THE AUSTRALIAN BAR ASSOCIATION

4 August 2010

The Hon Robert McClelland MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney-General

Legal Profession National Law – Consultation Draft

The Australian Bar Association ('the ABA') welcomes the opportunity to participate in the consultation process for the proposed Legal Profession National Law. The ABA supports the general thrust of reform in the direction of uniform legal professional structures in all States and Territories. The major objectives are commendable – simplified uniform legislation and regulation, national standards policies and practices where practicable, freedom of movement between jurisdictions to foster a truly national profession, and clear and accessible consumer protection.

Several of the topics canvassed in the draft Bill command in particular the attention of the ABA. Many of the topics, however, are of primary concern only to solicitors, for example, the Fidelity Fund and Trust Accounts.

The ABA has confined its submissions to those topics of particular interest to members of the Bar.

The Association's detailed submission is attached. The submission includes comment on problems that have arisen in the day-to-day application of the Model Law, and which have been carried forward into the proposed National Law.

In undertaking the task of reviewing the structure of the national legal profession, Governments should be mindful of the importance of achieving four fundamental objectives:

- the independence of the judiciary and their control over the admission process;
- the preservation of the independence of the national legal profession from dependence upon, or control by, the Government of the day;
- the maintenance of the profession's high professional standards; and
- the preservation of the competitiveness of the legal profession in the legal services market.

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The work performed by members of the Bar differs from, but is complementary to, the work performed by solicitors. So it has been for centuries and will continue to be.

Colonial Australia saw the establishment of three different structures for the legal profession, namely:

(i) a profession which was formally divided into barristers and solicitors in Queensland and New South Wales;
(ii) a profession which, at a formal level, was fused but practised separately in Victoria; and
(iii) a profession which was fused both formally and in practice in the smaller colonies of South Australia, Western Australia and Tasmania.

Notwithstanding the formal fusion, in each of South Australia, Western Australia and Tasmania an independent Bar has emerged in the post-war period, most recently in Tasmania. There are also independent Bars in the two territories: Australian Capital Territory and Northern Territory. The professional associations representing barristers in each of the States and Territories constitute the Australian Bar Association.

In the Australian experience, the clear trend has been towards lawyers practising in the traditional roles of barrister or solicitor, notwithstanding the formality of the style of admission or entitlement to practice.

The ABA believes that in any national regulatory scheme there is a compelling need to ensure that a careful balance is achieved between self regulation of the legal profession and Government intervention. The Association believes that the objectives of independence and accountability can be best achieved by adopting a co-regulatory model which closely resembles that which is currently in operation in New South Wales and Queensland. The 1998 report of the 'National Competition Policy Review of the *Legal Profession Act 1987'* undertaken by NSW Attorney-General's Department, subject to some very minor adjustments, endorsed the value of that model. Regulatory functions such as the issuing of practising certificates can (and should) be performed by either the Bar Association for barristers or by the Law Society for solicitors. Discipline in the first instance can (and should be), subject to the supervisory role of the Legal Ombudsman (Legal Services Commissioner), be dealt with by the professional associations.

The High Court noted in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193, that an essential principle underpinning our system of government is the observance of the rule of law. The rule of law will not prevail without assuring the law's principal actors - judges and practicing lawyers - a very high measure of independence of mind and action. Lawyers have a duty, within the law, to advance the interests of their clients fearlessly and to assist the courts in upholding the law. To enable them to perform these duties it is necessary that lawyers enjoy professional independence. An unreasonable interference in the way lawyers perform their duties is a challenge to such independence. As Sir Owen Dixon, one of Australia's greatest lawyers, said when he took up office as Chief Justice of Australia in on 21 April 1952:

> [B]ecause it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence.

Chief Justice Mason noted in 1992 that the central point of his Honour's statement was that a fundamental principle of an independent Bar is that each of its members has a duty not to refuse a brief

to appear in a jurisdiction and in a class of case in which the barrister professes to practise on the ground that he or she disapproves of the client, the client's conduct or the cause. In particular, there is an obligation not to refuse the brief either because the client or the cause is unpopular or because acceptance of the brief may, in the eyes of people who do not understand the obligation of the barrister, excite criticism on that account. An important element in the relationship between the court and the barrister is the special duty which the barrister owes to the court over and above the duty which the barrister owes to the client. The performance of that duty contributes to the efficient disposition of litigation.[1]

Independence is not provided for the benefit or protection of lawyers as such. Nor is it intended to shield them from being held accountable in the performance of their professional duties and to the general law. Instead, its purpose is the protection of the people, affording them an independent legal profession as 'the bulwark of a free and democratic society'.[2]

The ABA cannot overemphasise the position of the legal profession as a necessary part of the judicial system. A loss of independence by the legal profession also involves a loss of independence by the judicial system, something that must be preserved at all costs. In this country it is unlikely that that valuable independence will ever be lost by being usurped by a government in a single move; but it is possible that it might be lost by an incremental process resulting from the introduction of well-meant but ill-considered changes. Changes required by necessity for public accountability, increased efficiencies and competition can be achieved in a number of ways which do not impinge upon the independence of the profession. The questions Chief Justice Sir Gerard Brennan posed in an address to the Australian Bar Association Conference in August 1996 are even more pertinent today:

> Absent an independent Bar, how would the voice of the oppressed be heard? Where would one find an effective champion of an unpopular cause? How would the courts be able to able to function without the distillation of issues by skilled and independent minds? And how would any tendency towards judicial tyranny be restrained?

In its attached submission, the Australian Bar Association puts the case for:

- a National Board where the majority of the members are appointed from the legal profession;
- the Board and Ombudsman, if one is appointed (the case for which the ABA does not believe has been established), being charged with the establishment of standards, but not having operational roles, which are best left to the existing local authorities, including the professional associations;
- the system of admission continuing to be done at a local level, but under national standards acceptable to the Council of Chief Justices;
- a reduction in the increased and unnecessary burden that is being imposed on the profession in the area of cost disclosures, compliance audits and management system directions and the application of consumer elements of the Bill to law practices and commercial and government clients; and
- requirements being proposed to be imposed on the profession, in particular concerning the holding of professional indemnity insurance, being made subject to the commercial realities of the market place.

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[1] The Hon. Sir Anthony Mason AC, KBE, 'The independence of the Bench; the independence of the Bar and the Bar's role in the judicial system', (1993) 10 *Australian Bar Review*, pp. 1-10.

[2] J Debeljak, *Judicial independence in the modern democratic state*, (1999) 74 *Reform* 35 at 38.

The Association reiterates its offer made through its representative on the Consultative Group for experienced people to work cooperatively with the Taskforce staff on the detail of the Bill; not to relitigate policy, but to remove drafting errors and to ensure the Bill can and does do what it is intended to do. Amendment of an unworkable provision will be at best difficult and time consuming to achieve once the National Law is in place. It is with this in mind that the Association asks that it have an opportunity to review a further draft of the Bill before it goes forward for approval.

I have sent a copy of this letter to the Chairman of the Taskforce and to the Honourable Robert French AC, Chief Justice of Australia. In addition, copies have been sent to each of the Chief Justices and Attorneys General of the various States and Territories.

Yours sincerely

Tom Bathurst QC
Immediate Past President of the Australian Bar Association, on behalf all Australian Bars.

4 August 2010

LEGAL PROFESSION NATIONAL LAW

CHAPTER 1: PRELIMINARY.

PART 1.1: OBJECTIVES.

There should be added an objective 'to maintain the independence of the legal profession'.

PART 1.2: INTERPRETATION.

The definition of 'barrister' can be made easier to both implement and understand if it read along the lines of 'who practises in the manner of a barrister only, and who has formally subscribed to the Australian Bar Association's Rules of Conduct'. In the fused jurisdictions at present the practising certificates do not differentiate between the practitioner practising as a solicitor or as a barrister. In Western Australia barristers give an undertaking to the Supreme Court that they will only practice in the manner of a barrister. In practice, virtually all barristers are members of the relevant Bar Association. However, given that some practising as a barrister may not wish to be a member of a Bar Association, where an undertaking is not given to the Court their formally subscribing to the Rules that govern a barrister's practice should suffice.

The Barristers' Rules which form part of the Consultation Package make it clear that the practice of a barrister is conducted in a manner significantly different to that of a solicitor.

Quite apart from the requirement to practice as a sole practitioner and not to hold trust moneys, Rules such as the 'cab rank' rule requiring briefs to be accepted and the particular obligations barristers have to the court highlight these differences.

Titles such as 'solicitor and barrister' and 'barrister and solicitor' can mislead the consumer. Their inclusion in the proposed National Law should be further considered.

The ABA notes that there is no definition of 'Solicitor', yet the proposed National Law contains references to 'solicitor'. There should be a definition of the term 'solicitor'.

The definition of 'conviction' incorporates 'acceptance of a guilty plea'. The definition should be amended as there is scope for argument as to when a plea is formally accepted by the court (or a charge is found proved) – when it is made or when a sentence is imposed. The provision should operate when the court makes an order convicting or otherwise sentences, rather than when the plea is made or entered.

The definition of 'law practice' includes barristers. This in itself is not objectionable, but throughout the draft National Law there are references to 'law practice' that inadvertently pick up barristers when the provision does not, or should not, apply to a barrister. A barrister is a sole practitioner, a law practice, a principal of a law practice, an associate of a law practice and a legal practitioner associate of a law practice. This will confuse both practitioners and consumers. Clause 3.3.6 (1)(b) adds to this confusion – and needs to be amended to make clear that a barrister does not - and should not – receive trust money.

The title 'Ombudsman' should be replaced by 'National Legal Services Commissioner'. The term Ombudsman, while perhaps superficially attractive, is misleading in that an Ombudsman does not have a determinative or discipline role. It is an adoption of a popular misconception as to what an 'Ombudsman' can do. As the Commonwealth Ombudsman has noted, the use of the term 'Ombudsman' in the National Law 'may undermine public confidence in the role, impartiality and independence of the Ombudsman institution'.

The definition of 'serious offence' should be reviewed. Identifying indictable offences is no longer a straight forward exercise and some offences, e.g. common assault, are not widely recognised as indictable offences. Secondly, it needs to be ascertained whether the same offences are indictable offences in each jurisdiction. Thirdly, some offences which are not indictable should be required to be notified, e.g. mid and high range PCA offences which can identify fitness to practice issues.

PART 1.3: EXERCISE OF SPECIAL FUNCTIONS.

Neither the Board nor Ombudsman should have the power to take over local functions.

Clause 1.3.2 purports to provide that the Board's functions in respect of applications for a practising certificate are to be exercised on behalf of the Board by the local representative. However, cl. 1.3.7. (1) (d) is so broad as to render the purport of cl. 1.3.2 all but meaningless as a statement of intention. The circumstances set out in cl. 1.3.7 (1) (a) to (d) would permit the Board or Ombudsman (if there is one) to take over a function virtually at will. Neither the Board nor the Ombudsman should be an administrative bureaucracy concerned with individual matters. The justifications advanced for the call-in power are unlikely to occur in practice. The present inconsistencies in practices and procedures will be overcome by the introduction of uniform national rules.

If the Board or Ombudsman identifies a particular problem in a jurisdiction, that matter should be addressed through discussion with the relevant persons/Attorney General; the making or amendment of National Rules; or issuing a general direction (i.e. at a generic level, rather than taking over the conduct of a specific case. In the very unlikely event a local authority has a potential conflict of interest, or the authorities of two States or Territories are both dealing with a specific matter, or there is other good reason why one authority ought not to deal with a particular matter, that situation can be readily handled by the matter being dealt with by the equivalent body in another jurisdiction (either by the originating authority referring the matter or the Board or Ombudsman giving a direction as to which authority is to handle the particular matter). The Board itself would not have the necessary expertise to handle an operational problem – nor would the Ombudsman unless that office were to be a large, expensive (and unnecessary and duplicative) office.

CHAPTER 2: THRESHOLD REQUIREMENTS REGARDING LEGAL PRACTICE.

PART 2.1: UNQUALIFIED LEGAL PRACTICE.

This provision does not make clear who is to take remedial action where it is thought someone may be engaging in unqualified legal practice.

This generally is an area about which there is little informed understanding among commentators. There are two primary types of unqualified practice. They are where someone with no legal qualifications purports to be a practitioner, or someone who no longer holds a practising certificate practises law. The latter is more common. In both instances it is usual for the matter to come to light by a query being made to the professional association by a member of the judiciary, a practitioner appearing on the other side or a disgruntled member of the public.

There are protocols in place in most, if not all, jurisdictions, for these matters to be brought to the attention of the Supreme Court by either the Prothonotary or the relevant professional association. In NSW, where the offender has in the recent past held a practising certificate, the protocol gives the professional association responsibility for attempting to persuade the offender to cease purporting to practice, and if necessary making an application to the Supreme Court for an appropriate order, e.g. that the offender cease passing themselves off as a legal practitioner and practising law. The Prothonotary may initiate action in the Court where the person has not been a recent practitioner. The present system has the support of the courts, is well understood by the profession and works well. It is cost effective. There is no reason why the system should be changed.

Part 2.1.2: Meaning of qualified entity.

The meaning of cl. 2.1.2 (c) is not clear. To what practice does the section refer?

PART 2.2: ADMISSION.

The ABA opposes the proposal that admission of all applicants seeking to be an Australian lawyer be centralised with the Board. It is essential that the criterion for admission and related processes be acceptable to the Supreme Courts. The Courts must be satisfied that the certificates have been properly issued, particularly with respect to the question of a particular applicant being a fit and proper person to be admitted. The presence of members of the judiciary on the local admission authorities achieves this aim.

The local admission authorities, the cost of which is met substantially from fees they levy, provide a public interface that benefits the applicant – and ultimately the courts. The authorities draw upon the voluntarily given time and expertise of the professional bodies where an applicant for admission has made a disclosure that may go to their fitness to practice. There is a very significant contribution made by the professional associations in readmission and determination of early suitability applications, which can often be very complex. Not to draw on this expertise and advice, but to seek to develop some other body of skills and experience, would be detrimental to the admission process and impose considerable additional costs and delays on the applicant.

The Board should have the role of setting standards, mandating common forms and the like. However, there is no justification for it having an operational role. The proposed issuing of a compliance certificate by the Board rather than local authorities will not reduce costs (and may well increase costs incurred by applicants), will reduce the level of face-to-face assistance now given by the admission

authorities, and has the very real potential to cause unnecessary duplication in administration by the Board and the courts. Abolition of the State/Territory admission authorities so that it can be said that the number of 'regulatory bodies' oversighting the legal profession has been reduced is no justification for their abolition.

2.2.8: Removals from Supreme Court Roll.

Clause 2.2.8 is silent as to whether professional associations can move the Supreme Court for the removal of a person from the Roll, as they now can and do. It is a matter for the Court who has standing, but the legislation should make it clear that professional associations will continue to have this responsibility. It is a mark of a profession that it endeavours to ensure that members not fit to, in this case, practice, are brought before the appropriate tribunal. They can act quickly, effectively – and cost effectively. It will be for the Court to determine if the application is justified.

CHAPTER 3: LEGAL PRACTICE.

PART 3.2: LAW PRACTICES – GENERAL PROVISIONS.

Clause 3.2.6 needs to be redrafted to make it clear that a barrister is a sole practitioner. The present wording of the provision has the capacity to create confusion about business structures that may be permissible for barristers.

PART 3.3 AND 3.5: AUSTRALIAN PRACTISING CERTIFICATES.

It is assumed that the Board will, after consultation with those bodies who will issue the practising certificates, seek to introduce common forms and processes. The inclusion of some questions asked of those applying for a practising certificate, or renewal of the certificate, are in some instances due to court decisions or to overcome problems the issuing authority have experienced. For example, the 'bankrupt barrister' scandal in NSW some years ago lead to some major changes in what is now asked of applicants. Not all jurisdictions adopted the changes made in NSW. It is essential that the introduction of national forms and processes take account of matters such as this, and not be based on a lowest common denominator. If the Board proposes to lessen the reporting requirements, that decision should only be made after proper consultation and with an understanding of why the questions are currently being asked.

3.3.1. Discretionary conditions.

Part 3.3 should include a provision akin to the current s.105 in the *Legal Profession Act 2004* (NSW).

The section reads:

> 105 Consideration and investigation of applicants or holders
>
> (1) To help it consider whether or not to grant, renew, amend, suspend or cancel a local practising certificate, a Council may, by notice to the applicant or holder, require the applicant or holder:
> (a) to give it specified documents or information, or
> (b) to be medically examined by a medical practitioner nominated by the Council, or
> (c) to co-operate with any inquiries by the Council that it considers appropriate.
>
> (2) A failure to comply with a notice under subsection (1) by the date specified in the notice and in the way required by the notice is a ground for making an adverse decision in relation to the action being considered by the Council.
>
> (3) Without limiting subsection (2), a failure to comply with a requirement for medical examination may be accepted by the Council as evidence of the unfitness of the person to engage in legal practice.

This provision has proven to be extraordinarily effective where a barrister's apparent illness is adversely affecting his or her ability to practise. The medical examination and subsequent imposition of conditions relating to the treatment of the illness – or suspension or cancellation of the practising certificate – protects both the barrister and the public. It has allowed barristers who have a treatable illness to continue to practice, if necessary with supervision. It has also been found to be an effective

alternative to disciplinary action. It is an important consumer protection provision that needs to be included in the National Law.

3.3.6 Conditions - trust moneys and categories of practice.

Clause 3.3.6 provides that a practising certificate is issued subject to two conditions. One relates to trust money. The other concerns how the holder engages in legal practice and under 3.3.6 (1) (b) four alternative conditions are specified, including:

(i) as a principal of a law practice; or

(ii) as or in the manner of a barrister only.

However, under the legislation a barrister is 'a principal of a law practice'. This is but one instance where defining a barrister as a law practice creates confusion. The provision should be amended to make it clear that a holder of a practising certificate is authorised to practice in the 'manner of a barrister only'. [See comments in this regard above under Part 1.2: Interpretation.]

3.3.8: Statutory condition - to engage in supervised legal practice.

This provision needs to be amended to clearly exclude barristers from the supervision requirement.

3.3.11 Discretionary conditions.

There are a number of barristers (and maybe similarly solicitors) who currently have conditions on their practising certificate requiring them to adhere to a medical or financial reporting regime. There are also standard conditions for new barristers undertaking their first year of practice. Statutory office holders and the like (e.g. Solicitor General, prosecutors, public defenders) have a condition on their certificate in those jurisdictions where they hold practising certificates that, should they resign and come to the private Bar, they need first to have taken out professional indemnity insurance.

It is appreciated that all such conditions cannot be listed in the legislation, but the ABA asks that consideration be given to including in general terms those relating to the medical and financial reporting regimes, as these are significant consumer protection measures.

PART 3.4: FOREIGN LAWYERS.

The ABA strongly supports processes being in place to allow qualified foreign lawyers to practice in Australia. The statutory power now held by the NSW Legal Profession Admission Board and the WA Legal Practice Board to allow overseas practitioners to appear in a particular matter or to undertake legal work in Australia for a limited period without having to undertake the Academic and Practical Legal Training requirements usually imposed on overseas applicants for admission should apply across Australia. The protective 'tariff barriers' presently in place in some jurisdictions are unnecessary – and are used in some overseas jurisdictions as justification to exclude Australian lawyers from practising in those jurisdictions.

Part 3.5: Variation, suspension or cancellation of certificates.

While the Board (professional association) may vary suspend or cancel a practising certificate, there is no provision for surrender of a practising certificate. Surrender is a relatively common occurrence.

To the extent that cl. 3.5.4 and 5.2.13 do not cover the issue, the proposed National Law should be amended to expressly provide an authority for immediate suspension of a practising certificate similar to s.78 of the *Legal Profession Act 2004* (NSW). While this provision has been used rarely in NSW, it has on occasion been invoked to protect the public (and the courts) in instances of criminal behaviour and a practitioner's illness.

Clause 3.5.4(2) (b) permits the Board to renew a certificate while it is suspended – presumably the renewal would not affect the period of suspension.

The Board may cancel a practising certificate if the holder dies: cl. 3.5.3(3) (g). Surely the certificate should simply lapse? Cancellation is an unnecessary administrative requirement. If the national register is to record cancellations of practising certificates, then persons whose practising certificates are cancelled because they have died or ceased practice due to ill health or other reasons will be recorded as cancellations, along with those cancelled for disciplinary reasons. This anomaly needs to be rectified.

Division 3.5: Show cause procedure.

Clause 3.5.9(3) (b) requires amendment. It excludes an applicant for a practising certificate or renewal of a practising certificate from the requirement to provide a statement about a show cause event where the statement has been made 'as a previous applicant' for the grant or renewal of a 'compliance certificate' (sic- practising certificate?). It omits to pick up where the statement has been made as part of the show cause process during the currency of a certificate.

The time limits applying to notices and statements concerning show cause events in relation to the holders of a certificate are included in the Rules. They should be in the Act.

Provisions relating to the investigation of designated show cause events contained in cl. 3.5.14(1) and cl. 3.5.14(3)-(5) are not duplicated in the provisions relating to automatic show cause events. They should be.

Designated show cause events – action by the Board (cl. 3.5.14). The outcome does not contemplate the Board finding a person fit and proper but nevertheless wishing to impose conditions on a practising certificate. This is not an uncommon outcome; the proposed National Law should be amended accordingly.

CHAPTER 4: BUSINESS PRACTICE AND PROFESSIONAL CONDUCT.

4.2.38: External Investigations.

Under the current legislation external investigations are linked to trust records. The Executive Summary that accompanies the proposed National Law refers to an external investigator determining compliance with trust account provisions under Part 4.2 of the law. However, the clause goes beyond this. Clause 4.2.38 enables an investigator to undertake an external investigation in relation to 'particular allegations or suspicions regarding trust money…or any other aspect of the affairs of the law practice, or where the Ombudsman otherwise considers it appropriate to do so'. The drafting would seem to permit external investigation of a barrister's affairs. The clause should be amended to specifically exclude a barrister from this provision.

PART 4.3: LEGAL COSTS.

The ABA strongly supports full disclosure of costs to the client. However, it needs to be recognised that such disclosure often cannot be precise; for example, a fee disclosure of $x per day in court, and an estimate of how many days the matter may run, is appropriate. But how many days a matter *does* run is not in the control of the barrister. The disclosure provisions need also to take account of the fact that some clients do not want a detailed disclosure, or disclosure in a particular matter, for example, because the law practice has an ongoing relationship with the client, or has successfully tendered for the work. Accordingly, the practitioner, should, on written instructions of the client, be able to contract to provide a disclosure in terms other than that specified in the legislation.

An important objective of the National Legal Profession Reform project is reduction in the regulatory burden for Australian law practices. That objective, as well as the general objectives of efficiency and consumer protection, will be hindered by certain aspects of the present draft relating to disclosure. As presently drafted, the National Law will require a law practice that is retained by another law practice on behalf of a client separately to provide the client with information described in cl. 4.3.7. Barristers in non-fused profession jurisdictions and members of the independent Bars of fused profession jurisdictions are typically retained by solicitors on behalf of clients.

The present draft requires such an indirectly retained law practice to provide information directly to the client, notwithstanding that the usual professional relationship interposes a principal or instructing solicitor who is typically responsible for payment of the fees of the indirectly retained law practice, which are payable by the client to the directly retained law practice in the character of disbursements. Such disbursements are 'legal costs' for which the client is liable to the directly retained law practice (cl. 1.2.1). They are part of the 'legal costs', the basis of calculation of which the directly retained law practice is required to disclose to the client, and part of the 'total legal costs' which the directly retained law practice is required to estimate (cl. 4.3.7(1)). To impose a separate requirement of disclosure to the client by an indirectly retained law practice results in duplication, both in relation to the costs of the indirectly retained law practice and in relation to generic information about the client's rights. It is inefficient, and is unnecessary from a consumer protection perspective. It imposes an unnecessary and unjustifiable regulatory burden and is likely to lead to confusion for both practitioners and consumers.

A preferable approach is that taken in the NSW *Legal Profession Act 2004* where the obligation of making disclosure to the client is the responsibility of the directly retained law practice (s.310). The indirectly retained law practice is not required to make disclosure to the client, but to the retaining law practice, and the scope of information to be disclosed is only 'the information necessary' to enable the retaining law practice to make disclosure to the client of a limited sub-set of otherwise disclosable

information . The indirectly retained law practice has only a top-up obligation, so that the directly retained law practice receives any additional information necessary to perform its function.
The NSW Act recognises the primary function of the directly retained law practice in co-ordinating relevant information and providing it to the client. It also recognises the important fact that the retaining law practice has considerable control over the scope of work actually committed to a particular indirectly retained law practice. The retaining law practice is also often in possession of more complete information about the scope of the matter itself than the indirectly retained law practice at the point when the latter is retained. Finally, even without a regulatory framework, the retaining law practice is well positioned to obtain any additional information it needs from other law practices (barristers or solicitor agent) that it proposes to retain.

Clause 4.3.7(4) as presently drafted requires an indirectly retained law practice to duplicate the work of the retaining law practice in verifying informed consent in relation to the costs of the former as a disbursement of the latter, and in relation to the 'proposed course of action'. This fails to give proper recognition to the professionalism and the proper role of the retaining law practice which, being directly retained, has primary and direct contact with the client. In advice work a barrister rarely has any contact with the client. By requiring duplication or double-handling, it is inefficient and adds unnecessarily to cost. Clause 4.3.7(4) should only apply to a directly retained law practice.

As drafted, cl. 4.3.7(1)-(4) will lead to confusion and costly duplication. One of the important efficiencies of a divided profession is the ability of a solicitor to build and co-ordinate a legal team for a particular case, with the solicitor serving as the focal point of the legal team. That will be impaired if the functions of costs disclosure and of checking for informed consent are duplicated among directly and indirectly retained law practices.

Clause 4.3.7 should be amended so that a law practice that is retained by another law practice on behalf of a client is not required to make disclosure to the client or to take the steps referred to in cl. 4.3.7(4), but only to provide the retaining law practice with information disclosing the basis on which its legal costs will be calculated and such information as the retaining law practice reasonably requests concerning the estimation of its legal costs.

There is no minimum amount below which a formal cost disclosure is not required. It may well be impractical for both the practitioner and the client to be required to have a formal disclosure for a one-off meeting or the drafting of a simple letter. There needs also to be provision for a cost disclosure not being required in certain circumstances, such as those to be found in s. 312 of the *Legal Profession Act 2004* (NSW). The minimum amount of $750 should be increased to $1500, as under the present Western Australian legislation (*Legal Profession Act 2008* (WA), s.263 (2) (a)).

4.3.11. Contingency fees are prohibited.

The objective of cl. 4.3.13 is to prevent percentage fees by which a law practice acquires quasi-proprietary stake in the outcome of legal work, which may work as a temptation to improper practices. There is no objection to a law practice having a commercial interest in the outcome of legal work to the extent that such an interest is implicit in its remuneration for professional work by way of a proper professional fee with or without a permitted uplift, in circumstances where the debtor client may be dependent on the success of litigation, etc, to pay for the legal work.

The presently proposed wording is comparable with the wording of existing provisions, such as s. 325 of the NSW *Legal Profession Act 2004*. It does, however, appear to create a problem where a client

seeks to limit his or her liability for legal costs by reference to the degree of success of the litigation, etc, in which the law practice is engaged.

A client may ask a law practice to agree to restrict its entitlement to costs, in the manner of a sliding scale, in a context that is not governed by a fixed costs provision. There is no policy reason why the law practice should be forbidden to accommodate such a request.

Division 6: Cost assessment.

Clause 4.3.4 (1) provides that a law practice 'must, in charging legal costs, charge no more than fair and reasonable costs'. Clause 4.3.26(2) requires a costs assessor to do one or more of the things listed, including '(a) determine whether legal costs are fair and reasonable and, to the extent they are not fair and reasonable, to determine the amount of legal costs (if any) that are to be payable' and '(c) set aside, wholly or partly, a costs agreement if legal costs payable under it are not fair and reasonable'. In practice, practically all assessments must involve exercise of the power in cl. 4.3.26(a). Clause 4.3.30 provides that if, on assessment, 'the costs assessor considers that the legal costs charged by a law practice are not fair and reasonable, or that the assessment raises any other matter that may amount to unsatisfactory professional conduct or professional misconduct, the assessor must refer the matter to the Ombudsman to consider whether disciplinary action should be taken'.

The disallowance of any part of the costs claimed in a proposed National Law entails a conclusion that the subject costs are not fair and reasonable. On the presently proposed wording, a costs assessor who disallows any part of a law practice's bill has no choice but to refer the matter to the Ombudsman. Such an outcome will be hopelessly unworkable. A large proportion of solicitor/client assessments involve such a disallowance. Very few of them involve anything suggestive of unsatisfactory professional conduct or professional misconduct, but the statutory definitions make them 'capable' of being those things. It is unacceptable that every disallowance be referred to the Ombudsman.

The reporting obligation should be changed to a discretionary test, and/or the objective criteria for reporting made narrower. The simplest and cleanest solution would be to change 'must' in s. 4.3.30 to 'may'. That would leave the question to the discretion of the costs assessor, which would no doubt be exercised by reference to his or her perception of the apparent seriousness of the matter. If 'must' is retained, a more focused criterion for reporting should apply.

PART 4.4: PROFESSIONAL INDEMNITY INSURANCE.

4.4.2: Requirement to have professional insurance indemnity cover.

The dual application of subclauses 4.4.2 (1) and 4.4.2 (3) to barristers should be clarified. The ABA notes that significantly different civil penalties apply to a breach of each subclause. The provision should be amended to ensure that it is clear that subclause 4.4.2 (1) applies to barristers, but that they are exempt from compliance with subclause 4.4.2 (3).

PART 4.6: BUSINESS MANAGEMENT AND CONTROL.

4.6.1: Compliance audits.

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 incorporated legal practices goes too

far and is not justified. Clause 4.6.1 of the draft National Law authorises the Ombudsman to conduct a compliance audit of any law practice, including barristers, 'if the Ombudsman considers it necessary to do so.' There is no requirement that the Ombudsman must have reasonable cause to believe there is non-compliance and that a compliance audit rather than some less draconian measure, is warranted. No other profession is subject to such a regime. It would be a very serious intrusion into the independence of the legal profession. 'Risk management' is something that every competent practitioner routinely does, if only to ensure that the absence of such good management is not adversely reflected in their professional insurance premiums.

The compliance audit provisions are an extension of the provisions of the Model Law. The Model Law provisions allow compliance audits of incorporated legal practices only. 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. There is no justification for the provision being even further extended so that it covers a barrister's practice.

4.6.2: Management system directions.

As with cl. 4.6.1, this is another example where the draft National Law appears to have inadvertently captured a barrister's practice. It should not do so.

The power of the Ombudsman to give a management system direction is unqualified and intrusive. The Ombudsman can provide a valuable educative role and 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 direct that a particular management system should be adopted. 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.

If the Ombudsman does retain this power, the Ombudsman should only be able to exercise the power where he or she has reasonable cause to do so, e.g. to remedy a systemic non-compliance identified through a series of complaints.

4.7.4: Continuing Professional Development Rules.

Clause 4.7.4 (2) authorises the Board to approve courses or providers. While there is nothing objectionable about this power, the ABA notes that in recent years a number of professional bodies have ceased accrediting providers, although they do accredit particular courses. The quality of courses offered by a provider varies considerably. There is no guarantee that what the provider claims will be provided is in fact provided. This is a matter that can and should be left to the marketplace.

CHAPTER 5: DISPUTE RESOLUTION AND PROFESSIONAL DISCIPLINE.

Cost disputes.

The draft National Law provides for the Ombudsman to have a mandatory mediation function in costs disputes up to $100,000 and a discretionary jurisdiction to determine costs disputes less than $10,000. A 'costs dispute' is defined at cl. 5.2.5 as 'a dispute about legal costs not exceeding $100,000, payable on a solicitor-client basis, in respect of any one matter' between, broadly speaking, a law practice and a person who is charged. It is unclear whether this contemplates a dispute about legal costs where the legal costs do not exceed $100,000, or a dispute about legal costs where the extent of the dispute does not exceed $100,000. This should be clarified.

The ABA submits that the Ombudsman should not be given a power of cost determination, other than for genuine consumer disputes involving less than $10,000.

The Ombudsman should not be an alternative to the current cost assessment process. Cost determination by the Ombudsman will lead to the incongruous result in the area of litigation, where a substantial proportion of complaints arise, that party and party costs are dealt with by persons with expertise and experience in the area of cost assessment, but solicitor-client costs are not. Further, it will detract from the oversight the courts presently have in relation to those matters, something of considerable importance in the administration of justice. If the Ombudsman is to operate as an alternative to the cost assessment practice, the Ombudsman will need to duplicate the expertise already existing in the assessment system - another unnecessary cost. There is no good reason why the Ombudsman should not rather have the power to refer a complaint about a disputed cost to the existing assessment system. There is no justification for the Ombudsman establishing a costly duplicate system - and one which could well lead to 'forum shopping' by a disgruntled client.

It should be made clear that the provisions of Parts 5.2 and 5.3 relating to costs disputes do not apply to disputes between solicitors and barristers. It should be provided in cl. 5.2.5 that a 'costs dispute' does not include a dispute about costs charged by one law practice to another law practice that has retained the first-mentioned law practice on behalf of a client. Consumer protection provisions are not appropriate between professional law practices. To exclude such a dispute between law practices would not affect the client's rights in any dispute with the directly retained law practice (solicitor) about a claim to be reimbursed for disbursements (such as counsel's fees).

A law practice against which a complaint is made involving a costs dispute is required to lodge with the Ombudsman any paid costs, of which the complainant seeks reimbursement, within 28 days after notification of the complaint (cl. 5.3.7(3)). A complainant has a corresponding obligation to lodge unpaid costs but, unlike the law practice, the complainant can request exemption (cl. 5.3.7 (2)). The obligation of a respondent law practice to lodge paid costs with the Ombudsman is limited to the amount of which the complainant is seeking reimbursement, not the legal costs that are the subject of the dispute. The distinction disappears in practice, however, if the complainant seeks reimbursement of the whole amount of costs paid, and thereby puts the whole amount in dispute - a very common approach in costs assessment applications by clients.

The obligation on a law practice to lodge paid costs is unqualified by any discretion of the Ombudsman or a court. It arises by the unilateral act of a complainant in making a complaint, subject only to the possibility that the Ombudsman may satisfied of one of the grounds in cl. 5.2.12(1) and close the complaint before notifying the respondent law practice. Although the Ombudsman's power to make a

binding determination in relation to costs is limited to $10,000, the amount that a law practice can be required to lodge is not so limited. It can be anything up to $100,000.

There is no obligation on a law practice to lodge or freeze paid costs in the case of an application for costs assessment. The fact that there is such an obligation in the case of a complaint to the Ombudsman means that a person who has paid legal costs can put greater pressure on the law practice in question by making a complaint to the Ombudsman than by applying for assessment of costs.

Clause 5.2.8 prescribes a time limit for making a costs dispute complaint of 60 days after costs became payable 'or, if an itemised bill was requested ..., within 30 days after the request is complied with'. As there is no explicit time limit for requesting an itemised bill, it is arguable that a client who has paid costs on a lump sum bill may get around the time limit in cl. 5.2.8 by requesting an itemised bill.
The provision for dealing with costs lodged with the Ombudsman by the client and/or the law practice (cl. 5.3.8) is incomplete. It does not fully deal with a case where the costs dispute is not settled, the complaint is not withdrawn and an application for assessment is made. The Ombudsman is given discretion to pay costs lodged by either party to the client 'if the Ombudsman considers it appropriate to do so in the circumstances'. There is no equivalent discretion to pay or repay lodged costs to the law practice. There is no provision for dealing with lodged costs if the discretion is not exercised.

If the Ombudsman is to be given jurisdiction with respect to costs disputes:

a) the requirement on the legal practice to lodge paid costs (cl. 5.3.7 (3)), if it is retained at all, should only arise where the Ombudsman is satisfied that there is a real prospect that the law practice will be unable to refund such costs in the event of an unfavourable assessment;

b) cl. 5.2.8(2) should include a time limit in relation to a complainant's request for an itemised bill, such as by inserting after 'if an itemised bill was requested in respect of those costs' the further words 'within 30 days after the complainant first received a lump sum bill'. Alternatively, a time limit for requesting an itemised bill should be inserted in cl. 4.3.17; and

c) the Ombudsman's general discretionary power under cl. 5.3.8(2) (c) should be expanded to permit re-payment to the law practice or lawyer concerned.

If the Ombudsman is given power to determine costs (in lieu of referral 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 have regard in determining whether costs are fair and reasonable, and similar rights of appeal should apply.

5.2.8 Time limits on making complaints.

The proposed general time limit of 5 years for the making of a complaint is excessive. The limit should be 3 years, with the Ombudsman having the power to extend the period where (a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay, or (b) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint, as in, for example, s.506 of the NSW *Legal Profession Act 2004*. The greater the period after the conduct that leads to the complaint, the more difficult (and expensive) it is to investigate the complaint. The older complaints are very often vexatious or have been investigated already by a range of authorities. The proposed National Law gives the Ombudsman discretion to waive the 5 year requirement where it is just and fair to do so. That power should remain, but with a 3 year limitation period.

5.2.12: Closure of complaint after preliminary assessment.

The clause should be expanded to give the Ombudsman power to close a complaint where there is civil ligation (including administrative proceedings such as a costs assessment) on foot relevant to the complaint.

Determination of consumer disputes: 5.3.6 / 5.6.3.

The ABA opposes the Ombudsman being able to make a determination about legal costs of less than $10,000, unless the determination is subject to an appeal to an independent tribunal.

Part 5.4: Disciplinary matters.

Under clause 5.4.5, the Ombudsman has power to make determinations of unsatisfactory professional conduct.

The ABA appreciates that one of the objectives of the Ombudsman scheme is to provide a quick and efficient method for resolving complaints about lawyers. However, it is not appropriate for the Ombudsman to make findings that a lawyer or legal practitioner has engaged in unsatisfactory professional conduct, which is in effect a judicial determination. A better model is that provided by s.540 of the *NSW Legal Profession Act 2004* which enables summary conclusion of a complaint by caution, reprimand, compensation order or imposition of conditions. The section requires the Commissioner or Council to be satisfied that there is a reasonable likelihood that the practitioner would be found by the tribunal to have engaged in unsatisfactory professional conduct, but no finding is made. The practitioner is not required to consent to the process or disciplinary action but has a right to seek a review other than where a caution is imposed.

Other than where a caution or reprimand is warranted, 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.

The ABA recognises that at the moment there can be significant delays in having a matter determined by the relevant tribunal. This is a problem that requires urgent attention by Attorneys Genera - but it is not justification for empowering the Ombudsman to make what is in effect a judicial determination.

5.4.9: Determination by designated tribunal – disciplinary matters.

This provision sets out the determinations which may be made if the tribunal finds a lawyer guilty of unsatisfactory professional conduct or professional misconduct. Cl. 5.4.9 (1) (f) refers to the tribunal making 'an order recommending' that the name of the lawyer be removed from the roll and Register. This is a less direct power than the (preferable) provision in s.562 (2) (a) of the *Legal Profession Act 2004* (NSW) where the tribunal simply orders that the name of the practitioner *is* removed from the Roll. There should be such a power for those jurisdictions where the Supreme Court is not the only authority which determines discipline matters.

Part 5.5: Compensation orders.

The ABA opposes the Ombudsman having an unfettered authority to make a compensation order. The power to make a compensation order arises where 'the Ombudsman … is satisfied that … the aggrieved

person has suffered loss because of the conduct concerned … and …it is in the interests of justice that the order be made', this is giving the Ombudsman the authority of a tribunal, yet with none of the usual safeguards. The Ombudsman's decision is final, except where the Ombudsman decides to conduct an internal review.

The Ombudsman should not have quasi-judicial powers. If the Ombudsman is to have the power to make a compensation order, the amount should not exceed $10,000 (the same amount set for cost determinations), unless complainant and practitioner consent. Any determination of the Ombudsman should be appealable to an independent tribunal.

CHAPTER 6: EXTERNAL INTERVENTION.

6.2.2: Determination to initiate external intervention.

This clause allows for the appointment of a manager to a barrister's practice (because the barrister comes within the definition of 'law practice'). However, unlike the present practice, the proposed National Law requires the manager to be an Australian legal practitioner with a principal's practising certificate authorising receipt of trust money (cl.6.3.1). Barristers do not hold trust moneys. The provision should be redrafted to allow the appointment of a qualified person (e.g. a barrister).

6.4.3: Role of managers.

The role of managers has been drafted from the perspective of a solicitor's practice. It should be amended to make it clear that a manager may return briefs to instructing solicitors or clients and decline instructions.

CHAPTER 7: INVESTIGATORY POWERS.

7.2.2: Requirements- complaint investigations.

This provision does not refer to a former lawyer. Accordingly, there may not be power to serve a notice on a former lawyer.

7.2.2 (2).

This provision authorises an investigator to require 'any person (other than the lawyer) who has or has had control of documents *relating to the affairs of the lawyer'* to provide access to the documents. Practical problems have arisen with this wording in the present legislation when claims are made that the documents relate to the affairs of the client rather than of the lawyer. The provision might be better drafted along the lines 'documents relating to the subject matter of the complaint'.

7.3: Entry and search of premises.

The imposition of criminal penalties for an omission to produce evidence of appointment, or inform the occupier of a wide range of matters, should be given further consideration. In addition, it is not clear why in cl. 7.3.5 the penalty is set at that for a body corporate.

7.5.3: Failure to comply.

This provision, which specifies that certain acts or omissions are capable of constituting unsatisfactory professional conduct or professional misconduct, refers to an Australian legal practitioner, but not to an Australian lawyer. The fact that a person does not at the time hold a practising certificate should not of itself excuse an Australian lawyer from assisting the Ombudsman's investigation. Further, it is not clear what conditions are referred to in paragraph (b).

CHAPTER 8: NATIONAL REGULATORY AUTHORITIES.

Part 8.1: Standing Committee of Attorneys General.

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. SCAG should not have the ability to give directions on policy matters to the Board. Clause 8.1.2. (1) should be amended to read: 'The Standing Committee has a general supervisory role in relation to this law'. Clause 8.1.2 (3) should be deleted, as should the reference to policy directions in cl. 8.1.2 (4) and (5). The reference to the Standing Committee in cl. 8.2.4. (2) should be deleted. Clause 8.2.5 (1) (e) should also be deleted – it is contrary to the independence of both the Board and the legal profession. It would remain open for SCAG to be able to refer policy issues to the Board for its consideration.

SCAG should only have a supervisory role in relation to the national law – and appoint three of the members of the Board.

Part 8.3: National Legal Services Ombudsman.

The Australian Bar Association opposes the creation of an office of Ombudsman to be separate from that of the Board. A separate office cannot be established without additional costs being incurred. There is no justification for imposing upon the local Legal Service Commissioners and their counterparts an additional level of regulation. The ABA appreciates that there are inconsistencies in both administration and practice across Australia (for example, the categorisation of complaints and their statistical recording; how complaints, particularly consumer complaints, are handled in the different jurisdictions, and the like). These inconsistencies are being addressed by both the regulators themselves and bodies such as the annual meeting of the regulators and professional associations. However, there is, at least for the immediate future, a need for central direction and monitoring. These functions can be handled by the Board without the establishment of an expensive, unnecessary office of Ombudsman.

The ABA strongly support the adoption of national standards governing the prompt resolution of complaints against legal practitioners. A cost effective national system that is both effective and relatively easy to understand benefits consumers and legal practitioners alike. The removal of the remaining 'bumps in the road' in the way of a uniform, streamlined and more efficient regulatory framework is essential. Unfortunately, the proposed new role of the Ombudsman in a national complaints system will produce an unnecessarily more complex and costly regulatory and compliance regime. The present complaint handling systems across Australia, although with different methodologies and titles, is in general working well. Improvements can, and should, be effected. These improvements should be made by the profession and the independent commissioners, with a broad oversight by the Board.

Most complaints are 'consumer complaints', that is, relatively minor matters that usually can be (and should be) resolved by a telephone call or, if necessary, brief correspondence from the relevant regulatory authority. The fact that there are few complaints against legal practitioners, and relatively few of those are found after investigation to be justified, does not in any way diminish the importance of each complaint being handled quickly, efficiently and, ideally, in a way that leaves all concerned agreed that the matter has been dealt with to their satisfaction. However, there is no need for a national bureaucracy to handle those complaints. There is no systemic failure with the current complaint handling processes. Claims to the contrary are unjustified. The creation of an additional federal

complaint handling tier would inevitably result in *unnecessary duplication*, *additional costs* and *delays* for no benefit to either complainants (be they 'consumer' or 'conduct' matters) or members of the legal profession.

As noted above under *PART 1.3: Exercise of special functions*, the powers contemplated in the draft National Law are excessively intrusive. It is inappropriate for the proposed Ombudsman to be able to, at will, take over matters being handled by a local jurisdiction. If this power is retained and exercised, the Ombudsman will require a large, experienced and unnecessarily costly staff. There is no practical justification or benefit in the establishment of an additional layer of regulation in the form of a national Ombudsman.

If, not withstanding these fundamental objections to the establishment of a separate office of National Ombudsman, such an office is established, it should be a very small office with a general oversight role; its function should be working with the commissioners and profession to remove the various relatively minor terminological, statistical differences and the like and the development of a national education program. It should allocate projects of relevance across Australia to a lead 'agency', including allocation of responsibility for investigating complaints in the case of any cross-jurisdictional problems that remain. The Ombudsman's role should be to harness the expertise of the profession and commissioners for the benefit of all. The Ombudsman should not have an operational role in the handling of individual complaints or conduct investigations.

Further, the matters noted below need to be taken into account.

The title 'National Legal Services Ombudsman' should be replaced with that of 'National Legal Services Commissioner' (see comments at Chapter 1 above).

8.3.3.: Objectives of the Ombudsman.

This clause should specifically state that the Ombudsman's jurisdiction extends to complaints against a person who is on the Roll, but does not currently hold a practising certificate, where the complaint relates to the practice of law. It is not uncommon for a practitioner to cease to practice to try and avoid disciplinary action.

8.3.4: Functions of the Ombudsman.

'The Ombudsman has *all the powers necessary* to perform his or her functions and achieve the objects of the office of the Ombudsman, including the powers conferred on it by this law or *any* law of a jurisdiction.'

It is not clear what is intended by this clause. On a literal reading, the Ombudsman is being given unlimited powers. The Ombudsman's powers should be limited to those set out in the National Law and any State/Territory law that confers a power on that State/Territory's Legal Service Commissioner or their counterpart.

The Ombudsman should not have the power to make findings of unsatisfactory professional conduct. Disciplinary matters should continue to be dealt with by appropriate tribunals.

It is important 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 competent or in other cases where such action is in the public interest (for example, where a practitioner is seriously ill and has ceased to practice).

In the interests of fairness and justice, there must be rights of appeal on the merits from decisions of the Ombudsman.

8.3.5: Independence of Ombudsman.

The Ombudsman should not be subject to direction by the host Attorney General or SCAG on any matter.

Clause 8.3.5 (2) refers to the Ombudsman exercising his or her functions 'in accordance with any applicable guidelines or other provision contained in the National Rules'. It is not stated who will issue the 'guidelines'. The National Rules will be made by the Board. If the Ombudsman is established as a separate statutory office, the Ombudsman should not be subject to direction of the Board in relation to any person or complaint. The Ombudsman should be appointed by, and answerable to, the Federal Attorney-General in the same way as the Commonwealth Ombudsman is answerable to the Prime Minister.

8.3.7: Delegation of Ombudsman's functions.

The ABA strongly supports the intention that the 'special' functions' of the Ombudsman will be performed by local representatives that are listed in Schedules 3 and 4, and that each local representative is empowered, by virtue of cl. 1.3.10, to further delegate those functions to, inter alia, a local professional association. The ABA's preferred approach continues to be the efficient, cost effective and timely *co-regulatory model* that already exists in most jurisdictions. This co-regulatory model provides a relatively straightforward, certain model where the independent statutory commissioner receives *all* complaints (where they are initially addressed to a professional association they are immediately sent on to the Commissioner). The commissioner then determines how the complaint will be handled. That is, the statutorily independent commissioner makes the decision how a complaint will be handled, *not* the professional associations.

The practice is for the commissioners to handle the consumer complaints (and they do so very well) and conduct complaints are in the main handled by the professional associations under the oversight of the commissioner. The commissioner has statutory powers to take over complaints which are being investigated by a professional association, conduct reviews of the decisions of the professional associations and has the right to appear in disciplinary proceedings. In the few cases where a professional association may have a conflict of interest (most notably when a complaint is against a serving member of the association's governing body), the complaint is retained by the commissioner.

In co-regulatory jurisdictions at present, professional associations play a crucial role in the resolution of complaints. These matters are pursued rigorously and effectively and largely to the satisfaction of complainants. This model should be retained.

The ABA notes that there are different co-regulatory systems currently in different jurisdictions. In the ABA's view, the very successful and by any comparison cost effective NSW model, which allows the one professional body to follow a conduct complaint through all stages, should continue to apply in the larger jurisdictions where the vast majority of conduct complaints are made, but be adapted where necessary for the smaller jurisdictions The great value of this co-regulatory system is that there is an independent, statutory oversight of the process and that any complainant dissatisfied with the decision

of the professional associations can have their complaint reviewed by the statutorily independent local Commissioner. That is, the Commissioner's resources are concentrated on the complaints where the complainant remains unhappy; there is no need for the Commissioner to expend time and energy on the vast majority of conduct complaints where the complainant is satisfied with the decision of the professional body.

While in NSW the professional associations conduct investigations, *determine* them and where appropriate *pursue disciplinary action* in tribunals and courts, in some jurisdictions, for example Queensland, professional bodies can only make recommendations for the determination of a complaint or, as in Victoria, the professional association is "referred" a complaint for investigation and report only. These systems mean that the determining body has to duplicate much of the work undertaken by a professional body in its investigation in order to determine the complaint. The Commissioner having to review all recommendations, rather than only where a complainant seeks a review, causes major delay and increased cost. The answer is not to remove responsibility for the investigation from the professional body and place it in the office of the Ombudsman's primary delegate (the Commissioners and their counterparts) but to place the responsibility with the professional bodies under the supervision of the Commissioner/Ombudsman.

The ABA appreciates that the present co-regulatory model in the three largest States is not immediately transferable to the smaller jurisdictions. We are not suggesting that it should be. But the basic principle, that of a co-regulatory system, where the professional associations work with, and are oversighted by, the statutorily independent commissioner who has the authority to review either on his/her own initiative or on request of the complainant, is a principle that should apply across Australia. While recognising that under the National Law this co-regulatory approach can continue, the ABA believes it is in the public interest for this form of co-regulation to be specifically recognised in the National Law rather than the matter being left to future delegation.

CHAPTER 9: MISCELLANEOUS.

Part 9.1: LEGAL PROFESSION NATIONAL RULES.

9.1.3: Development of National Rules for legal practice, conduct and continuing professional development.

National Rules of the kind described in section 9.1.3 (e.g. 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.

Clause 9.1.3 (2) states that the Law Council of Australia and the Australian Bar Association *may* develop proposed National Rules'. This provision should specifically recognise that, in addition to any other Rules, the LCA and ABA *will* have the responsibility for developing the *professional conduct* rules. The provision needs also to be clarified to specifically recognise that the ABA will develop the Rules concerning the practice of barristers and the LCA the Solicitors' Rules.

9.1.4: Making of National Rules.

Clause 9.1.4(2) gives SCAG an unfettered power of veto, which is inimical to the independence of the profession. SCAG is not even required to give reasons for the exercise of its veto power.

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:

> '(a) the Commissioner has reported to the Attorney General that the rule is not in the public interest, or
>
> (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.'

SCAG's veto authority 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

> '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'.

SCAG should be required to publish its reason for any disallowance.

Alternatively, and preferably, any question of anti-competitive or restrictive rules should be left to the independent, and expert ACCC. The ABA notes that its proposed new Conduct Rules are based on Rules which were examined in detail (and accepted) by the ACCC in the recent past.

Part 9.2: Australian Legal Profession Register.

The proposed Register should clearly differentiate between those who have been admitted on to the Roll and those who hold a practising certificate. There should be separate parts of the Register. The former should be accessible only to regulators and professional associations. To do otherwise will cause confusion and inconvenience, especially to the consumer.

SCHEDULE 1.

PART 2: Composition of the Board.

It is essential that, like the judiciary, the legal profession is independent of the Executive. The stated aim of COAG when initiating the National Legal Profession Reform process was to establish uniformity in the regulation of the legal profession. A key aim was:

> '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 practices wherever possible and appropriate.'

The objective 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. Unfortunately, the Proposed National Law goes beyond COAG's stated objective and imposes Executive control on the profession.

The independence of the legal profession rests, amongst other things, on the principle of the Rule of Law and the need for the profession (and the persons appointed to the judiciary, who are largely drawn from the legal profession) to be protected from interference, or the risk of interference, by government in performing their duties.

The ABA strongly supports the model proposed by the Law Council of Australia:

- one member nominated by the Council of Chief Justices (or by the Chief Justices of the admitting courts – this is a matter for the Council itself to determine); *
- two members nominated by the Law Council of Australia;
- one member nominated by the Australian Bar Association; and
- three members nominated by the SCAG, one of whom should be a 'consumer' representative.

In all instances, the members of the Board should be *nominees*. They should not be chosen by SCAG from a panel of names submitted by the Council of Chief Justices, LCA or ABA.

*Nominee of the Council of Chief Justices to be the Chair – not as provided for in cl. 2.(1) (4).

Part 2 (1) (5): Conditions on which a member is appointed.

The purpose of this clause is unclear. Terms of office and remuneration are dealt with in cl. 4 and 5. As drafted, the provision allows the host Attorney General to impose an unlimited range of conditions on the appointment. This potentially seriously compromises the independence of the appointee. The provision should be deleted.

Part 2.6: Vacancy in office of member.

The provision relating to the termination of a Board member are inappropriate, in particular that relating to 'unsatisfactory performance'. It should not be open to the host Attorney General to be able to terminate an appointment at any time because he or she subjectively determines a member's performance to be 'unsatisfactory'. The provisions should be as for an appointment to a statutory tribunal; see, e.g. *Administrative Decisions Tribunal Act 1997* (NSW) Schedule 3 (8) - which does not include a reference to 'unsatisfactory performance'.

Part 4: Appointment of chief executive officer of Board.

The CEO should be appointed solely by the Board, not with the approval of SCAG. The involvement of SCAG is an inappropriate intrusion on the independence of the Board.

Part 6: Committees of Board.

The composition and functions of the Advisory committees should be left to the Board to determine, rather than an attempt being made in the proposed National Law to specify the appropriate committees. The advisory committees should have a direct reporting relationship to the Board.

SCHEDULE 2: PROVISIONS RELATING TO OMBUDSMAN.

Part 1.1: Appointment of Ombudsman.

While recognising arguments for the Ombudsman to be independent of the Board, the ABA does not believe the role of the Ombudsman as it has proposed above warrants the establishment of a separate office. However, if the Governments were to determine otherwise, the ABA believes that the appointment should be made by the Federal Attorney-General after consultation with the Board.

Part 1.4: Immunity.

The immunity given in cl. 4 (2) is too limited. The immunity provision should be along the lines of that found in s. 601 of the *Legal Profession Act 2004* (NSW).

LEGAL PROFESSION NATIONAL RULES

Chapter 2: Unqualified legal practice.

2.2.1: Entitlement to certain titles.

See comments above at Part 1.2 of Chapter 1 concerning the definition of 'barrister'.

Chapter 3: Admission.

3.4.1 (f): This provision should be extended to include any concluded disciplinary action in the legal profession, other than where the matter was dismissed. This lacuna in the present legislation has caused practical difficulties.

Chapter 4: Australian practising certificates.

Rule 4.2.3: Discretionary conditions on Australian practising certificates.

Unlike, for example, s. 54 of the *Legal Profession Act 2004* (NSW), the proposed National Law does not set out the statutory conditions relating to the practice of a barrister. It should. Provisions relating to practice as a barrister are scattered throughout the legislative package. The Rules provide in clause 4.2.3(1) (g) that the Board may impose discretionary conditions on a practising certificate of a barrister precluding partnership and practising as an employee. Sub-clause (g)(iii) permits a condition requiring the holder 'not to hold office as a principal or director of a business, where the corporate or unincorporated, otherwise then as a sole practitioner'. This may allow incorporation. The Rule should be amended to remove this possible contradiction.

This Rule refers to 'specific legal education or training' (at cl. 4.2.3 (1) (b) (ii)). The ABA assumes that the Rule is intended to allow necessary courses such as the Bars' Bar Practice Course and, as a corollary to the Bar Practice Course, the Reading Program, to continue. These mandatory training measures, currently being introduced in those jurisdictions which do not already have them, are now statutorily recognised in some jurisdictions (see, for example, s 56 of the *Legal Profession Act 2004* (NSW). They should be recognised in the National Law.

A prerequisite in some jurisdictions to undertaking a Bar Practice Course is successful completion of a set of examinations in Ethics, Practice & Procedure and Evidence. Uniform practices across Australia are being considered by the Australian Bar Association. Where there are examinations there has been nothing to suggest that they have not operated successfully. The courses currently recognised by a State or Territory should be recognised in the National Law.

Rule 4.3.2: Variation, suspension or cancellation.

This provision contains drafting errors in paragraphs (d) (i) and (ii) and (e). If the proposed action was cancellation, the notice will not specify variation or suspension of the certificate, and similarly if the proposed action was suspension, the notice will not specify variation of the certificate.

Rule 7.1.5: Trust money and trust accounts- Application of these rules – barristers.

Clause 4.2.7(2) requires barristers receiving costs in advance to deal with the money in accordance with the National Rules. Rule 7.1.5 contains the relevant provisions.

The Rule requires the money to be deposited in an account until 'the money is paid to an Australian legal practitioner engaged by the client in the matter' (cl. 7.1.5 (b) (iii). The reference to an Australian legal practitioner could include the barrister who is receiving the costs in advance, therefore defeating the section by the barrister paying the money to himself/herself. Is the clause meant to refer to *another* Australian legal practitioner?

The barristers should be required to issue a receipt where they receive money in advance.

CHAPTER 9: PROFESSIONAL INDEMNITY INSURANCE (PII).

A significant number of practitioners, including most barristers, obtain their professional indemnity insurance (PII) from commercial providers on the open market. In recent years various attempts have been made to require Bars to mandate that barristers obtain their PII from a particular provider. There have been suggestions that certain mandatory PII requirements be imposed on the Bars that could not be obtained from a commercial insurer. The National Law should specifically recognise that the standards it may set do not prevent the Bars obtaining their PII policies from the competitive commercial market and that the prescribed PII requirements be readily obtainable from the commercial market. The Board should have the power to approve a policy that does not meet the minimum standards where market conditions make it difficult to obtain cover at a reasonable cost.

Rule 9.2.1: Minimum standards for professional indemnity insurance.

Rule 9.2.1 (6): In its current terms, this provision requires that there must be coverage of $1.5m for each and every claim. This in effect means that all policies must have a limit of liability for each claim of $1.5m and no aggregate limit of liability or that, if they do have an aggregate limit of liability, it is automatically reinstated an unlimited number of times when it is exhausted by a claim or claims. Cover in these terms would be very difficult to secure on commercial terms. The Rule should be amended to require that every policy provide minimum coverage of $1.5m for each and every claim and in the aggregate, with the aggregate being subject to at least two automatic reinstatements, including for run-off cover. The provision of two automatic reinstatements would mean that the insurer is potentially liable for three times the stated aggregate limit of liability under the policy. Three of the current policies available to New South Wales barristers (and barristers in most other jurisdictions) provide for two reinstatements, i.e. the policies provide for three times the stated policy limit. This has never caused a problem since the introduction of compulsory professional indemnity insurance cover.

Rule 9.2.1 (8): None of the Bars' current PII policies obtained on the commercial market meet this requirement in one respect. Run-off is not available where the barrister has been struck off the Roll or ceases practice for disciplinary reasons. Having this new provision will be seen by the insurers as dramatically increasing their potential exposure. Although the ABA appreciates the public protection basis for the inclusion of this new requirement, this needs to be balanced against the fact that most Australian barristers will either be unable to obtain PII because of the provision, or will be required to pay substantially increased premiums, against a background of there having been a four-fold increase in premiums in the last couple of years.

Rule 9.2.1(12) does not state how much retroactive cover is required to be provided. If it is intended that the period of retroactive cover be unlimited, this may be an instance where cover cannot be reasonably obtained on the commercial market. The period should be at least six years.

9.2.5: Exemptions.

In a number of jurisdictions members of parliament hold a practising certificate, but are exempt from holding PII unless they do practice. It is suggested that cl. 9.2.5 provide that this practise may continue. In some jurisdictions statutory office holders and the like, e.g. Crown Solicitor, prosecutors, public defenders, currently hold a practising certificate. Although they are exempted from holding PII, there is a condition on their practising certificate – or they give a written undertaking – to the effect that they will not seek to practise at the private Bar until they have obtained the necessary PII. The Rules should recognise this requirement.

9.5.1: Injunctions.

Clause 9.5.1 (2) should be amended to make it clear that a local representative may apply to the Supreme Court for an injunction.

9.7: General.

There should be a general provision along the lines of s. 602 of the *Legal Profession Act 2004* (NSW) concerning the non-compellability of certain witnesses to give evidence or produce documents in respect of any matter in which the person was involved in the course of administration of the complaints and discipline regime. Prior to the amendment of the NSW Act a few years ago, this was a fertile area for costly and time wasting activity – at times by third parties who were fishing for adverse information about a practitioner for reasons that had nothing to do with a complaint.

CHAPTER 11: CONTINUING PROFESSIONAL DEVELOPMENT.

11.2.1: Definition of CPD activity and CPD unit.

The ABA assumes that the Board will delegate to the professional associations its powers under this Rule. Not to do so would be impracticable. Questions by practitioners about a CPD issue arise daily.

The ABA notes that cl. 11.2.2 (1) (b) is taken from cl. 176 of the *Legal Profession Regulation 2005* (NSW). This provision has operated without difficulty since its introduction in its present form and should be retained.

Rule 11.2.3 provides for exemptions, but does not appear to explicitly provide for a reduction in the required units - for example, for parenting reasons. This should be clarified and authority provided for a reduction in units in appropriate circumstances.

Rule 11.2.4 (4) is a practical provision that is already followed in some jurisdictions. There is a strong demand for CPD towards the end of the CPD year which professional associations seek to meet. This provision allows those who have already accrued their required CPD units to avail themselves of CPD activities available in this part of the year to make an early start on their units required for the following year.

Rule 11.2.6 does not indicate the process the Board's delegate must undertake if a practitioner's compliance plan is inadequate. It is suggested that options provided for in 11.2.6 (2) should then come into effect.

CHAPTER 13: AUSTRALIAN LEGAL PROFESSION REGISTER.

13.2.1: Details of disciplinary orders.

The Rules presently require that disciplinary order made under Chapter 5 of the National Law against a lawyer *must* be included in the register. Under the present disciplinary regime in some jurisdictions, cautions (which are intended to be used as part of an educative process) are not publicised and there is a sunset clause for penalties such as reprimands, fines, conditions that have ceased to apply etc. There are good reasons why some penalties and conditions, should not be published – or not continue to be published after a certain period. This is a matter that should be left to the Board, after consultation, to prescribe rather than there being a blanket mandatory requirement in the proposed National Law.

The ABA suggests that cautions not be placed on the register. The removal of a person from the Roll or the cancellation of a practising certificate for reasons other than those currently set out in Rule 13.2.2 should be noted on the public register.

Reprimands should remain on the register for the balance of the relevant practising certificate year and one further year. Published decisions of tribunals and courts should be on the register permanently. It is not clear whether a determination of unsatisfactory professional conduct by the Ombudsman under cl. 5.4.5. is a disciplinary order and as such is to appear on the register.

As noted in the comments above at 9.2, the Register should have separate parts listing those on the Roll and those who hold a practising certificate. The part relating to persons who do not hold a practising certificate should be available to regulators and professional bodies but not generally to members of the public.

13.2.3: Certain details not to be included in publicly available version of Register.

The present prohibition on the Register including the residential address is too broad. There are many practitioners who have chosen to work from home. The mere fact that their practice address is also their home address is not of itself justification for not publishing the practice address. The publication of a practitioners' practice address has proven to be of value to clients (and potential clients); that is, the consumer. That measure should not now be wound back. However, the National Law should provide, as for example is the practice in NSW (cl. 20 *Legal Profession Regulation 2005*), that for good reason the Board can exempt a person who practices from their home from the requirement that their practice address be shown on the register.