fewer than 15 employees is not commercially orientated (see section 4.3.2(2)(a)).</li> <li>• Certain other exceptions in the Model Law should continue to apply, e.g. where the costs are below a certain threshold (e.g. \$750 or \$1500); where the client has received previous disclosures and has waived its entitlement to further disclosures; or where the client will not be required to pay the legal costs or they will not otherwise be recovered by the law practice.</li> <li>• Generally speaking, where an exception is provided for commercial or government clients, that exception should also extend to third party payers who would be regarded as commercial or government clients if they were clients of the practice concerned. The same principles ought apply.</li> <li>• The effect of not having this in the legislation is that most law practices will not take on small matters due to the problems that will arise with disclosure requirements and other administrative costs.</li> </ul>
<b>Costs agreements</b>	
Carolyn Bond	<ul style="list-style-type: none"> <li>• The remedy for failure to comply (a void costs agreement) is inadequate for consumers (and an inadequate incentive for practitioners) because costs can be claimed after they are assessed - possibly without any reduction in costs relating to failure to comply.</li> </ul>
Noela L'Estrange	<ul style="list-style-type: none"> <li>• The Draft Bill has an inherent conflict in the policy of allowing contracts for provision of legal service and the assessment process. If a costs agreement is reached between a law practice and client in accordance with the principles set out and the agreement complied with, then the agreement ought be the principle for assessing costs. Whilst parties can enter into a costs agreement to regulate their relationship, if the matter goes to costs assessment, the assessor can determine that the fees are not fair and reasonable, without reference to the costs agreement.</li> <li>• This overrides freedom of contract between lawyer and client rendering the costs agreement illusory. See section 3.41(1)(a) and (b). While the legislation provides that subject to this law a costs agreement may be enforced in the same way as any other contract it will not be to the extent that it is only prima facie evidence that the costs charged are fair and reasonable (section 4.3.4(2)(d)).</li> <li>• The Bill should allow for circumstances in which there is no requirement for a formal client agreement – eg in matters under \$3000.</li> </ul>

## Costs assessment

Robert Milliner

- Contrary to the current position, no-one can contract out of the costs assessment provisions. The costs assessment provisions should not apply to commercial or government clients as there is no demonstrated case that they need this protection. Indeed, the costs assessment process is simply not an appropriate mechanism for dealing with cost disputes in commercial matters. If the provisions do apply by default, commercial or government clients should be able to contract out, as per the Model Law. To prohibit them from doing so undermines freedom of contract and the primacy of costs agreements entered into by commercial and government clients.
- The provisions should also not apply to commercial and government third party payers who would be regarded as commercial or government clients if they were clients of the practice concerned.
- Under the Model Law, where there is a costs agreement, the assessor can only assess whether the *agreement* itself is fair and reasonable (eg it may be declared void if the client was induced to enter it by fraud). However, under the Bill, an assessor can determine whether the *costs* are fair and reasonable (and declare the agreement void if he determines they are not). It is a very different thing to allow the assessor to second-guess whether the costs under an agreement, freely entered into by contracting parties, are fair and reasonable and to simply ignore the costs agreement if he comes to a different view.
- In a costs assessment involving a third party payer, the assessor must be required to have regard to the instructions provided by the client, the way the matter has proceeded (e.g. whether there have been scope changes) and whether the client is happy with the outcomes. It is important to recognise these factors because the work is done at the request of the client, not at the request of the third party payer.
- The Bill does not address the lack of uniformity in the cost assessment regime. It operates differently in different states and needs modernisation. The Regulation Impact Statement admits it was too hard (see Para 3.4.3.2). However, there should be a uniform national costs assessment regime.
- To provide greater certainty in the costs assessment process, there may be benefit in drawing on elements of more sophisticated assessment regimes, such as that which applies in the United Kingdom.

Noela L'Estrange

- The “proportionality” test which has been introduced as an element of assessing what is fair and reasonable is problematic and should be removed. Sub-section 2(b) of Section 4.3.4 provides that legal costs are fair and reasonable if they are proportionate in amount to the importance and complexity of the issues involved in the matter, the amount of value involved in the matter and whether the matter involved a matter of public interest.
- In short this creates uncertainty, will be difficult to apply as a principle, undermines the primacy of the costs agreement

	<p>between lawyer and client and ignores the role played by client instructions and other factors in the progression of a matter, relying on the perfection of hindsight. The test doesn't define exactly what it means. A law practice could face the issue that costs should be reduced because the amount involved might be small yet the litigation could involve extensive issues required to be addressed by the law practice.</p> <ul style="list-style-type: none"> <li>• In addition if this is a consideration under the <i>Legal Profession Act</i> for the recovery of costs between the law practice and the client it will also, by operation of the indemnity principle, be a consideration for a party and party costs. This will open up an avenue of argument on party and party assessments that proportionality should be considered for the recovery of costs even when the successful litigant is faced with a recalcitrant litigant. The effect of this is that a law practice will be reluctant to accept a retainer in small claims though meritorious where those claims involve complexity.</li> </ul>
<p><b>Billing</b></p>	
Robert Milliner	<ul style="list-style-type: none"> <li>• The changes to the billing provisions are generally welcome. However, there continue to be some antiquated requirements. For example, a bill is required to show a responsible principal. It is an understandable requirement that the client be told who is the responsible principal, but why does it need to appear on the bill?</li> <li>• A number of the requirements around bills require information to be “included” in or to “accompany” a bill. For example, section 4.3.22 requires a “written statement” of dispute resolution avenues to be included in a bill or to accompany a bill. This requirement may inhibit innovation in electronic billing techniques. It should be sufficient if the relevant information is provided at the same time as the bill, but not necessarily as part of or accompanying the bill.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• Section 4.3.17 requires law practices to comply with a request to provide an itemised bill within 21 days. The time frame is unrealistic and should be extended to 60 days to allow (as is often the case) a cost assessor time to prepare the itemised account.</li> </ul>
<p><b>Contravention and Penalties</b></p>	
Robert Milliner	<ul style="list-style-type: none"> <li>• Contravention of the obligations in this Part should be capable of constituting unsatisfactory professional conduct or professional misconduct only on the part of those involved in the contravention, not on the part of all principals of the law practice.</li> <li>• It is unacceptable that there be disciplinary sanctions for a finding that costs are not fair and reasonable. The Model Law test of “grossly excessive” legal costs should be retained for this purpose.</li> </ul>

## PART 4.4

### ISSUE: Professional indemnity insurance

#### General comments

Robert Milliner	<ul style="list-style-type: none"><li>• It is premature to open the compulsory insurance scheme to other APRA approved insurers. In the absence of further analysis, there is a risk that the cost of insurance in the open market will be higher than that which is provided by the statutory insurers. Accordingly, we suggest that further consideration be given to whether there is likely to be an overall benefit in continuing to require the compulsory layer to be provided by a statutory insurer.</li><li>• Competition between the statutory insurers should be encouraged.</li><li>• Section 4.4.4 (3) does not deal with national practices which, while holding themselves out under a common name, operate in different jurisdictions through a number of separate partnerships. The legislation should allow those firms to take out insurance in one jurisdiction in which any of them operate.</li></ul>
ACLA	<ul style="list-style-type: none"><li>• ACLA appreciates the cost of doing business in each state is different, and firmly believes PI schemes must remain unchanged. Depending on how regulatory costs are 'smeared' across the states, a national scheme may be more expensive and ultimate lead to higher costs to practice for individual lawyers, particularly those in smaller jurisdictions.</li><li>• The exemption clearly does not include in-house practitioners who advise corporations/persons other than their actual employer, or practitioners who have a source of income such as a right of private practice; director's fees etc., other than their "ordinary remuneration".</li></ul>
Noela L'Estrange	<ul style="list-style-type: none"><li>• Section 4.4.2 (4) may impose an impracticable obligation –eg is notice actual or implied knowledge?</li></ul>

## PART 4.5

ISSUE: Fidelity Cover	
<b>General Comments</b>	
Carolyn Bond	<ul style="list-style-type: none"><li>The adequacy of fidelity funds must be regarded as key goal. Caps on claims are too low in some jurisdictions and should gradually increase as fidelity funds are increased.</li></ul>
<b>Arm's Length Assessment of Claims</b>	
Carolyn Bond	<ul style="list-style-type: none"><li>Agree. Given the significant impact on consumers and perceptions of conflicts this should be dealt with at arm's length. Also the profession's concerns about fees or levies being imposed on the profession, and the broad discretion in relation to limits placed on claim amounts (and any requirement on the claimant to pursue other avenues of redress) could lead to actual, or perceived, conflicts.</li></ul>
Noela L'Estrange	<ul style="list-style-type: none"><li>The meaning of the phrase "at arm's length" is unclear and is undefined. In a jurisdiction in which the fund is wholly practitioners' funds, in which its investment and management are the responsibility of the professional body, and in which there have been no complaints from applicants in the past 10 years, the justification for removing the profession from the decision making responsibility is unfounded and unclear.</li><li>In no circumstances should the Ombudsman be given any responsibility for Fidelity Fund decision making.</li></ul>
<b>Who does it apply to? (including eligibility to make a claim)</b>	
Carolyn Bond	<ul style="list-style-type: none"><li>Must be clarified - the purpose suggests this is limited to "clients" but most people would expect this to cover some that are not actually clients, for example a beneficiary of a will (where proceeds of the estate are held in trust) or a deposit placed in the trust account of the vendor's solicitor.</li></ul>
<b>Fund of Last Resort</b>	
Carolyn Bond	<ul style="list-style-type: none"><li>The proposed Bill appears to be somewhat inconsistent (as does some of the current legislation) in the obligation on a claimant to pursue other avenues of redress when the original claim is being determined, and the level of such an obligation if an appeal is being heard by a Court. Requiring claimants to pursue all other avenues (often at risk of further financial loss, for example where a legal claim is won but the other party is insolvent) can deter claims - particularly by</li></ul>

	lower income clients. Claimants should not be required to pursue other options of redress unless they clearly have the ability/funds to do so and this would be better undertaken by the fidelity fund (through its right of subrogation).
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## PART 4.6

<b>ISSUE: Business management and control</b>	
<b>General comments</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• The powers to conduct compliance audits and give management system directions are too broad and unqualified. The expansion of these powers to practices other than ILPs goes too far and is not justified.</li> <li>• Section 4.6.3 may have unintended consequences in that it may, for example, apply to service trust or financing arrangements that are commonly used by law firms.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• These provisions, if appropriately amended, are in my view the single most effective reform that could be made to the current regulatory arrangements to better protect consumers of legal services and promote adherence to appropriate professional standards.</li> <li>• The opponents of these reforms claim that they are unjustified and will add unnecessary compliance costs, especially for small law practices. These claims are unsupported by any evidence and indeed the evidence is all to the contrary (see my separate and more detailed submission headed Business Management and Control – the Compliance Audit Power).</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>• This would now apply to all legal practices, and has the potential for raising costs of compliance without the need to demonstrate any cost benefit in requiring the actions from a class of practices. It may well be an unwarranted intrusion into the management of small business, which represents the vast majority of legal practices in Australia. If it is considered in any form, it will need close management to ensure its national utility and applicability.</li> </ul>

## Compliance audits

Robert Milliner

- The power of the Ombudsman to conduct a compliance audit of a law practice is unjustifiably broad and intrusive at a number of levels:
  - a) There is no requirement that the Ombudsman have any good cause for conducting a compliance audit. The Ombudsman may decide to conduct an audit whenever the Ombudsman “thinks it necessary”, for any reason or for no reason, and whether or not a complaint has been made. For example, there is no requirement that he must have reasonable cause to believe that there is non-compliance by the law practice. While it might be expected that the Ombudsman would exercise his powers reasonably, this is no justification for conferring such unconstrained powers. There is a risk that the power may be exercised officiously or capriciously. This is an unacceptable risk for law practices.
  - b) The Ombudsman should not be able to conduct a compliance audit in respect of individual instances of non-compliance. Individual instances of non-compliance should properly be dealt with via the complaints and discipline mechanisms. The intrusive compliance audit power should be reserved for cases where there is reasonable cause to believe there is systemic non-compliance by a law practice.
  - c) The scope of the audits should be restricted to issues concerning the compliance of the law practice with applicable rules, and should not extend into broader issues concerning “the management of the provision of legal services by the law practice”. There should be no power generally to audit the management of legal services by a law practice except to the extent that that is a necessary element of an audit into an issue of non-compliance with the relevant rules. Law practices should not be subject to this sort of intervention in their operations.
  - d) The compliance audit provisions are an extension of the provisions of the Model Law. The Model Law provisions (section 2.7.22) allow compliance audits of incorporated legal practices only. LLFG understands that the policy behind the Model Law provisions was that the audit capability was a trade-off for the limited liability that incorporated legal practices achieved through incorporation. The same rationale does not apply in the context of unincorporated legal practices whose principals have unlimited liability for the practice.
  - e) The extension to all law practices is an expansion of regulatory functions that will need to be funded and will increase the cost of regulation. This is not consistent with the reform objectives.
- If there is to be a compliance audit then there should be provisions for ensuring the law practice can comment on the findings and appeal against them

John Briton	<ul style="list-style-type: none"> <li>• Section 4.6.1 of the draft Law authorises the Ombudsman to conduct a compliance audit of any law practice, incorporated or otherwise, ‘if the Ombudsman considers it necessary to do so.’ Those words are capable of multiple meanings and insufficiently precise to convey the legislative intent. They might be interpreted liberally, to authorise the Ombudsman to conduct a compliance audit of a law practice or audits of each of a class of law practice or indeed of all law practices if the Ombudsman believes that to be required or appropriate for the effective discharge of his or her functions under the Law. Equally they might be interpreted more narrowly, to authorise the Ombudsman to conduct a compliance audit of a law practice only if he or she has reasonable grounds to believe that the law practice is non-compliant. It would be wrong to allow so crucial a power to be the subject of unnecessary argument.</li> <li>• Section 4.6.1 should be amended such that the Ombudsman must conduct an audit in such a way as to keep the compliance cost to a law practice subject to audit proportionate to the value of the information that is sought to be obtained. This is one of the best practice principles enunciated by the Australian Administrative Review Council in its report entitled <i>Government Agency Coercive Information Gathering Powers</i>, 2008.</li> <li>• Notably, section 8.3.6 of the draft Law gives the National Legal Services Board a specific function ‘to monitor and review the exercise of the functions of the Ombudsman’. We should expect the Board to hold the Ombudsman to account if he or she over-reaches.</li> </ul>
Carolyn Bond	<ul style="list-style-type: none"> <li>• An important part of the new system. A measure that has shown to prevent problems before they arise.</li> </ul>
<b>Management system directions</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• The power to give a management system direction is unacceptably paternalistic, draconian and intrusive, especially in the case of an unincorporated practice whose principals have unlimited liability in respect of their practice.</li> <li>• The Ombudsman can provide a valuable educative role and provide guidance to the profession with respect to management systems. However, the Ombudsman’s role should be limited to those functions. The Ombudsman should have no power to give a management system direction to a law practice, including an ILP.</li> <li>• It is inappropriate that a third party, not intimately involved in the management of a law practice, should be able to give directions to the practice to implement management systems specified by that third party: <ul style="list-style-type: none"> <li>○ There is an issue of capability and expertise. It is unreasonable and unrealistic to expect that an Ombudsman (who, incidentally, is not currently required to have any particular qualifications or experience) will have sufficient knowledge of the intricacies of a particular law practice or sufficient management skill to be able to determine how the law practice may most effectively conduct its practice and ensure compliance with its obligations.</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ The power is highly intrusive. As a matter of principle, the management of a law practice should be properly left to the law practice. The Ombudsman is not answerable to the shareholders or partners of the law practice and should therefore not be in a position to give such directions, particularly where the direction may have financial implications. Law practices should be able to manage their practices and innovate as they see fit, provided they meet their legal obligations.</li> <li>○ No case has been made to justify the need for this power. Law practices and lawyers are subject to a wide range of stringent statutory, common law and professional obligations. A failure to meet those obligations potentially has serious consequences for the law practice and lawyer concerned, especially when there are disciplinary implications. These obligations provide a natural incentive for law practices to implement management systems which are appropriate to that practice, without the threat of management systems being imposed by the Ombudsman. The Taskforce has not demonstrated why this power is needed and why the desired effect cannot instead be achieved by the Ombudsman performing an educative role.</li> <li>○ The Ombudsman’s power to give management system directions is unqualified. He can give a direction whenever he “considers it necessary to do so”. This leaves open the risk of capricious exercise of the power. If, contrary to our submission, the Ombudsman does retain this power, we submit that he should only be able to exercise the power where he has reasonable cause to do so, e.g. to remedy a systemic non-compliance identified through a compliance audit.</li> <li>● If the power does remain, there is no justification for extending the power beyond ILPs to other law practices. No case has been made to justify such an extension. The Taskforce has not provided evidence of non-compliance, particularly in the context of larger firms, which justifies the need for this power.</li> <li>● As discussed above in relation to the audit power, LLFG understands that the policy behind the Model Law provisions was that introducing the power to give management system directions was a trade-off for the limited liability that principals of an ILP achieved by virtue of incorporation. The same rationale does not apply in the context of a law practice structure in which principals have unlimited liability for the practice. It is not appropriate that the partners of an unlimited liability law practice should be personally liable for the consequences of these directions</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>● Section 4.6.2 does not as the opponents of these reforms suggest authorise the Ombudsman (or his or her local delegates) to require a law practice to implement any particular management system, only to require a law practice ‘to ensure that appropriate management systems are implemented and maintained to enable the provision of legal services... in accordance with the Law, the national Rules and the applicable professional obligations.’ That is as obvious a requirement of law practices as the requirement of lawyers that they comply with their professional obligations under the Law, the Rules and their professional obligations.</li> </ul>

**PART 5.2**

<b>ISSUE: Complaints</b>	
<b>General comments</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• LLFG supports the introduction of a system for the quick, efficient and inexpensive resolution of consumer complaints. However, the proposed complaints system is not targeted at areas where there is a demonstrable need and where the complaints system is likely to provide a solution.</li> <li>• In particular, the complaints system should, consistent with other consumer protection regimes (such as the Trade Practices Act), be limited to genuine “consumer” matters. The Taskforce has not demonstrated any need or justification for a system which deals with complaints which do not relate to consumer matters. A “consumer matter” should therefore exclude disputes between a practice and a commercial or government client and costs disputes which exceed a specified amount. It is inconsistent with the reform objectives to apply limited resources to issues involving commercial or government clients who have the means to look after their own interests.</li> <li>• The proposed threshold of \$100,000 for costs disputes that fall within the jurisdiction of the Ombudsman is too high. This should be in the order of \$25,000 - \$40,000, consistent with the positions in the Model Laws and the TPA.</li> <li>• The Ombudsman has power to deal with a wide range of complaints, including complaints from commercial and government clients. He also has new significant decision-making powers (as opposed to an investigative or mediating role). He may make determinations on matters involving legal services, has powers to compensate and may make findings of unsatisfactory professional conduct (professional misconduct goes to a court or tribunal). He can suspend practising certificates. He is responsible for trust account supervision. He can conduct compliance investigations and give binding management system directions. He decides whether to send in an external investigator, supervisor or manager. While there are some appeal rights, these are too narrow. There needs to be greater authority or oversight (e.g. by the Board) in relation to these matters.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• These are significant and welcome reforms that greatly enhance consumer protection and facilitate the fair and timely resolution of complaints.</li> <li>• There is no provision in the draft Law, but there should be, that protects someone who makes a complaint or who gives information to the Ombudsman or a delegate of the Ombudsman in relation to a complaint from liability civilly (including in an action for defamation), criminally or under an administrative process for making the complaint or otherwise giving the information. See, for example, the Queensland <i>Legal Profession Act 2007</i> at section 487. This is a fundamental consumer protection measure which should be embedded in this legislation and not left to the defamation</li> </ul>

laws of each of the states and territories.

- There is no provision in the draft Law, but there should be, that empowers the Ombudsman or a delegate of the Ombudsman to require a respondent to a complaint to answer questions or produce information in relation to the complaint despite any duty of confidentiality or legal professional privilege they may owe a client (on the strict understanding that the client's legal professional privilege must be preserved). See, for example, the National Model law at sections 4.13.8 and 4.13.9; the Victorian *Legal Profession Act 2004* at section 4.4.1 and the NSW *Legal Profession Act 2004* at sections 603, 605 and 724. The Ombudsman's capacity to conduct 'own motion' investigations and to investigate third party complaints more generally will be fundamentally compromised in the absence of such provisions (as we well know in Queensland, where our local *Legal Profession Act* alone among its counterpart legislation in the other states and territories contains no such provision).
- Section 5.1.4(4) precludes judges, magistrates and members of tribunals from being subject to complaint in relation to their conduct (or alleged conduct) prior to their appointment to those offices. It is not acceptable that there is no mechanism to deal with consumer matters or disciplinary matters involving conduct by people who hold these positions prior to their appointment to those positions. This provision should be amended to allow such conduct to be dealt with or alternatively for any such complaint to be dealt with by some other appropriate body such as a Judicial Commission. Any such alternative remedy for complainants should include comparable 'consumer redress' where it is fair and reasonable that a complainant be given redress.
- Section 5.1.4(6) makes government legal officers who engage in legal practice subject to complaint, including, for example, legal officers employed by prosecuting authorities such as Directors of Public Prosecutions. Currently in Queensland only legal practitioners, relevant regulatory authorities and the chief executive officers of the government agency in which a government legal officer is employed may make a complaint about a government legal officer - see the Queensland *Legal Profession Act 2007* at section 429(2). The broadening of the application of the complaints provisions to government lawyers could lead to a significant increase in the number of unmeritorious complaints.
- Section 5.1.4 (5) says Chapter 5 applies to the conduct of legal practitioners acting as cost assessors, but many cost assessors are not lawyers. The question arises whether making a cost assessment is engaging in legal practice and, if it is, then many cost assessors are what we now know as 'unlawful operators'. What is the regulatory framework for ensuring that non-lawyer cost assessors adhere to appropriate professional standards and enabling complaints to be dealt with?
- Section 5.2.8 sets a 5 year time limit for the making of a complaint. This is arguably too long a period and consideration should be given to setting a time limit of 3 years (but keeping the same 'waiver' provisions in sub-sections (a) and (b)).
- Section 5.3.4: Settlement Agreements says that the Ombudsman 'must' do all the things listed following mediation of a consumer matter. This is impractical. The section should provide the Ombudsman with a discretion by using the word 'may'.

Peta Spender	<ul style="list-style-type: none"> <li>• It is good that anyone can make a complaint under this provision but, as drafted, it appears that only direct clients can make a complaint because of the definition of ‘consumer matters’ (see below re: 5.2.5).</li> <li>• This provision says that a complaint can be about any conduct to which the chapter applies. It is not clear whether this provision should be read down by 5.2.4 and 5.2.5 (see below re: 5.2.5.).</li> <li>• This provision states that a complaint may contain or give rise to either a consumer matter or a disciplinary matter or both. It appears to be intended that the Ombudsman’s power is confined to these types of complaints (see below re: 5.2.5).</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>• ACLA believes the principles in administrative review would apply in such instances. There would need to be specific prescribed circumstances where an internal review is warranted to <ul style="list-style-type: none"> <li>a) ensure matters are efficiently expedited and not held up on a minor (as opposed to a ‘material’) technicality; and</li> <li>b) the Ombudsman’s ‘binding’ authority is not diluted or diminished.</li> </ul> </li> <li>• ACLA supports the efficient expediting of costs disputes and minimizing situations for ‘forum shopping’.</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>• Section 5.6.3 apparently makes a binding determination of the Ombudsman under 5.3.5(2)(a) in relation to a costs dispute of less than \$10,000 non appellable. If there is to be no appeal from a determination, the monetary ceiling for that restriction should be set much lower – say \$3000. This would accord with the published history of the tribunal findings in the Qld jurisdiction. There is no evidence to support the higher limit.</li> <li>• The power of the Ombudsman to make an order for a fine arising from unsatisfactory professional conduct up to \$25,000 is a jurisdictional limit currently reserved to the tribunals. The Ombudsman’s jurisdictional limit should be lowered to \$15,000.</li> </ul>
<b>Complaints against legal practices</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• Under section 5.3.5, the Ombudsman has the power to make various determinations to resolve a consumer matter. While there is a limit to the amount the Ombudsman can award as a compensation claim, there is no limit on other orders the Ombudsman may make which have a similar financial impact, e.g. orders that the law practice waive or reduce fees. These orders should be subject to the same cap.</li> <li>• Where the Ombudsman is required to determine a costs dispute (in lieu of it being referred to a costs assessor, the Ombudsman should be required to have regard to the same factors as those to which a costs assessor is required to</li> </ul>

	<p>have regard in determining whether costs are fair and reasonable.</p>
<p>John Briton</p>	<ul style="list-style-type: none"> <li>• Complaints are rightly allowed to be made about the conduct of both lawyers and law practices and the terms ‘unsatisfactory professional conduct’ and ‘professional misconduct’ are defined within the National Law to refer to the conduct ‘of a lawyer or law practice’. But there are a number of inconsistencies in Chapter 5 in relation to this issue. For example, the word ‘civil’ in section 5.1.4(2) is presumably a typographical error and was intended, presumably, to be the word ‘consumer’; the definition of ‘disciplinary matter’ at section 5.2.6 refers only to the conduct of a lawyer, and not the conduct of a law practice; and similarly the ‘determination’ sections, sections 5.3.5, 5.4.5 and 5.4.9. These inconsistencies should be resolved by making it clear that complaints can be made about the conduct of either a lawyer or a law practice (as per section 5.2.2) irrespective of whether the complaint involves a consumer matter or a disciplinary matter. Clearly this requires that someone at the law practice be designated to be the respondent in relation to complaints about the law practice and to be liable accordingly to any disciplinary consequences that may flow from the complaint – see below.</li> <li>• Please note in this regard my comments under the earlier sub-heading Part3.2: Responsibility and Liability of Principals. And so, for example, section 5.3.5(3)(a) should be amended to replace the word ‘principal’ with the words ‘supervising legal practitioner’ and sections 5.4.5 and 5.4.9 should be amended to make it clear that the respondent lawyers include, in the case of determinations of complaints about the conduct of a law practice, the supervising legal practitioners of the law practice.</li> <li>• The term ‘legal practice’ as currently defined does not include a government legal practice. Likewise the definition of the term ‘principal’ makes no reference to government legal practices. It is inconsistent with the scheme of the Act to leave out from the regulatory structure government lawyers who operate in, what are in effect, legal practices. It is also inconsistent given that individual government lawyers may be subject to complaint. This results in the anomaly that the Ombudsman is authorised to deal with individual complaints but not look at any systemic issues that may arise effecting a government lawyer’s professional obligations.</li> <li>• Some of the largest law practices in the Nation are government entities such as Crown Law, Australian Government Solicitor, Office of the Director of Public Prosecutions, Public Trustee Offices along with a wide variety of government departments which maintain their own in-house legal teams (Department of Defence, Department of Transport, Department of Child Safety, ATO, etc). All of these entities employ large numbers of lawyers yet they are left out of the scheme with respect to costs and, more importantly, the duty to supervise staff, implement and maintain appropriate management systems as well as being subject to compliance audits. Though it may be argued that they are subject to the Public Sector Ethics and Management requirements these schemes examine issues which are inherently different to the objectives of the Act such as protecting the administration of justice as well as to promote and enforce professional standards, competence and honesty.</li> <li>• Many of these entities are essentially unregulated in terms of their professional obligations and given many of their</li> </ul>

	important functions in the administration of justice and the public's confidence in the rule of law, it is important that they be subject to the same regulatory arrangements as all other legal practices.
Carolyn Bond	<ul style="list-style-type: none"> <li>• Must be able to complain against legal practices - focussing solely on individual practitioners means that broader problems aren't picked up.</li> </ul>
<b>Distinction between consumer and disciplinary matters</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• The Ombudsman should not be able to make determinations of unsatisfactory professional conduct. Discipline is a public interest matter which should not be treated in a peremptory fashion by the Ombudsman. This should remain the role of the relevant tribunals.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• This is an entirely appropriate distinction that breaks the nexus between providing consumers with redress when redress is due and professional discipline.</li> </ul>
Peta Spender	<ul style="list-style-type: none"> <li>• 'Consumer' is not properly defined. The Definitions at 1.2.1 refer you to 5.2.5 which contains the definition of "consumer matter". This provision effectively undermines the broad standing provision under 5.2.1, since the dispute or issue must arise out of or in relation to the provision of legal services to the person.</li> <li>• The five-year limitation period is an odd timeframe. Most state and territory limitation acts have limitation periods that work in multiples of three e.g. 3, 6, 12 and 15 years etc and federal legislation has tended to follow these conventions (see the table of limitation periods in Colbran et al, <i>Civil Procedure: Commentary and Materials</i> 4<sup>th</sup> edn page 197). I note that 5.2.8(3) states that the Ombudsman's decision to waive or refuse to waive the limitation period cannot be challenged in proceedings by the complainant or the respondent. Some thought would need to be given as to whether appeal rights against this decision would arise under the jurisdictional legislation.</li> <li>• It is a bit unclear what the word "misconceived" means in 5.2.12 (a). It might be worth putting in a note under 5.2.12 (d) which refers the reader to the definition of "commercial or government client" in 4.3.2.</li> <li>• This provision (5.3.5) states that the Ombudsman may resolve a consumer matter by making a determination that is fair and reasonable in all the circumstances. This test is vague. Its vagueness is exacerbated by 5.6.3 which states that there are no rights of appeal for compensation orders made under \$10,000.</li> </ul>
Carolyn Bond	<ul style="list-style-type: none"> <li>• There is still too much cross-over between these two types of matters [consumer and disciplinary]. Must be separated out and handled by different bodies - or at least clearly separated out within the one body.</li> </ul>

## Distinction between consumer and disciplinary matters

Carolyn Bond

(comments made by  
Catriona Lowe, Consumer  
Action Law Centre and  
Jenni Mack, CHOICE)

- We are concerned that the current institutional design perpetuates the confusion of the concepts of consumer dispute resolution and conduct matters. What consumers want from dispute resolution is fast and efficient resolution of their problem. The outcomes and role of the consumer in conduct matters is very different. In consumer matters, consumers want their problems fixed, quickly, efficiently and fairly and they want their problem remedied. Conduct matters are entirely different – they are regulatory and the consumer provides the source material in a process that goes way beyond their individual problem.
- We think the system needs to be designed around the needs of consumers and that the long established principles of dispute resolution should apply to consumer matters ie accessible, independent, fair, efficient, effective and accountable. In our submission, we will set out what this means at a practical level, but there are four specific things we wanted to bring to your attention now:
  - 1) There are simply too many delegations in the current proposal for the consumer matters part to work well – we think a single national office to resolve consumer matters would work much better for consumers. The delegations matter less for conduct matters where the consumers’ immediate needs are not central stage.
  - 2) The monetary limits for determinations \$25 000 for general consumer matters and \$10 000 for cost disputes are way too low. It should be at least \$100 000 or at very least the \$10 000 for cost disputes needs to be raised to the \$25 000 for other matters.
  - 3) The remedies for consumer and conduct matters are confused. Cautions and education directions are sanctions appropriate for conduct matters. Consumer matters require remedies that fix problems and/or provide compensation.
  - 4) The review rights that are set out in the bill are not consistent with quick, fair and efficient dispute resolution. Review rights of the nature set out in the bill do not exist in any other comparable dispute resolution body and are particularly inappropriate for the legal profession. The ombudsman will never be able to hold itself out as free, fast and efficient as lawyers will be far more likely to seek reviews than other industries given that using the courts is their core skill. There are a number of ways of addressing this issue, which we will detail in our submission.

**PART 5.4**

<b>ISSUE: Ombudsman</b>	
<b>General comments</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>Under section 5.4.4(c), the charging of more than a fair and reasonable amount for legal costs is capable of being unsatisfactory professional conduct or professional misconduct. By contrast, under the Model Law, the trigger is the charging of “excessive” costs. We believe this is an inappropriate expansion of the existing regime and that the “fair and reasonable” test is not appropriate. It is not appropriate that disciplinary sanctions are determined according to the same test that is used to assess whether a bill of costs should be adjusted under the costs assessment regime. According to this test, if a costs assessor makes any adjustment at all (even very minor) to a bill of costs, he has determined that the costs are not fair and reasonable. It would follow that the lawyer or law practice is automatically exposed to potential disciplinary action. Disciplinary action is an extremely serious step which should not follow from the mere adjustment of a bill. A different and higher standard is required and we suggest it is appropriate to maintain the Model Law test of “grossly excessive” costs (e.g. Model Law section 3.4.49).</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>Again these are significant and welcome reforms that greatly enhance consumer protection and facilitate the fair and timely resolution of complaints.</li> </ul>
<b>Complaints handling role</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>Under section 5.4.5, the Ombudsman has power to make determinations of unsatisfactory professional conduct. Given the seriousness of a finding of unsatisfactory professional conduct (including its potential reputational impact), we believe this is a matter which is appropriate for determination by the relevant Tribunal, rather than by the Ombudsman. We appreciate that one of the objectives of the Ombudsman scheme is to provide a quick and efficient method for resolving complaints about lawyers. While it is appropriate, to achieve that objective, for the Ombudsman to have powers to resolve small disputes in consumer matters, the same rationale does not apply in the context of disciplinary action (which is principally a matter of public interest). The Ombudsman’s powers in relation to unsatisfactory professional conduct should be the same as its powers in relation to professional misconduct, namely to initiate proceedings in the Tribunal where that is warranted.</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>There needs to be a classification framework that distinguishes the type and hierarchy of binding orders, determinations and reviews as well as a referral power where matters arising relate specifically to professional conduct.</li> </ul>

## Powers and functions (in complaints-handling role)

John Briton	<ul style="list-style-type: none"><li>• Section 5.4.8(3): the disciplinary bodies should not be bound by the rules of evidence, just as they aren't in Queensland – see the Queensland <i>Civil and Administrative Tribunal Act 2009</i> at section 28(3) and <i>Legal Profession Act 2007</i> at section 645. There is no reason why lawyers should be treated differently and arguably more favourably in this respect than members of other professions and occupations. Notably the New South Wales Law Reform Commission canvassed this issue in detail in the course of reviewing that state's Legal Profession Act in 2000 and recommended that the rules of evidence should not apply to disciplinary proceedings against lawyers – see Attachment 1. See also Scott McLean, <i>Evidence in Legal Profession Disciplinary Hearings: Changing the Lawyers' Paradigm</i>, The University of Queensland Law Journal, Volume 28, No 2, 2009.</li><li>• Part 5.5: Compensation orders - the wording of these sections suggests that a complainant may request monetary compensation for loss other than pecuniary loss. That should be made clear, if that is the intention.</li></ul>
Carolyn Bond	<ul style="list-style-type: none"><li>• See above.</li></ul>

## PART 7

### ISSUE: Investigatory powers

#### General comments

John Briton	<ul style="list-style-type: none"><li>• Section 7.2.2(1) should authorise the Ombudsman or a delegate of the Ombudsman to require a respondent to a complaint to answer questions or produce information in relation to the complaint despite any duty of confidentiality or legal professional privilege they may owe a client (on the strict understanding that the client’s legal professional privilege must be preserved) – see my earlier comments under Part 5.2: Complaints, General Comments, above.</li><li>• Section 7.2.2(1) should authorise the Ombudsman or a delegate of the Ombudsman to require a respondent lawyer to appear before him or her to answer questions – see for example the Queensland <i>Legal Profession Act 2007</i> at section 443(1).</li><li>• Section 7.2.2(1) requires a lawyer subject to complaint to assist in and cooperate with the investigation of the complaint, but imposes no similar obligations on other lawyers who may have evidence in relation to the complaint or otherwise be able to assist. They should be similarly required to cooperate to facilitate the effective and timely investigation of complaints.</li><li>• Part 7.4 gives investigators significant additional powers in relation to incorporated legal practices including the power to hold hearings and to examine persons. There does not seem to be any good policy reason why law firms are subject to a lesser investigatory regime than incorporated legal practices.</li></ul>
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## PART 8.2

### ISSUE: National Legal Services Board

#### General comments

Justice Tobias	<ul style="list-style-type: none"><li>• On page 1 of the first paper provided by the Task Force to the Consultative Group entitled “The Regulatory Framework: A National Legal Profession 16 September 2009”, it was stated in paragraph 1 that COAG had decided to establish uniformity in the regulation of the legal profession. In paragraph 3 the key aims were set out and which included “Creating and supporting a National Legal Profession in a National Legal Services market through simplified uniform legislation and regulatory standards and the provision for setting national standards, policies and</li></ul>
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practices wherever possible and appropriate.”

- Accordingly, the whole objective of the process was to achieve an appropriate level of uniformity of regulation of the profession throughout Australia. This involved setting uniform national standards, policies, practices and rules.
- At no time in any of the material provided by the Taskforce to the Consultative Group or to the public (until the draft Law was published) did the Taskforce ever suggest that it was proposing that the Executive should take control of the Legal Profession. It was only hinted at by Laurie Glanfield at a meeting of the Consultative Group in which he was asked for his response to a letter from the Chief Justice of the High Court on behalf of the Council of Chief Justices with respect to the composition of the National Legal Services Board (the Board).
- Even the objectives set forth in clause 1.1.3 of the draft Law and which are consistent with the key aims referred to in the document of 16 September 2009, do not suggest that it was an objective of the draft Law that the Executive (through SCAG) would have ultimate control over the Legal Profession.
- One would have thought it common ground that, like the Judiciary, the Legal Profession must also be independent of the Executive. Regrettably, the draft Law seeks to achieve the precise opposite. It does so essentially in two ways. First, by clause 2 of Schedule 1 of the draft Law which sets out how the Board is constituted. The host Attorney-General on the recommendation of SCAG can appoint five of the seven members of the Board thus giving rise to the potential of “stacking” it to suit a political agenda. The whole purpose of the project, as I understand it, was to set up an independent National Legal Services Board which itself would then regulate the profession. But it was never contemplated that that Board, although having consumer representation upon it, would have the majority of its members appointed by the Executive. As if this was not enough, clause 8.1.2 of the draft Law empowers SCAG to dictate policy to the Board (as well as the Ombudsman) so that even the Executive is not prepared to trust a Board, the majority of the members of which it itself appoints. I have already suggested amendments to clause 8.1.2 as well as some other matters in a letter to Professor Lavarch, copied to Marjorie Todd, which is on the AG’s website and the contents of which for ease of reference and with one change, I have incorporated into this submission.
- Clause 8.1.2 should be confined to the SCAG requesting reports from the Board and the Ombudsman. Accordingly, the provision should be amended as marked up below:

#### **8.1.2 Role of Standing Committee**

- (1) The Standing Committee has a general supervisory role in relation to ~~the Board and the Ombudsman to ensure they are fulfilling their duties under this Law consistently with the objectives of~~ this Law.
- (2) Subject to this section, the Standing Committee may request reports from the Board and the Ombudsman regarding specified aspects of their operations.
- ~~(3) Subject to this section, the Standing Committee may give directions on policy matters that are relevant to the operations of the Board and the Ombudsman and that are consistent with objectives of this law.~~
- ~~(4)~~(3) ~~Neither~~ A request for a report nor a policy direction cannot be about a particular person or a particular matter.

~~(5)~~(4) The Board and the Ombudsman must provide the Standing committee with any requested reports and must comply with any applicable policy directions.

~~(6)~~(5) The Standing Committee may receive and consider annual and other reports from the Board and the Ombudsman.

- Consistent with the foregoing clause 8.2.4(2) should be amended by deleting the words “of a Standing Committee and” in the first line. Clause 2(1) of Part 1 of Schedule 1 to the draft Law should be redrafted as follows:
  - “(1) The Board is to consist of:
    - (a) one member appointed by the Council of Chief Justices (or such other body as the Chief Justices shall nominate) which member shall be the Chairperson of the Board; and
    - (b) two members appointed by the Law Council of Australia; and
    - (c) one member appointed by the Australian Bar Association; and
    - (d) one member appointed by the Council of Law Deans; and
    - (e) not more than two members appointed by the host Attorney-General on the recommendation of the Standing Committee on the basis of their expertise in one or more of the following areas:
      - (i) the protection of consumers;
      - (ii) the regulation of the legal profession.”
- It is unnecessary that one or other of the members appointed by the host Attorney-General should have expertise in the practice of the law as such persons will be appointed by the Law Council of Australia and/or the Australian Bar Association. Furthermore, it would not concern me if the current (d)(ii) was deleted as I think it is unnecessary. It would be difficult to know who such people would be in any event. An alternative but appropriate source of membership would be a member appointed by the Council of Law Deans for which I have provided in a new subparagraph (d).
- If the foregoing amendment to clause 2(1) is accepted, then clause 2(4) should be deleted. In any event and at the very least, the Chairperson should be appointed by the Board itself not by the host Attorney-General on the recommendation of SCAG.
- Clause 2(5) of Schedule 1 should also be deleted. It is inimical to the independence of the Board (let alone the legal profession) even if it is constituted as presently proposed especially with respect to nominees of the Council of Chief Justices and the Law Council. Further, the power of the host Attorney-General to set conditions is unfettered – no criteria are stated as to the nature of the conditions which could be imposed. It would empower the host Attorney-General to, for instance, impose a condition on a member’s appointment requiring him or her to vote in a particular way on a particular issue. The provision is just another example of the attempt by the Executive to control the legal profession at all levels. It should be removed.
- If clause 2(5) is deleted there should be a consequential deletion of clause 6(2)(b).
- Clause 6(2)(a) should be amended by deleting the words “*unsatisfactory performance*”. As a matter of construction they

	<p>go beyond incompetence or misbehaviour. It would therefore include voting by the member which did not suit the agenda of the host Attorney-General or SCAG.</p> <ul style="list-style-type: none"> <li>Finally, clause 6(2)(a) should be amended by inserting the word “proved” after the word “for” at the commencement of the subclause.</li> </ul>
Justice Tobias (comments made by Garry McGrath, Secretary of the NSW Bar Association)	<ul style="list-style-type: none"> <li>The Bill creates a risk of the interference with the independence of the Courts and the legal profession by the Executive Government. See, for example, the wide powers and jurisdiction of the Board provided by the combined effect of sections 8.2.3 and 8.2.4.</li> <li>To the extent that the Board (in its currently proposed composition) subsumes some roles presently undertaken by the representative State law societies and bar, it adversely affects the independence of the profession.</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>The Board should have and maintain oversight of the regulatory work nationally, so sensibly, the ombudsman should report to the National Board.</li> <li>For practical purposes, the initial terms of the Board members might be varied, to support changeover to new members at the end of the initial term, and allow for appropriate knowledge continuity.</li> <li>The need for, and appointment of Board Committees should be considered carefully by the Board. For example, if there is an appropriate current committee, it may be sensible to transfer that committee to the Board. However, not all extant committees may have the appropriate skill set for the new regime, and reconsideration of their purpose would be a useful preliminary step. All committees should have a specified term.</li> </ul>
<b>Composition</b>	
Justice Tobias	<ul style="list-style-type: none"> <li>See above under “General Comments”.</li> </ul>
Justice Tobias (comments made by Garry McGrath, Secretary of the NSW Bar Association)	<ul style="list-style-type: none"> <li>Schedule 1, Part 2 of the Bill dilutes the influence of the Courts substantially in favour of the host Attorney General (including in relation to the appointment of Board Chairman). Notwithstanding clause 2(2), there is potential for partisan appointments, which is, presently, precluded to an extent by the representational election of law societies and bar associations. If the National scheme were to be proceeded with further, then appointees ought to be members of the profession and ought to be appointed by the Courts and representative professional associations.</li> </ul>
Robert Milliner	<ul style="list-style-type: none"> <li>On the current proposal, only two of the seven members can be assumed to be lawyers. The Board should comprise a majority of practising lawyers. This is critical to maintaining the independence of the profession.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>I agree that the Council of Chief Justices and the Law Council should each have a nominee appointed to the Board. I strongly disagree however with any suggestion that the professional bodies or the Law Council as their peak body should</li> </ul>

	<p>be able to nominate more than two members of a seven member Board. The professional bodies represent the interests of their members when the Board should represent and be seen to represent the public interest, and accordingly their over-representation on the Board would compromise public confidence in the Board. There should be no return or appearance of return to self-regulation which failed in the past to adequately protect the public interest but rather a consolidation at the national level of the profession's accountability to the community it serves.</p> <ul style="list-style-type: none"> <li>• Subject to the above, I am comfortable with proposals that the Board should comprise a majority of lawyers. It is imperative however that the Board includes at the very least a significant minority (three members of a seven member Board) of non-lawyers who between them have experience in consumer protection and in corporate and/or professional regulation more broadly. They should be seen to represent the interests of the users of legal services and the public interest.</li> </ul>
Peta Spender	<p>SUMMARY</p> <ul style="list-style-type: none"> <li>• The Board should consist of even numbers of 'consumers' and 'members of the profession' with the choice of chair from a selection panel <ul style="list-style-type: none"> <li>a). 3 members should be appointed by SCAG on the basis of their expertise in : <ul style="list-style-type: none"> <li>- the protection of consumers</li> <li>- the regulation of professions</li> </ul> </li> <li>b). 3 members should be nominated by the profession ( in each case the member is appointed by SCAG from a panel of 3 nominated by the participating institution) <ul style="list-style-type: none"> <li>1 member nominated by the Council of Chief Justices</li> <li>1 member nominated by the Law Council of Australia</li> <li>1 member appointed by the Australian Bar Association</li> </ul> </li> </ul> </li> <li>• The Chair should be appointed by a selection panel appointed by SCAG with stakeholder input. A similar process to that recently adopted in the appointment of federal court judges should be considered. This allows for both stakeholder input and an effective process of appointment.</li> </ul> <p>REASONING</p> <ul style="list-style-type: none"> <li>• I think it is appropriate for the nominating institutions to put forward a panel of 3 to provide some flexibility to achieve other desirable qualities In the Board such as diversity in the gender, backgrounds and skill sets of the participants.</li> <li>• Although I think there is considerable merit in the current wording of 2(1)(c) insofar as it allows SCAG to develop a mix of</li> </ul>

	<p>expertise in the Board by applying the criteria of expertise in the practice of law, the protection of consumers and the regulation of the legal profession, I am persuaded by Carolyn Bond’s argument that general expertise in regulation is more important than expertise in the regulation of the legal profession. I have opted for a half way point – regulation of professions.</p> <ul style="list-style-type: none"> <li>• There is also some force in the argument that the independence of the legal profession needs to be fostered. Although the arguments about the independence of the legal profession can be overstated, the <i>Haneef</i> case demonstrated that political pressure can be applied through the use of professional rules (see generally . Bartlett, Mortensen and Robertson (eds) (2009) 28 <i>University of Queensland Law Journal</i> Issue 2 ‘Australian and New Zealand Lawyers: Ethics and Regulation’).</li> <li>• Perhaps more importantly, however, there is considerable value in preserving the good aspects of the investment that the Australian legal profession has made in its own development to date. For example, the participation of lawyers in the regulation of their own profession should be encouraged, particularly the involvement of the members of the profession who are still proud to be lawyers.</li> <li>• The Chair is an important position, not just because of the dynamics of the board (e.g. the casting vote under Schedule 1 r 13) but also because a good Chair will perform important leadership, managerial and consultative roles in the regulatory framework, the profession and in the community. I therefore consider that the Chair should be appointed by a selection panel.</li> <li>• This model has left the issue open as to whether the profession has a numerical majority on the Board because the consumers and lawyers are evenly balanced and the choice of the Chair would decide the issue if it could be said that the Chair belongs to a particular camp. It is feasible, however, that the Chair would be independent of both camps.</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>• Majority of Board members should be people with practical legal experience. Ideally there should be developed clear role descriptions for key positions (Chair and CEO) with identified skill sets for whole Board, against which selection should be made to ensure the Board has the best skills for its responsibilities. The rationale for lawyers being the majority of members is that this is the policy making body for the national profession. There needs to be careful balance and understanding of the impact of policies on those who are in the business of practising.</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>• In practice ACLA has no particular preference regarding which National Board composition model is adopted except that the terms/guidelines regarding the composition and appointment of the NLSB must include the following: <ul style="list-style-type: none"> <li>• if the model adopted contains rights for the Law Council, Australian Bar Association or Council of Chief Justices to nominate a board representative, one nominee from the in-house profession should also be specified. It would be unfair to permit one or all of the above mentioned groups a right to nominate a person unless the in-house profession has the same express right – especially given the size and influence of the in-house profession in Australia.</li> </ul> </li> </ul>

	<p>The in-house profession:</p> <ul style="list-style-type: none"> <li>○ now numbers approximately 12,000 members, which is at least as large as the number of barristers practising in Australia currently; and</li> <li>○ is the fastest growing section of the profession.</li> </ul> <ul style="list-style-type: none"> <li>● it is also not appropriate to limit the areas of expertise for SCAG to nominate board representatives to “(the) practice of law, protection of consumers or regulation of the legal profession”. An <i>express</i> reference to in-house legal counsel must be included because of their unique role in the legal industry, and ability to understand both consumers (at all levels) and practitioners of the law. It is therefore suggested the expertise “criteria” be clarified or extended, to <b>explicitly</b> include and distinguish the practice of law “as in-house counsel”.</li> </ul>
<p>Carolyn Bond</p>	<ul style="list-style-type: none"> <li>● Overall structure would be better dividing the disciplinary and regulatory responsibilities from the consumer dispute responsibilities. Board should be an independent regulator and should deal with disciplinary regulatory matters.</li> <li>● Should be independent from the profession. Could be a regulatory Board similar to the ACCC for example, alternatively, could be balanced Board similar to the Victorian Board. In addition to the attributes of members (expertise in the legal profession, regulation of the legal profession and consumers, an additional attribute should be added "expertise in regulation").</li> </ul>
<p>Carolyn Bond (comments made by Catriona Lowe, Consumer Action Law Centre and Jenni Mack, CHOICE)</p>	<ul style="list-style-type: none"> <li>● We are very comfortable with the make-up of the board as proposed by the draft bill. We also note that the Legal Services Board in Victoria has operated for almost 5 years with a balanced number of practitioner and community representatives and a Chair appointed by the Attorney-General, without any apparent objection from the profession or the judiciary. While we support these models, if there is to be move away from the approach in the draft bill, we wish to put our views before you sooner rather than later.</li> <li>● It is our view that the board must be independent. Independent means <i>independent of the profession</i>. This is all the more crucial if the Board is to have any role – regardless of how minor – in overseeing the role of the Ombudsman.</li> <li>● We believe that such independence could be achieved in a way which also meets the concerns of the profession and we draw on our long standing experiences with the governing Boards of the various bodies such as the Financial Ombudsman.</li> <li>● An independent Board will be constituted with: <ul style="list-style-type: none"> <li>a) equal number of consumer/community representatives as legal profession representatives, and</li> <li>b) a Chair who is independent of the profession.</li> </ul> </li> <li>● The consumer/community representatives should be experienced, genuine consumer/community representatives with</li> </ul>

	<p>a strong understanding of consumer issues, professional standards setting and/or regulation generally.</p> <p><i>Chair of the Board</i></p> <ul style="list-style-type: none"> <li>• We have concerns with the suggestion that a nominee of the Council of Chief Justices could meet the requirement of an independent Chair. While such an appointment would be regarded in many other situations as “independent”, such an appointment would not be viewed as independent from the profession in the context of regulation of the legal profession.</li> <li>• Given the concerns of the profession that the Board is independent of Government, and our concerns that it is independent of the profession, an appropriate method of appointing the Chair would be for a balanced Board to appoint its own Chair. However, for practical reasons there may be a need for an alternative appointment process for the first Chair.</li> <li>• We urge you to consider nominating the first Chair of the Board in the absence of a Board to undertake the process. The first Chair’s appointment could be set for a maximum term (for example two years) to enable the Board to appoint the Chair at an early stage.</li> </ul>
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<b>Appointments</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• A majority of the Board should be practising lawyers and appointed on the recommendation of the Law Council of Australia, the Australian Bar Association and the Council of Chief Justices. To preserve the independence of the profession, it is inappropriate that the majority of the Board be appointed by SCAG.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• I agree that the Board should comprise seven members appointed by SCAG provided that SCAG is required to appoint a nominee of each of the Council of Chief Justices and the Law Council and that there are appropriate protections to ensure the Board’s independence (for example by appropriate amendments to section 8.1.2, especially sub-section (3)).</li> <li>• It would be helpful if the Law specified criteria that SCAG must take into account in making appointments to the Board. Those criteria might include competency criteria and a criterion that the composition of the Board should as far as reasonably practicable reflect the diversity of the profession (which is made up of big firm and small firm lawyers; lawyers in private practice, and government, in-house, legal aid and community legal sector lawyers; etc) and the diversity of the community more generally (which is made up of both men and women, young and old, of different ethnicities; and men and women from large and small states / territories and from state capitals, suburbs, regional cities</li> </ul>

	and towns and the bush; etc).
Peta Spender	<ul style="list-style-type: none"> <li>• See comments in Composition section above.</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>• ACLA firmly believes there should be representation of in-house lawyers on the National Board. There should also be a balanced representation of the jurisdictions. The inaugural Board may be appointed by SCAG for a period of 3 years. Thereafter, there should be a 1/3 retirement. Subsequent selection and appointment process should be open and transparent, based on merit and overseen by the Chair of the Board.</li> </ul>
Noela L'Estrange	<ul style="list-style-type: none"> <li>• Nominations for legal positions should come from the profession (including the COCJ).</li> <li>• Appointments made by SCAG.</li> <li>• Board is required to appoint the CEO. Identification of appropriate skills and experience for this person will be critical to success.</li> </ul>

<b>Conditional appointments</b>	
Peta Spender	<ul style="list-style-type: none"> <li>I cannot see why conditional appointments would need to be made and on balance think they should be avoided.</li> </ul>
Noela L'Estrange	<ul style="list-style-type: none"> <li>Purpose of this section is unclear and unhelpful. Clear that Board members are not "representatives" – their obligations are as a Board to consider matters in the best interests of the national profession and its appropriate regulation. If conditions on appointment undermine these principles, this section should be deleted from Schedule 1 Part 2. There is the prospect of a condition interfering with the obligations of the member as a Board member.</li> </ul>

Necessity of support staff	
Noela L'Estrange	<ul style="list-style-type: none"> <li>Support staff should be kept at a minimum in light of the non-operational purpose of both the Board and the Ombudsman. There must be clear guidelines in place about the contracting of any consultants or contractors (Schedule 1 Part 5, 24). There is something of an implicit assumption that employment may be under Public Service awards (Schedule 1 Part 5, 23 (a), which appears to refer to secondment arrangements; and Schedule 1 Part 5, 23 (b) which refers to staff from local representatives. Unclear from this Schedule whether these arrangement relate only to working directly for the Board – as the phrase used is “.. in connection with the exercise of its functions...”</li> </ul>
Justice Tobias	<ul style="list-style-type: none"> <li>It is apparent that on the basis of the draft Law as currently presented, the Board will need a substantial support staff especially if it is to take over the role as the sole admission authority from each of the State and Territories. As is set out in the submission of the Executive Officer of the NSW Legal Profession Admission Board (which should be taken as part of this submission), there are approximately 5,500 applications for admission per annum in Australia. Each of these applications has to be checked to ensure they comply with the necessary requirements of the rules which will be particularly time consuming. Furthermore, and probably the most time consuming aspect of admission applications, is dealing with disclosures: i.e. disclosures by applicants in relation to whether they are fit and proper to be admitted. Achievement of the relevant academic and PLT requirements merely involves ticking a box. But assessing disclosures, determining whether further information is required and then making a recommendation with respect thereto to the Board, will be particularly time consuming and will require very experienced personnel to undertake that task. Furthermore, it is necessary for an experienced person to determine those disclosures which are minor and those which are not upon the assumption that minor disclosures are generally, as they presently are, confined to traffic offences (providing alcohol or drugs do not play too large a part in those offences). On the statistics provided by Robin Szabo, there are nationally up to 300 significant disclosures which require assessment per annum. If these matters are to be dealt with by the Board (and they should be), then the time of the Board is going to be taken up with dealing with them leaving precious little time for it to deal with other matters which are part of its functions given that the Board will probably only meet, at the maximum, about 10 or 11 times per annum.</li> <li>There is also a serious question from the point of view of the Supreme Courts with respect to their blind acceptance of certificates of compliance issued by the Board especially if the Board is to be constituted as presently proposed. As Robin Szabo points out in her submission, one of the advantages of a local admission board such as the NSW LPAB is that it includes three Supreme Court Judges, of which two are respectively the Chair and Deputy Chair of the Board. This system ensures that the Supreme Court, as the admitting authority, can be satisfied that the applicants recommended by the LPAB for admission have passed the fit and proper test. That will not be the case with the proposed Board. I am aware that there are serious misgivings, at least in the upper echelons of the NSW Supreme Court, that it will lose that representation on the body that certifies applicants who have made disclosures as fit and proper for admission. There is a tension here that needs to be resolved for otherwise the Task Force cannot assume that the Supreme Courts, and</li> </ul>

	certainly the NSW Supreme Court, will necessarily accept certificates of compliance at face value.
<b>Independence of profession</b>	
Justice Tobias	<ul style="list-style-type: none"> <li>I have already made comments in relation to this issue which is absolutely critical under “General Comments”. The loss of independence of the Profession as currently proposed and which is inconsistent with the original and publicly stated objective of the proposed reforms, is a matter of fundamental significance to the whole process.</li> </ul>
Robert Milliner	<ul style="list-style-type: none"> <li>It is critical that the reforms preserve the independence of the profession. The Bill raises significant concerns in this regard, due to the fact that there is no guarantee that a majority of the Board be practising lawyers and that the appointments are to be made by SCAG.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>The objectives of the National law should include a specific sub-section which reads ‘promoting and protecting the independence of the profession.’ See Part 1.1 above.</li> </ul>
Peta Spender	<ul style="list-style-type: none"> <li>See comments in the Composition section above.</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>ACLA is concerned that the Board’s authority may be fettered by SCAG and believes the Law must ensure the Board can operate independently to safeguard genuine separation of powers.</li> </ul>
Noela L’Estrange	<ul style="list-style-type: none"> <li>Critical to maintain the independence of the profession in the policy making body to ensure workable outcomes for the profession. This is also a critical matter in the consumer interest.</li> </ul>

<b>Role of SCAG</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• In order to maintain the independent standing of the legal profession, the Board needs to remain independent of government. It is inappropriate for SCAG to have a supervisory role in relation to the Board.</li> <li>• SCAG should not have the ability to give directions on policy matters to the Board.</li> <li>• National Rules of the kind described in section 9.1.3 (eg conduct rules) should not be subject to approval by SCAG. The requirement that SCAG has approval and veto rights threatens the independence of the profession.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• See comments in Appointments section above, which suggests that SCAG should take into account criteria in making appointments to the Board.</li> </ul>
Justice Tobias	<ul style="list-style-type: none"> <li>• SCAG should have no role except in accordance with my amendment to clause 8.1.2 of the draft Law and to its power to appoint, through the host Attorney General, not more than two members of the Board.</li> </ul>
Noela L'Estrange	<ul style="list-style-type: none"> <li>• Appointment of Board on nomination of LCA, ABA and COJ.</li> <li>• Limited direction of policy development.</li> <li>• Ought not have the power to direct policy (8.1.2 (3))</li> </ul>
<b>Delegations</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• The delegation model entrenches the status quo of administration on state and territory lines. This is a lost opportunity to provide, over time, flexibility to achieve efficiencies through the use of resources in other ways. For example, over time, there may be efficiencies to be gained from work relating to one jurisdiction being performed by resources available in another jurisdiction.</li> <li>• The mandatory delegation to existing state bodies, especially in respect of the Ombudsman's powers, raises the question whether those bodies, as currently constituted, have the necessary skills for those functions, given they may not originally have been appointed to fulfil those functions. There needs to be an analysis of the various national functions (Board and Ombudsman) and whether the intended state delegates currently perform those functions and are adequately qualified and equipped to do so.</li> <li>• The call-in powers of the Ombudsman and Board are too limited. To achieve a meaningful national system, it is critical</li> </ul>

	<p>that there be consistency and uniformity in decision-making. On the basis of the draft Bill, the main mechanism available to influence this is the call-in powers, which are currently limited to specific circumstances. There should be a discretionary call-in power in relation to all activities of the local representatives.</p>
ALCA	<ul style="list-style-type: none"> <li>• If the co-regulatory model is to be fully adopted, then each of the existing relevant state-based bodies should have delegated authority to undertake the administration of these functions, and follow the appropriate protocols in their interaction with the National Legal Services Board.</li> <li>• The protocols would be determined by the Board and take a ‘minimalist’ approach, but dovetailing where relevant with existing processes, working in consultation with the state-based professional bodies.</li> <li>• In relation to local representation of the Board, current state-based regulatory bodies eg Legal Services Commissioner should continue to perform their functions for professional conduct matters.</li> </ul>
Justice Tobias	<ul style="list-style-type: none"> <li>• As I understand the draft Law, essentially the only functions of the Board which are to be delegated to its local representatives in all jurisdictions, is the issuing of Australian practising certificates. Although the draft Law does not identify who those local representatives should be, so far as NSW is concerned they should be the Council of the Law Society and the Council of the NSW Bar Association. See further under Part 3.3.</li> <li>• Clause 8.2.5(1)(e) should be deleted as it is inimical to the independence of the Board, let alone the profession.</li> <li>• Clause 8.2.5(2) creates some issues in so far as it would empower the Board to delegate to a member of the Board’s staff any of the Board’s functions relating to the admission of Australian lawyers. It would be entirely inappropriate for such a person to have delegated to him or her the power to determine, for instance, whether a particular applicant was a fit and proper person; even more so where there has been other than a minor disclosure by that person.</li> <li>• As to clause 8.2.5(2)(c), I do not understand that the draft National Rules currently provide for the specification of any particular entity. In my view there should be some limit on this power for otherwise the Board could delegate to an entirely inappropriate entity any of its functions relating, for instance, to the admission of practitioners. The draft Law itself should indicate what entities it has in mind rather than leaving it to the unfettered discretion of the Board. This would be a matter of particular significance if the composition of the Board was to remain as currently proposed. The complaint loses some of its force if the Board is composed in the manner I have suggested.</li> </ul>

<b>Advisory committees</b>	
ACLA	<ul style="list-style-type: none"> <li>• ACLA believes there should be:               <ul style="list-style-type: none"> <li>a) a general power authorising the establishment of advisory committees, and</li> <li>b) a broad outline on the process for creating advisory committees.</li> </ul> </li> <li>• The subject areas for establishment should be at the discretion of the Board to enable a degree of flexibility and discretion. The Board may take advice from the Attorney General on certain matters for consideration, but this discretionary also. The advisory committees should have a direct reporting relationship to the Board.</li> <li>• ACLA believes it is in the public interest, independence of the Board be upheld in this situation to minimize politicization of policy matters for Board consideration.</li> </ul>

### PART 8.3

<b>ISSUE: National Legal Services Ombudsman</b>	
<b>General comments</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• The proposed powers of the Ombudsman are too wide and confuse the investigative/mediating role that the Ombudsman should perform with a quasi-judicial role.</li> <li>• There is no detail about the qualifications or expertise that the Ombudsman must possess. The role is a very important and wide-ranging one, so it is critical that these requirements be spelled out. The person appointed must be appropriately skilled and qualified to perform all those functions. For example, the person appointed should at least have legal qualifications and a minimum number of years experience as a practising lawyer (say, 10 years, consistent with other like senior appointments).</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• As the Commonwealth Ombudsman and others have pointed out, the name 'Ombudsman' is misleading and inappropriate given the powers and functions that the draft Law confers upon the office and given the well established and different roles down the eastern seaboard at least of Legal Services Commissioners. The name 'National Legal Services Ombudsman' should be replaced by the name 'National Legal Services Commissioner'.</li> </ul>

Peta Spender	<ul style="list-style-type: none"> <li>In my view, the Ombudsman should be called the "Legal Services Commissioner". I have some sympathy with the submission made by the Commonwealth Ombudsman as to the confusion caused by the nomenclature in this proposal.</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>ACLA has no view on the term 'Ombudsman' and is comfortable with the title, if the functions of the complaints handling body are consistent with the commonly understood role of an 'Ombudsman'.</li> </ul>
Noela L'Estrange	<ul style="list-style-type: none"> <li>I see no need for the regulatory body to be entirely separate. It should be part of the overall Board function – which would be appropriately resourced for its work. Appropriate safeguards in place for the separate work undertaken. The Board is stated to have the responsibility of monitoring and reviewing the exercise of the O'man's functions. Logically, why should the O'man not report to the Board, which has overall responsibility for the policy framework of which regulation is part?</li> <li>I object to the mixture of criminal penalties with the civil penalties for professional misconduct or unprofessional conduct vesting in the regulator. Criminal penalties arise from charges (eg fraud) which are separate to the actions taken against a practitioner for professional misconduct or unprofessional conduct. Criminal sanctions have always been a judicial function, and there has been no evidence to support this fundamental change.</li> <li>The chapter heading of Chapter 5 should be revised. Professional discipline (even though it might arise in a "mixed complaint") may or may not be one which ought to be dealt within the broader approaches to dispute resolution which arise from consumer complaints – for which the purpose of the framework is to provide for timely and effective resolution outlined in 5.1.1.(a). Professional discipline is a separate purpose outlined in 5.1.1.(b).</li> </ul>
Justice Tobias  (comments made by Garry McGrath, Secretary of the NSW Bar Association)	<ul style="list-style-type: none"> <li>This is an unnecessary additional level of administration.</li> </ul>

Powers and functions	
Robert Milliner	<ul style="list-style-type: none"> <li>• The Ombudsman’s powers should be limited to investigative/mediating functions, rather than decision-making functions. The combination of all these functions confuses the role of the Ombudsman.</li> <li>• However, we accept that it may be appropriate for the Ombudsman to have some power to make determinations in respect of what are genuinely small consumer matters (which should exclude matters involving commercial or government clients). The current description of a consumer matter is too wide.</li> <li>• In the context of disciplinary matters, the Ombudsman must not have the power to make findings of unsatisfactory professional conduct. Disciplinary matters are too serious to be dealt with in a peremptory fashion by the Ombudsman. They should continue to be dealt with by appropriate tribunals. The Ombudsman should have the role of investigating the complaint and initiating proceedings in the tribunal where that action is warranted.</li> <li>• It is critical that the Model Law flexibility in relation to the summary disposal of complaints be retained. For example, the Ombudsman should have discretion to dispose of matters where the lawyer is generally diligent and otherwise has a good track record.</li> <li>• In the interests of fairness and justice, there must be rights of appeal on the merits from decisions of the Ombudsman.</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• Part 8.3 should include words requiring the Ombudsman to promote consistency in the implementation and application of the Law and related policies and practices by the Ombudsman’s local representatives and their delegates (if any).</li> <li>• It is important to promote public confidence in the Ombudsman and his/her local representatives that the local representative be an independent body wherever possible. It is also important that responsibility for receiving and dealing with complaints, for conducting compliance audits and for conducting trust account investigations is consolidated in the one regulatory body. The three functions are complementary - they are all investigative and information gathering functions and are all directed to the same ultimate purpose of promoting, monitoring and enforcing appropriate standards of conduct. The information and perspective gained in the exercise of any one of them should be readily available to inform the exercise of any of the others, and in particular to help the Ombudsman to identify the law firms most likely to put consumers and the public at risk and to direct his or her scarce resource there. Section 1.3.4 should be amended to reflect this policy intent.</li> </ul>
Peta Spender	<ul style="list-style-type: none"> <li>• The Ombudsman has functions which go well beyond the conventional understanding of the role of an ombudsman, for example he or she has powers which are more in the nature of judicial powers e.g., the power to make binding determinations, to make compensation orders, to order parties to "attend mediation in good faith" (5.3.2(2)) and to order a respondent to pay a fine up to \$25,000 (5.4.5).</li> </ul>

Relationship with the Board	
Robert Milliner	<ul style="list-style-type: none"> <li>It is unclear what controls exist over the Ombudsman. Considerations of independence make it inappropriate for the Ombudsman to be subject to the oversight of SCAG. The Board should have greater oversight and authority over the Ombudsman, including a power to direct it to call in a matter.</li> </ul>
Relationship with SCAG	
Robert Milliner	<ul style="list-style-type: none"> <li>The relationship of the Ombudsman to SCAG is problematic and is a concern for the independence of the profession. It is inappropriate for the Ombudsman to be subject to SCAG's oversight. While section 8.3.5 specifies that the Ombudsman is not subject to the control and direction of SCAG or others in relation to dealing with any specific case, as a matter of principle, oversight by the executive government is inappropriate. We suggest that the proper body to oversee the Ombudsman is the Board and that the Board's powers in this regard should be more expansive.</li> </ul>
Justice Tobias	<ul style="list-style-type: none"> <li>The Legal Services Ombudsman (the name of which should be changed to Legal Services Commissioner) should be independent of SCAG: see the comments above with respect to clause 8.1.2 of the draft Law. Accordingly, clause 8.2.5(1)(e) should be deleted. If that amendment is made then clause 8.3.5 probably becomes unnecessary although it would not be out of place for there to be a general provision in respect of both the Board and the Ombudsman that neither are subject to the control and direction of the Standing Committee or the host Attorney-General in relation to any of their functions under the draft Law.</li> <li>As a consequence of the foregoing and the necessity for the Ombudsman to be independent of SCAG, clause 8.3.7(1)(d) should also be deleted.</li> <li>Clause 8.3.7(2) is a matter of some concern given its width. In effect, the Ombudsman could delegate all of his or her functions under Chapter 5 to a member of his or her staff. This would clearly be inappropriate. In any event, the Ombudsman or his or her local representative (eg, the NSW Legal Services Commissioner) should have power to delegate any of his Chapter 5 functions to a professional association. As to clause 8.3.7(2)(c), I have already made comments on the equivalent provision for the Board (clause 8.2.5(2)(c)) and those comments also apply here.</li> </ul>
Noela L'Estrange	<ul style="list-style-type: none"> <li>Should be reporting through the Board.</li> </ul>

<b>Delegations</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• See comments made under the National Board Delegations section (Part 8.2).</li> </ul>
John Briton	<ul style="list-style-type: none"> <li>• Agrees with the Taskforce’s preference that ‘one body only should be nominated as the Ombudsman’s delegate in each jurisdiction and, where possible, this should be an independent body’ (discussion paper dated 30 October 2009).</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>• ACLA believes there should be high level cooperative guidelines and supporting protocols which may be created under the authority of a general power in the Law to ensure enduring consistency and uniformity in delegates’ decision-making and exercise of the Ombudsman functions.</li> </ul>
<b>Local representation of the Ombudsman</b>	
ACLA	<ul style="list-style-type: none"> <li>• For consumer-based complaints, there may be two options contingent on capacity and cost: <ul style="list-style-type: none"> <li>a) Leverage existing state-based consumer-claims infrastructure, with an annex function devoted to consumer complaints handling of the legal profession. The incremental infrastructure costs may be lower than establishing a separate new area – however capacity and case management workload might be an issue.</li> <li>b) To establish a new ‘state-based’ franchise of the National Ombudsman. We expect this will be more expensive and may create more inefficiencies with additional administrative interfaces, and hence more ‘red-tape’.</li> </ul> </li> </ul>

## Part 9.1

<b>ISSUE: Legal Profession National Rules</b>	
Robert Milliner	<ul style="list-style-type: none"> <li>• SCAG should not have the power to approve/veto conduct rules. These should remain a matter for the profession, independent of government.</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>• There should be no differentiation between in-house and external lawyers regarding the rights and obligations under the National Rules. The application of some rules must be modified for application to in-house lawyers because of their differing operating environment. For example, the requirement to undertake CLE for trust accounting or legal practice development should not apply for in-house lawyers and nor should there be restrictions on in-house lawyers acting for related entities and joint ventures.</li> </ul>

Justice Tobias	<ul style="list-style-type: none"> <li>• I have a particular concern with respect to the width of clause 9.1.4. Having said that and subject to the alternative suggested below, I am prepared to accept that some form of veto or disallowance by the SCAG should be accommodated.</li> <li>• However, clause 9.1.4(2) gives SCAG an unfettered power of veto which is inimical to the independence of the profession. Further, SCAG is not even required to give reasons for the exercise of its veto power.</li> <li>• By way of contrast, under s 716 of the Legal Profession Act 2004 (NSW), the Attorney-General may, by order published in the Gazette, declare any legal profession rule or any part thereof inoperative if: <ul style="list-style-type: none"> <li>a) “the Commissioner has reported to the Attorney-General that the rule is not in the public interest, or</li> <li>b) the Attorney General is of the opinion that the rule imposes restrictive or anti-competitive practices that are not in the public interest or the rule is not otherwise in the public interest.”</li> </ul> </li> <li>• Given that the Board under the draft Law relevantly takes the place of the Commissioner under the NSW Act, I suggest that the power of veto of SCAG should be confined to those rules submitted to it by the Board where SCAG is of the opinion that the rule or any part thereof <p style="margin-left: 40px;">“imposes restrictive or anti-competitive practices that are not in the public interest or which is otherwise not in the public interest because it is inimical to one or more of the objectives of this Law as set out in clause 1.1.3”.</p> </li> <li>• Alternatively, and preferably, why not leave any question of anti-competitive or restrictive rules to the competition watchdog – the ACCC? It is the expert body in this area whereas, with respect, SCAG is not. Furthermore, the ACCC is independent of the Executive and, therefore, leaving this issue to it is consistent with the necessity to maintain the independence of the profession from the Executive. Finally, it should be noted that the original NSW Bar and Law Society rules as they were in the mid-90’s were re-written to exclude any anti-competitive or restrictive rules as a consequence of the not so gentle urgings of the Trade Practices Commission (as the ACCC then was) and, in particular, upon the insistence of its then Chair, Professor Fels. He was very persuasive! There has not been a suggestion since those rules were re-written that the Conduct Rules of the NSW Bar Association or Law Society were or are in any way anti-competitive or restrictive.</li> <li>• Consideration should also be given to including a provision such s 717 of the NSW Act.</li> </ul>
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## Part 9.2

<b>ISSUE: Australian Legal Profession Register</b>	
John Briton	<ul style="list-style-type: none"> <li>• Rule 13.2.1 should clarify whether a determination of unsatisfactory professional conduct by the Ombudsman under section 5.4.5 is a disciplinary order and as such appears on the register. That is not clear at the moment.</li> </ul>
ACLA	<ul style="list-style-type: none"> <li>• ACLA believes there should be a time limit for conduct notations to appear on the Register.</li> </ul>
Justice Tobias (comments made by Robin Szabo, Executive Officer, LPAB)	<ul style="list-style-type: none"> <li>• The NLSB is to maintain an Australian Legal Profession Register containing details of Australian Lawyers, Australian Legal Practitioners and Australian-registered foreign lawyers. (2.2.7) The Supreme Court must maintain a roll of Australian lawyers with a reference to conditional admissions.</li> <li>• LPAB currently maintains the roll for the NSW Supreme Court. There appears to be considerable increased administration and costs associated with the proposed new regime. The NLPB issues a compliance certificate (with or without conditions); after admission the Supreme Court or delegate (Board) must advise the NLPB; the NLPB must be advised of the issue of practising certificate; if conditions are breached, the status of an Australian-registered foreign lawyer changes, a temporary admission expires or a condition imposed on practise is fulfilled or breached, there would need to be a constant exchange of information to ensure accurate and consistent details are maintained</li> <li>• The procedures for maintenance of consistency and updating of names across rolls, registers and websites requires closer consideration.</li> </ul>

## Part 9.5 and 9.6

<b>ISSUE: Injunctions and penalties</b>	
Peta Spender	<ul style="list-style-type: none"> <li>• I couldn't see the references to civil penalties in the provisions of the National Law and it might be worth inserting a section which lists all the civil penalty provisions. For an example, see section 1317E of the Corporations Act.</li> </ul>
ALCA	<ul style="list-style-type: none"> <li>• From a public interest perspective, ACLA is keen there be a balanced approach to dealing with contraventions and conduct matters, not just a punitive approach.</li> <li>• National Ombudsman may have a role in collaboration with local law societies and associations such as ACLA to provide guidance on 'best ethical practice' and self-checking mechanisms to pre-empt potential risks of unethical conduct.</li> </ul>

## Part 9.7

### ISSUE: Destruction of documents

Robert Milliner

- The Bill adopts a provision, currently in the Victorian Act, which allows a law practice to destroy documents relating to a matter after 7 years, but only if the law practice has been unable despite using reasonable efforts to get instructions from the client about how to deal with the documents. It is not practical for firms to seek client instructions in this way.
- The draft LCA Conduct Rules provide a more practical approach and have reversed the default position, so that documents may be destroyed after 7 years unless there are client instructions to the contrary. The Bill and the Conduct Rules are therefore in conflict, but the position in the Conduct Rules is preferable.

## LEGAL PROFESSION NATIONAL RULES

### CHAPTER 2

#### ISSUE: Unqualified legal practice

Justice Tobias	<ul style="list-style-type: none"> <li>• With respect to clause 2.2.1 of the draft Rules, I suggest the following:             <ul style="list-style-type: none"> <li>a) Under Item e – Barrister – in column 4 insert after the word “engages” in the second last line, the word “only”.</li> <li>b) Delete Item 4 and insert it in Item 3 so it reads “Barrister, counsel”.</li> </ul> </li> <li>• The reason for the suggested amendment in (b) above is that barristers in the courts are referred to as “counsel”. It would be misleading for all Australian legal practitioners to be able to call themselves by the title “counsel” when they are not barristers.</li> </ul>
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### CHAPTER 3

#### ISSUE: Admission

Peta Spender	<ul style="list-style-type: none"> <li>• The emphasis upon or whether an applicant for admission is under (a) and (m) "currently" a fit and proper person and "currently" unable to carry out satisfactorily the inherent requirements of practice is good, particularly when linked back to definitions of professional misconduct under 5.4.3 of the National Law.</li> </ul>
Justice Tobias	<ul style="list-style-type: none"> <li>• Clause 3.4.1(c) should have added to it the following further sub-paragraph:             <ul style="list-style-type: none"> <li>“(iv) the circumstances under or pursuant to which the offence was committed”.</li> </ul> </li> <li>• One thing the draft Rules do not seem to deal with under Chapter 3 is the necessity for an applicant to make application in a prescribed form. Part 4 of Chapter 3 provides for the matters that a Board has to consider, but there is nothing in Chapter 3, so far, that either sets out the information an applicant should provide in his or her application form or which provides for a prescribed form which would contain the relevant requirements to be completed by the applicant.</li> </ul>
Justice Tobias (comments made by Robin Szabo,	<ul style="list-style-type: none"> <li>• The draft rules refer to approved tertiary academic course and approved providers of practical legal training. The Board’s Diploma in Law course is accredited under its own rules to satisfy the academic requirements for admission in NSW; some other jurisdictions accept completion of the Board’s exams by overseas applicants as compliance with their requirements</li> </ul>

Executive Officer, LPAB)	<ul style="list-style-type: none"><li>• In December '09 the Board reviewed a draft accreditation template and recommended that it thought it prudent to await the outcome of the establishment of the new Tertiary Education Quality and Standards Agency (TESQA) that will work with education providers to develop objective and comparative benchmarks and to carry out rigorous audits and consider if there is any intersection between TESQA requirements, Australian Law School Standards published by CALD and accreditation requirements.</li></ul>
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## CHAPTER 6

### ISSUE: Business structures

John Briton

- See earlier comments under Part 3.7: Incorporated and Unincorporated Legal Practices

## CHAPTER 11

### ISSUE: Continuing Professional Development

ACLA

- There should be uniform national rules regarding the undertaking of continuing legal education. However, the mandatory continuing legal education requirements for in-house counsel should be tailored to reflect the specific needs of in-house practice (i.e. in both the public and the private sectors).

Noela L'Estrange

- In relation to 4.7.4 CPD Rules, the Board should not assume the responsibility for approving courses or providers of Continuing Professional Development. Market forces currently decide these issues, and it is a matter of detail and effort to which the Board should not be drawn at all.
- In most jurisdictions the acronym CPD refers to *Compulsory* professional development, rather than continuing PD. The elements detailed in 11.2.2(1) (a) relate to the compulsory elements of a general PD requirement.
- In Chapter 11, the reference in 11.2.2 (b) exists in no jurisdiction other than NSW, is not part of the national CPD requirements which have been developed across all jurisdictions. 11.2.2(b) should be deleted from the Rules.
- In general terms of consumer protection, the Rules may in time, extend the unit requirements for CPD

## CHAPTER 13

### ISSUE: Australian Legal Profession Register

Noela L'Estrange

- 13.2.1 states that the National Register, maintained by the Board, contains details of disciplinary orders. What public interest is there in making publicly available details of orders made under 5.4.5(1) (a – e)?
- In relation to 5.4.5 (1) (f) – suggest that only judgements should be noted on the register.
- 5.4.5 (1)(e) – notification should only appear on the Register once the decision has been made by the Board, not on the

	<p>order recommending it.</p> <ul style="list-style-type: none"><li>• Potential for the process to be used to “push” a practitioner to settle a matter to avoid it appearing on the register. If the consumer interest is to be served, would a number of settlements made on similar circumstances not be more in the public interest than a single instance in which there was a determination?</li><li>• Propose that information does not go to the Register until either the expiry of any appeal time period, or an appeal decision has been made.</li><li>• How long does the information remain on the Register – suggest removal after 12 months.</li><li>• Concern about orders from O’man appearing on the public Register – this may have a significant effect on the practitioner’s business for a relatively minor matter. Again – what public interest is being served?</li></ul>
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**OTHER ISSUES (INCLUDING GENERAL COMMENTS)**

**ISSUE: OTHER****General comments**

John Briton	<ul style="list-style-type: none"><li>• As mentioned previously (under General Comments re Part 1.3 and 8.2: National Legal Services Board), section 1.1.3 should be amended to commence with the words ‘The objectives of this Law are to promote and protect public confidence in the legal system, the administration of justice and the rule of law, and to... [etc]’, and then to include a specific sub-section which reads ‘promoting and protecting the independence of the profession.’</li></ul>
Noela L’Estrange	<ul style="list-style-type: none"><li>• The skills and competencies sought for the position of CEO and Chair of the Board should align to those of a “start up business”. Similarly, there should be a role description for the O’man (however named) which highlights the importance of the role being the one responsible for national consistent application of the framework in all jurisdictions. This is not a normal regulator role (operational) –it is the national manager of the current regulatory (and co-regulatory) bodies – it is a leadership and coordinating role. That is the type of experience which ought to be sought.</li></ul>
Justice Tobias (comments made by Garry McGrath, Secretary of the NSW Bar Association)	<ul style="list-style-type: none"><li>• The primary impetus for change, frankly speaking, comes from a limited number of national and international firms which are unrepresentative of the majority of legal practitioners (or the majority of their clients).</li><li>• The objectives of the present proposed scheme (and the criticisms of the present multi-state legal profession) could in substantial measure be met otherwise then by adoption of the proposed centralised scheme.</li><li>• As a general criticism, the proposed scheme creates an unnecessary additional level of (federal) administration and creates additional costs and requires or is likely to require an additional levy or fee.</li></ul>
Carolyn Bond (comments made by Catriona Lowe, Consumer Action Law Centre and Jenni Mack, CHOICE)	<p><i>Transition to a truly national system</i></p> <ul style="list-style-type: none"><li>• We are concerned the draft bill will entrench the role of state agencies and does not provide the necessary capacity to continue to drive reform. The system must be set up so that it can relatively quickly transition to a truly national body. We suggest all references to the national bodies “must delegate” should be removed and replaced with “may delegate”.</li></ul>

<p>ACLA</p>	<ul style="list-style-type: none"> <li>• The key messages ACLA would like to make the Taskforce aware of are the following: <ul style="list-style-type: none"> <li>○ <i>Consumer Advocates and Practitioners</i> - In-house lawyers are unique in the legal industry for a number of reasons, the most obvious is that in-house lawyers are both <b>users</b> and <b>practitioners</b> of legal services. In-house lawyers represent a significant portion of Australian businesses and government departments/entities who purchase legal services – these business include small to medium enterprises, large corporate and multinationals and most government departments and instrumentalities. Therefore in-house lawyers have unique insight to the practical application of law in communities and understand the drivers and needs of the purchasers of the legal services;</li> <li>○ <i>In-house Perspectives Must be Represented on the Board</i> - The broader legal community will not take the specific needs and requirements of in-house lawyers (and their employers) into account when making decisions on matters which expressly effect in-house lawyers. ACLA does not believe this is an overstatement and has formed the view over a number of years experience including the relatively recent reversal of well established rights when legal practice regulation is updated (such as the reversal of representation rights when the Victorian Legal Profession Act 2004 (and rules) was drafted and implemented).</li> </ul> </li> </ul>
<p><b>Maintaining uniformity over time</b></p>	
<p>John Briton</p>	<ul style="list-style-type: none"> <li>• It will be important in the interests of maintaining uniformity over time that the COAG agreement which underpins the National Legal Profession Law precludes the states and territories from regulating aspects of the delivery of legal services under other local legislation which is not subject to the agreement. The Queensland <i>Personal Injuries Proceedings Act 2002</i>, for example, regulates the conduct of lawyers by imposing restrictions on the advertising of personal injury services in ways that are inconsistent with the requirements under counterpart legislation in the other states and territories. Maintaining uniformity will require a retrospective fix (by reviewing the relevant provisions in other legislation) in addition to a prospective fix (by precluding the introduction of any new such legislation without national agreement).</li> <li>• Uniformity could also be compromised if the decisions and administrative process of the Board’s and/or the Ombudsman’s local representatives remain subject to local review bodies including local Ombudsmen, Information Commissioners and like bodies.</li> </ul>
<p><b>Funding (eg costs of national bodies, costs to practitioners)</b></p>	
<p>Robert Milliner</p>	<ul style="list-style-type: none"> <li>• The funding of the new system does not appear to have been worked out at this stage. The ACIL Tasman analysis is not convincing in the absence of any direction about the rationalisation of existing regulatory bodies.</li> </ul>

Noela L'Estrange	<ul style="list-style-type: none"> <li>• Costs information about the proposed new system must be made public as part of the consultation process. There are no obvious savings identified that will contribute to the new costs.</li> <li>• There must be clarity and transparency about the costs of the 2 new bodies - and how they are to be met - as part of signing off the draft Bill and Rules.</li> </ul>
<b>Potential costs for single jurisdiction law practices</b>	
Noela L'Estrange	<ul style="list-style-type: none"> <li>• Any additional impost on practices to pay for a new regulatory system – with no control over future costs, including the fact that PC fees may be set, in time, nationally, is not a way in which small businesses can operate with any great confidence. There needs to be clarity about how many regulatory bodies there are, and how the National Board will address the reduction in overall costs over time (certainly the first 3-5 years would be a normal business expectation).</li> <li>• The powers of the Ombudsman to require compliance audits will be extended to all practices (4.6.1). There is nothing in the costs to indicate how this extension of current regulatory power will be funded.</li> </ul>
<b>Areas of substantive change where change not necessary</b>	
Peta Spender, Justice Tobias and Noela L'Estrange	<ul style="list-style-type: none"> <li>• Section 3.2.7 – privilege section doesn't acknowledge in-house and government lawyers</li> </ul>
<b>Continuing professional development (amount, how providers approved etc)</b>	
Noela L'Estrange	<ul style="list-style-type: none"> <li>• Suggest that over time, in the interests of consumer protection, a comparative look at compulsory PD models from other professions might indicate the need to increase the 10 units. This will also require a reconsideration of "what counts", similar to other professional bodies – eg CPS, GP etc.</li> </ul>
<b>Existing inconsistencies in PLT and Admissions Boards</b>	
Noela L'Estrange	<ul style="list-style-type: none"> <li>• It is unclear on the current drafting what would be the role of a local admissions board.</li> </ul>

## Legal Profession National Rules – Solicitors’ Rules 2010

John Briton has made comments on the Solicitors’ Rules. These comments have been forwarded to the Law Council of Australia.

ACLA

- Section 11.6: ACLA believes the practice of building “effective information barriers” in law practices is subject to both accidental and sometimes, deliberate abuse. The Rules should therefore require that such barriers are open to audit by both the client and an external independent body, such as a law society /legal services board. Information barriers should not be permitted at all unless both affected clients have given prior informed consent.
- Section 12.3: A prohibition preventing an in-house lawyer from borrowing or assisting an associate to borrow money from a client/former client unless that client is (vi) “the employer of the solicitor”, has little relevance in the in-house context because the client often *is* the employer.

## Appendix A – Statistics

Contribution from Justice Tobias (provided by Robin Szabo, Executive Officer, LPAB).

Obtained from Admitting Authorities together with some details as to how applications and disclosures are dealt with by each jurisdiction.

	<b>NSW</b> 2009 (admissions)	<b>WA</b> 1 Mar 09-28 Feb 10 (admissions)	<b>Vic</b> 2009 calendar year	<b>QLD</b> 2009 calendar year	<b>SA</b> Apr 09-Mar 10	<b>ACT</b> 2009	<b>TAS</b> 2009	<b>NT</b>
Admissions /Applications	1839 (747 to date in '10)	404 (excludes MRA)	1457	833	324 local	271	79	39
Disclosures	244 (116 to date in '10)	40 (est)	1384 (95%)	513	43	No stats kept	N/A	
Minor	197 (86 to date in '10)				39			3
Substantial /serious	47 (30 to date in '10)	5	59	134				2
Early Suitability applications	2 (1 to date in '10)	1 (since Mar 09)		8	4	9 (since Jul 06)		1
Re-admission applications	2 (3 so far in '10)	12		0				
Mutual Recognitions	38 (NZ)		33		61		6-10	6

## **New South Wales**

All disclosures are included in Board agenda papers. Details of minor matters are provided in summary and all of the relevant documents for matters considered to be of a more serious nature are included in agenda papers. In most cases, decisions are made at the Board meeting, however, in some instances an applicant may be asked to provide further information. In 2009, consideration of three applications with significant disclosures, were deferred so that a Board member could prepare a report for the Board to consider at a future meeting. Board members also prepare reports for re-admission and early suitability (s26) applications after the views of the Law Society and Bar Association have been received. The Bar Council prepares a comprehensive report for the Board. Applicants must serve copies of readmission and early suitability application on both professional bodies. It is estimated that 85% of applications are submitted by applicants in person. In 2010, NSW has already received 3 re-admission applications and 1 application for early suitability.

*Note: NSW admission figures do not include refused applications.*

## **Victoria**

The 59 disclosures considered significant were referred to a Board hearing. Five of those were referred to a formal Special Hearing with transcript and Counsel is engaged to assist the Board. The Board heard an additional 62 technical applications under the Admission Rules for abridgements, approvals, variations etc. The decision to refer a disclosure to the Board is made by the CEO or Registrar. All others are noted as minor and dealt with administratively. Victoria requires all admission applications to be submitted in person.

## **Western Australia**

The Executive Director is delegated to consider a person suitable notwithstanding a disclosure is made. Minor convictions eg traffic convictions are considered by the Executive Director. Any "suitability matters" as set out in the Act or other matters such as academic misconduct are considered by the Admissions and Registrations Committee of the Board on a case by case basis. Initially the Committee considers the documents provided with the application ie police certificate, two certificates of good standing and statutory declaration or letter and any other material provided with the application. The Committee may make a determination or request further information from the applicant or third parties, hold an informal meeting with the applicant or a formal enquiry to determine whether the applicant is fit and proper.

## **Queensland**

All applications, including suitability matters are listed on an agenda list which is distributed to Board members. The Secretary has discretion to determine whether a suitability matter is minor or major, and whether the Board needs to consider certain applications based on the seriousness of the suitability. "Minor" matters such as traffic offences, regulatory offences such as DUI, careless driving etc are listed on the agenda list for Board members to be aware of. "Major" or more serious matters such as possession or supply of drugs, matters involving dishonesty, bankruptcy, academic misconduct etc are written onto agenda papers and the documentation circulated to Board members for consideration.

## **South Australia**

All disclosures are considered by Board on the basis of the disclosed documents included as part of the statutory declaration in support of admission at the monthly Board meeting. In some of the more serious disclosures, especially medical, the Board may defer consideration pending receipt of further materials

eg detailed medical/psychological reports. In some cases an applicant may be required to attend before the Board (with counsel if desired) to answer questions in relation to the matters disclosed. Where possible the Board deal with the application at first instance.

### **Australian Capital Territory**

No statistics kept as to disclosures, however, the most common are traffic matters such as speeding and DUI. More recently disclosures of plagiarism have become reasonably common. Of the six admission ceremonies held annually, there is usually at least one applicant in each group who has made a significant disclosure. Minor disclosures are noted by the Board, more significant can involve seeking more information from the applicant and the Board always directs that the disclosures are brought to the attention of the court.

### **Tasmania**

No statistics available on disclosures, however, minimal numbers. In the last 7 years, there is no recollection by the Law Society of it making any objections following service of disclosures by admission applicants. Most recent cases have mainly related to academic misconduct. The applicants have been advised that the Law Society will not object to their application provided the matter is disclosed to the court. "Suitability matters" have only been applied following introduction of the new Act, the obligation to make disclosures prior to the Act existed under common law.

### **Northern Territory**

Of the two serious disclosures, one ultimately withdrew her application, and the other has been referred to the Supreme Court. Where disclosure are traffic or the like, the Board does not usually take any action, provided that full details are provided in the supporting affidavit to the application, and will provide a certificate – which is what happened in the three with minor disclosures. If the Board has reservations, it will defer consideration of the application to the next meeting, and will direct the Registrar to contact the applicant and provide more information.

With respect to the early suitability, the Board request more information from the applicant, including certificates of good fame and character from persons who indicated they were aware of the matters disclosed. The applicant was reluctant to do so and withdrew his application.