National Legal Profession Taskforce
c/o Assistant Secretary
National Legal Profession Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

13 August 2010

Dear Taskforce Chair,

RE: NATIONAL LEGAL PROFESSION REFORM PROJECT

The NSW Office of the Legal Services Commissioner ("OLSC") thanks the Taskforce for the immense amount of valuable work that it has done in producing the Consultation Package and the Regulatory Impact Statement.

As the Taskforce is aware, the OLSC has produced a number of papers in relation to various aspects covered by the now proposed draft Legal Profession National Law ("National Law"). The OLSC is very pleased to see that the vast majority of what we had suggested has found its way into the proposed National Law.

What follows is a short final submission concerning a few issues, which either lack clarity or in our view will cause sufficient difficulties and potential problems that need further consideration if not addressed.

In the body of our submission we will deal with the proposed structure of the National Law. This discussion will then be followed by a series of annexures, which will cover the following;

- Principles of the Conference of Regulatory Officers (Annexure A);
- Comments concerning the proposed National Law (Annexure B)
- Comments concerning the proposed National Rules (Annexure C);
- Suggestions for clarification of specific drafting issues (Annexure D).

Over the past few months there has been a significant amount of discussion about aspects of the National Legal Profession Reform Project. By and large such discussion has focused on the constitution of the National Legal Services Board, the role and necessity of a National Legal Services Ombudsman and the costs of the proposed system. Critically absent from such discussions has been talk about how the proposed framework will actually operate. There has been no discussion about communication or information exchange.

This is of great concern. If the underlying purpose or rationale for proposing a new model for the regulation of the legal profession in Australia is based on harmonisation and reducing complexity and cost, surely there should be some discussion about how an effective communications and information exchange strategy can achieve this aim.

This submission will address this issue in light of the proposed framework.

THE PROPOSED NATIONAL STRUCTURE

The OLSC fully supports the approach taken in attempting to avoid proscriptive legislation by adopting principles, outcomes or 'outcomes-focused' (to use the United Kingdom phraseology) legislation.

Whereas some commentators have expressed concern that outcomes-focused legislation is unnecessarily vague and will create difficulties for compliance within the profession, the OLSC believes that by working closely with the profession, appropriate guidance can be developed and delivered with positive outcomes for all.

In addition we support the suggested approach of producing a National Law to be passed by one jurisdiction and adopted throughout Australia through the process of mutual recognition. We strongly believe that the time is ripe for one single consistent approach to regulation of the legal profession to be achieved in Australia.

The OLSC has for many years promoted and worked towards the harmonisation of the practice of regulation in Australia not only through our support of the earlier attempt concerning the Model Laws, but through our support and involvement in CORO (the Conference of Regulatory Officers).

THE NATIONAL LEGAL SERVICES BOARD

The proposal to create a National Legal Services Board ("National Board") has attracted a considerable amount of attention from both the legal and wider community in Australia. Much has been written about the appointment, composition and powers of the National Board. This attention is not without merit as this institution is new and undeveloped in the proposal.

The Taskforce has proposed that a National Board be established to "achieve substantive and ongoing uniformity." The work of the National Board would

include “determining applications for admission and registration as an Australian-registered foreign lawyer and approval of professional indemnity insurance products” as well as maintaining “a national register of admissions, practising certificates, disciplinary orders and registrations of foreign lawyers.” Section 1.3.7 of the National Law makes it clear that the intention is for the powers of the National Board to be delegated to local authorities, and in particular, the professional associations.

The OLSC supports the proposal that a national body and not a Commonwealth body be established.

The Taskforce has also proposed the establishment of advisory committees to provide advice to the National Board in the exercise of its functions. The OLSC supports this proposal and will make further submissions as appropriate in relation to the number, type and constitution of such committees in due course.

The debate about the National Board’s constitution has been, since the release of the National Law, largely dominated by judicial opinion as to who should have the powers of appointment. This debate, driven by the chief justices asserts that the majority of the National Board should consist of members of the legal profession who should be appointed independently of government and the Standing Committee of Attorneys-General (SCAG). The rationale behind this view appears to be a concern that the independence of the profession could be adversely influenced if the proposed regulatory regime gives the executive arm of government the power to appoint the majority of board members. The Chief Justices, the Law Council of Australia and several legal practitioners have argued that the independence of the legal profession rests on the principle of the Rule of Law and non-interference by government.

Following this, there has been further discussion about the composition of the National Board concerning consumer representation. In response to these debates the Taskforce published a Discussion Paper in July 2010 seeking views as to appointments and constitution of the National Board.

The OLSC notes that the July 2010 Discussion Paper has proposed the following model for the composition and appointment of the National Board:

- one member recommended by the Standing Committee of Attorneys-General (SCAG) from a panel of three persons nominated by the Council of Chief Justices
- one member recommended by SCAG from a panel of three persons nominated by the Law Council of Australia, and
- no more than five members recommended by SCAG on the basis of their expertise in one or more of the following areas: the practice of law, the protection of consumers or the regulation of the legal profession.

The Taskforce has also proposed that a member of the National Board should be appointed Chair on the recommendation of SCAG.

The rationale for this model, according to the Taskforce, is to ensure that "membership should reflect an appropriate balance between the legal profession who will be the subject of regulation and those with experience in consumer protection and professional regulation."

The OLSC notes that the Law Council of Australia has proposed an alternative model for the National Board. This model envisages as follows:

- Two members nominated by the Law Council of Australia
- One member nominated by the Australian Bar Association
- One member nominated by the Council of Chief Justices, and
- Three members nominated by SCAG

In the Law Council's proposed model the nominee of the Council of Chief Justices would be the Chair. The OLSC notes that in addition to the Law Council's model several other models have also been proposed.

The OLSC makes no specific submission in relation to this issue but we wish to make the following comments.

Firstly, the concern expressed about the Rule of Law and its application to the structure of the National Board has significance and relevance when focused on the concern that the Executive should not have power over the judiciary in our "separation of powers" form of government.

Secondly, this concern is not new in Australia and occasionally emerges in discussions about the appointment of judges, the creation of solicitors' and barristers' rules and indeed the creation and appointment of independent commissioners.

Historically, we have managed to weave our way through the debates and arguments and have achieved a workable system, which could be said to be the envy of much of the world. An example of a successful system can be found in NSW where solicitors' and barristers' rules are prepared by the profession with commentary by me as Commissioner and a veto power to the Attorney General on public interest grounds. In other words, the profession makes the rules with government's guidance to be administered by me as the independent Commissioner in a co-regulatory relationship with the professional associations.

A separate issue arises when considering the role of community members or consumers of legal services.

The OLSC strongly believes that the involvement of such "lay" membership in regulatory authorities is entirely appropriate, valuable and indeed critical. However, the concept of a majority of lay members, ostensibly to provide independence for the regulator from the profession, is in the view of the OLSC misplaced.

The OLSC submits that decisions by a regulator however constituted must be reviewable by a Court (constituted by lawyers, albeit with lay member involvement), which has the benefit of legal knowledge and expertise in presenting and running disciplinary prosecutions.

THE NATIONAL LEGAL SERVICES OMBUDSMAN

The Taskforce has proposed that a National Legal Services Ombudsman ("National Ombudsman") be established "to handle complaints and compliance functions in a nationally uniform manner." The Taskforce has suggested that the National Ombudsman be one of three types of bodies;

1) A national body with centralised functions;
2) A central body with local delegates; or
3) An overseer to promote uniformity with functions devolved to the local levels.

The Taskforce also proposed a fourth option, which is to have no Ombudsman at all. In this option the functions would be left with the existing State and Territory bodies.

The Taskforce has proposed that models 1-3, existing State and Territory Courts and Tribunals would review decisions where appropriate and would determine some disciplinary matters. The Taskforce envisages that any divergence in the decisions of the Courts & Tribunals will likely be minimised "by the clear enunciation of regulatory principles in the mirror/applied legislation and unambiguous approaches for the implementation of these principles."

The OLSC supports the referral power of the National Ombudsman. The OLSC believes that the professional associations should retain a role in the regulatory system and indeed the intention in the proposal for the regulator to work closely with the regulated makes that relationship even more important.

The OLSC notes that the Taskforce's proposed models have also attracted considerable attention. There has been some concern about the extent of the role and function of the National Ombudsman and the cost of establishing such a body. The Attorney-General of NSW has, for example, expressed the view that discipline of the legal profession is a local matter and should not be delegated. Others have expressed concern that the powers of the National Ombudsman as a result of section 1.3.7 are too wide. We share the same concerns.

Our concerns in relation to the role and functions of the proposed National Ombudsman are twofold. Firstly, we are concerned with the review power of the National Ombudsman. Second, we are concerned with the National Ombudsman's clawback power found in section 1.3.7 of the National Model Law.

The review power

As we have expressed in previous submissions we have a deep concern that the role of a National Ombudsman, if that office holds the power to review the decisions of local representatives, would have a number of perhaps unintended consequences.

Firstly, we submit that determining what matters should be reviewed and upon what consideration, could prove extremely difficult and at the very least raise unrealistic expectations in the minds of legal practitioners who have been disciplined or consumers who have had their complaints dismissed.

Secondly, were the National Ombudsman to have the power to review decisions by the local representative, it would render the local representative virtually powerless. This is unnecessary and unacceptable as decisions by Commissioners presently are reviewable by the Courts and it is our submission that that is an entirely appropriate place for a review power to lie. This is particularly poignant where the Courts are expressing concern about their role and of possible loss of their original jurisdiction in relation to the disciplining of legal practitioners.

Thirdly, it also raises the question as to what Court would review the decision of the National Ombudsman.

Fourthly, of most concern is the issue of cost and efficiency. It is highly likely that if a review power exists in the National Ombudsman many thousands of complainants and respondent practitioners dissatisfied with decisions made in the various jurisdictions would seek such a review with the result of the need for a large bureaucracy at an extremely high cost. This appears inconsistent with the basic drivers behind the National proposal.

The clawback power

The Ombudsman's proposed power to clawback matters is found in section 1.3.7 of the National Model Law. Section 1.3.7 provides as follows:

" 1.3.7 Power of National Authority to take over exercise of special function

(1) A national authority at its discretion may, by notice given to the local representative for this jurisdiction and after consulting with the representative, take over from it (or its delegate) responsibility for a particular matter that involves or may involve a special function. The national authority may do so if of the opinion that it is appropriate to take over the matter on the ground that:

(a) the matter is likely to set a precedent; or
(b) the matter should be resolved in a manner that would promote national uniformity; or
(c) the matter could result in an actual or perceived conflict of interest if managed by the representative or its delegate; or

(d) the representative or its delegate has acted against or not acted on:

(i) a direction of the national authority; or
(ii) a recommendation of the Ombudsman made under this Law in relation to an Australian practising certificate.

(2) When the national authority takes over a matter from a local representative or its delegate:

(a) the national authority may, despite section 1.3.2 or 1.3.4, deal with and determine the matter afresh, but may adopt or take into account anything done or received by the representative or its delegate to date; and
(b) the representative or its delegate is to provide any assistance required by the national authority to deal with the matter (including copies of or access to all documents held by the representative or its delegate that relate to the matter); and
(c) the representative or its delegate otherwise ceases to have responsibility for the matter unless the national authority refers the matter back to the representative under subsection (3).

(3) The national authority may refer a matter back to the local representative or its delegate at any time to be dealt with and determined by the local representative or its delegate, with such directions under section 1.3.9 as to how the matter should be dealt with as the national authority thinks fit.

(4) A reference in this section to a delegate includes a reference to a sub-delegate."

The OLSC has several concerns about the National Ombudsman's clawback power.

Firstly, the National Law is unclear whether the National Ombudsman will be reviewing decisions of State Bodies or the State Bodies performing internal reviews. In fact the National Law, we submit is unclear about many aspects of the clawback provisions and the necessity for such a provision.

The OLSC questions why the Taskforce sees a need for the National Ombudsman to clawback matters that are likely to set a precedent. Similarly, the OLSC questions why the Taskforce sees a need for the Ombudsman to clawback matters that could promote national uniformity. The OLSC submits that the State Bodies are more than capable of dealing with such matters. In fact, they currently do so.

The OLSC has grave concerns about how the clawback system would in effect operate. For example, what processes would be used to identify a

complaint that should be referred back to the National Ombudsman? Similarly, who would make those decisions?

The OLSC submits that the role and function of the National Ombudsman as presently drafted will neither establish a regulatory framework that is simple or easily accessible, nor will it ensure a more efficient and cost effective system. In our view, the proposed model will overcomplicate the handling of complaints and will result in unnecessary duplication, additional costs and delay especially if the clawback powers of the National Ombudsman remains.

The OLSC submits that the current co-regulatory framework for dealing with complaints in NSW provides a straightforward model that facilitates the timely resolution of complaints.

THE RELATIONSHIP BETWEEN THE NATIONAL OMBUDSMAN AND THE NATIONAL BOARD

In addition to these issues we are also concerned about the relationship between the National Ombudsman and the National Board. To date we are not aware of any statement that has been made which defines the relationship between these two proposed bodies. We are of the view that a clear statement needs to be made about this relationship. This statement should stipulate that in order to ensure a harmonious regulatory framework the National Ombudsman and the National Board should either be integrated, or have a clear information exchange and policy development framework established. To this end we submit that a general discretion to share information with "relevant agencies" would be more preferable than a list approach.

The concerns of the OLSC in relation to these matters are borne from a wider concern that, as presently constructed, the proposed National Ombudsman and proposed National Board will not adequately facilitate the ultimate aim of the National Legal Profession Reform Project of regulatory harmonisation. We submit that if communication and information exchange have not been factored into the proposed model, the stated aims of harmonisation, simplification and increased effectiveness of legal profession regulation will not occur.

As discussed later in this proposal the role of CORO could have a significant and positive role to play in facilitating communication and harmonisation.

COMMUNICATION AND INFORMATION EXCHANGE

In its latest Discussion Paper (July 2010) concerning the composition and appointment of the National Board the Taskforce writes that it, "through the draft National Law, proposes the establishment of a national co-regulatory scheme for the legal profession." The Taskforce notes that co-regulation has existed in Australian States and Territories for many years and works well. The OLSC agrees.

The essence of co-regulation is about working together as distinct from having separate roles. In NSW we have used a co-regulatory framework to regulate the legal profession since 1994. In our view the co-regulatory model has been a success. A large part of the success stems from the fact that the Law Society of NSW and the NSW Bar Association plays a crucial role in the determination and resolution of complaints. Both the Law Society of NSW and the NSW Bar Association represent the voice of the professions and it is through them that we are able to obtain and share information as to the normative behaviour of legal practitioners.

The OLSC is keenly aware of the necessity to keep the professional organisations involved in the complaints handling process and has always advocated for such involvement. The OLSC notes with disappointment that this has not been the experience of other regulators. In the United Kingdom, for example, a tense relationship exists between the Solicitors Regulation Authority and the Law Society of England and Wales, much to the detriment of the profession. The OLSC is keen to ensure that a similar situation does not occur in Australia. The OLSC therefore submits that a National regulatory framework that incorporates an effective community and information exchange strategy is imperative for success.

The OLSC is concerned that the proposed framework does not adequately address how communication and information exchange will occur at a national level amongst the various organisations. Without a well-defined communication mechanism, the OLSC fears that the system will fail to achieve its ultimate aim of harmonisation.

A PROPOSED SOLUTION FOR HARMONISATION

The OLSC proposes that a possible solution to the problems outlined above is the Conference of Regulatory Officers ("CORO").

CORO is the pre-eminent conference of statutory regulators, law societies, bar associations and admitting authorities involved in regulation of the legal profession in Australia. CORO meets annually and provides a forum for all regulators of the legal profession to come together to discuss developments and exchange information of events that have occurred within the different jurisdictions. While informal in structure, CORO aims to generate discussion and debate around issues such as regulatory principles, education/continuing professional development, organisation matters and funding and costs. CORO affords the opportunity of strengthening former associations as well as developing new associations with other regulators.

CORO is held in conjunction with the Annual Trust Account Inspectors Workshop and the Conference of Admitting Authorities. Representatives of these groups from each State and Territory in Australia join CORO for a day and a half of deliberations after having spent time discussing issues of specific interest to them.

Over the last few years, the adoption of the model laws and the creation of a national profession have been high on the CORO's agenda. CORO members have played an important role in both administering the national model rules as well as harmonising regulatory practices, policies and procedures. Agreements have been reached through CORO to address such national issues as harmonising the regulation of incorporated practices, the development of national continuing professional development guidelines and the development of national regulatory protocols.

The work of CORO is documented in its official website.

At CORO this year in August discussion will focus on CORO's role in harmonising regulatory practices as well as policy development. To this end, CORO will consider any relevant legislative changes, decisions of Courts and Tribunals, significant complaints, policy developments and research projects. CORO will continue to discuss the harmonisation of the regulation of incorporated legal practices, the CPD guidelines, professional indemnity insurance and trust accounts.

We believe that CORO can play an ongoing role in assisting the National Board and Ombudsman in achieving national harmonisation of policies, practices and procedures through the following methods:

- The adoption of draft principles (Annexure A) to be presented at this years CORO conference.
- A move towards the establishment of a CORO secretariat to be resourced through existing organisations and charged with the responsibility of providing a systematic mechanism for dealing with issues as they arise.
- Utilisation of the existing CORO website by all local representatives of the National Board and Ombudsman. This could facilitate discussion and agreement on a wide range of issues.

While only the first steps, the above will complement the important work done by CORO at its annual two-day conference and create a year round approach to harmonisation.

As stated earlier, we applaud the work of the Taskforce in developing a National Law which, in our view, achieves its aim of reducing proscriptive regulatory pressure while encouraging and promoting greater a closer relationship between the regulated and the regulators to provide positive ethical guidance for the profession.

While much work needs to be done in developing the policy strategy of practices to implement the proposed National Law, and the role of advisory committees is as yet unclear, we are optimistic that the chosen approach, in the light of these few suggestions, is the correct one for achieving client protection, promotion of the Rule of Law and a reduction of complaints against legal practitioners.

Yours sincerely,

Steve Mark
Commissioner

ANNEXURE A

CONFERENCE OF REGULTORY OFFICERS – PRINCIPLES

- Harmonisation of:
    - Practices
    - Policies
    - Procedures

- Discussion, Debate and Exploration of:
    - Regulation principles
    - Emerging issues
    - Relationships
    - Education/CPD
    - Effectiveness and efficiency
    - Organisational matters (eg; staffing)
    - Funding and costs

- Sharing Experience and Expertise

- Networking

ANNEXURE B

THE LEGAL PROFESSION NATIONAL LAW

Law Firm Audits

The OLSC notes that the National Law as presently drafted empowers local representatives to conduct audits on all law firms, not just incorporated legal practices.

The extension of the audit power has attracted much criticism from sectors of the legal community such as the major law firms and the Law Council of Australia. Critics have asserted that the power to audit all legal practices is too broad and will create additional and unnecessary regulatory burdens.

The OLSC however submits that these criticisms are unfounded.

The purpose of auditing a legal practice is not to burden a legal practice but to assist them in improving their management systems, for their increased efficiency and effectiveness and ability to meet the needs of their clients.

The OLSC submits that a good management system is central to an ethical and professional practice. The regulation of incorporated legal practices ("ILPs") in NSW provides credible evidentiary proof. Research has proven that by requiring ILPs to establish and maintain "appropriate management systems" the complaint rate against ILPs has dropped by two thirds. We have also found that the majority of ILPs who have gone through the process of establishing "appropriate management systems" have supported the process as a positive initiative.

In NSW we have had the power to audit traditionally structured practice (i.e. those that are not ILPs) for several years. The power to do so has, to date, not been questioned or opposed. The OLSC submits that the extension of the power to audit all legal practices is a positive regulatory move with benefits both to the profession and their clients and not an unnecessary regulatory burden.

Time Limits

The OLSC is concerned about several of the time limits that have been specified in relation to complaints.

In section 5.2.8, for example, the National Law proposes that the timeframe for lodging a complaint is 5 years and may be extended if necessary. We submit that this time limit is too long.

In NSW under the present Act the time limit for lodging complaints with the OLSC is 3 years. We have found that often when we deal with complaints that have been lodged close to the three-year limit, the complainant and respondent's recollection of events become more vague as time passes. We submit that a 5-year time period would further exacerbate this situation.

On the other hand, we submit that the time frame for lodging a complaint about costs is not long enough. In section 5.2.8(2) of the National Law, a complaint that involves a costs dispute 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.

In our view the time limits stipulated therein are far too tight for complainants. We submit that the current time limitation for lodging a complaint about costs in NSW, that is, within 12 months, should be retained.

Trust money and trust accounts

In relation to trust money and trust accounts, the OLSC supports generally the proposals contained within the National Law Consultation Draft but submits that disbursement from trust accounts should be subject to the highest level of potential scrutiny and proof. The OLSC notes that disbursement of controlled money requires a written direction. The requirement for a direction in writing in relation to trust accounts ought also be included.

Costs

In relation to costs, the OLSC commends the inclusion in the Consultation Draft of the notion of proportionality. The OLSC submits that a consideration of proportionality should also be included in those factors that a costs assessor may have regard to when determining fair and reasonable costs.

The proposed simplified costs disclosure regime, the prohibition on charging for preparation of a bill of costs and responsibility for a bill resting with a principal (thereby providing a legislative solution to the problem created by *Nikolaidis –v- LSC*) are all fully supported. However, it is submitted that the point at which "charging" occurs should also be addressed. It is the OLSC position, in line with the Court of Appeal decision in Nikolaidis, that charging occurs at the time the bill of costs is delivered.

Complaints

The OLSC welcomes the proposal that complaints may be lodged against lawyers, law practices or both. In our experience it is frequently the case in practice that, over a period of time, a client has multiple lawyers within one practice representing him or her and is unable to identify with any precision who did what and when. Similarly, in circumstances where supervision is an issue, the identity of the supervising partner will frequently be unknown. The proposed provision to accept complaints against law practices as entities overcomes such problems and will assist in promulgating an ethical culture throughout law practices.

Determinations

The OLSC fully supports the extended range of determinations that may be made in the resolution of consumer matters and in the determinations of disciplinary matters.

The OLSC acknowledges that the power of the Ombudsman to deal with costs disputes not exceeding $100,000 and to reach binding determinations in

relation to disputes less than $10,000 is a power that will address a significant number of grievances about lawyers' conduct, and do so with significantly reduced cost and complexity. The requirement that costs in dispute be lodged with the Ombudsman, by the lawyer if the costs are already paid or by the complainant if the costs are unpaid, will ensure bona fides on the part of both parties.

However, it is probable that many complainants will be unable to lodge the costs in dispute and, despite the Ombudsman's discretion to waive the requirement, there may exist a reluctance to seek mediation of what may be an entirely justifiable issue on the basis that the complainant does not have the funds to lodge and does not want to run the risk of the Ombudsman refusing to exercise the discretion. The OLSC notes that payment of a debt by instalments is not an uncommon order in the NSW courts and the requirement for lodgement of costs does not contemplate payment by instalments.

On this basis the OLSC submits that an extension of the Ombudsman's discretion beyond undue hardship is appropriate.

The OLSC also welcomes the power in consumer matters to order compensation to a sum of $25,000 where it is fair and reasonable in all the circumstances and notes that redress of this nature will satisfy a large percentage of justified consumer grievances, again with considerably reduced cost and complexity of the regulatory system.

ANNEXURE C

THE LEGAL PROFESSION NATIONAL RULES

Withdrawal of trust money for legal costs

The OLSC is concerned that withdrawal of trust money for legal costs should only be done with the informed consent of the person for whom or on whose behalf the money is held. It is difficult to see how a person could authorise the withdrawal of money for legal costs on the basis of a costs agreement alone, such agreement having been entered into at the beginning of the retainer and before the law practice and client know the full extent of the work that may ultimately be required to be done. The OLSC suggests the Rules should require a law practice to give a person a bill of costs (and not just a written request for payment) before money may be withdrawn. This is consistent with the draft National Law which prohibits a law practice from commencing proceedings to recover legal costs unless a bill has been given.

Bills of Costs

The OLSC notes that whilst the proposed National Law provides that a bill may be in the form of a lump sum or an itemised bill, neither term is defined in the proposed National Rules. It would be useful to have definitions of both. Any such definition should take into account alternative billing methods, in addition to the more commonly used method of time costing.

Charging

The proposed National Law imposes upon all practitioners a duty to charge only fair and reasonable costs. The OLSC submits that the following principles should be included in the Rules to ensure greater clarity for the profession and greater protection for the consumer of legal services:

- A prohibition on practitioners charging multiple clients for the same work;
- A prohibition on practitioners making a profit on disbursements.

Professional Indemnity Insurance (PII)

The OLSC strongly supports the proposition that PII be mandatory for practising lawyers.

The existing PII scheme in NSW prevents the issue or renewal of a practising certificate (PC) unless insurance is in place. In contrast, the National Law imposes two obligations. Firstly, it prevents a practitioner engaging in legal practice without insurance. Secondly, it is also a prerequisite for the grant or renewal of a PC that the practitioner has PII or will have it before the grant of a PC. Whilst the Rules set out that the Board may have regard to evidence that an insurer has agreed to issue a policy or evidence that a premium has been paid, we are concerned that this scheme could allow a PC to be granted where PII is not actually in force or where it subsequently lapses. A model where PII is a condition of granting or renewing a PC, and must not expire before the end of the period of the PC, is preferable.

Run-off insurance

Under the National Law, run-off insurance must be provided for 7 years after the time when the insured ceases to exist, or dies, or ceases to provide legal services. This does not appear to cover the situation where insurance simply lapses, for example because a premium is not paid. This could be overcome by requiring run-off cover for seven years after the point when the policy comes to an end.

Continuing Professional Development

The OLSC applauds the work of the National CPD Taskforce which grew out of CORO and has worked for the past few years to develop a harmonised CPD approach for Australia. Whilst it appears that the guidelines produced by that taskforce have been largely incorporated into the proposal, we are concerned at the level of detail and specificity. As these "Rules" will actually have the effect of Regulations under the proposed National Law, amendment may be unnecessarily difficult.

Australian Legal Profession Register

The only information required by the Rules for the Register is the disciplinary orders made under Chapter 5. The OLSC submits that it is preferable for cooperation (again through CORO) between the current regulators to ensure that historic information about practitioners throughout Australia is held in one place. Accordingly, the OLSC submits information about disciplinary orders imposed under statutory regimes existing prior to the commencement of the National Law should be included on the Register.

ANNEXURE D

SPECIFIC COMMENTS FOR DRAFTING CLARIFICATION

Part 1.2	**Definitions**
1.2.1	*Unincorporated legal practice* is defined as a partnership or unincorporated body or group but does not include a law firm. A law firm is defined as a partnership. The distinction may be that a law firm consists only of legal practitioner partners whereas an unincorporated legal practice may consist of partners other than legal practitioners. The definition is not sufficiently clear.
Part 4.2	**Trust money and trust accounts**
Division 1	*Preliminary*
4.2.2 & *National Rules* 7.1.4(a)	OLSC commends the inclusion of a requirement that legal services must have been provided before money received for payment of costs is excluded from the definition of trust money but proposes the addition of the words "*and for which a bill has been given*"
Division 2	*Trust money and trust accounts*
4.2.13	There is no requirement that a direction in relation to disbursement of trust funds be in writing although a direction in writing is required for controlled moneys [4.2.14]. It is submitted that a direction in writing provides greater protection to clients and to practitioners.
4.2.18(c)	This assumes any amount over and above the amount of legal costs reasonably due and owing has already been released. This is not always the case. Some solicitors retain the whole of a client's settlement money pending payment of legal costs. *National Rules* – rule 7.2.2 prescribes the procedure to be followed for withdrawal of trust money. OLSC is concerned trust money should only be withdrawn with the informed consent of the person for whom or on whose behalf the money is held. It is difficult to see how a person could authorise the withdrawal of money for legal costs on the basis of a costs agreement alone, such agreement having been entered into at the beginning of the retainer and before the law practice and client know the full extent of the work that may ultimately be required to be done.

Part 1.2	**Definitions**
	OLSC suggests Rule 7.2.2 should require a law practice to give a person a bill of costs (not just a written request for payment) before money may be withdrawn. cf 4.3.23 which prohibits a law practice from commencing proceedings to recover legal costs unless a bill has been given. 4.3.23 should also prohibit withdrawal of money from trust to pay legal costs unless a bill has been given 7.2.2(b)(ii) should include reference to costs assessment if that is to be an alternative to dispute resolution by the Ombudsman.
4.2.21 & *National Rules*	The OLSC supports the approach of providing detailed and prescriptive rules in relation to the keeping of trust account and controlled money records. The precise content of such records is more appropriately the subject of comment by accountants and trust account investigators. The OLSC suggests, in the interests of transparency, that the particulars that must be kept of each payment of trust money (Rule 7.2.10) and trust money transferred by journal entry (Rule 7.2.13) should also include a requirement to identify the person or persons effecting, directing or authorising the withdrawal, as is required for withdrawal of controlled money - Rule 7.4.2(5)(g).
Division 5	*Miscellaneous*
4.2.42 & *National Rules*, 7.2.20(1)	Some provision should be made for accounting to a person for transit money. Disputes often arise in relation to money allegedly paid for a specific purpose and then not used for that purpose.
4.2.42 & *National Rules*, 7.2.21(1)	Reference to Rule 2.17 is an error.
Part 4.3	**Legal Costs**
Division 1	*Introduction*
4.3.3	The third party payer definitions appear to be adopted from the NSW current legislation. They have caused confusion in this jurisdiction and need to be clarified.

Part 1.2	**Definitions**
Division 2	*Legal Costs Generally*
4.3.4 (2)(c)	This does not adequately capture the common objection that work should be done by a fee earner with an appropriate level of experience and expertise. For example, work of an administrative nature should not be carried out by and charged for at the partner rate. OLSC suggests "*of the lawyers concerned*" be replaced with "*required for the work done*".
4.3.4 (3)	This seems to have the potential to sanction charging that might otherwise not be fair and reasonable e.g if a costs agreement were to provide for multiple tasks performed simultaneously to be billed separately, using minimum 6 minute units for each, would that mean charging in this way is prima facie fair and reasonable? This provision seems to undermine the common law position that charging in accordance with a costs agreement does not preclude scrutiny of the charges in a disciplinary context on the basis of overcharging. OLSC suggests there should be a specific prohibition on practitioners charging more than one client for the same unit of time spent working simultaneously on multiple matters or for multiple clients.
4.3.6 (1)	Purports to put the costs agreement at the top of the hierarchy. Some fixed costs provisions do not permit contracting out by way of a costs agreement e.g costs in workers compensation matters (and those that do may impose onerous requirements). (a) logically follows (b).
4.3.6 (2)	Consumer protection would be enhanced if the words "*and the client need not pay the costs*" were inserted after *this Part.*
4.3.7 (1)	Does not provide for disclosure of a range of estimates, which may be more appropriate in litigious matters
4.3.7(2) & 4.3.7(3)(a)	Does not in its terms require the provision of a fresh, updated estimate.

Part 1.2	**Definitions**
4.3.7(3)	Whilst the aim is to reduce complexity (see the Consultation Regulation Impact Statement, 3.2.1.1), some important information that should be disclosed is not included, such as: • the billing arrangements (at regular intervals? On completion of the matter?) • Whether interest will be charged on unpaid costs and the rate • In litigious matters, whether costs may be (at least partially) reimbursed by the opposing party if successful (a), which relates to the ongoing obligation to disclose, logically follows (b).
4.3.8	Non-associated third party payers are excluded from the disclosure obligations but in practice mortgagors/lessees form the largest group of third party payers who complain about not being fully informed about legal costs. What is the position of beneficiaries of an estate (who are at best non- associated third party payers and may not fall within either definition of a third party payer)?
Division 3	*Costs Agreements*
4.3.10	Does not require that costs agreements specify how an offer to enter into a costs agreement may be accepted, for example by continuing to instruct a law practice cf LPA s322(4). Many consumers believe that a costs agreement must be signed to be valid and enforceable.
Division 4	*Billing*
4.3.16 & 4.3.17	4.3.16 provides that a bill may be in the form of a lump sum bill or an itemized bill. 4.3.17 provides that a person may request an itemized bill. However, neither term is defined in the National Law or accompanying National Rules and there is no indication of what must be included in an itemised bill. Any definition should take into account alternative billing methods as well as time costing.

Part 1.2	**Definitions**
4.3.21	There is no statutory prohibition on charging other costs that should not be recoverable, e.g costs associated with making costs disclosure or making a costs agreement, costs of recovering costs from a client/third party payer.
Part 5.3	**Consumer matters**
5.3.6	Resolution of costs dispute by Ombudsman Consultation Report asks: *Should the Ombudsman have the power to deal with costs disputes over $100,000?* The figure of $100,000 seems to refer to the amount of legal costs billed (see 5.3.6 and Consultation Report – "…*the Ombudsman will have jurisdiction to assist in the resolution of costs disputes involving legal costs up to $100,000.*") The crucial factor is not the amount of costs billed but the amount in dispute between the parties. The Ombudsman's jurisdiction of $10,000 should be the starting point for determining the upper end of the range of costs dispute the Ombudsman can realistically be expected to deal with. We submit that parties with a costs dispute of less than $100,000 should be required to seek the assistance of the Ombudsman. We submit that it should be mandatory for the Ombudsman to make a binding determination for matters under $10,000.
5.4.5	Include order for refund of costs already paid.
Part 5.4	**Disciplinary matters**
5.4.4 (c)	It would be useful if the new legislation could put beyond doubt the point at which charging occurs.
5.4.5	Include order for refund of costs already paid.

Part 1.2	**Definitions**
5.4.8	In relation to proceedings before the designated tribunal the rules of evidence are said to apply only to allegations of professional misconduct. We submit they should apply equally to allegations of unsatisfactory professional conduct.
5.4.10(2) & (3)	At present, Regulators are at risk of an adverse costs order in unsuccessful test cases, which may be a disincentive for pursuing such cases. However, often a point of legal principle or of public interest is involved.
Part 5.5	**Compensation Orders**
5.5.2 (3)	For the avoidance of doubt a requirement to repay an amount already paid, including any payments by way of withdrawal of trust money should be included.
5.5.4	The pre-requisites for the ordering of compensation provide no clarity as to the meaning of "received or entitled to receive".
Part 9.6	**Criminal and civil penalties**
9.6	The interface between the criminal and civil penalty provisions and disciplinary action under the Act is unclear.
Part 9.7	**General**
9.7.1	The prohibition on disclosure of information applies only to investigation officers thereby providing no protection against ventilation of matters by lawyers and complainants beyond the investigative regime.
	The current NSW legislation provides for production of information and documents from a lawyer despite any duty of confidentiality. The Draft Law does not contain a similar provision.