COAG

NATIONAL LEGAL PROFESSION REFORM PROJECT

SUBMISSION
BY THE
LAW COUNCIL OF AUSTRALIA

13 August 2010
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PRESIDENT’S STATEMENT

13 August 2010

Mr Roger Wilkins AO
Chairperson
National Legal Profession Reform Taskforce
Attorney-General’s Department
CANBERRA ACT 2600

Dear Mr Wilkins

I have pleasure in forwarding to you the Law Council of Australia’s Submission in response to the National Legal Profession Reform Consultation Package released by the Taskforce of 14 May 2010.

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Council speaks for the Australian legal profession on national and international issues, representing the interests of approximately 56,000 Australian lawyers, through their representative bar associations and law societies and the Large Law Firm Group Ltd (the “constituent bodies” of the Law Council).

The Law Council of Australia endorses micro-economic reforms aimed at efficient and effective regulation of the Australian legal profession and the provision of legal services that enables and facilitates legal practice on a truly national basis. The removal of existing jurisdictional regulatory barriers to seamless national legal practice is a core reform deliverable for the Australian legal profession.

The Taskforce has proposed that there be nationally uniform, simplified legislation and rules. The Law Council strongly supports this approach as an effective means for delivering national consistency in regulatory standards and in the application of those standards.

The Law Council also agrees with the Taskforce that a number of areas of the proposed national regulatory framework need to remain as matters for each State and Territory to determine according to local requirements. These are: professional indemnity insurance providers and insurers; fidelity funds; public purpose and similar funds; and local representatives charged with day-to-day administration of the proposed national regulatory system.

The Law Council endorses the Taskforce’s proposals in the area of admission of overseas-qualified and experienced legal practitioners to the Australian legal profession, as well as the ability of the National Legal Services Board to enter mutual recognition arrangements with overseas legal profession regulatory authorities.

The Law Council also supports the approach taken by the Taskforce to a National Law (containing uniform, national professional and regulatory principles, entitlements and obligations); to National Rules (containing uniform, national regulatory rules, processes and procedures); to National Conduct Rules for barristers and solicitors developed by the professional bodies; and to the establishment of a National Legal Services Board (to oversee the implementation and consistent application of the National Law, National Rules, and national policies and practices determined by the Board).

The Law Council endorses the Taskforce’s aspiration that the establishment of a national regulatory framework based upon a uniform National Law and National Rules should lead to a reduction in the
number of State and Territory regulatory authorities and, consequently, a reduction in the cost of regulation. The cost of a new national regulatory system, and the sources of funding for that system are matters of significant concern to the legal profession because of the impact costs and funding sources can have on law practices, clients and public purpose funds. As I have previously advised, the legal profession remains strongly of the view that there should be sufficient savings from the new regulatory framework to fund the national bodies, particularly if the Law Council’s submissions in relation to these bodies are accepted, and the profession does not support a levy on practising certificate fees. It is extremely disappointing that at the time of preparation of this submission, the Taskforce has not released any updated costing information and funding proposals. Accordingly, the legal profession will find it difficult to lend its support to the Taskforce’s proposals without an opportunity to understand the Taskforce’s modelling of the likely overall cost of a new national system of regulation, and the sources of funds needed to operate that national system.

The Law Council has identified a number of areas where the Law Council disagrees with the Taskforce proposals.

Matters that relate to the fundamentals of the proposed national framework are set out in Part 1 of this Submission. These are areas which need to be addressed for the Law Council to lend its support to the Taskforce’s proposals.

Part 2 of this Submission sets out priority policy issues relating to particular regulatory subject areas which the Law Council considers need to be addressed to improve the efficiency, equity, fairness and effectiveness of the Taskforce’s proposals.

Part 3 of this Submission sets out recommendations about technical issues and improvements to the National Law and National Rules.

Yours sincerely

Glenn Ferguson
PART 1 – FRAMEWORK ISSUES

1.1 Composition of the National Legal Services Board

The Law Council has considered the Taskforce proposal for a seven member National Legal Services Board, to be appointed by the Standing Committee of Attorneys-General. The seven members appointed by the Standing Committee would consist of:

- one member selected by the Attorneys-General from three candidates nominated by the Council of Chief Justices;
- one member selected by the Attorneys-General from three candidates nominated by the Law Council of Australia;
- no more than five members selected by the Attorneys-General so that they collectively provide experience in legal practice, consumer protection and regulation.

Furthermore, the Taskforce proposes that one of the members of the Board will be appointed the Chairperson of the Board by the host Attorney-General on the recommendation of the Standing Committee.

The Law Council rejects the proposition that the Executive Government selects all of the members of the Board. The Law Council also rejects the Taskforce proposal that the National Board will have a majority of members not drawn from the legal profession and judiciary.

The Law Council’s opposition is based on a matter of deeply-held principle – that an independent legal profession is fundamentally important to the Australian community and must be preserved.

The concept of independence of the legal profession is complex and rests, amongst other things, on the principle of the Rule of Law.

The legal profession performs a unique role in society. The Law Council rejects any suggestion that the legal profession can be characterised as other professions, or that it can be controlled simply as a government-regulated occupation.

Unlike other professions or occupations, the primary duty of every legal practitioner is to the courts and the administration of justice. Through this unique role, legal practitioners serve the courts, their clients and the broader community in maintaining the rule of law. The legal profession must be able to carry out its duties free from interference, or the possibility of interference, by outside influences, including in particular, interference by the Executive Government.

A National Legal Services Board with a majority of members drawn from outside the legal profession and judiciary will undermine the independence of the legal profession and, through that, community confidence in the rule of law and the impartial administration of justice.

The Law Council has also considered the Taskforce’s July 2010 Discussion Paper Composition and Appointment of the National Legal Services Board and the alternatives put forward by the Taskforce for comment on the composition of the Board, but is not persuaded that any of the other options put forward will address the Law Council’s concerns.

The Law Council strongly submits that its proposal for a seven member National Board consisting of three members nominated by the Law Council and Australian Bar Association (ABA); three members nominated by the Standing Committee of Attorneys-General, and one member nominated by the Council of Chief Justices achieves a workable balance between the interests and perspectives of the legal profession, the interests and perspectives of community and the interests and perspectives of the judiciary.
It is incorrect and inaccurate to suggest that a Board composed in the manner suggested by the Law Council will somehow be “controlled by the legal profession.” To say that Board members nominated by the Law Council, ABA and the judiciary would somehow “conspire” to advance the interests of the profession is simplistic and wrong. These Board members, once appointed, would fulfill their legal duty to the Board. What is of concern to the legal profession is the method of appointment and the actual composition of the Board, rather than somehow “having the numbers” to control the Board.

Law Council position

The Council maintains its position that a seven-member Board must consist of three members nominated from the legal profession, three members nominated by the Standing Committee of Attorneys-General and one member nominated by the Council of Chief Justices, who would also be the Chairperson of the Board.

1.2 Powers and functions of the Standing Committee of Attorneys-General

The Taskforce proposes\(^1\) that the Standing Committee of Attorneys-General would have the following roles and functions:

1. a general supervisory role in relation to the Board and the Ombudsman to ensure they are fulfilling their duties under the National Law consistently with the objectives of that Law.
2. to request reports from the Board and the Ombudsman regarding specified aspects of their operations.
3. to 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. to receive and consider annual and other reports from the Board and the Ombudsman.

The Law Council supports elements 1, 2 and 4 above of the Taskforce proposal. The Law Council agrees that the Standing Committee of Attorneys-General must have a general supervisory role over the National Legal Services Board and National Legal Services Ombudsman, and that the Board and Ombudsman must provide to the Standing Committee specific reports and annual reports of their operations.

The principle of parliamentary accountability is a cornerstone of democratic government. Elements 1, 2 and 4 of the Taskforce’s proposals will ensure accountability of the national regulatory authorities to the Standing Committee of Attorneys-General and, through that Ministerial Council, to the State Parliaments and Territory Legislative Assemblies for fulfilling their duties under the National Law consistently with the objectives of the National Law.

The Law Council opposes element 3 of the Taskforce proposal – that the Standing Committee may give policy directions to the Board and the Ombudsman. The national regulatory authorities must carry out their statutory duties to apply and administer the National Law consistently with the objectives of that Law, without the potential for policy interference that would undermine the National Law. In the Law Council’s view, changes in policy underpinning the National Law are properly matters for parliaments and legislative assemblies to decide.

There is an inherent contradiction in section 8.2.4 of the National Law whereby the National Legal Services Board is to have the general administration of the National Law and to be empowered to do all such things as are necessary or convenient to give effect to the National Law, to perform its functions and achieve its objectives, and yet is to be subject to policy directions from the Standing Committee.

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\(^1\) National Law, section 8.1.2
Law Council position

The National Law must not provide for a situation where the National Law and its administration is dependent upon, and can be altered by, policy directions from the Standing Committee of Attorneys-General.

1.3 National Legal Services Ombudsman

The Taskforce proposes the establishment of a National Legal Services Ombudsman who would, through local representatives and delegates exercise a wide range of regulatory powers and functions under the National Law. The subject areas of regulation include trust money and trust accounting; business management and control; dispute resolution and professional discipline; appointment of managers and receivers to law practices; and appointment of investigators.

The Law Council also notes that under the National Law the National Legal Services Board will, though local representatives, delegates or in its own right exercise regulatory functions such as granting compliance certificates for admission, granting or renewing practising certificates, registration of foreign lawyers, and approval of business structures.

There is no apparent rationale for the division of regulatory powers and functions as between an Ombudsman and a National Legal Services Board as proposed by the Taskforce. Furthermore, there are regulatory subject areas where it is envisaged both the Board and Ombudsman would exercise regulatory powers and functions – i.e. the functions would overlap.

The Law Council also notes that the breadth of powers and functions proposed for the Ombudsman are not powers and functions that the community would generally understand or expect to be powers and functions of an Ombudsman. In particular, the Law Council disagrees that an Ombudsman as properly conceived, should be conferred a general objective to “ensure compliance” with the requirements of the National Law and National Rules.

The Law Council believes that reform in this area should focus on consumers’ needs for a complaints-handling framework that facilitates the prompt resolution of complaints against legal practitioners through national standards which deliver a uniform, streamlined and more efficient complaints-handling framework.

Apart from confounding the roles of the Board and Ombudsman, the Taskforce’s proposals will require the establishment of a separate and costly regulatory structure to support the Ombudsman’s functions as proposed, notwithstanding the Taskforce’s position that the funding of the new national bodies must occur within the existing funding envelope of the current regulatory system.

The Law Council does not see that any reliable evidence has been put forward, or that a compelling argument has been made out, by the Taskforce for the creation of a National Legal Services Ombudsman, particular where the role of such an Ombudsman would not be focused specifically on handling consumer complaints.

Law Council position

The regulatory powers and functions proposed for the National Legal Services Ombudsman should be rolled into the functions of the National Legal Services Board.

2 The power of a national authority to take-over responsibility for a particular matter involving the exercise of a special function is discussed at 1.5 below.
1.4 Role of the National Legal Services Board

The Law Council considers that one of the fundamental benefits to be gained from reform is the creation of a National Legal Services Board with the objective and purpose of setting national standards through the making of National Rules, overseeing the effectiveness of the national regulatory system and ensuring consistent application of the National Law and National Rules by local representatives appointed by the States and Territories and their delegates.

Another fundamental benefit to be gained from reform is that day-to-day administration of the national system is carried out within the States and Territories by local representatives appointed by the States and Territories and their delegates, preserving and (as noted by the Taskforce in its Consultation Report 2010) leveraging the benefits of existing institutional infrastructure and expertise.

The Law Council also notes the Taskforce aspiration that any new national regulatory system must not lead to an increase in regulatory costs – i.e. funding of the new national bodies must occur within the existing funding envelope of the current regulatory system.

Given the above, the Law Council does not consider it appropriate or necessary for the National Board to perform regulatory functions (such as registration of foreign lawyers) that could just as easily and more efficiently be performed by its local representatives and their delegates.

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<th>Law Council position</th>
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<td>Day-to-day regulatory powers and functions of the Board should be exercised by local representatives rather than by the Board itself.</td>
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1.5 “Take over” powers of the National Authorities

The National Law establishes a regulatory system under which the regulatory functions of the National Authorities (known as “special functions”) will be performed on a day-to-day basis by local regulatory authorities (to be nominated by the States and Territories) and their delegates.

The Law Council agrees with the observation by the Taskforce in its Consultation Report 2010 that the national regulatory system should leverage the benefits of existing institutional infrastructure and expertise. The regulatory framework proposed by the Taskforce would largely achieve this objective.

The Law Council notes that the National Law provides that a National Authority may “take over” from a local representative (or its delegate) responsibility for a particular matter that involves or may involve a special function. The circumstances are where:

1. the matter is likely to set a precedent; or
2. the matter should be resolved in a manner that would promote national uniformity; or
3. the matter could result in an actual or perceived conflict of interest if managed by the representative or its delegate; or
4. the representative or its delegate has acted against or not acted on a direction or recommendation of a national authority.

In relation to circumstance 2, the Law Council expects that national authorities, would, as a matter of course, implement administrative arrangements that escalate and resolve matters where an issue of

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1 The Law Council recommends that there be only be one National Authority – the National Legal Services Board.
2 Part 1.3 of the National Law.
3 Section 1.3.7
national uniformity arises. Numerous provisions throughout the National Law provide a basis for achieving this outcome.\(^6\)

The Law Council does not, therefore, consider this to be an area where a National Authority would need to “take over” and personally resolve a matter. The Law Council notes that additional costs would be incurred in establishing two separate administrative structures\(^7\) for this purpose.

For similar reasons, the Law Council does not agree with the need for a “take over” power in relation to circumstance 4. It is difficult to conceive of the possibility that a State or Territory appointed representative of a National Board or National Ombudsman would intentionally act against, or not act upon, a lawful direction or recommendation of a National Authority.

In relation to circumstance 3, the Law Council acknowledges that circumstances might arise where an actual, potential or perceived conflict of interest would make it imprudent for a regulatory authority to handle a particular matter. On the very few occasions where such a situation has arisen (usually in relation to a disciplinary matter), appropriate arrangements are made to ensure that the conflict of interest is avoided. The Law Council does not consider there to be a need for a “take over” power to deal with these situations by transferring resolution of the matter to a National Board or National Ombudsman. The Law Council’s view is that these situations can be dealt with more effectively and efficiently under administrative arrangements and protocols that enable – on the rare occasions when they might arise – the matter to be transferred to a local representative in another State or Territory.

The Law Council notes that the Large Law Firm Group Ltd has made a number of submissions expressing a different position on this issue.

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<td>The “take over” powers in section 1.3.7 of the National Law are unnecessary. A generalised use of the “take over” power would lead to the establishment or development over time of large, separate administrative offices for the proposed National Authorities. Section 1.3.7 must be omitted from the National Law.</td>
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1.6 Compliance audits and management system directions

Compliance audits

Section 4.6.1 of the National Law will empower the Ombudsman to conduct an audit of the compliance of a law practice with the National Law, the National Rules, and the applicable professional obligations, including the management of the provision of legal services by the law practice. Furthermore, the Ombudsman may initiate a compliance audit on the basis that the Ombudsman “considers it necessary to do so”.

The Law Council has significant concerns with the Taskforce’s proposal for the following reasons:

- Present legal profession legislation provides for compliance audits to be undertaken of incorporated legal practices in relation to compliance by the incorporated legal practice with legislative provisions and rules applying specifically to incorporated legal practices and the management of the provision of legal services by the incorporated legal practice. Experience has shown that no systemic compliance problems exist among incorporated legal practices.

- No evidence has been put forward by the Taskforce demonstrating systemic problems among law practices generally that would warrant or justify the introduction of a general compliance audit power.

\(^6\) see in particular subsection 8.2.4(4).

\(^7\) one for the National Legal Services Board and one for the National Legal Services Ombudsman.
• The overwhelming majority of law practices in Australia consist of sole practitioners (including all barristers who must practice as sole practitioners), small law firms and, increasingly, small law firms that have incorporated. Significant costs will be incurred by these law practices in participating in audit processes. These costs will ultimately be borne by the clients of those law practices selected by the Ombudsman for auditing. Furthermore, a compliance audit into the management practices of sole practitioners such as barristers does not seem to be a logical or sensible proposition.

• It is unacceptable that an audit could be undertaken by the Ombudsman into compliance with “professional obligations” such as a legal practitioner’s duties to the Supreme Court, duties to clients and adherence to ethical standards.  

• The introduction of a general audit function will require regulatory authorities to recruit staff with knowledge of legal practice management, adding considerably to the cost of the national regulatory system.

• The National Law does not define what factors must be taken into consideration by the Ombudsman in forming an opinion that “it is necessary” to undertake a compliance audit. In this regard the Law Council would expect that such an intrusive power would, at the very least, be based upon the Ombudsman having reasonable grounds to believe a systemic breach of the National Law and National Rules has occurred, or is occurring, in the management practices of a law firm.

• Furthermore, the National Law makes no provision for matters such as:
  o making a finding of non-compliance;
  o providing evidence concerning that proposed finding;
  o making submissions on a proposed finding in advance of that finding;
  o permitting, in appropriate circumstances, the law practice to implement changes to ameliorate the past non-compliance and avoid further non-compliance without formal sanctions or further report;
  o the consequences of such a finding; and
  o the preservation of procedural fairness during an audit process and rights of review and appeal against an adverse audit finding or outcome.

**Management system directions**

Section 4.6.2 of the National Law provides that the Ombudsman may, if he or she considers it necessary to do so, give a management system direction to a law practice or a class of law practice. Management system directions are intended to ensure that a law practice implements and maintains “appropriate management systems to enable the provision of legal services in accordance with the National Law, National Rules and applicable professional obligations”. The Taskforce proposes that there be a statutory obligation on a law practice to comply with such a direction and to provide periodic reports to the Ombudsman on the management systems and on compliance with the systems.

The significant concerns of the Law Council outlined above in relation to compliance audits apply equally to the Taskforce’s proposal for management system directions. In addition:

• The National Law does not define what is meant by an “appropriate management system” or a “periodic report”, nor has a proposed National Rule on these topics been proposed.
• Placing an obligation on law practices to provide periodic reports on compliance adds considerably to the cost of running a law practice without any clearly defined purpose and use of such reports by the Ombudsman.

• Management system directions are an unprecedented and unreasonable regulatory intrusion into the management of the day-to-day operations and affairs of a law practices, the overwhelming majority of which are small businesses.

• Giving a management system direction to a law practice (for example, a law practice consisting of a barrister, who must practice as a sole practitioner) in relation to professional obligations represents a serious intrusion into the relationship and duties of legal practitioners as officers of the court.

**Law Council position**

The Law Council does not support compliance audits as they are currently envisaged. The Law Council supports a compliance audit power where there are reasonable and demonstrable grounds for believing there may have been, based upon complaints, systematic breaches of the National Law.

The Law Council is opposed to management system directions, except as a result of a compliance audit where it is required to remedy systemic breaches of the National Law.

1.7 Audit and investigation powers.

The draft National Law proposes that the Ombudsman may initiate a number of actions based upon forming an opinion that it is reasonable to do so. These actions relate to regulatory areas such as:

- Part 4.2 Trust money and trust accounts
- Part 4.6 Business Management and Control (compliance audits and management systems directions).
- Part 5.2 Investigation of complaints.

Chapter 7 of the draft National Law sets outs the range and scope of investigatory powers the Ombudsman may invoke in carrying out the functions mentioned above.

By way of example, Part 7.4 of the National Law provides that an investigator has, and may exercise, certain coercive information gathering and examination powers in relation to investigations and audits of incorporated legal practices that are available to ASIC under the Australian Securities and Investments Commission Act 2001.

However, in invoking such powers, Division 7 of the National Law does not replicate or apply provision such as, for example, section 28 of the ASIC Act, which sets out clear criteria for when investigatory powers may be exercised.

The Law Council notes that the National Law proposed by the Taskforce will introduce more intrusive audit and investigatory powers than are currently available to legal profession regulatory authorities, and that the use of such powers will simply be on the basis that the Ombudsman “considers it necessary to do so”.

The Law Council considers that powers of audit or investigation must only be available where clearly articulated and reasonable criteria for their use exists and that important safeguards relating to matters such as client privilege, protection from liability and non-compellability are preserved.
Law Council position

The National Law must set out specific or detailed criteria and protections concerning the grounds upon which the Ombudsman may invoke the audit and investigation powers.

1.8 Penalties framework

The Law Council is seriously concerned that the Taskforce believes there is a need to substantially increase the incidence of penalties for breaches of the National Law and National Rules in comparison to those that exist under the various Legal Profession Acts, particularly given, as the Taskforce notes in its Consultation Report 2010, that a key driver for the commencement of reforms under the auspices of COAG was the recognition that further efforts could be made to ease the regulatory burden on Australian law practices and legal practitioners.

The Law Council is particularly concerned that the Taskforce obviously believes there is a need to criminalise a large number of breaches of the National Law but has provided no evidence of widespread serious non-compliance with existing regulatory obligations by the Australian legal profession to warrant such a proposal.

The Law Council view is that offences against the National Law that would not otherwise be offences against criminal codes (such as fraud involving trust money) must be clearly justifiable.

By way of example, section 3.5.12 of the National Law provides that the Board may serve a notice on an Australian legal practitioner alleging that the practitioner has practised law outside the terms of a restriction on his or her practising entitlements, and requiring the practitioner to provide a statement showing cause why the Board should not take action to vary, cancel or suspend the practising certificate. Section 3.5.13 of the National Law places a further obligation on the legal practitioner to provide a statement explaining why the practitioner considers himself or herself to be a fit and proper person to hold a practising certificate. Failure to comply results in a criminal penalty.

The Law Council considers it an absurdity to suggest that a failure to respond in writing to an allegation is criminal activity.

Criminalising conduct not only unnecessarily stigmatises, it also means that such matters will be dispersed between the designated Tribunal and the Court for matters that are essentially professional conduct issues. It would, therefore, seem to follow that the increase in the number of penalties increases the risk of double jeopardy (i.e. a contravention can result in both a fine and a disciplinary sanction).

The Law Council agrees that any breach of the National Law should be conduct capable of constituting unsatisfactory professional conduct or professional misconduct which can result in disciplinary action, including being struck from the roll of Australian lawyers. However, the Law Council does not believe that the penalty framework in the National Law strikes any kind of sensible or appropriate balance between conduct that should be treated as a disciplinary matter and conduct that warrants a civil or criminal penalty.

Law Council position

The framework of penalties proposed by the Taskforce for breaches of the National Law and National Rules must be reconsidered.
1.9 Centralised admission

The proposed National Law has been drafted on the premise of a system of centralised administration of admissions, supported by nationally uniform admission prerequisites, guidelines and admission rules, to be contained in National Rules made by the Board (with assistance, it is anticipated, by an Admissions Advisory Committee).

The possibility of reducing the need for eight separate Admission Boards engaged in admission application processing is seen by the Taskforce as an area where regulatory costs can be reduced by eliminating duplication of admission bodies, and by redesign and streamlining of the application processes and procedures while also ensuring national consistency in the application of the admission prerequisites and discretionary decision-making.

On the other hand, the Law Council notes concerns expressed in other submissions to the Taskforce that centralising the admission function would have detrimental impact through: the loss of face-to-face contact with and assistance to admission applicants; the loss of voluntary local expertise from the legal profession in assisting to assess admission applications; and a loss of capacity to assist the Supreme Courts in the admission processes.

The adoption of national admission standards by the Board, coupled with redesigned and uniform processes and procedures, but leaving the decision making on individual applications at the local level will achieve the advantages advocated by the Taskforce without the detrimental impacts identified in the other submissions to the Taskforce.

Law Council position

The Law Council opposes centralisation of admission processing and considers that this function must be a special function of the Board under the National Law.

1.10 Legal costs framework

The legal costs framework is contained in Part 4.3 of the National Law (dealing with: legal costs generally; costs agreements; billing; unpaid legal costs; and costs assessment) and in various parts of Chapter 5 (Dispute resolution and professional misconduct) that are concerned with consumer matters.

The Law Council considers that the legal costs framework proposed by the Taskforce in the National Law lacks coherence and needs to be substantially re-drafted. Furthermore, the Law Council considers that reforms should have strengthened the role of the costs agreement as the primary basis for the relationship between a legal practitioner and client by clearly establishing that common law principles apply to the efficacy and validity of costs agreements.

By way of example, while section 4.3.14 of the draft National Law provides that a costs agreement may be enforced in the same way as any other contract, this enforceability is subject to the provisions of the National Law. The role of a costs agreement, for all but those commercial and government clients who contract out of the costs provisions, is reduced by the Taskforce proposals to being merely prima facie evidence that the costs disclosed in the agreement are fair and reasonable, and this is itself subject to the provisions of this Division relating to costs disclosure having been complied with.

The proposed National Law has created a legal costs framework:
   (a). where there is greater uncertainty created;
   (b). increased steps for compliance together with the regulatory and administrative burden for law practices; and
(c). intrudes into areas of practice where regulation is not warranted.

Also, whilst no issues exist with supporting informed decisions by clients and protecting vulnerable consumers, the National Law increases the regulatory burden without delivering benefits 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 of the National Law.

The general observations and concerns set out above about the diminishing primacy of the costs agreement as a freely negotiated and privately enforceable contract are compounded by disjointed drafting in the costs provisions of the draft National Law:

(a). the requirements of a costs agreement and what is to be contained in them are set out in the National Law at section 4.3.10;

(b). the requirements of a conditional costs agreement are contained in the National Rules at Rules 8.2.1 to 8.2.3;

(c). billing is provided for in the National Law at section 4.3.16; and

(d). the requirements for delivery of the bills contained in the National Rules at Rules 8.3.1 to 8.3.2.

Furthermore, the legislation does not specifically deal with lump sum costs agreements or how fair and reasonable concepts will call the viability of such arrangement into question. This does not support effective business management in a range of legal matters. For example, in matters involving simple conveyancing matters, commercial reality suggests that the costs of compliance with the contemplated regime will create excessive paperwork for simple matters where a client is prepared to accept a lump sum fee for a service.

### Law Council position

The provisions relating to costs agreements need to be strengthened to ensure that the costs agreement is treated as the paramount document for regulating the relationship between practitioner and client in the area of legal costs, by ensuring common law principles are applied to costs agreements.

The costs provisions in the draft National Law and National Rules require restructuring to achieve a more coherent framework and an appropriate balance between what is contained in the primary legislation and what is contained in the National Rules.

#### 1.11 What constitutes “reasonable steps” in relation to client understanding and consent?

Section 4.3.7 of the National Law will impose disclosure obligations on law practices in relation to clients in legal costs matters. In particular, section 4.3.7(4) requires that a law practice must “take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs after being given that information.

The Law Council acknowledges that there are significant consumer concerns about understanding legal advice, the course of action required to resolve a matter in a client’s favour and the costs involved. However, the Law Council rejects the proposition that the solution is to impose the subjective test in section 4.3.7(4) on law practices.

Imposing a subjective test as proposed creates considerable uncertainty and risk for legal practitioners as it requires the practitioner to make a judgment about a client’s ability to understand.
What is involved in reasonable steps is inherently uncertain. What is involved in what must be satisfied, namely another person’s understanding, is also inherently uncertain. The legislation gives no guidance on these concepts, yet it effectively shifts responsibility for the level of a client’s knowledge and understanding entirely onto the legal practitioner.

By way of example, banks’ solicitor guarantee certificates require the solicitor to certify that the advice given by the solicitor has been understood. Experience shows that in the event of a dispute, lack of understanding of the advice given by the solicitor is commonly put forward as a defence against enforcement of the contract to which the certificate relates.

The consequences for a legal practitioner not satisfying himself or herself that a client understands and consents are severe – subsection 4.3.7(5) provides:

- the costs agreement concerned is void;
- the client or an associated third party payer is not required to pay legal costs until they have been assessed or any costs dispute has been determined by the Ombudsman; and
- the contravention is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

It may also be observed that once a costs agreement is voided under section 4.3.7(5)(a) (or section 4.3.15) the protection afforded by section 4.3.4(3) that a costs agreement is prima facie evidence that the costs disclosed are fair and reasonable is lost.

Much therefore rides on the judgement of a law practice as to the reasonableness of the steps it takes to satisfy itself that a client has understood and given consent. A lawyer may not be able to assume that silence or inaction denotes consent. Also, if the client’s first language is not English, the question which arises is what additional reasonable steps would a law practice need to take to satisfy itself the client understands and consents over and above providing a written, translated statement.

The Law Council also notes that sections 5.3.5 and 5.3.6 of the draft National Law enable the Ombudsman to make his or her own binding determination about disputed legal costs where the amount involved is less than $10,000 on the basis of the Ombudsman’s (subjective) “assessment of what is fair and reasonable in all the circumstances”. The distinct possibility arises that a legal practitioner can be called upon to prove the basis of his or her subjective assessment of a client’s understanding and consent up to five years or more after the events occurred and to argue that his or her subjective assessment at the time was more correct than the Ombudsman’s subjective assessment made with the benefit of “perfect hindsight”.

The Law Council suggests that law practices need greater assurance under the National Law and suggests that a further subsection should be added so that a disclosure document signed by the client is prima facie evidence that the client understands and accepts the proposed course of action for the conduct of the matter and the proposed costs.

The Law Council also considers it unreasonable for the National Law to propose that failing to discharge disclosure obligations should lead to the whole of a costs agreement being automatically set aside. In many cases it is likely to be more appropriate for part of an agreement to be set aside.

It is suggested that it is appropriate, given the consequences, that the law provide for partial invalidity. For example a client (or associated third party) should have the right to apply to set aside part or all of the cost agreement if there is non-compliance.
Law Council positions

1. Section 4.3.7(4) of the National is unreasonable, onerous and very unfair to legal practitioners.

2. In addition to a costs agreement being prima facie evidence that costs disclosed in the agreement are fair and reasonable, a signed costs agreement should also be evidence that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed cost.

3. A signed costs agreement should be voidable only.

4. The National Law or National Rules should provide clear guidance about what steps are “reasonable” in this context.

1.12 Who may determine that a costs agreement is void.

Section 4.3.15 of the proposed National Law provides that a costs agreement that contravenes or is entered into in contravention of the National Law is void.

The Law Council is concerned that no provision is made for, or no recognition is given in the National Law to the following:

- Who will determine whether or not there has been a contravention.
- Who will determine the costs agreement is void and how will this be done.
- That the Supreme Court, in its supervisory capacity has the right to determine if a costs agreement is valid, or partially valid, recognising also that a costs agreement is a contract and that the Supreme Court has the power to determine that a contract be wholly or partially set aside.

The Law Council considers it might be inferred from other provisions of the National Law that the Ombudsman would be responsible for ensuring compliance with Part 4.3 (Legal costs) and might assert a right to declare a costs agreement void. The Law Council urges this matter be clarified, particularly as a costs agreement is essentially a private contract, the setting aside of which is a judicial function.

Law Council positions

1. A Tribunal or appropriate court should be responsible for the administration of Part 4.3 of the National Law, including deciding if there has been a contravention of the National Law and that a costs agreement should, as a consequence, be wholly or partly set aside.

2. A costs agreement that contravenes, or is entered into in contravention of, any provision of Part 4.3 of the National Law should be voidable.
PART 2 – PRIORITY POLICY ISSUES

GENERAL ISSUES

G.1 Penalty units

Issue
Section 1.2.1 of the National Law defines the term “penalty unit” to have the same meaning as in an Act of the host jurisdiction. However the monetary value of penalty units varies from one jurisdiction to another.

The setting of the monetary value of penalty units should be an open, transparent and accountable process. The proposed National Law effectively leaves this to the host jurisdiction.

To achieve national uniformity the penalty units should not only be identical in all jurisdictions, but should be set by way of agreement between all jurisdictions.

Law Council recommends

1. The proposed Legal Profession National Rules should specify the value of penalty points as they relate to offences in the National Law so as to ensure they have a uniform monetary value in every jurisdiction.

2. Changes in monetary value of penalty units should be agreed through the SCAG processes.

G.2 Penalty levels

Issue
Many of the penalty provisions in the National Law specify higher maximum penalties for a body corporate than for a natural person – typically, the penalty for a body corporate is five times the penalty for a natural person.

While this is consistent with approaches in other legislation, it would mean that, for example, a sole practitioner who chooses to incorporate would be subjected to five times the penalty for a breach as a sole practitioner, or a principal in a 200 person partnership.

Differentiation of penalty level based on whether the penalty is incurred by a body corporate or natural person may lead to inequities depending on the size of a law practice and may impact on choice of business structure.

Law Council recommends

The penalties that apply to a corporation should be the same as those that apply to a natural person.

G.3 Consistent meaning of the expression ‘fair and reasonable’

Issue
The phrase “fair and reasonable” arises in several contexts in different areas of the National Law:

- Section 4.3.4 provides that legal costs must be fair and reasonable. Several factors are listed as guidelines to assist in determining whether the costs incurred are fair and reasonable.
- Section 4.3.28—when determining whether legal works are fair and reasonable, the cost assessor must have regard to a number of factors listed under section 4.3.28(2).
• Section 5.3.5 – “Ombudsman may resolve a consumer matter by making a determination that, in the Ombudsman’s view, is fair and reasonable in all the circumstances”.

The criteria/guidelines for determining “fair and reasonable” where the phrase is used, is worded differently. There is some confusion as to whether these differently-worded criteria are the same.

For example, the first indicia of fair and reasonable costs (s 4.3.4(2)(a)) is that costs “are reasonably incurred and are reasonable in amount”.

A concern is that this statement does not differentiate between costs which might seem unreasonable but were incurred on instructions, and those which are not reasonable because they were not incurred on instructions, or were incurred by a practitioner acting unreasonably.

The second indicia (s 4.3.4(2)(b)) includes that costs “are proportionate in amount to the importance and complexity of the issues involved in the matter...”. This definition does not appear to allow for consideration of the importance of the matter to the client, who may be prepared to continue a matter and incur increased costs.

Similarly, the definition does not appear to take into account the situation where, as a defendant, a client is forced to incur costs beyond the complexity or objective value of the matter.

As a matter of principle, a phrase used in the law should not have different meanings in different provisions.

Law Council recommends

1. The National Law must provide a single test for determining what constitutes “fair and reasonable”.

2. The indicia must clearly relate to and be readily applicable to the particular facts and circumstances of each case.

3. The concept of “fair and reasonable” should only relate to costs and not to the Ombudsman’s view under section 5.3.5.

4. In terms of “fair and reasonable” as the phrase relates to costs, the introduction of a requirement for proportionality is unworkable and should be omitted.

PART 2.2 – ADMISSION TO THE AUSTRALIAN LEGAL PROFESSION

2.2.1 Conditional admission of foreign lawyers

Issue

Section 2.2.5 of the National Law provides that the Board may recommend in a compliance certificate in respect of a foreign lawyer that the foreign lawyer be admitted subject to conditions that:

• limit the period of the foreign lawyer’s admission;

• require the foreign lawyer to engage in supervised legal practice, or limit the area of law in which the foreign lawyer may engage in legal practice, or otherwise restrict the foreign lawyer’s practising entitlements;

• require the foreign lawyer to undertake particular academic or practical legal training or both.

Section 2.2.5 also provides that admission of a foreign lawyer is subject to the conditions (if any) recommended by the Board in the compliance certificate, and that the Supreme Court may, after the admission of a foreign lawyer and on the recommendation of the Board, vary or revoke a condition
to which a foreign lawyer’s admission by the Court is subject. Failure to adhere to a condition on admission may result in the person’s name being removed from the roll of Australian lawyers.

While the Law Council supports the proposals, it is concerned that the conditional admission arrangements may unnecessarily add to the Court’s administrative workload. It should be possible for the Board to assist the Court by monitoring compliance of admitted overseas-qualified lawyers with the conditions placed on their admission, rather than requiring Supreme Courts to develop their own completely separate procedures and processes.

**Law Council recommends**

The Law should provide for:

1. Conditions on the practice of Australian law by overseas-qualified legal practitioners admitted on a conditional basis to be imposed on admission or on their Australian practising certificates; and
2. Conditional admission to only relate to the practice of Australian law for a limited time and limited purpose, but not for obtaining additional qualifications or training; and
3. Conditions relating to attainment of additional qualifications by these persons be managed through the Australian practising certificate regime.

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**PART 3.2 – LAW PRACTICES – GENERAL PROVISIONS**

**3.2.1 Liability of principals**

**Issue**

Subsection 3.2.3(1) of the National Law imposes a personal responsibility on each principal of a law practice in relation to the actions of the law practice - each principal of a law practice is responsible for ensuring that all reasonable action is taken to ensure that:

- associates of the law practice comply with the National Law, National Rules and professional obligations; and
- the law practice complies with the National Law, National Rules and any applicable professional obligations.

Subsection 3.2.3(2) provides that a failure to uphold that responsibility is capable of constituting unsatisfactory professional conduct or professional misconduct.

Section 3.2.3 would make every principal of a law practice personally liable to disciplinary action for the actions of:

- every other principal of the law practice;
- every partner, director, officer, employee or agent of the law practice;
- every consultant to the law practice;
- every Australian-registered foreign lawyer who is a partner in the law practice or in a business that includes the law practice;
- every person who is a partner in a business that includes the law practice; and
- every person who shares the receipts, revenue or other income arising from the law practice.

The Law Council notes that section 3.2.3 of the National Law seeks to extend to every principal of every law practice (regardless of the size, structure, geographic locations or roles and responsibilities of particular principals within the law practice) the same responsibilities that applied under the Legal Profession Model Bill to principals who occupied the specific role of legal practitioner director of an incorporated legal practice.
Section 3.2.4 of the National Law provides that if a law practice contravenes any provision of the National Law or National Rules that imposes an obligation on the law practice, each principal of the law practice is taken to have contravened the same provision, unless the principal establishes that:

- he/she had no actual, imputed or constructive knowledge of the contravention; or
- he/she was not in a position to influence the contravening conduct and it was reasonable for him/her to not be in a position to influence that conduct, or
- he/she was not in a position to influence the contravening conduct, and used all due diligence to prevent the contravention.

The Law Council notes that section 3.2.3 of the National Law is modeled on section 8.1.2 of the Legal Profession Model Bill with the addition of a “reasonableness” test as whether it was reasonable for a principal not to be in a position to influence conduct occurring anywhere within the law practice that resulted in a breach of the National Law, National Rules or professional obligations.

The Law Council considers that sections 3.2.3 and 3.2.4 of the National Law represent an extraordinary and unacceptable extension of the joint and several responsibility and vicarious liability of principals of law practices for disciplinary action:

- as expressed, the responsibility under section 3.2.3 is so broad as to render a principal of a large multi-jurisdictional practice who is, for example, located in Western Australia somehow responsible for the day-to-day actions of an employee located in, for example, Tasmania; and
- as expressed, the liability under section 3.2.4 is so broad, it would render principals liable for the acts and omissions of barristers briefed in the law practices’ matters; and
- the tests of influence, imputed and constructive knowledge and reasonableness are illusory and are unlikely to ever be satisfied.

**Law Council recommends**

1. A principal of a law practice should only be liable for disciplinary action for failing to ensure compliance with the National Law, National Rules and professional obligations arising for matters in which he or she is actively involved.

2. The policy objectives and practical application of these provisions in the National Law should be adjusted to maintain the position under the Legal Profession Model Bill.

### PART 3.5 – VARIATION, SUSPENSION AND CANCELLATION OF CERTIFICATES

#### 3.5.1 Variation, suspension or cancellation

**Issue**

Section 3.5.3 of the National Law makes general provision for the Board to vary, suspend or cancel the practising certificate of an Australian legal practitioner, or the registration certificate of an Australian-registered foreign lawyer, including upon the recommendation of the Ombudsman.

Section 3.5.4 of the National Law makes provision for the Board to temporarily suspend the practising certificate of an Australian legal practitioner, or the registration certificate of an Australian-registered foreign lawyer if there are reasonable grounds for doing so. The Board may do so pending action that it is, or is considering taking; or in response to a recommendation from the Ombudsman in relation to action the Ombudsman is taking, or is considering taking. The LCA notes that any such decision has an immediate impact on the right to engage in legal practice and the right to run a law practice.

The power to vary, suspend or cancel practising entitlements can have immediate and long-term consequences for practitioners, Australian-registered foreign lawyers and their clients.
The Law Council considers that these decisions should be based upon clearly articulated guidelines and factors, particularly where the Ombudsman makes a recommendation on the basis that he or she is “considering” what action might or might not be taken in response to a complaint.

**Law Council recommends**

1. There must be clearly articulated guidelines and factors setting out the basis upon which the Ombudsman may make recommendations to vary, suspend or cancel a practising or registration certificate.

2. The National Legal Services Board must be responsible for setting those guidelines.

### 3.5.2 Renewal of practising certificates – fit and proper person test

**Issue**

Section 3.4.5(4) of the National Law provides that the Board may refuse to grant or renew an Australian registration certificate on any ground specified in the National Rules for the purpose of that section.

National Rule 4.2.2 provides that in determining whether an applicant is a fit and proper person to hold an Australian practising certificate the Board “may have regard to the matters specified in Chapter 3” (of the National Rules).

Chapter 3 of the National Rules relate to admission to the Australian legal profession. National Rule 3.4.1 sets out the fit and proper person test in relation to admission, one of the matters included in which is whether or not the person is currently subject to an unresolved complaint, investigation, charge or order under, among other things, the National Law.

The overwhelming bulk of complaints made every year about legal practitioners do not proceed to investigation let alone result in findings of wrong doing. It is inappropriate as a general rule for an unresolved (and therefore unsubstantiated) complaint to play a role in the Board’s decision whether or not to renew an Australian practising certificate.

Failure to renew an Australian practising certificate would have severe consequences. Such consequences would not merely affect the practitioner concerned who would be deprived of his/her livelihood but for all of the practitioner’s clients, including those involved in litigation and indeed anyone involved or employed by the practitioner’s law practice.

On the other hand, the Law Council recognises that situations will arise where a practitioner has been the subject of a serious unresolved complaint, which may, for example, still be in course of hearings before a Disciplinary Tribunal. In these circumstances, the Law Council considers the Board should use a power to suspend the practising certificates, rather than a power to not renew a practising certificate.
Law Council recommends

1. The National Rules should be amended to make clear that unresolved complaints cannot affect the outcome of the Board’s consideration of whether or not to renew a practising certificate.
2. Applications for renewal of an Australian practising certificate should not be deferred to the outcome of a complaint.
3. The power to suspend a practising certificate is the appropriate power to deal with serious unresolved complaints.

PART 3.7 – INCORPORATED AND UNINCORPORATED LEGAL PRACTICES

3.7.1 Disqualification of entities from providing legal services

Issue

The National Law provides circumstances which may trigger the Ombudsman to:

- make an application to the Supreme Court for the Court to make an order disqualifying an incorporated or unincorporated legal practice from providing legal services – section 3.7.7(1);
- make an application to the Supreme Court for the Court to make an order disqualifying a person who is not an Australian legal practitioner from being involved in the management of an incorporated or unincorporated legal practice – section 3.7.8(1); and
- make an application to the Supreme Court for the Court to revoke a disqualification order – section 3.7.8(2).

The disqualification of such an entity from providing legal services has severe consequences for the entity’s clients, particularly those involved in litigious matters, as well as employees and others.

The power to apply to a Supreme Court for an order that effectively disqualifies an incorporated or unincorporated legal practice from providing legal services should not be exercised without there being reasonable grounds.

Guidelines that make clear the circumstances or basis that trigger the mechanism must be developed and be well communicated to the profession at large.

Accordingly, the circumstances which may trigger an Ombudsman to apply to a Supreme Court for such orders should be set by the National Board.

It is noted that section 3.7.7(1) provides that the Board may also make an application to the Supreme Court for a disqualification order, but section 3.7.8 does not provide for the Board to make an application for disqualification of a person from being involved in the management of an incorporated or unincorporated legal practice.

Law Council recommends

1. The National Law must provide a clear basis upon which the Ombudsman can make the specified applications.
2. The circumstances or basis must rely on there being reasonable cause or reasonable grounds for disqualification.
3. The National Legal Services Board should be responsible for setting out guidelines in the National Rules.
PART 4.2 - TRUST MONEY AND TRUST ACCOUNTS

4.2.1 Exemptions from trust money and trust account provisions

**Issue**

Section 4.2.3(3) of the draft National Law enables National Rules to provide for exemptions from all or specified provisions of the trust money and trust accounts provisions for: specified law practices or classes of law practices; specified law practices or classes of law practices in specified circumstances; or specified kinds of trust money in specified circumstances.

Section 4.2.3(4) provides that the National Rules may provide that specified provisions of this Part do not apply to specified law practices or classes of law practice or apply to them with specified modifications.

Section 4.2.3 provides that the Ombudsman may exempt a particular law practice from complying with any of the provisions of this Part, subject to any conditions that the Ombudsman may impose.

The National Law confers wide powers on the Ombudsman to grant exemptions from the application of the trust account provisions.

The reasons that underpin such wide powers to exempt are unclear.

However, if the object of this Law is for consistent application, then the number and extent of exemptions must be limited, defined and contained within the Law rather than the Rules.

Similarly, in order to maintain consistency, such a power should not be conferred on an Ombudsman, but on the local representative of the National Board.

**Law Council recommends**

1. The National Law must specify the basis upon which exemptions may be granted from the application of the trust money and trust account provisions.

2. This area of the law must be administered by the local representative of the National Board, rather than the Ombudsman or the Ombudsman’s local representative.

4.2.2 Trust money and trust accounts – choice of ADI

**Issue**

Section 4.2.9 of the draft National Law provides that a law practice which receives trust money to which Part 4.2 applies (apart from controlled money and transit money received other than in cash) must maintain a general trust account.

Section 4.2.24 of the draft National Law provides that an Approved Deposit-taking Institution (“ADI”) is authorised to maintain trust accounts to hold trust money if it is regulated by APRA.

A law practice that is required to maintain a general trust account should maintain that account at an ADI that has contractually agreed to pay interest or its equivalent on trust money deposited to that account.

There are a very large number of ADIs, each of which may or may not offer interest on trust accounts.

ADIs that pay interest on trust accounts need (in nearly all jurisdictions) to pay that interest to a regulatory authority, not to the law practice.
Long-standing practice has been that contractual arrangements are negotiated between regulatory authorities and ADIs to provide for the payment of interest on trust monies in general trust accounts and the payment of that interest directly to the regulatory authority; and contain an agreement to comply with any reporting requirements.

Neither the National Law nor the National Rules make provision for arrangements to be entered into between the Board (or its local representatives) and ADIs

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<tr>
<td>1. The National Law should provide that a law practice be required to maintain a general trust account only at an Approved Deposit-taking Institution that has contractually agreed to pay interest or its equivalent on trust money deposited to that account.</td>
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<tr>
<td>2. Local legislation should be allowed to provide the specifics for entry into contractual arrangements with ADIs for the purpose of payment of the interest from general trust accounts and the payment of that interest to the relevant local authority.</td>
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4.2.3 Single national trust account – choice of jurisdiction in which it may be maintained

Issue

Section 4.2.10 provides that a law practice which engages in legal practice in more than one jurisdiction may choose to maintain a general trust account in one of those jurisdictions only. The jurisdiction chosen must satisfy each of three criteria:

- it must be a jurisdiction in which the practice maintains a permanent office; and
- the jurisdiction must be the home jurisdiction of a principal who holds an Australian practising certificate; and
- that principal must engage solely or principally in legal practice at that office.

In relation to the second test, it has been suggested that rather than the home jurisdiction of a principal of the law practice, this test should be revised to the jurisdiction of the majority of principals of the law practice holding Australian practising certificates, noting that this suggestion has potential implications for fidelity funds.

Law Council recommends

1. For a law practice that operates in two jurisdictions, a single national trust account should be located in the jurisdiction in which the law practice maintains it head office or equivalent.
2. For a law practice that operates in more than two jurisdictions, the jurisdiction should be that elected by the law practice (which is the home jurisdiction of a principal holding an Australian practising certificate).

4.2.4 Single trust account - prohibition on additional accounts

Issue

Section 4.2.10 of the National Law allows a multi-jurisdictional practice to choose to maintain a national general trust account in one of the jurisdictions in which the law practice engages in legal practice. However, where a law practice chooses to do so, section 4.2.10 (5) provides it must not also operate another general trust account in any jurisdiction. In short and on penalty, a multi-jurisdictional law practice may operate only one single national general trust account.
Concerns have been raised that the draft National Law does not allow law practices discretion to determine how best to arrange and administer its trust accounts arrangements.

There appears to be little justification in constraining multi-jurisdictional law firms to a single trust account.

**Law Council recommendation**

A multi-jurisdictional law practice should be free to maintain as many national general trust accounts as best suits the law practice’s requirements and operational convenience.

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**4.2.5 Trust money and trust accounts – External investigation framework**

**Issue**

Under existing laws, there is a great deal of overlap between roles and responsibilities in relation to ensuring and securing compliance with the trust money and trust account provisions. However, in broad terms, the existing laws take the following approach:

- Self-compliance is tested annually through the annual external trust account examination and reporting process;
- External examination by a regulator-appointed examiner occurs where there is a failure or problem with the self-compliance testing approach; and
- An external investigation process occurs where a serious issue arises, which might lead to the appointment of a manger, supervisor or receiver.

The legislated approach is supplemented by an administrative or legislative program of routine inspections. Issues that require a formal investigation process may be detected through any one of the above approaches, or as a result of a complaint investigation.

The general consensus is that, notwithstanding the overlapping of roles, the above approach has been practical and efficient – particularly a well-managed administrative program of random inspections.

The National Law has, in Chapter 7, effectively wrapped the existing legislative processes into a formal investigatory powers and entry-and-search regime covering: trust records examinations; trust records investigations; compliance audits and complaint investigations.

Section 4.2.36 of the National Law sets out the principal purposes of an external investigation: “to ascertain whether a law practice has complied with or is complying with the requirements of [Part 4.2] and to detect and prevent fraud or defalcation…”

It is unclear whether these provisions are intended to provide for continuation of existing regimes for routine inspections for compliance with the legislation or whether the Division relates only to investigations which occur as a result of a notification of a breach of the Law and/or Rules.

If it is intended that Division 4 relates to routine inspections then some of the powers contained in Chapter 7 (which are applied to routine inspections by section 4.2.39) are inappropriate.

**Law Council recommends**

The Legal Profession National Law:

- must preserve the existing framework for ‘routine’ trust account investigations; and
- should refer more specifically to purposes of external investigations to allow for those conducted based on risk and other assessment in order for such investigations to continue.
PART 4.3 – LEGAL COSTS

4.3.1 Disclosure obligations as they affect indirectly retained law practices (including barristers)

Issues

Section 4.3.7 of the National Law places the same disclosure and assurance obligations on indirectly-retained law practices as are placed upon a retaining law practice. (An indirectly-retained law practice would be barristers in non-fused profession jurisdictions, members of the independent bars of fused profession jurisdictions who are typically retained by solicitors on behalf of clients, and solicitor agents in all jurisdictions.)

Section 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.

An indirectly retained law practice should only be required to provide an instructing law practice with information about the basis upon which costs will be charged.

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<tr>
<td>1. Section 4.3.7 should be amended so that a law practice that is indirectly retained will not be required to make a separate costs disclosure, or to “take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of conduct for the matter and the proposed costs after being given that information”.</td>
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<td>2. Section 4.3.7 should also be amended to ensure that a law practice that is retained by another law practice on behalf of a client is required to only 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.</td>
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4.3.2 Commercial or government clients

Issue

Section 4.3.2 of the draft National Law attempts to retain a basic policy position that certain clients of law practices are sophisticated enough to not require the statutory consumer protections of the costs regime.

The Legal Profession Model Bill and Legal Profession Acts define such clients as “sophisticated clients”, whereas the draft National Law defines such clients as “commercial or government clients”.

Furthermore, under the Model Law (section 3.4.13(1) and Legal Profession Acts) the exclusion from the disclosure obligation of sophisticated clients is automatic, whereas under the draft National Law (section 4.3.2) commercial and government clients will be required to contract out of the disclosure obligations.

Also, under the Model Laws and Legal Profession Acts a sophisticated client was defined to include a law practice. The corresponding provision in section 4.3.2 of the draft National Law only applies if the law practice employs 15 or more employees (disregarding casuals).

Barristers, small solicitors’ firms and some mid-sized solicitors’ firms, if they are themselves clients of another law practice, are ‘sophisticated’ under the existing law, but not ‘commercial’ under the draft National Law.
Section 4.3.2 of the proposed National Law adds additional complexity and compliance problems, particularly if multiple small law practices (such as barristers) are retained by a commercial or government client, or by another law practice on behalf of such a client.

The practicability of the operation of the proposals in the draft National Law is questionable.

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<th>Law Council recommends</th>
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<tbody>
<tr>
<td>1. The proposed definition of ‘commercial or government client’ should be amended and enlarged to include all categories of “sophisticated client” as provided for in the Legal Profession Acts, including any law practice.</td>
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<tr>
<td>2. Section 4.3.7 should be amended so that disclosure is not required in the case of a commercial or government client.</td>
</tr>
</tbody>
</table>

### 4.3.3 Legal costs must be fair and reasonable

**Issue**

The word “fair” in the phrase “legal costs must be fair and reasonable” found in section 4.3.4 of the National Law is unnecessary because it adds nothing to the test – if costs are reasonable they will be fair to both the client and the practitioner. The Law Council notes that the Common Law authorities refer to “reasonableness” as opposed to “fairness” in relation to what legal costs can be charged.

If a “fairness” test is to be retained, it must be made clear that the test is fair and reasonable as between the practitioner and client in relation to the circumstances of the engagement and the work performed.

The costs regime of the National Law as proposed departs significantly from the regime under the Legal Profession Model Laws which relied on a concept of recovery of costs that are fair and reasonable (by reference to independent costs assessment).

The concept of fair and reasonable in terms of costs must not be connected with, or confused for, the test of fair and reasonable that is relied upon in the disciplinary regime (such as sections 5.3.5 (1) and 5.3.6(3)).

Consideration should be given to whether or not the provisions of the National Law are intended by the Taskforce to codify the common law. If this is not the case, the matter needs to be clarified.

<table>
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<th>Law Council recommends</th>
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<tr>
<td>The costs regime of the National Law must be reviewed and amended to provide that proper disclosure and a valid costs agreement are the starting point for what constitutes fair and reasonable costs.</td>
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</table>

Assuming the paramountcy of such a valid costs agreement becomes more central to the regime proposed, then “fair and reasonable” is whatever was agreed between the client and legal practitioner, subject to displacement based on what are unfair and unreasonable costs.

### 4.3.4 Costs disclosure must be in writing

**Issue**

The National Law (section 4.3.7) does not specify that a costs disclosure must be given in writing.

In the absence of written disclosure there are likely to be factual disputes about whether or not proper disclosure was made.
Both clients and legal practitioners would benefit in terms of proceeding with certainty if guidance about the form that disclosure should take, were available.

The steps a practitioner is required to take to comply with the disclosure obligation should be spelt out, and illustrated by way of a model form of disclosure developed.

**Law Council recommends**

1. The National Law should be amended to require all costs disclosures required are given in writing.
2. The National Rules should contain a ‘model’ rather than prescribed form of disclosure.

### 4.3.5 Minimum amount where costs disclosure is not required

**Issues**

The National Law (section 4.3.7) does not provide a threshold or set a cap for the minimum amount of costs (which presently exists under Legal Profession legislation), below which costs disclosure provisions of the proposed National Law do not apply.

As a matter of practical reality, requiring disclosure in every situation where legal services are to be provided for a fee is impractical, inconsistent with existing law and will add considerably to the regulatory burden for both practitioners and clients.

A minimum amount below which costs disclosure is not required should be capable of consistent adjustment over time through the National Rules.

**Law Council recommends**

1. Subject to section 4.3.9 (clients right to insist on a negotiated costs agreement), the National Law should set a minimum amount threshold below which formal costs disclosure is not required.
2. The national minimum threshold should initially be set at $3 000 (excluding disbursements and GST).
3. The national minimum threshold should be specified in the National Rules and subject to consistent review from time to time.

### 4.3.6 Evidence of acceptance of an agreement on costs

**Issue**

Section 4.3.10(2) stipulates that a cost agreement must be written or evidenced in writing.

In practice, acceptance is often denoted through conduct, i.e. many clients have continued to instruct the law practices after receiving an offer. Experienced solicitors have recognised the need, at times, to allow the cost agreement to be evidenced in conduct.

It is noted that section 3.4.24(3) of the Legal Profession Model Bill provided that a costs agreement may consist of a written offer that is accepted in writing or by other conduct.
**Law Council recommends**

1. The National Law should provide that acceptance of an agreement as to costs is capable of being evidenced by conduct consistent with acceptance.

2. Section 4.3.10(2) of the National Law should provide that acceptance of a cost agreement can be evidenced by conduct.

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### 4.3.7 Notification in a bill of a client’s rights

**Issue**

Section 4.3.22 of the National Law provides that a law practice must ensure that a bill includes or is accompanied by a written statement setting out:

- (a) the avenues that are open to the client in the event of a dispute in relation to legal costs; and
- (b) any time limits that apply to the taking of any action referred to in paragraph (a).

The National Law provides many avenues, options and processes that may be available to a client who wishes to dispute a bill – see for example Part 5.3 (Dispute resolution and discipline – consumer disputes).

A law practice should be able to comply with the obligations under section 4.3.22 without the doubts (and risks) that may arise if it has to decide what particular avenues might be available to each particular client, having regard to each client’s individual circumstances.

The National Rules should set out a form, or form of words, to be used by practitioners on a bill to a client setting out the client’s rights and parameters for disputing the bill.

**Law Council recommends**

The National Rules should provide a pro forma of the words required, or where the obligation would be satisfied, by referral to a web site, the correct form of instructions and details to be included to make a proper notification.

---

### 4.3.8 Interest on unpaid legal costs

**Issue**

Section 4.3.24 of the proposed National Law makes the following provision for interest on unpaid legal costs:

1. A law practice may charge interest on unpaid legal costs if the costs are unpaid 30 days or more after the law practice has given a bill for the costs in accordance with Part 4.3.

2. A law practice may also charge interest on unpaid legal costs in accordance with a costs agreement.

3. A law practice must not charge interest under this section on unpaid legal costs unless the bill for those costs contains a statement that interest is payable and of the rate of interest.

4. A law practice must not charge interest under this section or under a costs agreement at a rate that exceeds the rate specified in, or determined under, the National Rules for the purposes of this section.
5. A law practice must not charge interest under this section or under a costs agreement on a bill given more than six months after the completion of the matter.

The rationale is unclear for the provision in proposed section 4.3.24 that a law practice must not charge interest on an unpaid bill given more than six months after the completion of the matter. There is an unfairness for a law practice if a client has already had six months without having to pay his or her legal costs without interest, and then being given a statutory release from paying any interest whatsoever once the bill has been given.

Furthermore, the statutory release from paying further interest acts as a strong incentive to not pay the bill once it is given.

National Rule 8.3.2 provides that the rate of interest on unpaid legal costs is the rate that is equal to the Cash Rate Target as at the relevant date, increased by 2 percentage points. The Law Council notes that the Cash Target rate is set by the Reserve Bank and is subject to frequent adjustment. For example, the rate changed six times in both 2008-09 and 2009-10. Potentially, this rate can change each month. The Law Council does not consider using this rate to be practicable for clients or law practices.

Law Council recommends

1. The National Law ought not prohibit a law practice being entitled to charge interest on unpaid legal costs merely because the bill was not rendered within six months of completion of the matter to which the bill relates.

2. The rate of interest to be charged on unpaid costs must exceed the Cash Target Rate if it is to act as an incentive to make payment.

3. The interest rate (plus 2%) should be set instead to the interest rate on unpaid judgment debts of the Federal Court (plus 2%).

4. Subsection 4.3.24(1) should be amended to provide that the subsection is “subject to subsection (2)”.

4.3.9 Role of the costs assessor

Issue

Section 4.3.26(2) of the National Law provides that a costs assessor may determine whether legal costs are fair and reasonable, and to the extent they are not fair and reasonable, determine the amount of legal costs that are to be payable.

Section 4.3.26(2) also enables a costs assessor to determine whether or not a valid costs agreement exists; and set aside a costs agreement in whole or in part if the legal costs payable under the contract are not fair and reasonable.

Section 4.3.28 the proposed National Law provides:

(1) In considering whether legal costs for legal work are fair and reasonable, the costs assessor must have regard to section 4.3.4 (2).

(2) In considering whether legal costs for legal work are fair and reasonable, the costs assessor may have regard to the following matters:

(a)-(j).....

This section specifically refers the assessor back to section 4.3.4(2). Section 4.3.4 provides that legal costs are fair and reasonable if they:
(a) are reasonably incurred and are reasonable in amount; and
(b) are proportionate in amount to the importance and complexity of the issues involved in a matter, the amount or value involved in a matter, and whether the matter involved a matter of public interest; and
(c) reasonably reflect the level of skill, experience, specialisation and seniority of the lawyers concerned; and
(d) conform to any applicable requirements of this Part, the National Rules and fixed costs legislative provisions.

The role of the costs assessor established by the above-mentioned provisions is to decide whether the fees charged are fair and reasonable, not (as they are required to do presently) to objectively determine the amount of legal costs payable.

The proposed National Law effectively requires costs assessors to exercise quasi-judicial powers, which they are ill-equipped to do and possibly unwilling to undertake, on the basis of potential liabilities.

Section 4.3.26 confounds these two roles – paragraph 4.3.26(2)(a) provides that the primary role of the costs assessor is to determine whether legal costs are fair and reasonable and, to the extent they are not fair and reasonable, determine the amount of legal costs (if any) that are to be payable. One is a subjective judgment, and the other is an objective decision – one relates to quality, the other relates to quantity.

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. It is intended by the proposed National Law that the grounds to set aside the costs agreement are now only restricted to statutory requirements as an assessor does not have judicial discretion to consider whether the agreement was unconscionable or not.

Costs assessors are not a judicial body. 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 have judicial discretion to carry out the functions contemplated by the proposed National Law, particularly when those findings are the subject of an appeal (see section 4.3.32). This is an unworkable scheme. Lack of transparency will no doubt be the subject of public criticism of such a system.

**Law Council recommends**

1. The role of the costs assessor must be confined to the assessment of costs based on objective criteria, rather than any subjective judgment about whether or not the quantum assessed is “fair and reasonable”.
2. The provision relating to the proper role of the costs assessor needs to be fundamentally reconsidered.

### 4.3.10 Cost assessment and disciplinary actions

**Issue**

Section 4.3.30 of the proposed National Law compels a costs assessor to refer to the Ombudsman any case in which the costs assessor considers that the legal costs charged by a law practice are not fair and reasonable.

The test at section 4.3.30 represents a substantial departure from the existing position that a costs assessor is compelled to refer for disciplinary considerations instances of grossly excessive charging of legal costs.
The concern is that the proposed National Law suggests a monetary test could be applied so that a costs assessor would be compelled to refer to the Ombudsman any case where costs are reduced on assessment, even if the legal costs were only reduced by a single dollar.

It would appear that the proposed law substantially ‘lowers the bar’ on when costs in excess of the costs assessor’s assessment can give rise to disciplinary action.

Section 4.3.30 of the proposed National Law should provide that if 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 may refer the matter to the Ombudsman, not must refer the matter to the Ombudsman.

**Law Council recommends**

The National Law must be amended to provide that the decision by a costs assessor to refer a matter to the Ombudsman should only be mandatory if costs charged are grossly excessive.

### 4.3.11 Applications for cost assessment and costs complaints

**Issue**

Section 5.2.8(2) of the National Law provides that a complaint about costs must be made within 60 days after the costs were payable (or 30 days of receiving an itemised bill, if requested).

Section 4.3.27 sets a time limit of 12 months within which to apply for a costs assessment.

The combined effect of sections 5.2.8(2) and 4.3.27 as presently drafted would appear to ensure that a complainant who does not complain directly to the Ombudsman within 60 days has an alternative way to raise his or her costs dispute.

It would appear that the intent of section 5.2.8(2) is rendered ineffective by section 4.3.27 and a period of 12 months is available in which to make a complaint about disputed legal costs. There must be some symmetry between the time period within which an application for a costs assessment may be made and the time period within which a complaint involving a costs dispute may be made.

Furthermore, section 5.2.19(2) permits referral of matters for cost assessment for the purpose of investigating a disciplinary matter outside any applicable time limit for making applications for costs assessments. Section 5.2.19 of the proposed National Law provides:

1. For the purpose of investigating a complaint involving a disciplinary matter, the Ombudsman may arrange for an assessment of costs charged or claimed by the respondent.
2. Any such application may be made outside any applicable time limit for making applications for costs assessments.

It is of concern that this provision could be used to extend the limitation period on cost assessments.

Also, an appropriate balance needs to be struck between the entitlement to apply for a costs assessment, and the need for a law practice (particularly a small law practice) to have certainty that costs can be recovered and to not have to regard fees received as contingent income.

If section 5.2.8(7) is to be retained, a referral for cost assessment should only be permitted before the expiry of the limitation period. It is also noted that the Ombudsman has a power to make a non-appellable compensation order after a cost assessment, effectively allowing the Ombudsman to overrule the determination of a costs assessor.
Law Council recommends

1. The National Law must be amended to align the time periods and deadlines for applying for a costs assessment and the making of a complaint that involves a costs dispute.

2. The National Law should be amended to provide that the time limit for lodging an application for a costs assessment be reduced from 12 months to six months.

3. The National Law should be amended so it does not allow the Ombudsman to overrule a determination of a costs assessor.

4.3.12 Unreasonable legal costs – principals

Issue

Section 4.3.34 of the National Law provides as follows:

(1) A contravention of a requirement of this Part that a law practice must not charge more than fair and reasonable legal costs is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of:

(a). the responsible principal or principals for a bill given by the law practice (see section 4.3.18); and

(b). each legal practitioner associate or foreign lawyer associate who was involved in giving the bill or authorising it to be given.

(2) Subsection (1) applies to a responsible principal unless he or she establishes that it was not reasonable for him or her to suspect or believe that the bill was excessive in the circumstances (otherwise than by the mere assertion of someone else involved in the law practice), and so applies:

(a) whether or not he or she had actual knowledge of the bill or its contents; and

(b) whether or not he or she had actual knowledge that the legal costs were unreasonable.

The reference in paragraph (1)(b) to “involved in giving the bill” is vague and will lead to uncertainty.

Also, subsection (2) establishes a convoluted test for exclusion from liability in that a principal who was responsible for giving a bill – paragraph 1(a) – must establish that it was not reasonable for him or her to suspect or believe that the bill was excessive, even if he or she had no actual knowledge of the bill or its contents.

It appears as though the only way a principal can escape liability is to personally review each and every bill that he, she or an employee or associate “gives”, to satisfy himself or herself that the costs are not unreasonable (i.e. that they were fair and reasonable).
Law Council recommends

1. Recommendations have been made elsewhere in the Submission in respect to the proper scope and extent of principals’ responsibility and liability for contraventions of the law by the law practice and associate legal practitioners as follows:

2. The liability of principals in the National Law represents an extension of liability both in scope and level such that it is excessive and unworkable.

3. The National Law should be amended to restore the liability of principals to a position similar to that under the Legal Profession Model Bill.

PART 4.4 – PROFESSIONAL INDEMNITY INSURANCE

4.4.1 Objectives

Issue

Section 4.4.1 of the draft National Law provides that the objectives of Part 4.4 on professional indemnity insurance are to:

(a) to ensure that clients of law practices have adequate protection, by way of appropriate compensation, against the consequences of professional negligence; and

(b) to ensure that all practitioners have an adequate minimum level of professional indemnity insurance cover regardless of the jurisdiction in which a practitioner engages in legal practice.

Insuring against the consequences of professional negligence is a narrower concept than insuring against civil liability.

The objectives of insurance under the existing legal profession legislation are stated, for example at section 3.5.2(3) of the Legal Profession Act (Vic) 2004 as follows:

“The insurance must cover civil liability of—

(a) the law practice; and

(b) each person who is or was a principal or an employee of the law practice—

in connection with the practice's legal practice...”

The scope of professional indemnity insurance under the National Law should by its objectives be expressed to extend to cover for civil liability so consumers are not disadvantaged.

Law Council recommends

The National Law should be amended to provide that professional indemnity insurance extends to broad form civil liability incurred in connection with the provision of legal services by law practices.
4.4.2 Complying policies of Professional Indemnity Insurance

Issue

Section 4.4.3(1) of the National Law provides that the requirements for a complying policy is that it is issued or provided by:

- an insurer authorised by APRA under the Insurance Act 1973 of the Commonwealth to carry on insurance business in Australia; or
- an insurer or other provider approved under applicable jurisdictional legislation; or
- an insurer or other provider approved by the Board; and
- it complies with the minimum standards specified in the National Rules for the purposes of this section; or
- is approved by the Board; and
- where applicable legislation of a jurisdiction contains a declaration to the effect that this paragraph applies in relation to this jurisdiction—it is issued or provided in accordance with applicable legislation of this jurisdiction.

The Taskforce’s Consultation Report at page 21 provides under the section entitled Areas of continued jurisdictional regulation:

Professional indemnity insurance

The National Law maintains the existing requirement for all Australian legal practitioners to have an adequate minimum level of professional indemnity insurance (PII) cover (Part 4.4). The National Law and National Rules also specify the criteria for establishing a ‘complying policy’ of PII, and requirements for when and how insurance is to be obtained. The National Rules adopt the national minimum standards developed by the SCAG Joint Working Party on PII.

However, the National Law also makes specific provision (see section 4.4.3) for jurisdictions to continue to legislate to establish PII arrangements within their own jurisdictions.

The Consultation Report goes on to explain that the Taskforce has “aimed to ensure that existing jurisdictional professional indemnity insurance schemes are not interrupted by introduction of the National Law”, and that the “existing requirements under those schemes are unchanged.” The question posed by the Taskforce is: “Do the provisions of Part 4.4 (of the Consultation Draft of the Legal Profession National Law) achieve those aims?”

Approval of insurance policies or insurers through any process or against criteria other than as provided by the relevant part of the existing jurisdictional legislation threatens to interrupt existing jurisdictional arrangements. For example, in NSW a range of matters are dealt with under Part 3.3 of the Legal Profession Act (NSW) 2004 in relation to complying policies which include contributions, levies, payments from funds and other matters.

Notwithstanding the National Law section 4.4.3 (1) (c) declaration, National Legal Profession Rule 9.2.3 appears to be intended to operate as a control mechanism by providing that:

For the purposes of section 4.4.3 of the Legal Profession National Law, the Board must not approve an insurer or a professional indemnity insurance policy unless the Board considers it appropriate to do so.
However, if the larger intention is to ensure that jurisdictional schemes are not interrupted, only insurers (whether or not they are APRA authorised) approved under the relevant jurisdictional legislation should be regarded as providers of complying insurance policies.

Furthermore, it is unlikely the Board would have the expertise or knowledge to review and approve each jurisdiction’s policy, and if this is the case, additional costs will be incurred to obtain the expertise externally.

**Law Council recommends**

1. The National Law and National Rules should be amended to make clear that complying insurance policies are only those that are approved under the relevant legislation of each jurisdiction.
2. Section 4.4.3(1)(b)(ii) of the National Law and National Rule 9.2.3 should be omitted.

### 4.4.3 Where and how professional indemnity insurance is to be obtained

**Issue**

The provisions of section 4.4.4 are intended to override jurisdictional legislation by providing circumstances in which practitioners or practices engaging in legal practice in two or more jurisdictions may arrange to only obtain their PII in one of those jurisdictions.

Some concerns have been expressed about the efficacy of subsections 4.4.4(3) and (4) in preventing disruptions to the integrity of current jurisdictional professional indemnity insurance arrangements.

Of particular concern is the potential affects on local schemes if multi-jurisdictional law practices, in accordance with the National Law, move their professional indemnity insurance arrangements into and out of jurisdictions on a regular basis.

The Law Council notes that the stability and viability of a professional indemnity insurance scheme (and insurance premiums) depends upon factors such as the number of practitioners in the jurisdiction scheme and the long-term claims history. For smaller jurisdictions in particular, the impact of a regular movement of (relatively) large numbers of practitioners into and out of the local PII scheme could substantially affect the scheme’s premium and financial stability, and its ability to negotiate with underwriters for want of certainty about numbers, risk profiles and effects on retroactive cover.

Options to address these concerns (and thereby ensure the continuing viability of local schemes) include ensuring the “permanent office” test in subsection 4.4.4(4) of the draft National Law is sufficiently robust to prevent abuse and, by introducing a requirement that a multi-jurisdictional law practice that is contemplating changing the jurisdiction in which it obtains its professional indemnity insurance for the practice notifies the PII schemes concerned at an appropriate time in the underwriting cycle to enable appropriate underwriting of the risk to take place.

**Law Council recommends**

The Taskforce give further consideration to:

1. the robustness of the proposed “permanent office” test; and
2. notification by way of election of an intention to move PII cover from one jurisdiction to another by a specified date in the insurance cycle.
4.4.4 National Minimum Standards - National Rule 9.2.1

Issue

Draft National Rule 9.2.1 provides Minimum National Standards which refer at (4) (7) and (9) to persons engaged as follows:

(4) Professional indemnity insurance must extend to civil liability incurred in connection with the legal services of the insured and persons engaged by the insured in the provision of legal services.

(7) Professional indemnity insurance must provide indemnity for any former principals of, or those formerly engaged by, the insured and by any prior law practice of the insured.

(9) In the case of a claim arising from dishonesty or fraud, professional indemnity insurance must not exclude indemnity of a principal of, or person engaged by, the insured who was not knowingly connected with any dishonesty or fraud related to the claim.

By referring to ‘engaged’, an inference could be drawn that the rule unintentionally requires the law practice to provide cover that extends to barristers briefed or retained by the insured or experts, consultants and others.

Law Council recommends

That ‘employed’ be substituted for ‘engaged’ wherever the term appears in National Rule 9.2.1 (4) (7) and (9).

4.4.5 Exemptions under National Rule 9.2.5

Issue

There is no requirement under existing legal profession legislation for corporate lawyers to carry professional indemnity insurance for legal services provided on an in-house basis. The draft National Rule 9.2.5 (a) seeks to maintain the current exemption of corporate lawyers from the requirement to obtain insurance where the corporate lawyer “provides legal services only as an employee to his or her employer in the course of employment”.

A necessity to insure may, however, arise by way of requirements other than through legal profession legislation. For example in Victoria all legal practitioners that appear before courts are required to have professional indemnity insurance. Such a requirement is inconsistent with the terms of the exemption for corporate lawyers at draft National Rule 9.2.5.

Situations also arise in which corporate lawyers provide legal services to associated entities in a corporate group, or to third parties who have a contractual relationship with the employer. For example an in-house counsel may provide legal services to a third party in the course of his or her employment providing legal services to an associated entity within the employers’ corporate group; in-house counsel employed by an insurer who provides advice to the insurance company’s insured.

Doubts have been raised about whether the scope of the exemption in draft National Rule 9.2.5 is appropriate.

Law Council recommends

The scope of the exemptions in draft National Rule 9.2.5 needs to be reconsidered by the Taskforce.
4.4.6 Availability of cover

Issue

Some of the minimum national standards for professional indemnity insurance may not be available from market-based insurers, or if available, may not be available at an acceptable cost.

It is understood the Australian Bar Association will be lodging a Submission in response to the Taskforce consultation package and that this Submission will canvass the relevant issues and options.

**Law Council recommends**

The Taskforce give consideration to the matters raised in the submission from the Australian Bar Association.

PART 4.5 – FIDELITY COVER

4.5.1 Annual contributions; exempted categories of legal practitioners

Issue

Section 4.5.8 (4) of the proposed National Law exempts barristers, government lawyers, corporate lawyers and classes of practitioners specified in National Rules from the obligation to make fidelity fund contributions.

Currently some jurisdictions require fidelity fund contributions to be made by all practising certificate holders, including corporate lawyers, regardless of whether or not a trust account is maintained.

The Law Council does not support an expansion of current categories of exemption beyond those already in place from jurisdiction to jurisdiction.

**Law Council recommends**

That this be a matter dealt with by the law of each jurisdiction relating to fidelity funds.

4.5.2 Caps on payments for claims

Issue

Section 4.5.13 of the proposed National Law provides as follows:

(1) The nominated authority may fix either or both of the following:

   (a) the maximum amounts, or the method of calculating maximum amounts, that may be paid from the fidelity fund in respect of individual claims or classes of individual claims;

   (b) the maximum aggregate amount, or the method of calculating the maximum aggregate amount, that may be paid from the fidelity fund in respect of all claims made in relation to individual law practices or classes of law practices.

(2) Amounts must not be paid from the fidelity fund that exceed the amounts fixed, or calculated by a method fixed, under subsection (1).
(3) Payments from the fidelity fund in accordance with the requirements of subsection (2) are made in full and final settlement of the claims concerned.

(4) Despite subsection (2), the nominated authority may authorise payment of a larger amount if satisfied that it would be reasonable to do so after taking into account the position of the fidelity fund and the circumstances of the particular case.

(5) No proceedings can be brought, by way of appeal or otherwise, to require the payment of a larger amount or to require the nominated authority to consider payment of a larger amount.

Proposed subsection (3) provides that once a payment is made up to the statutory cap, those payments are made in full and final settlement of the claims concerned.

Subsection (3) appears to ignore that the nominated authority may, in exercise of its subrogation, recover more than the statutory cap. In these circumstances, the claimant should receive a higher amount, rather than the Fund.

If this is what is intended by subsection (4), it should be an entitlement, not a discretionary payment.

**Law Council recommends**

The National Law should be amended to make clear the intention that where through subrogation an amount that exceeds the statutory cap is recovery, that amount is to be paid to a claimant as an entitlement rather than as a discretionary payment.

### 4.5.3 Advertising inviting claims relating to a default

**Issue**

Subsection 4.5.18(2) of the draft National Law proposes a period of 12 months from the date of advertising for receiving information and inviting claims about a default.

In the interests of expediency, 12 months is too protracted a time period for inviting claims. It effectively means that every advertised fidelity fund matter will take well over 12 months to be finalised.

**Law Council recommends**

The National Law should provide a maximum period of six months for responding to advertisements inviting claims against a fidelity fund.

### 4.5.4 Arm’s-length from the profession decision-making

**Issue**

Proposed subsection 4.5.22(1) of the National Law provides that claims against the fidelity fund “must be determined independently, at arm’s-length from the profession”.

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. There is accordingly no justifiable reason for the imposition of this requirement other than events that arose in the context of South Australia. Notably the facts relating to that matter set it apart on its facts. That situation did not arise from the administration of the scheme by those with the duty to do so.
The National Law or National Rules do not elaborate about what, in practice, constitutes arm’s-length.

Furthermore, there appears to be no provision for the Board or any other entity to determine whether or not the processes adopted by each nominated authority are at arm’s length.

**Law Council recommends**

1. The National Law requirement at section 4.5.22 (1) that fidelity fund claims be determined independently, at arm’s-length as proposed is unnecessary, unworkable and should be deleted.

2. The Law Council recommends that provision be made for consumer representation on fidelity fund decision-making bodies.

3. If these recommendations are not accepted, the National Law or National Rules should specify the ways in which the rule/requirement can be satisfied.

### 4.5.5 Payment of fees, legal costs and expenses from fidelity fund

**Issue**

National Rule 12.5.1 (4) provides that fees, costs and expenses not paid to an external intervener by a law practice are payable from the relevant Fidelity Fund or, if the law of the jurisdiction otherwise provides, in accordance with that law.

Presently, the source of payment of these fees varies from jurisdiction to jurisdiction. In some jurisdictions they are paid from a public purpose fund and in other jurisdictions they are paid from a fidelity fund.

The Law Council considers that, apart from claims, payments from the Fidelity Fund should be limited to fees directly associated with the management of the Fund and claims against the Fund.

**Law Council recommends**

1. Fees, costs and expenses of an external intervener should not be paid from a Fidelity Fund.

2. The National Rule at 12.5.1 must be amended accordingly.

### 4.5.6 Concerted interstate defaults

**Issue**

Proposed section 4.5.32 of the National Law replicates existing Model Bill and Legal Profession Act provisions which provide that in the case of a default involving interstate elements, the fidelity funds of the relevant jurisdictions involved are to contribute:

- in equal shares in respect of the default, regardless of the number of associates involved in each of those jurisdictions and disregarding the capping and sufficiency provisions of those jurisdictions; or
- in other shares as agreed by the appropriate authorities involved.

The Law Council notes that the “equal shares” approach can operate unfairly because it does not take into account issues such as degree of culpability and the relative number of practitioners involved. These matters can only be addressed by the “shares as agreed” approach.
The Law Council submits that the National Law should have made these considerations explicit so that contributions by fidelity funds to concerted interstate defaults are apportioned on a fair and equitable basis.

Law Council recommends
The National Law should explicitly state factors to be considered in apportioning contributions by fidelity funds in defaults involving interstate elements.

PART 4.7 – NATIONAL RULES

4.7.1 Approval of CPD courses or providers

Issue
Section 4.7.4(2) of the draft National Law provides scope for requirements for approval of Continuing Professional Development ("CPD") courses or providers.

The provision for approval of CPD courses or providers is opposed, particularly on the basis of the size of the market of providers of CPD and the cost of establishing and maintaining what would effectively be an accreditation system of sorts, including appeal and review arrangements.

Law Council recommends
1. That aspect of reform proposal that contemplates approval of CPD courses and providers is opposed.
2. The relevant jurisdictional authorities should be free to make their arrangements in this regard.
3. The proposed National Law should be amended to make clear this intention. Market forces remain an effective and appropriate mechanism for restricting unsatisfactory providers and courses.

4.7.2 Proposing and making professional conduct, legal practice and professional development rules

Issue
Section 9.1.1 of the draft National Law provides that the Board may make Legal Profession National Rules “for or with respect to any matter that by this Law is required or permitted to be prescribed or specified or that is necessary or convenient to be prescribed or specified for carrying out or giving effect to this Law”.

Section 9.1.2 of the draft National Law provides that the Board may – except in relation to professional conduct, legal practice, and continuing professional development rules – develop proposed National Rules.

Section 9.1.3 of the draft National Law provides that the Law Council of Australia and Australian Bar Association may develop proposed National Rules in relation to professional conduct, legal practice and continuing professional development.

The Law Council is concerned that the specific function of developing professional conduct, legal practice and professional development rules conferred on the Law Council of Australia and Australian...
Bar Association under section 9.1.3 of the draft National Law could be overridden by the Board’s general rule making power in section 9.1.1 of the draft National Law.

**Law Council recommends**
The general rule making power in section 9.1.1 of the draft National Law should not permit the Board to unilaterally make a professional conduct, legal practice or professional development Rule in a manner that is contrary to the specific provisions of section 9.1.3 of the draft National Law.

**PART 5.3 – CONSUMER MATTERS**

5.3.1 Lodgement of disputed legal costs with Ombudsman

**Issue**
Section 5.3.7 (3) of the National Law requires a law practice or lawyer against whom a complaint involving a cost dispute has been made, to lodge within 28 days the amount of disputed costs (up to $100,000) with the Ombudsman. Because of the operation of the provisions relating to the time within which a complaint may be made to the Ombudsman, the lodgment by a law practice of an amount represented disputes cost may be required any time up to five years after the conduct giving rise to a dispute occurs.

This would effectively mean that a law practice must regard fees received in any matter in which the costs are less than $100,000, as contingent income for that period.

Furthermore, if it is intended that a law practice may be required to lodge an amount representing disputed costs many years after the matter complained of had been concluded, practical problems will arise where the law practice has ceased or been incorporated or merged into another law practice, or where the particular practitioner involved has died or moved to another law practice.

The Law Council notes that section 5.3.7 (2) of the National Law allows clients that would experience hardship if they had to lodge disputed costs with the Ombudsman to be exempted from the requirement. However, small law practices, which would equally suffer hardship from having to lodge large sums of money with the Ombudsman are not entitled to a similar concession.

**Law Council recommends**

1. The proposal in the National Law requiring disputed costs to be lodged with the Ombudsman is strongly opposed.
2. The proposed National Law should be amended to provide that the requirement (at subsection 5.3.7(3)) that a law practice lodge disputed costs with the Ombudsman does not apply in a case where the complaint involving a cost dispute is raised after the times specified at 5.2.8(2) and whenever the Ombudsman exercises his or her discretion under subsection 5.2.8(1) to waive the five year period in which a complaint must be lodged.

5.3.2 Determination of consumer disputes involving less than $10,000

**Issue**
Section 5.3.6 of the National Law provides that where the amount of legal costs in a dispute is less than $10,000:
• the Ombudsman can deal with the matter by making a binding determination about the amounts of costs payable.
• the binding determination is to be based upon what the Ombudsman considers is fair and reasonable.
• the binding determination is not subject to a costs assessment, but may be subject to an internal review.

Furthermore, section 5.6.3 ensures that there is no right of appeal from a determination by the Ombudsman if the determination is about disputed costs of less than $10,000.

The Law Council is opposed to the Ombudsman having a power to make determinations about legal costs of less than $10,000 without a practitioner being entitled to an independent administrative review and appeal rights. Such a power would supplant the proper role of costs assessments and administrative and judicial review safeguards.

Law Council recommends

Determinations made by the Ombudsman in legal costs disputes must be subject to appeal and review.

PART 5.4 – DISCIPLINARY MATTERS

5.4.1 Disciplinary orders – unsatisfactory professional conduct

Issue

Section 5.4.5 of the National Law will enable the Ombudsman, in relation to a disciplinary complaint, to make a finding that the respondent lawyer has engaged in unsatisfactory professional conduct. Having made such a determination, the Ombudsman may then proceed to impose a range of sanctions set out in that section.

The Law Council opposes the Ombudsman exercising a power that is properly exercised by a Disciplinary Tribunal or Court.

The Law Council recognises that there are good reasons for dealing with minor instances of unsatisfactory professional conduct without commencing proceedings in the Disciplinary Tribunal; however administrative expediency cannot justify conferring upon a regulator appointed by executive government powers that are properly to be exercised by judicial bodies.

While the Law Council is prepared to support a means by which minor conduct breaches can be dealt with “summarily”, the basis for doing this must be one of consent by the lawyer to have the matter disposed in that fashion.

In such a case, the criteria for the Ombudsman to make orders should be that the Ombudsman is satisfied that the Tribunal would be likely to find unsatisfactory professional conduct proved. Further, the fine which the Ombudsman may impose should be limited to $10,000 (and the fine should be paid to the local jurisdiction and not the National Board).

Law Council recommends

1. The Ombudsman’s power to dispose of a discipline matter involving unsatisfactory professional conduct must be on the basis of consent to that by the lawyer concerned.
2. Where the lawyer does not consent to the proposed remedies, the matter must be dealt with by referring it to the Disciplinary Tribunal.
3. The maximum fine the Ombudsman might impose should be limited to $10,000 and must be payable to the local jurisdiction, not the National Board.
PART 5.5 – COMPENSATION ORDERS

5.5.1 Compensation orders

Issue

Section 5.3.5 of the National Law enables the Ombudsman to resolve a consumer matter by making a determination that, in the Ombudsman’s view, is fair and reasonable. A determination so made can include a compensation order in favour of the complainant. Such an order by the Ombudsman can, under section 5.5.2 of the National Law, be for an amount up to $25,000. Such an order may also preclude a law practice from recovering legal costs or require repayment of costs, or from discharging a lien.

The Law Council notes that section 5.5.3 requires the Ombudsman to be satisfied that “it is in the interests of justice that the order be made”.

The Law Council also notes that in a legal costs dispute the Ombudsman may make a binding determination of an amount up to $10,000, however, the Ombudsman is to be empowered to make a compensation order for an amount up to $25,000. The logic of the different amounts is not readily apparent.

Where a compensation order is for an amount of less than $10,000 section 5.6.3 of the National Law ensures there is no appeal from the Ombudsman’s decisions.

The Law Council agrees that compensation orders (and other remedies) can be efficient and effective ways of resolving consumer disputes; however that flexibility should not come at the expense of removing the right of administrative and judicial review from the person against whom compensation orders and other remedies are directed.

Law Council recommends

1. The Ombudsman must not exercise unfettered quasi-judicial powers.
2. If the Ombudsman is to have a power to make compensation orders, the Ombudsman’s decisions must always be subject to administrative and judicial review.
3. The maximum amount of compensation order the Ombudsman might make should be aligned with the maximum amount of costs determination the Ombudsman might make, and both amounts should be for less than $10,000.

PART 8.2 – NATIONAL LEGAL SERVICES BOARD

8.2.1 Delegation of functions

Issue

Clause 8.2.5 (2) of the draft National Law provides for the Board to delegate certain powers to

(a) a committee of the Board; or
(b) a member of the staff of the Board; or
(c) an entity specified, or of a kind specified, in the National Rules for the purposes of this section.

However, the National Rules do not specify the relevant entities for the purposes of section 8.2.5.
Law Council recommends

1. There should be an express provision in the National Law allowing delegation of functions (which are not special functions of the Board or the Ombudsman) to a regulatory body or professional association.

2. It is proposed that if the relevant proposed delegates area are identified, the overall scheme will offer more certainty and stability.

PART 8.3 – NATIONAL LEGAL SERVICES OMBUDSMAN

8.3.1 Objectives of office of Ombudsman

Issue

Section 8.3.3 of the draft National Law provides the objectives of the office of the Ombudsman are as follows:

(a) to ensure that complaints against Australian legal practitioners, Australian-registered foreign lawyers or law practices and disputes and other issues involving law practices are dealt with in a timely and effective manner; and

(b) to ensure compliance with requirements of this Law and the National Rules that are to be observed by Australian legal practitioners, Australian-registered foreign lawyers and law practices; and

(c) to educate the legal profession about issues of concern to the profession and to clients of law practices; and

(d) to educate the community about legal issues and the rights and obligations that flow from the client-practitioner relationship

The Law Council opposes conferring formal educative functions on the Ombudsman. Educative functions of the Ombudsman are by their nature likely to lead to significant increase in the operating cost of the Ombudsman’s office. No proposal has been put forward by the Taskforce as to the scope and extent of this activity.

Law Council recommends

The objectives relating to educating the legal profession and community mentioned at paragraphs 8.3.3(c) paragraphs 8.3.3(d) of the National Law should be deleted from the list of objectives for which the Office of National Legal Services Ombudsman is created.
PART 3 – TECHNICAL ISSUES AND SUGGESTIONS FOR IMPROVEMENT

Purpose: This Part sets out technical issues/gaps/errors/improvement suggestions about particular sections of the National Law and National Rules.

CHAPTER 1 PRELIMINARY

Part 1.2 Definitions

Section 1.2.1 Definitions - Associate

<table>
<thead>
<tr>
<th>Definitions - Associate</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>associate</strong> of a law practice means a person who is one or more of the following:</td>
</tr>
<tr>
<td>(a) a principal of the law practice;</td>
</tr>
<tr>
<td>(b) a partner, director, officer, employee or agent of the law practice;</td>
</tr>
<tr>
<td>(c) a consultant to the law practice;</td>
</tr>
<tr>
<td>(d) an Australian-registered foreign lawyer who is a partner in the law practice or in a business that includes the law practice;</td>
</tr>
<tr>
<td>(e) a person who is a partner in a business that includes the law practice;</td>
</tr>
<tr>
<td>(f) a person who shares the receipts, revenue or other income arising from the law practice.</td>
</tr>
</tbody>
</table>

Issue:

The reference to “agent” is very ambiguous. It is potentially extremely wide.

The reference to “consultant” is also very ambiguous. For example, it could apply to a barrister who is consulted in a brief, an IT consultant reviewing the computer systems and other non-legal personnel.

Law Council recommendation:

The concepts of “agent” and “consultant” need to be defined for the purposes of the National Law.

Section 1.2.1 Definitions – Barrister

<table>
<thead>
<tr>
<th>Definitions – Barrister</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>barrister</strong> means an Australian legal practitioner whose Australian practising certificate is subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only, whether or not his or her home jurisdiction is a fused jurisdiction or a non-fused jurisdiction.</td>
</tr>
</tbody>
</table>

Issue:

The National Law intends to replace the various categories of practising certificate with a single Australian Practising Certificate and to use conditions attached to the practising certificate to set out the nature of restrictions or conditions (if any) on the scope of the holder’s practising entitlements.

The definition notes that a barrister would hold a conditional practising certificate authorising the holder to engage in legal practice as or in the manner of a barrister. It is noted that barristers give undertakings to the Supreme Court to engage in legal practice solely in the manner of a barrister.
Law Council recommendation:
The definition of *barrister* as proposed in the National Law should be amended to read:

*barrister* means an Australian legal practitioner whose Australian practising certificate is subject to a condition that the holder is authorised to engage in legal practice solely as, or in the manner of a barrister, whether or not his or her home jurisdiction is a fused jurisdiction or a non-fused jurisdiction.

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**Section 1.2.1 Definitions - Community legal service**

*community legal service* means an organisation (whether incorporated or not) that:

- holds itself out as a community legal service or community legal centre (whether or not it is a member of a State or Territory association of community legal centres, and whether or not it is accredited or certified by the National Association of Community Legal Centres); and

- is established and operated on a not-for-profit basis; and

- provides legal or legal-related services that:
  - are directed generally to people who are disadvantaged (including but not limited to being financially disadvantaged) in accessing the legal system or in protecting their legal rights; or
  - are conducted in the public interest.

**Issue:**
The definition of “community legal service” is too broad.

A community legal service, whether or not incorporated, should be accredited by the National Association of Community Legal Centres. This is important given the definition of law practice.

**Law Council recommendation:**
The definition of “community legal service” should be amended to the effect that a “community legal service” needs to be accredited by the National Association of Community Legal Centres.

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**Section 1.2.1 Definitions - Costs assessor**

*costs assessor* means:

- a person appointed by a court, judicial officer or other official to have the responsibility of conducting costs assessments; or

- a judicial officer or other official designated by jurisdictional legislation to have that responsibility.

**Issue:**
A variety of approaches is currently taken to the designation and appointment of persons as costs assessors. The reference in the definition to a costs assessor as “a person appointed by....or other official” is vague. To achieve clarity and national uniformity cost assessors should only be persons who are appointed by the Courts or a judicial officer.

**Law Council recommendation:**
The definition of “cost assessor” should be amended to delete the words “other official”.
CHAPTER 2  THRESHOLD REQUIREMENTS REGARDING LEGAL PRACTICE

Part 2.1  Unqualified legal practice

<table>
<thead>
<tr>
<th>Section 2.1.3</th>
<th>Prohibition on engaging in legal practice by unqualified entities</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>An entity must not engage in legal practice in this jurisdiction unless it is a qualified entity.</td>
</tr>
<tr>
<td></td>
<td>Criminal maximum penalty: for a body corporate—500 penalty units; for a natural person—100 penalty units or imprisonment for 2 years, or both.</td>
</tr>
<tr>
<td>(2)</td>
<td>Subsection (1) does not apply to an entity or class of entities declared by the National Rules to be exempt from the operation of subsection (1), but only to the extent (if any) specified in the declaration.</td>
</tr>
<tr>
<td>(3)</td>
<td>An entity is not entitled to recover any amount, and must repay any amount received, in respect of anything the entity did in contravention of subsection (1). Any amount so received may be recovered as a debt by the person who paid it.</td>
</tr>
</tbody>
</table>

**National Rule 2.3.1 - Exemption from prohibition on engaging in legal practice**

The following persons are exempt from the operation of section 2.1.3 (1) of the Legal Profession National Law:

| (a)           | a person carrying out conveyancing work in accordance with a licence in force under relevant State or Territory legislation; |
| (b)           | a land agent performing work in respect of instruments he or she is entitled to draw, fill up or prepare and to charge for, under relevant State or Territory legislation; |
| (c)           | an officer or employee in the service of the Crown (including the Public Service) drawing instruments in the course of his or her duty; |
| (d)           | a public trustee (however named) or a company performing trustee work on behalf of the government in the course of preparing a will or carrying out any other activities involving the administration of trusts, the estates of the living or deceased persons, or the affairs of living persons. |

**Issue**

The expression “engage in legal practice” is not defined for the purposes of the National Law. In accordance with subsection 2.1.3(2), National Rule 3.2.1 lists particular kinds of legal work undertaken by particular persons that are to be exempt from the general prohibition on unqualified entities engaging in legal practice.

National Rule 3.2.1 does not reflect the various kinds of persons and work that are currently exempt under various State and Territory legislation from the prohibition on engaging in legal practice when not entitled.

Presently, the scope of, for example, section 14(3) of the NSW Legal Profession Act extends to a person who as an employee provides legal services to his or her employer or a related entity provided the person is acting in the course of his or her employment and receives no fee, gain or reward for so acting other than his or her ordinary remuneration as an employee.

This exemption needs to be retained in a limited number of circumstances, for example, where an employee of a law firm such as a law clerks drafts a legal document, but does not otherwise undertake other activities that would constitute “engaging in legal practice” as that term is more broadly understood and accepted.

**Law Council recommendation**

National Rule 2.3.1 should exempt employees of law practices who are ordinarily engaged in work for that law practice where the nature of that work is limited to specific legal-related tasks.
Section 2.1.5  Entitlement of certain persons to use certain titles, and presumptions with respect to other persons

This section applies to the following titles:

(a) lawyer, legal practitioner, barrister, solicitor, attorney, counsel or proctor;
(b) Senior Counsel, Queen’s Counsel, King’s Counsel, Her Majesty’s Counsel or His Majesty’s Counsel;
(c) any other title specified in the National Rules for the purposes of this section.

Issue:
A person is admitted as a barrister and solicitor and upon admission becomes an Australian lawyer. Once granted a practising certificate that person becomes an Australian legal practitioner. There does not appear to be any reason or need to provide for the Board to identify titles other than those established by the National Law, or those long-established titles recognised by paragraphs (a) and (b) of the definition.

Law Council recommendation:
Paragraph (c) should be removed.

Part 2.2  Admission to the Australian legal profession

Section 2.2.2(1)  Admission

The Supreme Court of this jurisdiction may admit a natural person aged 18 years or over to the Australian legal profession as an Australian lawyer, but only if:

(a) the Board has provided the Supreme Court with a compliance certificate in respect of the person and the certificate is still in force; and
(b) this jurisdiction is specified as the nominated jurisdiction under section 2.2.4 (2); and
(c) the person is not already admitted to the Australian legal profession; and
(d) the person takes an oath of office, or makes an affirmation of office, in the form required by the Supreme Court.

Issue:
An important element of the admission process is the signing of the roll, which is the essential final step. The Supreme Court Roll is the public record of the admission of a practitioner as an officer of the Supreme Court.

Signing of the roll, firstly, relates to the importance of public records within each jurisdiction, each of which has laws relating to the maintenance of such records.

Secondly, signing the roll iterates the point that admission is more than a bureaucratic process. A legal practitioner, as an officer of the court, has both rights and obligations in addition to those covered under the National Law.

Law Council recommendation:
An additional paragraph (e) should be included to make reference to signing the roll.
### National Rule 3.4.1(a)  
**Board to consider certain matters**

For the purposes of section 2.2.3 of the Legal Profession National Law, the matters to which the Board must have regard, before determining whether a person is a fit and proper person to be admitted are as follows:

- **(a)** whether the person is currently a fit and proper person;
- **(b)** ....
- **(c)** whether the person has been convicted or found guilty of an offence in Australia or a foreign country, and if so:
  - **(i)** the nature of the offence; and
  - **(ii)** how long ago the offence was committed; and
  - **(iii)** the person’s age when the offence was committed;
- **(d)–(e)** ....
- **(f)** whether the person is currently subject to an unresolved complaint, investigation, charge or order under any of the following:
  - **(i)** the Legal Profession National Law, or a previous law of a jurisdiction that corresponds to that Law; or
  - **(ii)** a corresponding foreign law;
- **(g)** ....
- **(h)** whether the person’s name has been removed from:
  - **(i)** a roll of Australian lawyers, however described or expressed, in any jurisdiction; or
  - **(ii)** a foreign roll of practitioners;
- **(i) – (l)** ....
- **(m)** whether the person is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner.

### Issues:

1. The reference in paragraph (a) to a person being currently a fit and proper person might not allow consideration of matters that, although occurring in the past, would still mean the person is not a fit and proper person for the purposes of admission to the legal profession.

2. In relation to paragraph (c), the facts and circumstances surrounding a person’s conviction or finding of guilt are relevant considerations. A similar approach is taken to persons who have been acquitted or found not guilty of an offence.

3. Paragraph (h) also should not apply to primary applicants if it remains as presently worded. The procedures for admission should contain a statement as to whether an applicant has ever been “struck off” from any roll of practitioners or de-registered from any other profession. The circumstances of any such removal or de-registration would need to be fully investigated before referring the application to the Supreme Court for admission and the compliance certificate would need to be noted accordingly with reasons.
Law Council recommendations:

1. Delete the word “currently” in paragraph (a).
2. Amend paragraph (c) to include “the circumstances of the offence and the offender and the penalty imposed by the Court”.
3. Amend paragraph (h) in such a way to make clear that it only applies to an applicant for re-admission or secondary admission, it has no application to a first admission.

Section 2.2.5 Conditional admission of foreign lawyers

(1) The Board may recommend in a compliance certificate in respect of a foreign lawyer that the foreign lawyer be admitted subject to conditions of one or more of the following kinds:
   (a) a condition limiting the period of the foreign lawyer’s admission;
   (b) a condition requiring the foreign lawyer to engage in supervised legal practice, or limiting the area of law in which the foreign lawyer may engage in legal practice, or otherwise restricting the foreign lawyer’s practising entitlements;
   (c) a condition requiring the foreign lawyer to undertake particular academic or practical legal training or both.

(2) ..... 

(3) ..... 

(4) Without limiting the grounds on which a person’s name may be removed from the Supreme Court roll, the Supreme Court may order the removal of a person’s name from the Supreme Court roll for this jurisdiction for a contravention of a condition.

(5) (Without limiting subsection (4), a contravention of a condition is capable of constituting unsatisfactory professional conduct or professional misconduct.

Issues:

1. The reference to “foreign lawyer” is misleading as that expression is used elsewhere in the National Law to describe a person registered or authorised to practice foreign law in Australia (but not Australian law). It is inappropriate that an expression has more than one meaning in the National Law.
2. Section 5 is otiose - the removal of a person from the roll is the ultimate sanction for unsatisfactory professional conduct or professional misconduct.

Law Council recommendations:

1. The term “foreign lawyer” should be replaced with a more appropriate form of words to convey the intention that conditional admission is available only to persons who are overseas qualified lawyers authorised to engage in legal practice in an overseas jurisdiction.
2. Subsection (5) should be omitted.
### National Rule 3.4.2 Suitability reports

For the purposes of rule 3.4.1, the Board may require an applicant for admission:

(a) to provide either or both of the following:

(i) a report from a Commissioner of Police as to whether the applicant has been convicted or found guilty of an offence in Australia;

(ii) a report by a registered medical practitioner in Australia as to the health of the applicant; and

(b) if the applicant is:

(i) a foreign lawyer; or

(ii) a person who obtained the whole or part of his or her qualifications, skills or experience overseas;

and it is appropriate to do so, to demonstrate his or her proficiency in English.

### Issue:

The provision is inconclusive and uncertain in its use of the expressions “may require” and “either or both”. There needs to be some certainty. Currently, an applicant must provide a police certificate if they disclose a charge or conviction; must provide medical certificates if making a medical disclosure; and must provide documentation from the trustee in bankruptcy if disclosing a bankruptcy. These form part of the guide to admission which needs to be fully developed and be part of the National Rules.

### Law Council recommendation:

The National Law must make it clear that there must actually be a reason for the Board to ask for a police report or a medical report. The National Rules should set out the circumstances in which such reports may be requested.

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**CHAPTER 3 LEGAL PRACTICE**

### Part 3.3 Australian legal practitioners

**Section 3.3.6 (1)(b) Conditions - categories of practice**

(1) An Australian practising certificate is subject to the following conditions, as determined by the Board:

...  

(b) a condition that the holder is authorised to engage in legal practice:

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

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

(iii) as an employee of a law practice only; or

(iv) as a corporate lawyer or government lawyer only; or

(v) as a volunteer at a community legal service.

**Reason:**

The categories of conditions in s 3.3.6(1)(b) are restrictive in that they do not accommodate persons who may engage in legal practice on more than one basis – for example an employed solicitor who works part
time in a private law firm and part-time in corporate practice. This situation may be quite common in the case of, for example, practitioners who work part-time or are returning to work after parental leave.

**Law Council recommendation:**

This provision should be amended to accommodate lawyers who engage in different types of legal practice in particular circumstances. The word “only” should be deleted from subparagraphs (iii) and (iv).

<table>
<thead>
<tr>
<th>Section 3.3.11</th>
<th><strong>Discretionary conditions</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>The Board may impose discretionary conditions on an Australian practising certificate in accordance with the National Rules, but those conditions must be of a kind permitted by this Law or specified in the National Rules for the purposes of this section.</td>
</tr>
<tr>
<td>(2)</td>
<td>...</td>
</tr>
<tr>
<td>(3)</td>
<td>The Board must include details of discretionary conditions imposed on an Australian legal practitioner’s Australian practising certificate in the Australian Legal Profession Register.</td>
</tr>
</tbody>
</table>

**National Rule 4.2.3(1)(f)**

For the purposes of section 3.3.11 of the Legal Profession National Law, the discretionary conditions that the Board may impose on an Australian practising certificate are any one or more of the following:

(a) –(e) .....  
(f) a condition requiring the holder to provide the Board or a specified body with evidence as to:  
(i) any outstanding tax obligations of the holder; and  
(ii) provision made by the holder to satisfy any such outstanding obligations;  
(g) –(h)  

**Issue:**

The prescriptive list outlined in Rule 4.2.3 will not cater for the vast range of differing factual circumstances that arise in practice. Experience has shown that a general power is required.

**Law Council recommendation:**

That a further sub-paragraph be inserted in sub-rule 4.2.3(1) to provide the power to impose “any reasonable and relevant condition on the practising certificate”.

**Part 3.7 ** **Incorporated and unincorporated legal practices**

<table>
<thead>
<tr>
<th>Section 3.7.7</th>
<th><strong>Disqualification of entities from providing legal services</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>The Supreme Court of this jurisdiction may, on the application of the Board or the Ombudsman, make an order disqualifying an entity from providing legal services in this jurisdiction as a law practice to which this Division applies for the period the Court considers appropriate if satisfied that disqualification is justified.</td>
</tr>
<tr>
<td>(2)</td>
<td>An order under this section may, if the Supreme Court thinks it appropriate, be made:</td>
</tr>
<tr>
<td></td>
<td>(a) subject to conditions as to the conduct of the law practice; or</td>
</tr>
<tr>
<td></td>
<td>(b) subject to conditions as to when or in what circumstances the order is to take effect; or</td>
</tr>
<tr>
<td></td>
<td>(c) together with orders to safeguard the interests of clients or employees of the law practice.</td>
</tr>
<tr>
<td>(3)</td>
<td>An entity that is disqualified under this section ceases to be an incorporated legal practice or</td>
</tr>
</tbody>
</table>
Conduct of an Australian legal practitioner who provides legal services on behalf of a disqualified entity in the capacity of a partner, director, officer or employee of the entity is capable of constituting unsatisfactory professional conduct or professional misconduct where the practitioner ought reasonably to have known that the entity is disqualified under this section.

An order made by the Supreme Court of another jurisdiction applies in relation to this jurisdiction in the same way as it applies in relation to that other jurisdiction and as if it had been made by the Supreme Court of this jurisdiction.

**Issues:**

Section 3.7.7(1) enables the Supreme Court, on application of the Board or Ombudsman, to make orders disqualifying an entity from providing legal services.

Section 3.7.7(2) provides that an order made under this section may be made subjected to a range of conditions e.g. the conduct of the law practice, in what circumstance the order is to take effect, etc.

There are no provisions which would enable the Supreme Court to impose conditions on a law practice without disqualifying it first.

**Law Council recommendation:**

An additional provision be included to allow the Supreme Court to impose conditions on a law practice short of disqualification.

**CHAPTER 4  BUSINESS PRACTICE AND PROFESSIONAL CONDUCT**

**Part 4.2  Trust money and trust accounts**

**Section 4.2.2  Proposed additional definition – general trust account**

**N/A**

**Issue:**

It would be useful to have a definition of “general trust account” in the law, to ensure the clear distinctions being made about how different forms of trust money are to be held. A definition was usefully included in the Model Bill.

**Law Council recommendation:**

Insert a definition of “general trust account” along the lines of - “an account maintained by a law practice with an approved ADI for the holding of trust money received by the practice, other than controlled money or transit money”.
### Section 4.2.12(1)  Certain money to be deposited in general trust account

**(1)** A law practice must deposit trust money (other than cash) into the law practice’s general trust account as soon as practicable after receiving it unless:

- *(a)* the law practice has a written direction by a person legally entitled to provide it to deal with the money otherwise than by depositing it in the account; or
- *(b)* the money is controlled money or transit money; or
- *(c)* the money is the subject of a power given to the practice or an associate of the practice to deal with the money for or on behalf of another person.

**Civil maximum penalty:** for a body corporate—250 penalty units; for a natural person—50 penalty units.

**Issue:**

The drafting of provisions in the National Law relating to the treatment of trust money received in the form of cash are convoluted. It would be much easier for practitioners and clients if the treatment by a law practice of trust monies received in cash were dealt with by a single specific provision.

**Law Council recommendation:**

This (and other similar) provision should be amended to provide a single provision dealing with how trust money received in the form of cash is to be dealt with.

### Section 4.2.17  Trust money received in the form of cash

**(1)** A law practice that has received transit money must pay or deliver the money as required by the instructions relating to the money within the period (if any) specified in the instructions, or else as soon as practicable after it is received.

**Civil maximum penalty:** for a body corporate—250 penalty units; for a natural person—50 penalty units.

**Issue:**

This provision would be redundant if the recommendation about section 4.2.12(1) (above) were to be adopted.

**Law Council recommendation:**

Delete this provision.

### Section 4.2.18(1)  Withdrawal of trust money

**National Rule 7.2.2(b)**

**Section 4.2.18**

**(1)** A law practice must not withdraw trust money from a general trust account otherwise than by cheque or electronic funds transfer.

**Civil maximum penalty:** for a body corporate—100 penalty units; for a natural person—20 penalty units.

**Rule 7.2.2**

A law practice may withdraw money for legal costs if:
(a) ...; and
(b) the law practice has given the person a written request for payment and notice of the proposed withdrawal and:
   (i) within 7 days of the notice, the person has not objected to the withdrawal; or
   (ii) the person has objected to the withdrawal but has not referred the matter to the Ombudsman within 60 days after receiving the notice; or
   (iii) the money otherwise becomes payable.

Issues:

1. Section 4.2.18 should, for consumer protection reasons, include a restriction on trust cheques being made payable to cash.
2. The term “a written request” in Rule 7.2.2(b) departs from usual practice and may not constitute a proper bill in the form of a tax invoice.
3. Rule 7.2.2 requires authority AND a written request to the client for payment AND a notice to the client of a proposed withdrawal, which will make withdrawals from trust accounts for legal costs more difficult, costly and time consuming.
4. Rule 7.2.2 appears flawed - if a law practice has a costs agreement or trust account authority, nothing prevents the law practice transferring funds from its trust account even though the client may have objected to the bill.
5. Rule 7.2.2 makes no distinction in relation to a fixed price agreement. The seven day waiting period where the bill for legal services has already been agreed and the legal services have been provided is inappropriate. An exception should be included in these provisions.

Law Council recommendation:

1. That subsection 4.2.18(1) be amended to ensure a trust account withdrawal cannot be by way of a cheque payable to cash.
2. The term “written request” be amended to designate a tax invoice.
3. Rule 7.2.2 should provide an exception to the “written request” rule where the quantum for legal services has already been agreed and the legal services have been provided.
4. Rule 7.2.2 should be reviewed generally.

Section 4.2.18(2)(c) Treating trust money as unclaimed money

National Rule 7.2.25

Section 4.2.18

(2) A law practice may do any of the following, in relation to trust money held in the practice’s general trust account or controlled money account:

(a) exercise a lien, including a general retaining lien, for the amount of legal costs reasonably due and owing by the person to the law practice;
(b) withdraw money for payment to the law practice’s account for legal costs owing to the practice if the relevant procedures or requirements specified in the National Rules for the purposes of this Division are complied with;
(c) after deducting any legal costs properly owing to the practice, deal with the balance as
Rule 7.2.25

(1) If a law practice holding money in a trust account cannot find the person on whose behalf the money is held or a person authorised to receive it, the practice may:

(a) pay the money to the Treasurer for credit to the Consolidated Fund; and

(b) give the Treasurer such information as the Treasurer requires in relation to the money and the person on whose behalf the money was held by the practice.

(2) If a law practice pays money to the Treasurer under subrule (1), the practice is relieved from any further liability in relation to the money.

(3) The Treasurer must pay money deposited under this rule to a person who satisfies the Treasurer as to his or her entitlement to the money.

(4) Payment of money to a person under subrule (3):

(a) discharges the Crown and the Treasurer from any liability in relation to the money; and

(b) does not discharge the person from any liability to another person who establishes a right to the money.

(5) The Treasurer may require any person to give information that the person has, or can obtain, about the entitlement of a person to money paid to the Treasurer under this rule and attempts made to locate the person.

(6) A person to whom a requirement is made under this rule must comply with the requirement and must not, in purported compliance with the requirement, give information that he or she knows is false or misleading in a material particular.

Issues:

1. In relation to section 4.2.18(2)(a), a lien should only be exercised when there is an entitlement to do so.

2. In relation to subsection 4.2.18(2)(c), it is presumptuous to require any balance to be dealt with as unclaimed money. The unclaimed money provision should be a last resort. It is feasible that the balance may be refundable to a client or arises from some error. If this provision is to be retained it should apply only after exhausting all other possibilities of distributing the funds in accordance with client instructions.

3. As the provisions for dealing with unclaimed money may vary between jurisdictions, the Law Council recommends that all that is required in Rule 7.2.25 is a provision that unclaimed money be dealt with in accordance with jurisdictional requirements.

4. In relation to Rule 7.2.25(1), instances also arise where, for example, the trust cheque is of minimal value and the payee fails or refuses to bank the trust cheque.

Law Council recommendations:

1. That section 4.2.18(2)(a) be amended to “exercise a lien when entitled to do so, including a general....”

2. That section 4.2.18(2)(c) be amended to stipulate that trust money is only “unclaimed money” after exhausting all other possibilities of distributing the funds in accordance with client instructions.

3. Rule 7.2.25 should be amended to provide that unclaimed money be dealt with in accordance with jurisdictional requirements.

4. Rule 7.2.25(1) should be amended to include the words “or refuses to accept payment” after the words “authorised to receive it”.

### Section 4.2.28  When, how and where money is received

(1) ...  
(2) ...  
(3) The National Rules or (to the extent that the National Rules do not do so) the Ombudsman may provide guidelines for determining the jurisdiction in which a law practice receives trust money. For the purposes of this Law as applying in this jurisdiction, to the extent that the guidelines are relevant, the jurisdiction where a law practice receives trust money is to be determined in accordance with the guidelines.

**Issue:**

Subsection (3) appears to be establishing a two tier test for determining the appropriate jurisdiction, by reference to the National Rules and to guidelines issued by the Ombudsman, however neither the requirement nor the guidelines are in the Rules.

**Law Council recommendation:**

To facilitate compliance, the requirements or guidelines for determining the jurisdiction in which a law practice receives trust money should be contained within the Rules.

### National Rule 7.2.9  Back-ups

The law practice must ensure that:

(a) a back-up copy of all records required under these Rules is made at least once each month; and  
(b) each back-up copy is kept by the law practice; and  
(c) a complete set of back-up copies is kept in a separate location so that any incident that may adversely affect the records would not also affect the back-up copy.

**Issue:**

This provision when read with section 4.2.21 (2) – a requirement to maintain and keep trust records for a period of seven years after the last transaction entry in the trust record, seemingly imposes a heavy and unnecessary burden on law practices’ record keeping. For example, paragraph (a) appears to require a law practice to continuously back-up its records of concluded matters for 84 months.

**Law Council recommendation:**

Rule 7.2.9 should be amended to clarify and reduce a practice’s record keeping requirements.
<table>
<thead>
<tr>
<th>National Rule 7.2.10</th>
<th>Method of payment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(1)</strong></td>
<td>If a withdrawal of trust money from a general trust account of a law practice is made by cheque, the cheque:</td>
</tr>
<tr>
<td></td>
<td>(a) must be made payable to or to the order of a specified person or persons and not to bearer or cash; and</td>
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<td></td>
<td>(b) must be crossed &quot;not negotiable&quot;; and</td>
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<td></td>
<td>(c) must include:</td>
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<td></td>
<td>(i) the name of the law practice or the business name under which the law practice engages in legal practice; and</td>
</tr>
<tr>
<td></td>
<td>(ii) the expression &quot;law practice trust account&quot; or &quot;law practice trust a/c&quot;.</td>
</tr>
<tr>
<td><strong>(2)</strong></td>
<td>A cheque must be signed by, or an electronic funds transfer must be effected under, the direction or authority of:</td>
</tr>
<tr>
<td></td>
<td>(a) an authorised principal of the law practice; or</td>
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<td></td>
<td>(b) if such a principal is not available:</td>
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<tr>
<td></td>
<td>(i) by an authorised legal practitioner associate; or</td>
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<td></td>
<td>(ii) by an authorised Australian legal practitioner who holds an Australian practising certificate authorising the receipt of trust money; or</td>
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<td></td>
<td>(iii) by two or more authorised associates jointly.</td>
</tr>
<tr>
<td><strong>(3)</strong></td>
<td>A written record of the required particulars must be kept of each payment made by cheque or electronic funds transfer unless, at the time the cheque is issued or the transfer is effected, those particulars are recorded by a computerised accounting system in the trust account payments cash book, in which case a written record must be kept that is sufficient to enable the accuracy of the particulars recorded by the computerised accounting system to be verified.</td>
</tr>
<tr>
<td><strong>(4)</strong></td>
<td>For the purposes of subrule (3), the required particulars are:</td>
</tr>
<tr>
<td></td>
<td>(a) the date and number of the cheque or transaction;</td>
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<td></td>
<td>(b) the amount ordered to be paid by the cheque;</td>
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<tr>
<td></td>
<td>(c) in the case of a cheque, the name of the person to whom the payment is to be made or, if the cheque is made payable to an ADI, the name of the ADI and the name of the person receiving the benefit of the payment;</td>
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<tr>
<td></td>
<td>(d) in the case of an electronic funds transfer, the name and number of the account to which the amount was transferred and relevant BSB number;</td>
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<tr>
<td></td>
<td>(e) details clearly identifying the name of the person on whose behalf the payment was made and the matter reference, or in the case of a payment to an ADI, the name or BSB number of the ADI and the name of the person receiving the benefit of the payment;</td>
</tr>
<tr>
<td></td>
<td>(f) details clearly identifying the ledger account to be debited;</td>
</tr>
<tr>
<td></td>
<td>(g) particulars sufficient to identify the purpose for which the payment was made.</td>
</tr>
<tr>
<td><strong>(5)</strong></td>
<td>Written records relating to payments by cheque or electronic funds transfer (including cheque or transfer requisitions) must be kept in the order in which the cheques or transfers were issued or effected.</td>
</tr>
</tbody>
</table>
Issues:

1. Rule 7.2.10 provides that withdrawal of trust money must be through a cheque or electronic funds transfer. The provision does not cater for a written authorisation by a principal to the law practice’s bankers to direct debit the trust account. This has traditionally been an option for arranging bank cheques or telegraphic transfers.

2. Rule 7.2.10 (5) could be interpreted as requiring requisitions for cheques issued for each matter to be filed in order separately, or it could be interpreted as requiring requisitions for cheques issued for all matters to be kept in order together.

Law Council recommendation:

1. Rule 7.2.10 should be amended to allow for a written authorisation by a principal to the law practice’s bankers to direct debit the trust account in accordance with a specific approval granted on specific conditions imposed.

2. Rule 7.2.10 (5) should be redrafted to specify whether it requires requisitions cheques for each matter to be filed in order separately, or requisitions for cheques from all matters to be filed in order together.

National Rule 7.2.13 Journal transfers

(1) Trust money may be transferred by journal entry from one trust ledger account in a law practice’s trust ledger to another trust ledger account in the trust ledger, but only if:

(a) the law practice is entitled to withdraw the money and pay it to the other trust ledger account; and

(b) the transfer is authorised in writing by an authorised principal of the law practice or if such a principal is not available:

(i) an authorised legal practitioner associate of the law practice; or

(ii) an authorised Australian legal practitioner who holds an Australian practising certificate authorising the receipt of trust money; or

(iii) two or more authorised associates jointly; or

(c) the transfer is authorised in writing by an external intervener for the law practice.

(2)-(5) ....

Issue

Journal transfers represent a point in the trust accounting processes where a strengthening of the requirements will enhance client knowledge of how trust monies are being managed and accounted for.

Law Council recommendation:

There should be a provision requiring that the client must authorise, in writing, any journal transfers and that such authority forms part of the trust records.

National Rule 7.2.16 Trust ledger account in name of law practice or legal practitioner associate

(1) A law practice must not maintain a trust ledger account in the name of the practice or a legal practitioner associate of the practice except as authorised by this rule.

(2) A law practice may maintain in its trust ledger:

(a) a trust ledger account in the practice’s name, but only for the purpose of aggregating in the account, by transfer from other accounts in the trust ledger, money properly due to the practice
(b) a trust ledger account in a legal practitioner associate’s name, but only in respect of money in which the associate has a personal and beneficial interest as a vendor, purchaser, lessor or lessee or in another similar capacity.

**Issue:**

The rule fails to specify when a law practice must withdraw the trust ledger account from the general trust account. Failure to include provisions of this effect could potentially lead to mixing of monies.

**Law Council recommendation:**

This provision should specify a time limit for a law practice to withdraw the trust ledger account from the general trust account.

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### National Rule 7.2.18 Notification requirements regarding each general trust account

1. A law practice must notify the Ombudsman of the following details in respect of each account that is maintained at an ADI by the law practice (or by any legal practitioner associate of the practice) and in which is held money entrusted to the law practice (or to any legal practitioner associate of the practice):
   - (a) the name of the ADI, together with its BSB number;
   - (b) the name of the account, together with its account number;
   - (c) the name of each person who is authorised to operate on the account;
   - (d) for each amount of money so entrusted:
     - (i) the name of the person for whom the money is entrusted;
     - (ii) the purpose for which the money is entrusted;
     - (iii) the date on which the money is deposited in the account, together with the manner in which it is deposited;
     - (iv) the date on which the money is withdrawn from the account, together with the manner in which it is withdrawn.

2. The matters referred to in this rule must be notified to the Ombudsman at such times and in such manner as the Ombudsman requires.

**Issues:**

1. In addition to (a),(b) and (c) the law practice should notify the date that the trust account was opened.
2. Paragraph (d) is unnecessarily onerous upon law practices and will be expensive to administer.
3. Subrule (2) seemingly requires law practices to notify the Ombudsman of the details of all transactions in general trust, controlled money and investment bank accounts. Such a requirement is potentially very onerous and, from the text of the provision, it is unclear what the Ombudsman intends to do with this information after it has been received.

**Law Council recommendations:**

1. Subrule 7.2.18(1) be amended to include “the date that the trust account was opened”.
2. Subrule 7.2.18(1) (d) should be omitted.
3. Subrule 7.2.18(2) should be omitted.
National Rule 7.2.20  Trust account statements

(1)  A law practice must give a trust account statement to each person for whom or on whose behalf trust money (other than transit money) is held or controlled by the law practice or an associate of the practice.

(2)  Where relevant, the law practice must also give the person a separate statement for:
   (a)  each trust ledger account; and
   (b)  each record of controlled money movements; and
   (c)  each record of dealings with the money that is the subject of a power to which the practice or associate is a party.

(3)  A trust account statement is to contain particulars of:
   (a)  all the information required to be kept under the Legal Profession National Law or these Rules in relation to the trust money included in the relevant ledger account or record; and
   (b)  the remaining balance (if any) of the money.

(4)  A trust account statement is to be given:
   (a)  as soon as practicable after completion of the matter to which the ledger account or record relates; or
   (b)  as soon as practicable after the person for whom or on whose behalf the money is held or controlled makes a reasonable request for the statement during the course of the matter; or
   (c)  except as provided by subrule (5), as soon as practicable after 30 June in each year.

(5)  The law practice is not required to give a trust account statement under subrule (4) in respect of a ledger account or record if at 30 June:
   (a)  the ledger account or record has been open for less than 6 months; or
   (b)  the balance of the ledger account or record is zero and no transaction affecting the account has taken place within the previous 12 months; or
   (c)  a trust account statement has been furnished within the previous 12 months and there has been no subsequent transaction affecting the ledger account or record.

(6)  The law practice must keep a copy of a trust account statement given under this rule.

Issue:
The “trust account statements” which this section requires to be made available to the clients could result in less than meaningful communication. Where the matter is simple and involves only one or two trust account transactions, enclosing a trust account statement might be unhelpful, confusing and viewed as over-servicing.

Rule 7.2.20 (6) “The law practice must keep a copy of a trust account statement given under this rule” when viewed in context of:

1. Rule 7.2.6(1)(e) – “trust ledger accounts, the register of controlled money and trust account transfer journal are to be printed before they are archived or deleted from the system;”
2. Rule 7.2.9(a) – “a back-up copy of all records required under these Rules is made at least once each month; and”
3. Section 4.2.21(2)(d) – Records must be kept for 7 years;

puts an onerous burden on law practices to maintain huge volumes of records which might be unhelpful and costly.
Law Council recommendation:
This provision as to which historical records must be retained for what periods should be reconsidered as its requirements are presently unnecessarily, onerous and unhelpful.

National Rule 7.2.24(2)  Register of powers and estates in relation to trust money

(1) A law practice must maintain a register of powers and estates in respect of which the law practice or an associate of the law practice is acting or entitled to act, alone or jointly with the law practice or one or more associates of the law practice, in relation to trust money.

(2) Sub rule (1) does not apply where the law practice or an associate of the law practice is also required to act jointly with one or more persons who are not associates of the law practice.

(3) The register of powers and estates must record:
   (a) the name and address of the donor and date of each power; and
   (b) the name and date of death of the deceased in respect of each estate of which the law practice or associate is executor or administrator.

Issues:
1. In relation to subrule 7.2.24(2), it is important for a law practice to know and record that an associate of the law practice is entitled to act, even in conjunction with someone outside the practice.
2. Subrule 7.2.24(3) leaves open a number of matters that need to be clarified. For example, is the requirement to make a record in the Register to be met when the power is executed or when it is exercised; if the former, the Rule will need to specify what additional record is required to indicate that the power has been exercised.

Law Council recommendations:
1. Subrule 7.2.24(2) should be omitted.
2. The requirements about information to be recorded must be clarified.

National Rule 7.4.3(8)  Register of controlled money

(1)-(7) ....

(8) Within 15 working days after each named month, the law practice must prepare and keep as a permanent record a statement as at the end of the named month:
   (a) containing a list of the practice’s controlled money accounts showing:
      (i) the name, number and balance of each account in the register; and
      (ii) the name of the person on whose behalf the controlled money in each account was held; and
      (iii) a short description of the matter to which each account relates; and
   (b) showing the date the statement was prepared.

Reasons:
Rule 7.4.3 does not require that the register of controlled money be reviewed or verified once completed. The Rule makes no provision for the contents of the register to be checked by a responsible person such as a principal of the law practice.
Law Council recommendation:

National Rule 7.4.3 should include another subrule to the following effect:

“The record statement required to be prepared each month must be reviewed by a principal of the practice authorised to receive trust money and that review must be evidenced on the statement.”

Part 4.3 Legal costs

Section 4.3.7 Disclosure obligations of law practice regarding clients

(1) A law practice must, when or as soon as practicable after instructions are initially given in a matter provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs.

(2) A law practice must, when or as soon as practicable there is any significant change to anything previously disclosed under this section, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client.

(3) Information provided under this section must contain:

(a) a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter; and

(b) information about the client’s rights:

(i) to negotiate a costs agreement with the law practice; and

(ii) to negotiate the billing method (for example, by reference to timing or task); and

(iii) to receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised; and

(iv) to seek the assistance of the Ombudsman in the event of a dispute about legal costs.

(4) The law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs after being given that information.

(5) If a law practice contravenes this section:

(a) the costs agreement concerned is void; and

(b) the client or an associated third party payer is not required to pay legal costs until they have been assessed or any costs dispute has been determined by the Ombudsman; and

(c) the contravention is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

Issues:

1. In relation to section 4.3.7(1), the nature of the retainer may be such that it is not possible to give “an estimate of the total legal costs” as there may be a significant range of variables that will impact upon the total costs, including the client’s instructions.

2. Section 4.3.7(5) (a) presupposes a costs agreement is already in existence, which is not necessarily the case.

3. Section 4.3.7(5) (c) provides that a failure to make costs disclosure as prescribed is “capable of
constituting unsatisfactory professional conduct or professional misconduct”. This seemingly suggests that the failure to disclose costs, absent of other offensive conduct, could constitute professional misconduct.

In light of the fact that subsections 4.3.7(5)(a) and 4.3.7(5)(b) provide that a failure to make cost disclosure already disentitles the practitioner from recovering costs without assessment, the penalty of professional misconduct seems like an excessive and unnecessary burden.

**Law Council recommendations:**
1. Section 4.3.7(1) should be amended by including, at the end of the subsection, the following words, “or a range of estimates of the total legal costs”.
2. Section 4.3.7(5)(c) should be omitted.

**Section 4.3.10 Making costs agreements**

(1) A costs agreement may be made:
   (a) between a client and a law practice retained by the client; or
   (b) between a client and a law practice retained on behalf of the client by another law practice; or
   (c) between a law practice and another law practice that retained that law practice on behalf of a client; or
   (d) between a law practice and an associated third party payer.

(2) A costs agreement must be written or evidenced in writing.

(3) A costs agreement cannot provide that the legal costs to which it relates are not subject to costs assessment.

**Issue:**
Section 4.3.10 is silent on whether acceptance may be evidenced either by way of signature or also by way of conduct. Acceptance by way of conduct is not unusual.

**Law Council recommendation:**
Section 4.3.10 should specify that acceptance can be evidenced by way of conduct.

**National Rule 8.2.3 Conditional costs agreements – litigious matters**

If a conditional costs agreement relates to a litigious matter, the agreement must not provide:
   (a) for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely; or
   (b) an uplift fee that exceeds the amount permitted by the Legal Profession National Law.

**Issue:**
Some litigation may be in the public interest even where a successful outcome cannot be predicted, e.g. pioneering litigation against tobacco companies. If the firm and client are willing to take the risk it should be their decision.

**Law Council recommendation:**
Paragraph (a) should be deleted.
### Section 4.3.15  Certain costs agreements are void

1. A costs agreement that contravenes, or is entered into in contravention of, any provision of this Division is void.

2. Subject to this section and Division 6, legal costs under a void costs agreement are recoverable as set out in section 4.3.6 (1) (b) or (c).

3)-6) ..... 

**Issue:**

Subsection (2) is conceptually flawed in that if a costs agreement is void, costs cannot be recovered under it.

**Law Council recommendation:**

Subsection (2) should refer to “legal costs to which a void costs agreement relates”.

### Section 4.3.17  Request for itemised bill

1. If a bill is given by a law practice in the form of a lump sum bill, any person who is entitled to apply for an assessment of the legal costs to which the bill relates may request the law practice to give the person an itemised bill.

2. The law practice must comply with the request within 21 days after the date on which the request is made.

3. If the person making the request is liable to pay only a part of the legal costs to which the bill relates, the request for an itemised bill may only be made in relation to those costs that the person is liable to pay.

**Issues:**

1. A period of 21 days in which to provide an itemised bill will be difficult for small law practices to comply with, and for practitioners involved in large and complex matters.

2. A time limit should apply for a client to ask for an itemised bill. If it remains indefinitely open for a client to request an itemised bill, a law practice that has issued a lump sum bill remains indefinitely at risk that a person may ask for an itemised bill and instigate a complaint.

3. The Law Council notes that section 5.2.8(2) of the National Law appears to contemplate, as a general rule, that a person who wishes to complain to the Ombudsman about a lump sum bill should do so within 60 days; however, it is not apparent whether or not this time period includes the time period for requesting and receiving an itemised bill.

**Law Council recommendation:**

1. The time period for providing an itemised bill should be increased to 30 days.

2. A time limit needs to apply for a client to ask for an itemised bill.

3. The time periods applicable to section 4.3.17 and section 5.2.8 of the draft National Law need to be aligned.
### National Rule 8.3.1  How a bill for costs is to be given

(1) A bill for costs given by a law practice to a client must be given:

(a) by personal delivery to the client or an agent of the client; or

(b) by sending it by post to the client or an agent of the client:

(i) at the usual or last known business or residential address of the client or an agent of the client; or

(ii) at the address nominated to the law practice for that purpose by the client or an agent of the client; or

(c) by delivery to a person:

(iii) at the usual or last known business or residential address of the client or an agent of the client; or

(iv) at the address nominated to the law practice for that purpose by the client or an agent of the client; being a person who appears to be at least 16 years of age and to be employed at, or to reside at, that address; or

(d) electronically to an electronic address given to the law practice by the client for that purpose.

### Issue:
It is unclear whether or not section 8.3.1(1)(d) is broad enough to cover facsimile messages, which are a commonly used method of communication with clients.

### Law Council recommendation:
Paragraph (d) should be redrafted to ensure that electronically includes by Facsimile (Fax).

### Section 4.3.21  Charging for bills prohibited

A law practice must not make a charge for preparing or giving a bill, and any charge made for that purpose is not recoverable by the law practice.

### Issue:
Section 4.3.21 imposes a blanket prohibition on a law practice making a charge for preparing or giving a bill in any circumstances. However, preparation of a bill of costs from party/party taxation purposes is ordinarily recoverable by the client from the other party and ought to be recoverable by the law practice from the client.

### Law Council Recommendation:
Section 4.3.21 should be amended so that the prohibition on charging for preparing or giving a bill does not apply to bills of costs prepared on behalf of the client for the purpose of recovery of costs from another party to a matter.
### Section 4.3.22 Notification of client’s rights

A law practice must ensure that a bill includes or is accompanied by a written statement setting out:

(a) the avenues that are open to the client in the event of a dispute in relation to legal costs; and  
(b) any time limits that apply to the taking of any action referred to in paragraph (a).

**Issue:**

Section 4.3.21 will require a law practice to give a written statement about dispute avenues to every person to whom a bill is given. The Law Council does not believe it necessary or efficient that every bill given by a law practice be accompanied by such a statement.

**Law Council recommendation:**

Section 4.3.22 should be amended so as to not apply to, for example, a bill given by one law practice to another law practice.

### Section 4.3.27 Applications for costs assessment

(1) Applications for an assessment of the whole or any part of legal costs payable to a law practice may be made by any of the following:

(a) a client who has paid or is liable to pay them to the law practice;  
(b) a third party payer who has paid or is liable to pay them to the law practice or the client;  
(c) the law practice;  
(d) another law practice, where the other law practice retained the law practice to act on behalf of a client and the law practice has given the other law practice a bill for doing so.

(2) An application under this section is to be made in accordance with applicable jurisdictional legislation.

(3) An application under this section must be made within 12 months after:

(a) the bill was given to, or the request for payment was made to, the client, third party payer or other law practice; or  
(b) the legal costs were paid if neither a bill nor a request was made.

(4)-(5)....

(6) If an application for a costs assessment is made in accordance with this Division:

(a) the costs assessment must take place without any money being paid into court on account of the legal costs the subject of the application; and  
(b) the law practice must not commence any proceedings to recover the legal costs until the costs assessment has been completed.

(7) – (8)....

**Issue**

Section 4.3.27(3) provides for an application for cost assessment to be made within 12 months of a bill, a request for payment or actual payment of the legal costs in a matter.

This provision needs to synchronize with section 5.3.6 of the National Law dealing with the resolution by the Ombudsman of disputes involving legal costs.

The Law Council considers it would be inappropriate for the 12 months (or six months as recommended at Item 4.3.1 in Part 2 of this Submission) contemplated in section 4.3.27(3) to include the time spent by the
Ombudsman’s attempts to informally settle the disputes as contemplated by section 5.3.6(2) of the draft National Law.

**Law Council recommendation:**

Section 4.3.27 should provide that an application for a costs assessment may be made within six months (or alternatively within 12 months) after the Ombudsman has been unable to resolve the dispute under section 5.3.6(2).

### Section 4.3.32 Right of appeal or review (from costs assessment)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(1)</strong></td>
<td>An applicant for assessment or the law practice concerned may, in accordance with applicable jurisdictional legislation, appeal to the designated tribunal of the jurisdiction in which the law practice engages in legal practice and which has a substantial connection with the person against, or seek a review by that tribunal of, a decision of a costs assessor.</td>
</tr>
<tr>
<td><strong>(2)</strong></td>
<td>The appeal lies to the designated tribunal of the jurisdiction for which the costs assessor exercised his or her functions in relation to the decision.</td>
</tr>
<tr>
<td><strong>(3)</strong></td>
<td>The designated tribunal may make any order it considers appropriate on the appeal or review.</td>
</tr>
<tr>
<td><strong>(4)</strong></td>
<td>This section has effect subject to the provisions of Part 5.3 requiring a costs dispute to be dealt with by the Ombudsman where the amount of legal costs that are the subject of the costs dispute is less than $100,000.</td>
</tr>
</tbody>
</table>

**Issue:**

The reference to “designated tribunal” in subsection (1) does not facilitate a structured approach to reviews and appeals of costs assessments. The problem arises because “designated tribunal” is defined in section 1.2.1 of the National Law to interchangeably mean a court or a tribunal.

Furthermore, section 4.3.32 does not make provision for current arrangements that work well under which the review process includes, as a first step, an independent review of the costs assessment by a panel of two other costs assessors.

**Law Council recommendation:**

Section 4.3.32 should be reviewed to enable an independent review by other costs assessors, as well as clarify that an appeal or review may then first be made to a tribunal.

### Part 4.5 Fidelity cover

<table>
<thead>
<tr>
<th>Section 4.5.11 Insurance</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(1)</strong> The nominated authority may arrange with an insurer for the insurance of the fidelity fund, whether against particular claims or particular classes of claims or otherwise.</td>
</tr>
</tbody>
</table>

**Issue:**

The payment of insurance premiums is a legitimate cost to be borne by the fidelity fund, and should therefore be expressly recognised as being payable from the fund.

**Law Council recommendation:**

Section 4.5.11 be amended to make it clear that the insurance premium is payable from the Fidelity Fund.
Section 4.5.15  Audit

The nominated authority must cause the accounts relating to the fidelity fund to be audited annually, and must forward a copy of the audit report to the Ombudsman.

Issue:
The Law Council notes that jurisdictional legislation will also be required to support the reforms as they relate to Fidelity Funds. Furthermore, the National Board has general administration of the National Law. Accordingly, both the relevant State or Territory Government and the Board have accountabilities in relation to Fidelity Funds.

Law Council recommendation:
Section 4.5.15 should be amended such that the annual report should also go to the relevant State or Territory Government and the Board.

Section 4.5.34  Cooperation

(1) When dealing with a claim, a nominated authority may exercise any of its functions in co-operation with or with the assistance of other nominated authorities, the Board or the Ombudsman.

(2) Nominated authorities, the Board and the Ombudsman may exchange information concerning a claim.

Issue:
The National Law contemplates that the exercise of functions relating to administration of fidelity fund claims may be delegated. Section 4.5.34 does not appear to cater for this.

Law Council recommendation:
The words “and their delegates” should be added at the end of subsection 4.5.34(1) and as appropriate in subsection (2).

CHAPTER 5  DISPUTE RESOLUTION AND PROFESSIONAL DISCIPLINE

Part 5.2  Complaints

5.1.3  Application of this Chapter to conduct

(1) This Chapter applies to conduct of a lawyer or law practice wherever occurring, whether:
   (a) wholly within or outside Australia; or
   (b) partly within and partly outside Australia.

(2) This Chapter applies to conduct of a lawyer or law practice whether consisting of acts or omissions or a combination of both.

(3) This Chapter extends to conduct of a lawyer as a public notary.

Note. See sections 5.4.2 and 5.4.3 for unsatisfactory professional conduct and professional misconduct.

Issue:
Part 5.2 is expressed as applying Chapter 5 to law practices as well as lawyers (as defined for the purposes of Chapter 5).

While the Law Council recognises the Taskforce’s intention that the National Law should place obligations on
law practices as well as individual lawyers, this approach can give rise to problems when identify the “target” of a regulatory action.

In relation to conduct matters for example, these are matters dealt with *in personam* (a clear example is the giving of undertakings). Similarly, the sanctions that apply to instances of unsatisfactory professional conduct or professional misconduct (for example being struck off the roll of Australian lawyers) also apply *in personam*.

**Law Council recommendation:**

Section 5.1.3 should be amended to provide that if a complaint is made about a law practice, and the Ombudsman decides to deal with the complaint, the Ombudsman should take steps to ascertain the circumstances that gave rise to the complaint and identify the particular lawyer(s) involved in the conduct that gave rise to the complaint. Where this occurs, the Ombudsman should proceed with the complaint as if it were made about the conduct of the particular lawyer or lawyers.

**Section 5.2.5 Consumer matters defined**

| (1) | .... |
| (2) | A costs dispute is a dispute about legal costs not exceeding $100,000, payable on a solicitor-client basis, in respect of any one matter: |
|     | (a) between a law practice or a lawyer and a person who is charged with those costs or is liable to pay those costs (other than under a court or tribunal order for costs); or |
|     | (b) between a law practice or a lawyer and a beneficiary under a will or trust in relation to which the law practice or lawyer has provided legal services in respect of which those costs are charged. |

**Issues:**

The Law Council considers the $100,000 threshold used in the National Law to define a consumer matter is too high. Disputes involving costs of this magnitude may have a severe impact on small practices, particularly where the law practice may be required to lodge large sums of money pending his or her administrative actions to inquire into the complaint. Disputes of this magnitude are serious disputes which require the extensive skill and experience of a cost assessor.

Also, section 5.2.5(2)(b) of the National Law allows a beneficiary under a will or trust to make a complaint which constitutes a costs dispute. This means that persons who are under no obligation to meet the bill for legal services will have the right to dispute the costs. These disputes should lie only between the parties to the agreement to provide the legal services.

The Law Council does not consider that a monetary amount adequately or (if left at $100,000) equitably delineates between a consumer and a non-consumer matter. The Law Council also notes that section 5.3.6 of the National Law effectively provides that if the Ombudsman cannot by informal means resolve a dispute about legal costs where the disputed amount is $10,000 or more, the Ombudsman must refer the matter for costs assessment.

The definition of the monetary limit should make it clear that the sum includes disbursements, but not GST.

**Law Council recommendations:**

1. The monetary limit in subsection 5.2.5(1) should be reduced to $10,000 to align with the limits of the Ombudsman’s powers under section 5.3.6 to deal with dispute about legal costs by way of determination.
2. Subsection 5.2.5(2) should be amended to exclude beneficiary under a will or trust from making a complaint which constitutes a costs dispute.
3. The definition of the monetary limit should make it clear that the sum includes disbursements, but not GST.

Section 5.2.8 Time limits on making complaints

(1) A complaint must be about conduct alleged to have occurred within the period of 5 years immediately before the complaint is made, but the Ombudsman may waive the 5-year requirement if satisfied that:
   (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.

(2) To the extent that a complaint involves a costs dispute, it must be made within 60 days after the legal costs were payable or, if an itemised bill was requested in respect of those costs, within 30 days after the request was complied with.

(3) The Ombudsman’s decision to waive or refuse to waive the 5-year requirement is final and cannot be challenged in any proceedings by the complainant or the respondent.

Issues

The time limit for making complaints under section 5.2.8 is five years.

In several jurisdictions the current limitation period is shorter. Increasing the period within which complaints can be brought in those jurisdictions would, in effect, mean the National Law will have a retrospective application.

The Law Council considers that no law should have retrospective application.

Furthermore, any retrospective application could seriously impact on law practices and practitioners that may have ceased to exist.

Law Council recommendation:

The time limit provided for in section 5.2.8 for making a complaint should be three years.

Section 5.2.12 Closure of complaint after preliminary assessment

(1) Following preliminary assessment of a complaint, the Ombudsman may close the complaint without further consideration of its merits for any of the following reasons:
   (a) the complaint is vexatious, misconceived, frivolous or lacking in substance; or
   (b) the complaint was made out of time; or
   (c) the complainant has not responded, or has responded inadequately, to a request for further information; or
   (d) in the case of a consumer matter—the complainant is a commercial or government client; or
   (e) the subject-matter of the complaint has been or is already being investigated; or
   (f) the subject-matter of the complaint would be better investigated or dealt with by police or another investigatory or law enforcement body; or
   (g) the Ombudsman is satisfied that it is otherwise in the public interest to close the complaint.

(2) A complaint may be closed under this section without any investigation or without completing an investigation.
Issue:

Section 5.2.12 provides for the Ombudsman to close a complaint after preliminary assessment, including in circumstances where it may be considered in the public interest to do so.

The Law Council notes that that there is no general power to dismiss a complaint at any other stage, for example, after the completion of an investigation under Division 4 of Part 5.4.

Law Council recommendation:

Section 5.2.12 should be amended to include a general power to dismiss a complaint at any other stage.

Section 5.2.15 Submissions by respondent

(1) The respondent to a complaint may, within the period specified under section 5.2.14, make submissions to the Ombudsman about the complaint or its subject-matter or both, unless the complaint has been closed.

(2) The Ombudsman may at his or her discretion extend the period in which submissions may be made.

(3) The Ombudsman must consider any submissions made by the respondent within the specified period before deciding what action is to be taken on the complaint, and may but need not consider submissions received afterwards.

(4) The rules of procedural fairness are not breached merely because no submissions are received within the specified period and the Ombudsman makes a determination in relation to the complaint, even if submissions are received afterwards.

Issue:

The natural justice rules of procedural fairness are sufficient to cover the issue dealt with by subsection 5.2.15 of the draft National Law without requiring further legislative expression.

Law Council recommendation:

Subsection 5.2.15(4) should be omitted.

Section 5.2.18 Extending scope of investigation

(1) The Ombudsman may, if he or she considers it appropriate to do so, extend the scope of an investigation of a complaint so as to include conduct of the respondent revealed during the investigation.

(2) Conduct so revealed, or anything arising from that conduct, may be made the subject of a new consumer matter or disciplinary matter with respect to the complaint or may be made the subject of a new complaint.

(3) The new matter or new complaint need not be the subject of a separate or further investigation if the Ombudsman is satisfied that the subject-matter has already been sufficiently investigated or considered.

Issue:

The Ombudsman has power under section 5.2.18 to extend the scope of an investigation if additional
conduct is revealed during an investigation.

The Law Council is concerned that an extension of the scope of an investigation involving a conduct complaint into issues that go beyond the complainant and the conduct complained of raises confidentiality and privacy issues for the lawyer or law practice concerned, particularly if the Ombudsman is to be permitted to disclose those additional matters to the complainant.

**Law Council recommendation:**

Section 5.2.18 should be amended such that the Ombudsman cannot extend the scope of an investigation into a particular complaint but can, instead, deal with an additional and separate conduct issue as a fresh complaint.

### Part 5.3 Consumer matters

#### Section 5.3.5 Determination of consumer matters by Ombudsman

| (1) | The Ombudsman may resolve a consumer matter by making a determination that, in the Ombudsman’s view, is fair and reasonable in all the circumstances. |
| (2) | In determining a consumer matter, the Ombudsman may make any of the following orders: |
| (a) | an order cautioning the respondent or a legal practitioner associate of the respondent law practice; |
| (b) | an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice; |
| (c) | an order requiring the respondent to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work; |
| (d) | an order requiring: |
| (i) | the respondent Australian legal practitioner; or |
| (ii) | the respondent law practice to arrange for a legal practitioner associate of the law practice; to undertake training, education, be supervised or undertake counselling; |
| (e) | a compensation order against the respondent under Part 5.5. |
| (3) | A failure to comply with an order under this section is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of: |
| (a) | any principal of a respondent law practice; and |
| (b) | any Australian legal practitioner involved in the contravention. |

**LPNR 13.2.1 Details of disciplinary orders**

Details of disciplinary orders made under Chapter 5 of the Legal Profession National Law against a lawyer must be included in the Register.

**Issue:**

The Law Council notes that Ombudsman’s power to determine a consumer matter under section 5.3.5 does not include a power to dismiss a complaint, in whole or in part.

**Recommendation:**

Section 5.3.5 of the National Law should provide for the determination of a consumer matter by way of dismissal of the complaint.
### Part 5.4  Disciplinary matters

<table>
<thead>
<tr>
<th>Section 5.4.5</th>
<th>Determination by Ombudsman—unsatisfactory professional conduct</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(1)</strong></td>
<td>The Ombudsman may, in relation to a disciplinary complaint, find that the respondent lawyer or a legal practitioner associate of the respondent law practice has engaged in unsatisfactory professional conduct and may determine the complaint by making any of the following orders:</td>
</tr>
<tr>
<td></td>
<td>(a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;</td>
</tr>
<tr>
<td></td>
<td>(b) an order reprimanding the respondent or a legal practitioner associate of the respondent law practice;</td>
</tr>
<tr>
<td></td>
<td>(c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;</td>
</tr>
<tr>
<td></td>
<td>(d) an order requiring the respondent or a legal practitioner associate of the respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;</td>
</tr>
<tr>
<td></td>
<td>(e) an order requiring:</td>
</tr>
<tr>
<td></td>
<td>(i) the respondent lawyer; or</td>
</tr>
<tr>
<td></td>
<td>(ii) the respondent law practice to arrange for a legal practitioner associate of the law practice; to undertake training, education or counselling or be supervised;</td>
</tr>
<tr>
<td></td>
<td>(f) an order requiring the respondent or a legal practitioner associate of the respondent law practice to pay a fine of a specified amount (not exceeding $25,000) to the Board;</td>
</tr>
<tr>
<td></td>
<td>(g) an order recommending that the Board impose a specified condition on the Australian practising certificate or foreign lawyer registration certificate of the respondent lawyer or a legal practitioner associate of the respondent law practice.</td>
</tr>
<tr>
<td><strong>(2)</strong></td>
<td>If the Ombudsman proposes to determine a complaint under this section:</td>
</tr>
<tr>
<td></td>
<td>(a) the Ombudsman must provide the respondent or associate and the complainant with details of the proposed determination and invite them to make written submissions to the Ombudsman within a specified period; and</td>
</tr>
<tr>
<td></td>
<td>(b) the Ombudsman must take into consideration any written submissions made to the Ombudsman within the specified period, and may but need not consider submissions received afterwards; and</td>
</tr>
<tr>
<td></td>
<td>(c) the Ombudsman is not required to repeat the process if the Ombudsman decides to make a determination in different terms after taking into account any written submissions received during the specified period; and</td>
</tr>
<tr>
<td></td>
<td>(d) the rules of procedural fairness are not breached merely because no submissions are received within the specified period and the Ombudsman makes a determination in relation to the complaint, even if submissions are received afterwards.</td>
</tr>
<tr>
<td><strong>(3)</strong></td>
<td>If the Ombudsman determines a complaint under this section, no further action is to be taken under this Chapter with respect to the complaint.</td>
</tr>
</tbody>
</table>

**Issue:**

Section 5.4.5 does not provide for a scenario where the Ombudsman decides that the complaint has no merit and takes no action.

**Law Council recommendations:**

Section 5.4.5 would be improved by
- providing a general power to dismiss a complaint;
- providing a power to dismiss a complaint for public interest; and
- providing a power to dismiss a complaint whether or not the investigation is completed.

**Part 5.4, Div 3  Role of Designated Tribunal**

| No provision currently in the National Law |
|---|---|

**Law Council recommendation:**

The tribunal should be given the power to rectify or ignore procedural lapses and defects by way of a power similar to that set out in s 561 of the NSW LPA:

**News South Wales Legal Profession Act 2004 - 561 Procedural lapses and defects in appointments**

(1) The Tribunal may order that a failure by the Commissioner or a Council, or a person acting for them or under their direction, to observe a procedural requirement in relation to a complaint (including the making, investigation or referral of a complaint, the giving of notice in connection with a complaint, or the making of a decision in connection with a complaint) is to be disregarded, if satisfied that:

(a) the failure has not caused substantial injustice to the parties to the hearing, or

(b) any substantial injustice caused by the failure is outweighed by the public interest in having the complaint dealt with by the Tribunal, or

(c) any substantial injustice caused by the failure can be remedied by an order of the Tribunal.

(2) Subsection (1) applies to a failure occurring before proceedings were commenced in the Tribunal in relation to the complaint as well as to a failure occurring afterwards.

**A defect or irregularity in the appointment of any person exercising, or purporting to exercise, a power or function under this Chapter or Chapter 6 does not invalidate an act done or omitted by the person in good faith.**

**Section 5.4.7  Initiation of proceedings in designated tribunal**

The Ombudsman may initiate proceedings, in the designated tribunal of the jurisdiction with which the Ombudsman considers the conduct concerned has the closest connection, against a respondent if the Ombudsman is of the opinion that:

(a) the alleged conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the designated tribunal; or

(b) the alleged conduct may amount to professional misconduct.

**Issue:**

The Law Council is concerned that the Ombudsman is able to initiate proceedings before a Disciplinary Tribunal without first being obliged to conduct an investigation. The provision appears to pre-suppose that the Ombudsman will make a decision that a practitioner is likely to be found guilty, present evidence, solely on the basis of submissions received by the complainant and the responses by the legal practitioner.

**Law Council recommendation:**

Section 5.4.7 should be amended to include an express requirement to investigate a complaint before the Ombudsman can make a determination (other than closure of the complaint under section 5.2.12) particularly prior to the initiation of proceedings in a tribunal (under s 5.4.7).
Section 5.4.8 Procedure of designated tribunal

(1) Proceedings initiated under this Chapter in the designated tribunal are to be dealt with in accordance with the procedures of the designated tribunal.

(2) Subject to any procedural requirements, the designated tribunal may determine proceedings without conducting a formal hearing, but is bound by the rules of procedural fairness.

(3) The designated tribunal is bound by the rules of evidence in conducting a hearing in relation to an allegation of professional misconduct, but is otherwise not bound by those rules in relation to matters arising under this Chapter.

Issue:
Section 5.4.8(3) provides that designated tribunals are not bound by rules of evidence when conducting a hearing not regarding professional misconduct. There is no identified or justifiable rational for this unusual provision.

Law Council recommendation:
The provision should be amended such that the tribunal is bound by the rules of evidence regardless of whether or not a hearing is regarding professional misconduct.

Part 5.5 Compensation orders

Section 5.5.1 Request by complainant for compensation order

(1) A complainant may request:
   (a) the Ombudsman; or
   (b) the designated tribunal in proceedings under Division 3 of Part 5.4;

   to make a compensation order.

(2) A compensation order may be requested in respect of loss suffered by:
   (a) the complainant; or
   (b) another person who is a client of the respondent;

   (or both) because of the conduct the subject of the complaint. The complainant, or other person, suffering the loss is referred to in this Part as an aggrieved person.

(3) A complainant who makes such a request must describe the loss suffered by the aggrieved person and the relevant circumstances.

(4) A request may be made in the complaint or to the Ombudsman at any time after the complaint is made and before it is disposed of.

(5) However, a request may not be made after proceedings have been initiated in the designated tribunal with respect to the complaint unless the designated tribunal grants the complainant leave to make the request.

(6) A request may only be made within 5 years after the conduct that caused the loss is alleged to have occurred.

Issues:
1. Section 5.5.1 allows a complainant to request that a compensation order be made in respect of a loss suffered by any other person who is a client of the respondent. This approach would seemingly extend the access to the compensation order regime to persons who have not also made a complaint and had that complaint made out. Under existing legislation each person requesting a compensation order must...
have preceded the request with a formal complaint. Both the complaint and the loss suffered must be made out. The Law Council considers this proposal will introduce considerable uncertainty and may lessen the rigour otherwise required to establish an entitlement to compensation.

2. The time limit for applying for compensation orders is too long and should be reduced to three years (consistent with the recommendation about section 5.2.8 above.

**Law Council recommendations:**

1. Compensation orders must only be able to be made in relation to the complainant.

2. The time limit for seeking a compensation order should be three years.

---

**Section 5.5.3  Prerequisites for making of compensation orders**

1. Unless the complainant and the law practice or associate of the law practice concerned agree, a compensation order is not to be made unless the Ombudsman or designated tribunal (as the case requires) is satisfied that:
   
   (a) the aggrieved person has suffered loss because of the conduct concerned; and
   
   (b) it is in the interests of justice that the order be made.

2. A compensation order is not to be made in respect of any loss for which the aggrieved person has received or is entitled to receive:
   
   (a) compensation under an order that has been made by a court; or
   
   (b) compensation paid or payable from a fidelity fund of any jurisdiction, where a relevant claim for payment from that fund has been made or determined.

**Issue:**

Section 5.5.3 enables the Ombudsman to make a compensation order without being required to first conduct a proper investigation into the complaint that gave rise to the request for a compensation order. The Law Council notes that a lawyer has no right of review or appeal under section 5.6.3 if the compensation order is for an amount of $10,000 or less.

**Law Council recommendation:**

Section 5.5.3 (prerequisites for making of compensation orders) should be amended to include a requirement for an investigation (if the order is being made by the Ombudsman) or a hearing (if the order is being made by the tribunal) before a compensation order can be made.

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**National Rule 13.2.1  Details of disciplinary orders**

Details of disciplinary orders made under Chapter 5 of the Legal Profession National Law against a lawyer must be included in the Register.

**Issues:**

1. National Rule 13.2.1 requires disciplinary orders made by the Ombudsman under Chapter 5 to be included on the Register. This could result in sanctions which are not currently recorded, particularly cautions, being included on the Register and made publicly available.

   The Law Council does not consider it to be useful or productive to unnecessarily stigmatise legal practitioners by publishing details of each of the components of a disciplinary order unless there are overwhelming public interest reasons for doing so.

2. National Rule 13.2.1 does not elaborate on when a disciplinary order made by the Ombudsman under section 5.4.5 of the National Law is to be included in the Register. It is noted that section 5.6.3 provides a
right of appeal against a disciplinary order and it would be appropriate to not allow an order to be included until all appeal and review rights have been exhausted.

3. National Rule 13.2.1 makes no provision for how long a disciplinary order is to remain on the Register.

**Law Council recommendations**

1. There should not be record certain elements of a disciplinary order on the Register where it would be inappropriate to do so, for example “cautions” which are not presently recorded on discipline registers (It may also be appropriate that the corollary be that there is no appeal or review right for a non-published element of an disciplinary order).

2. Disciplinary orders made by the Ombudsman should not be included until the legal practitioner has exhausted all rights of appeal and review.

3. Disciplinary orders should be removed from the Register after 12 months.

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**CHAPTER 6  EXTERNAL INTERVENTION**

**Part 6.5    Receivers**

<table>
<thead>
<tr>
<th>Section 6.5.15</th>
<th>Termination of receivers’ appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>The appointment of a receiver for a law practice terminates in the following circumstances:</td>
</tr>
<tr>
<td></td>
<td>(a) the term (if any) of the appointment comes to an end;</td>
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<tr>
<td></td>
<td>(b) the appointment is set aside under section 6.6.3;</td>
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<tr>
<td></td>
<td>(c) a determination of a Supreme Court the relevant that the appointment be terminated has taken effect.</td>
</tr>
<tr>
<td>(2)</td>
<td>The Supreme Court may, on application by the Ombudsman or receiver made at any time, determine in writing that the appointment be terminated immediately or with effect from a specified date.</td>
</tr>
<tr>
<td>(3)</td>
<td>A receiver for a law practice must apply to the Supreme Court for termination of the appointment when the affairs of the law practice have been wound up and terminated, unless the term (if any) of the appointment has already come to an end.</td>
</tr>
</tbody>
</table>

**Issue:**

1. The wording of subsection 6.5.15(1)(b) is jumbled.

2. Subsection (3) provides that a receiver must apply to the Supreme Court for termination of the appointment when the affairs of the law practice have been wound up and terminated. The provision contemplates that all matters relating to the receivership have been wound up. However, it is often the case that all regulated property will not have been able to be delivered to the entitled party. This can result in the period of appointment of a receiver being unnecessarily protracted.

The Law Council considers there needs to be a mechanism by which receivers may be able to deal with trust property that could not be returned to the entitled beneficiaries within a reasonable period of time. One option would be to establish a conglomerate national trust account, managed by the Ombudsman, to hold such trust monies.

**Law Council recommendation:**

1. Section 6.5.15(1)(b) as drafted should be replaced with “…(c) a determination of the Supreme Court that the appointment be terminated takes effect”.

2. The National Law should make provision for the Ombudsman to maintain one conglomerate trust account for all trust money that appointed receivers have not been able to return to the entitled
beneficiaries within a reasonable period of time.

3. Subsection 6.5.15(3) should, as a consequence, be amended to provide that the winding up of the law practice is taken to be completed by the receiver transferring to the Ombudsman after a period of 12 months, or some other period, all regulated property that has not been delivered to the entitled parties.

Part 6.6  General

Section 6.6.7  Confidentiality

(1) An external intervener must not disclose information obtained as a result of his or her appointment except:

(a) so far as is necessary for exercising his or her powers or other functions; or
(b) as provided in subsection (2).

Criminal maximum penalty: 50 penalty units.

(2) An external intervener may disclose information to any of the following:

(a) any court, tribunal or other person acting judicially;
(b) the Board or the Ombudsman or both;
(c) any officer of or Australian legal practitioner instructed by or on behalf of:
   (i) a local representative of the Board or the Ombudsman; or
   (ii) the Commonwealth, a State or a Territory; or
   (iii) an authority of the Commonwealth or of a State or Territory;
       in relation to any proceedings, inquiry or other matter pending or contemplated arising out of the investigation or examination;
(d) a member of the police force of any jurisdiction if the Ombudsman or external intervener believes on reasonable grounds that the information relates to an offence that may have been committed by the law practice concerned or by an associate of the law practice;
(e) the law practice concerned or a principal of the law practice or, if the practice is an incorporated legal practice, a shareholder in the practice;
(f) a client or former client of the law practice concerned if the information relates to the client or former client;
(g) another external intervener appointed in relation to the law practice or any Australian legal practitioner or accountant employed by that other external intervener;
(h) any other external examiner carrying out an external examination of the trust records of the law practice concerned.

Issue:

Section 6.2.1 provides that one of the grounds for initiating external intervention relates to possible defalcations involving trust money and trust property. Where a matter does lead to claims against fidelity funds, the external intervener’s report will assist the investigation and management of fidelity fund claims.

Law Council recommendation:

Section 6.6.7 should provide for the external intervener’s report to be made available to the bodies investigating fidelity fund claims and making fidelity fund determinations.
**Section 6.6.9  Obstruction of external intervener**

A person must not, without reasonable excuse, obstruct an external intervener exercising a power or other function under this Law.

*Criminal maximum penalty: 50 penalty units.*

**Issue:**

The National Law does not provide for section 6.6.9 to apply to destruction of documents (as is presently the case).

**Law Council recommendation:**

That section 6.6.9 be amended to include an express penalty for destroying documents.

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**CHAPTER 9  MISCELLANEOUS**

**Part 9.2  Australian legal profession register**

<table>
<thead>
<tr>
<th>National Rules Part 2</th>
<th>Details to be included in the Register</th>
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<tbody>
<tr>
<td>13.2.1  Details of disciplinary orders</td>
<td>Details of disciplinary orders made under Chapter 5 of the Legal Profession National Law against a lawyer must be included in the Register.</td>
</tr>
</tbody>
</table>
| 13.2.2  Entities to furnish details of certain matter | (1) For the purposes of section 9.2.1 of the Legal Profession National Law, the Ombudsman must give to the Board:  
(a) information about each order made in relation to a lawyer under section 5.4.5 or 5.4.9 of the Legal Profession National Law as soon as practicable after the order is made; and  
(b) information about the quashing or overturning of a disciplinary order as soon as practicable after the order is quashed or overturned.  
(2) For the purposes of section 9.2.1 of the Legal Profession National Law, a local representative of the Board must give the Board information about:  
(a) the grant or renewal of an Australian practising certificate as soon as practicable after the issue or renewal;  
(b) the variation, suspension or cancellation of an Australian practising certificate as soon as practicable after the variation, suspension or cancellation.  
(3) The information given to the Board under this rule must include such details as are reasonably required for the purpose of maintaining the Register. |

**Issues**

1. There appears to be no requirement that the removal of a person’s name from the roll of legal practitioners be recorded on the Register. This information should be included.
2. A recommendation made by the Ombudsman under section 5.4.5(1)(g) – recommending the Board impose a specified condition on a practising certificate or registration certificate – should not be recorded on the Register because the Board will include details of any conditions it actually decides to impose.
Law Council recommendation:

1. Section 13.2.2 should be amended to include “the removal from the roll of practitioners by a Supreme Court”.
2. Section 5.4.5(1)(g) should be amended so that a recommendation made by the Ombudsman that the Board impose a specified condition on a practising certificate or registration certificate should not be recorded on the Register.

Part 9.7 General

Section 9.7.4 Duty to report suspected offences

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<tbody>
<tr>
<td>(1)</td>
<td>This section applies if a relevant person suspects on reasonable grounds, after investigation or otherwise, that a person has committed an offence against any law.</td>
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<td>(2)</td>
<td>The relevant person must:</td>
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<td>(a) report the suspected offence to the police or other appropriate prosecuting authority; and</td>
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<td></td>
<td>(b) make available to the police or authority the information and documents relevant to the suspected offence in the possession of, or under the control of, the person.</td>
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<tr>
<td>(3)</td>
<td>The obligation under subsection (2) (b) to make available the information and documents continues while the relevant person holds the relevant suspicion.</td>
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<tr>
<td>(4)</td>
<td>In this section relevant person means:</td>
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<td></td>
<td>(a) the Board; or</td>
</tr>
<tr>
<td></td>
<td>(b) the Ombudsman; or</td>
</tr>
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<td></td>
<td>(c) any of their local representatives or delegates; or</td>
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<tr>
<td></td>
<td>(d) any person who is a member of the staff of, or acting at the direction of, any of the entities referred to in paragraph (a), (b) or (c).</td>
</tr>
</tbody>
</table>

Issues:

1. The “duty to report suspected offence” is cast far too broadly. The section requires reporting of “[any] offence against any law.”
2. There should be no reporting obligation where the “suspicion” is based upon privileged or confidential information obtained as a result of the exercise of coercive powers or where the provider of the information was disentitled to claim privilege against self-incrimination. There should also be a prohibition on derivative use of such information.

Law Council recommendations:

1. Some sensible limitations should apply to offences that must be reported, such as a criterion about “seriousness”.
2. Section 9.7.4 should be amended to not require reporting of suspicions in the circumstances mentioned in Issue 2.