

**NATIONAL LEGAL PROFESSIONAL REFORM –
RESPONSE TO TASKFORCE DISCUSSION PAPER ON NATIONAL LEGAL
SERVICES OMBUDSMAN**

This response to the Taskforce's 30 October 2009 paper on a National Legal Services Ombudsmen has been approved by the following members of the Consultative Group:

Tony Abbott – Lawyer, Law Society of South Australia
Barbara Bradshaw – CEO, Law Society of NT
Joe Catanzariti – Immediate Past President, Law Society of NSW
Harold Cottee – General Manager, Professional Standards, LIV
Noela L'Estrange – CEO, Queensland Law Society
Martyn Hagan – CEO, Law Society of Tasmania
Philip Selth – Executive Director, NSW Bar Association
Dudley Stow – Past President, Law Society of Western Australia

OVERVIEW OF THE PROPOSED FRAMEWORK

1. The Discussion Paper begins:

Under the proposed regulatory framework, the office of the National Legal Services Ombudsman would be created to administer and oversee a national complaints-handling scheme.

Consumers of legal services throughout Australia would have a single, easily accessible avenue for making complaints about legal practitioners. If substantiated, complaints could result in findings of unsatisfactory professional conduct or professional misconduct against a legal practitioner. In addition, the Ombudsman would have powers to deal with complaints of a more 'consumer' nature, being complaints about the provision of legal services. The Ombudsman could make a determination in relation to these complaints if reasonably satisfied that the conduct the subject of the complaint was not fair and reasonable in all the circumstances.

Under the proposed framework, legal practitioners would benefit from the prompt resolution of complaints against them, including those arising from misunderstandings and miscommunication.

2. However, when closely examined against the background of the present arrangements for the handling of complaints against members of the legal profession, the objectives referred to above are achieved by the present arrangements. A 'national' Ombudsman would not provide any new benefits to either the consumer or the practitioner.

IN MOST STATES AND TERRITORIES THE CURRENT COMPLAINT HANDLING SYSTEMS ARE WORKING WELL.

3. Despite claims to the contrary, there are very few complaints of substance about members of the legal profession. Most complaints are what are generally called 'consumer complaints', that is, relatively minor matters that usually can be (and should be) resolved by a telephone call or, if necessary, brief correspondence from the relevant regulatory authority (for example, the Legal Services Commissioners). To illustrate this, in 2008 - 2009 the NSW Legal Services Commissioner received 2641 complaints against the more than 23,000 solicitors in NSW and 157 against the 2107 barristers. Of the complaints against practitioners finalised in that year, 63% were consumer disputes and of the completed investigations of conduct complaints, 83% were dismissed.¹
4. During 2008 – 2009 in Victoria there were 1,946 complaints against the 13,587 solicitors and 111 against the 1,784 barristers. Of the complaints that were closed, 28% were civil or costs related complaints; 14% were mixed civil and disciplinary matters and 58% were disciplinary. In only 7% of the disciplinary complaints did the Legal Services Commissioner form the view that the practitioner was likely to be found guilty of a disciplinary breach. The remainder did not proceed.
5. In Queensland in 2008 – 2009 the Legal Services Commissioner received 1066 complaints against more than 7,400 solicitors and 40 against 948 barristers. Of the complaints against practitioners finalised in that year, 9% were consumer disputes and of the conduct complaints finalised, 83% were dismissed. There was no instance in 2008-2009 where the Law Society recommended the complaint be dismissed and the LSC took disciplinary action. In 2008 – 2009 the Legal Services Commissioner referred 12 complaints to the Bar Association. The Association recommended charges in two instances (two of the referred investigations are ongoing).
6. In WA in 2008 – 2009, 508 complaints were finalised. During that period the Legal Practitioners Complaints Committee PCC resolved to refer 59 complaints/conduct enquiries to the State Administrative Tribunal and exercised

¹ Because each agency has its own method of classifying complaints and the outcome of investigations, it is not possible to simply take figures from various reports and make inter-jurisdictional comparisons; it would be like comparing apples to oranges to peanuts. The proposed Board should have as one of its tasks the establishment of a common reporting system.

its summary disciplinary jurisdiction in respect of a further 27 complaints/conduct enquiries.

7. In 2008 – 2009 the NT had 475 legal practitioners (solicitors and barristers). The Law Society received 21 new complaints during this period. Ten were dismissed, five were withdrawn by the complainant and six resulted in a finding of unsatisfactory professional conduct with either a fine or reprimand imposed. There was no finding of professional misconduct.
8. In 2008 2009 the ACT Law Society received 112 formal complaints against some 1300 solicitors. One practitioner was reprimanded by the ACT Civil & Administrative Tribunal; one matter is awaiting decision and three are waiting a hearing. In two cases the Law Society's Council was of the view that there had been unsatisfactory professional conduct. Thirteen matters remain under consideration. The ACT Bar Association, which has 70 members, received seven complaints; one barrister was cautioned.
9. In Tasmania, for the calendar year 2008, the Law Society received 100 complaints against some 530 Tasmanian practitioners (including barristers). 83 complaints were dismissed; two were referred to the Disciplinary Tribunal and 15 remained under investigation.
10. In South Australia in 2008 – 2009 the Legal Practitioners Conduct Board had 335 current investigation files with 317 files being closed during the year. Of the closed files there were 16 findings of unprofessional conduct and 5 findings of unsatisfactory conduct for the fused profession of some 3321 practitioners.
11. The fact that there are few complaints against legal practitioners, and relatively few of those are found after investigation to be justified, does not in any way diminish the importance of each complaint being handled quickly, efficiently and, ideally, and in a way that leaves all concerned agreed that the matter has been dealt with to their satisfaction. However, there is no need for a national bureaucracy to handle those complaints. As far as any of us are aware, and combined our experience of the complaint processes across Australia is very substantial, there is no systemic failure with the current complaint handling processes. Claims to the contrary are unjustified. There will always be claims that 'the system' is unfair, unjust, 'biased' etc - but that is what inevitably occurs with *any* complaint handling system. It is impossible to satisfy every complainant - and no sensible person would argue to the contrary.
12. The Discussion Paper provides no evidence (and we suggest there is none) that the present arrangements are unsatisfactory.
13. For a discussion of the present or the proposed complaint handling systems, there needs first to be a clear demarcation between the handling of 'consumer disputes' and 'conduct complaints'. In the first instance, the complainant

invariably wants his or her problem sorted out – and on occasion compensation paid. Often an explanation is all that is required. Where the practitioner has been at fault, often an apology is sufficient for an amicable resolution of the complaint. As noted above, the present Legal Services Commissioners or their equivalents currently handle these complaints - and do so well. The commissioners do require, and should be given, additional powers to address some consumer complaints. Further, it should be possible for consumer complaints to be made against both individual practitioners and law practices. Disciplinary complaints, however, should, as at present, be made only against individual practitioners.

14. The other category of complaints is those that may lead to disciplinary action being taken against the practitioner- the ‘conduct complaints’. It is to this class of complaint this note is primarily directed.

DELEGATION OR CONFERRAL OF POWER?

15. We note that the Discussion Paper indicates that the proposed Ombudsman may delegate his or her functions and powers to bodies nominated by the States and Territories. The Discussion Paper also indicates that it is intended that the current independent regulators be nominated as the delegates of the national Ombudsman. However, if the delegation is to be in ‘form’ only, the question arises as to why the proposed legislation cannot itself confer the power on the State regulatory bodies. If the answer to this is that the Ombudsman should be able to revoke the delegation, then that raises the question as to why the Ombudsman should be able to override a State regulatory body. If the Ombudsman were to have concerns about the actions of a State regulator, then those concerns should be resolved in discussion – not by withdrawing authority from an operational unit with all the problems that would then arise. If this is envisaged, then clearly the Ombudsman would need an existing, costly and staff-intensive office, to be able to take such action. It is simply unrealistic to suggest the Ombudsman would act in such a manner.

PROPOSED OMBUDSMAN: FUNCTIONS, POWERS AND ROLES

16. The following list, taken from the Discussion Paper, sets out the powers and functions that are envisaged for the National Legal Services Ombudsman. In relation to complaints about legal practitioners, the Ombudsman would:
 - receive all complaints;
 - dismiss complaints in certain circumstance;
 - investigate complaints:
 - make determinations in relation to complaints of a consumer nature

- prosecute matters involving unsatisfactory professional conduct and professional misconduct in the appropriate disciplinary tribunal
 - conduct internal reviews of decisions;
 - have involvement in reviews by the disciplinary tribunal, and appeals to the Supreme Court; and
 - provide education to the public and legal profession about ethical issues and the complaints process.
17. The list seems to be an amalgamation of the roles of the various existing regulatory bodies. No explanation is advanced in the Discussion Paper as to why a new 'national' system is necessary to replace the existing State and Territory - based systems or, more importantly, how the new system would be of benefit to the clients. The additional costs of a national Ombudsman are ignored.
18. Further, in relation to fidelity cover, it is suggested in the Fidelity Cover Discussion Paper that one option may be for the Ombudsman, (through its delegate in each State and Territory) to consider and determine claims against the fidelity fund. How the Ombudsman is to make such determinations, and the cost of the Ombudsman carrying out this function through its State or Territory delegates, is not given nor the current systems in any way costed. More importantly no evidence is provided to support the need for a change to the present State and Territory fidelity claim processes which have been operating without complaint for years. Indeed it is the unpaid contribution of the legal profession that has sustained it and ensured equitable outcomes
19. In relation to costs, it is proposed that the Ombudsman be able to deal with complaints relating to costs issues up to \$100,000. Where the Ombudsman is to obtain the necessary expertise to carry out this function, nor why the present Court-based system should be rejected, is not explained. It would lead to the incongruous result in the area of litigation where a number of complaints arise that party and party costs would be dealt with by persons with expertise and experience in the area of cost assessment but those persons would not be responsible for assessment of solicitor-client costs. Further, it would detract from the oversight the courts presently have in relation to those matters, something of considerable importance in the administration of justice.
20. The Ombudsman Discussion Paper exhibits the same flaw as many of the other Discussion Papers in that it makes claims in justification of what is proposed, but provides no evidence to support these claims. Nor is there the financial costing associated with either current or prospective regulatory activities.

21. We emphasise that we all strongly support the adoption of national standards governing the prompt resolution of complaints against legal practitioners. A cost effective national system that is both effective and relatively easy to understand benefits consumers and legal practitioners alike. The removal of the remaining 'bumps in the road' in the way of a uniform, streamlined and more efficient regulatory framework is essential. It is not just the large law firms and barristers who practice across State borders who will benefit from such a regulatory regime.
22. Unfortunately, the proposed *new* role of the Ombudsman in a national complaints system is unclear and, at least as presently envisaged, does not meet the aims that are stated for it. The suggested role of the Ombudsman will produce an unnecessarily more complex and costly regulatory and compliance regime.
23. To suggest that the proposed system would introduce a 'single, easily accessible avenue for making complaints about legal practitioners' incorrectly implies that there is currently no such system. There are systems in place now for the receipt of complaints. They are easily accessible and well known. A complainant is only required to make a complaint to one local body. The fact that the systems differ in each State and have different titles is not of itself an impediment to access. There is no evidence given (and we know of none) that a disgruntled client has not been able to find their way to the present regulator in each State. The existing legislation provides for the resolution of the few complaints that cross borders. The legislation could no doubt be refined or complemented by protocols agreed between the State regulators, although in practise the relevant jurisdiction for complaints that do come to the attention of more than one regulator are or could be quickly sorted out. There is already in existence a protocol on this issue. A common portal for the receipt of complaints could be established via a common post office box or a 1800 number, but whether this would be cost effective or provide any real benefit to consumers is doubtful.
24. The term Ombudsman, while perhaps superficially attractive, is misleading in that an Ombudsman does not have a determinative or discipline role. It is an adoption of a popular misconception as to what an 'Ombudsman' can do.² A preferable term is that now in use in some of the States, 'Legal Services Commissioner'.
25. Despite statements contained in the Discussion Paper, it is not at all clear how the proposed framework would 'strengthen the role and powers of complaint handling bodies', nor how it would 'ensure the more efficient, cost effective and timely resolution of complaints'. To the contrary, the creation of an additional federal complaint handling tier would inevitably result in *unnecessary*

² For a discussion of the terminology and of the relationship between an Ombudsman and a complainant, see t *Commonwealth Ombudsman First Annual Report 1978*, pp. 1- 23.

duplication, additional costs and delays for no benefit to either the complainants (be they ‘consumer’ or ‘conduct’ matters) or members of the legal profession.

26. Although at certain points in the Discussion Paper assertions are made that the proposed Ombudsman will receive ‘all complaints’ against legal practitioners and law practices, it appears that it is intended that the national body will delegate all or part of its powers in relation to the investigation of ‘disciplinary’ complaints to State authorities. We understand that this is meant to encompass State ‘Legal Services Commissioners’, who may in turn refer some complaints to State professional bodies for investigation.
27. However, it is proposed that the national Ombudsman will handle some complaints at the first instance, for example, where a complaint is particularly sensitive or where it may lead to a legal precedent. Why a national body should assume responsibility for ‘sensitive’ matters (whatever that may mean) is not explained; nor is it explained how the national body would be able to identify a complaint at the initial stages that may lead to ‘a precedent’ (presumably this is a reference to a decision of a tribunal or court).
28. Leaving aside the uncertainty inherent in these circumstances, it is difficult to imagine how the proposed system constitutes a ‘more simplified complaints handling scheme’.

THE SUCCESSFUL CO-REGULATORY MODEL: EFFICIENT, COST EFFECTIVE AND TIMELY.

29. The present co-regulatory model which applies in most jurisdictions provides a relatively straightforward, certain model where the independent statutory commissioner receives *all* complaints (where they are initially addressed to a professional association they are immediately sent on to the Commissioner). The commissioner then determines how the complaint will be handled. That is, the statutorily independent commissioner makes the decision, not the professional associations.
30. The practice is for the commissioners to handle the consumer complaints (and they do so very well) and conduct complaints are in the main handled by the professional associations under the oversight of the commissioner. The commissioner has statutory powers to take over complaints which are being investigated by a professional association, conduct reviews of the decisions of the professional associations and has the right to appear in disciplinary proceedings. In the few cases where a professional association may have a conflict of interest (most notably when a complaint is against a serving member of the association’s governing body), the complaint is retained by the commissioner.

31. In co-regulatory jurisdictions at present, professional associations play a crucial role in the resolution of complaints. In NSW they conduct investigations, *determine* them and where appropriate *pursue disciplinary action* in tribunals and courts. These matters are pursued rigorously and effectively and largely to the satisfaction of complainants. For example, in NSW over the past five years, 57 complainants sought a review by the Legal Services Commissioner in relation to complaints investigated and determined by the Bar Council. In each case the Legal Services Commissioner upheld the Council's decision. 250 reviews were requested of complaints investigated by the Law Society; in 239 of these reviews (95.6%) there was no change to the original decision. In Queensland, in 2008 – 2009 there was no instance where either the Law Society or Bar Association recommended the complaint be dismissed and the Commissioner took disciplinary action. None of the complaints dismissed by the NT Law Society in 2008 – 2009 resulted in a complainant appealing to the Disciplinary Tribunal.
32. The Discussion Paper ignores the fact that a very significant function of those professional bodies who now investigate complaints is the initiation of their own complaints against practitioners. These complaints typically arise out of the investigation of a complaint referred to the professional association by the commissioner; work undertaken in trust account inspections; the monitoring of compliance of practitioners with their obligations as solicitors or barristers, including compliance with conditions imposed on their practising certificates; and compliance with the Barristers' or Solicitors' conduct rules. There are also the disciplinary actions that inevitably arise from the renewal process for practising certificates, and the notification of 'show cause' events, such as bankruptcy, criminal convictions and where courts have imposed cost orders on a practitioner. These are major responsibilities that the commissioners have traditionally not undertaken, nor do currently (and most unlikely to have in the future) have the expertise to quickly handle. The statement in the Discussion Paper that 'most disciplinary proceedings arise from client complaints' overlooks these significant complaints.
33. The disciplinary work undertaken by experienced practitioners in professional associations' professional conduct committees has been crucial to the success of the co-regulatory systems. The investigation of most conduct complaints requires a good understanding of law, court practice, practice management and the application of the profession's ethical rules. This expertise is simply not available to the commissioners unless it is obtained from a member of the profession at some cost. The time donated by practitioners involved in the complaints process translates into many millions of dollars, which would otherwise have to be provided from Consolidated Revenue – or, contrary to the stated aim of reducing the cost of regulation, be imposed on the profession.
34. It also needs to be recognised that in some jurisdictions (and it should be the case in all) that there is significant lay representation on the professional associations' bodies that investigate conduct complaints. None of us are aware

of *any* suggestion by a lay representative that the practitioners have been too 'soft' on a member of the profession. Indeed, it is the lay representatives' view that the profession is harder on its own members than are the lay representatives.

35. Under the current co-regulatory regimes, professional bodies have the ability to act speedily, for example, to cancel or suspend practicing certificates as a result of material which comes to light in the course of investigation of a complaint or, as sometimes happens, comes to notice during court proceedings. Although the Paper contemplates the *possibility* of professional associations being delegated the power to conduct investigations and make recommendations concerning the institution of disciplinary proceedings, it does not envisage professional bodies making determinations in this regard.
36. At present, in some jurisdictions a conduct complainant is given a detailed 'statement of reasons' for the decision made by, the professional body where one has investigated the complaint. There is no reason why this practice could not be adopted across Australia. The reports that are presently given as a matter of course to the complainant almost always satisfy the complainant, even if their complaint has been dismissed. They can see how (for example, in NSW the Bar Council or the Law Society Council) arrived at its decision. These reports are prepared by experienced, senior practitioners and have undergone a peer review process. If the professional associations were to lose their role as the initial investigator of a complaint (and we emphasise that their decision is subject to review by the Legal Services Commissioner), then any such report would have to be prepared in the office of the Legal Services Commissioner/ Ombudsman. It is a fair comment to say that, with all the best will in the world, the staff of the Commissioner/Ombudsman would not be able to routinely produce the quality of reports to satisfy complainants that are currently produced by experienced practitioners to whom the investigation of conduct complaints is delegated under the co-regulatory system now applying in NSW and some other jurisdictions. The consumer can only lose out if the professional associations are not to investigate conduct complaints. It is our recommendation that for reasons of efficiency, cost and experience the professional associations retain or where necessary be given this power.
37. In some jurisdictions, for example Queensland, professional bodies can only make recommendations for the determination of a complaint or as in Victoria the professional association is "referred" a complaint for investigation and report only. These systems mean that the determining body has to duplicate much of the work undertaken by a professional body in its investigation in order to determine the complaint. The Commissioner having to review all recommendations, rather than only where a complainant seeks a review, causes major delay and increased cost. The answer is not to remove responsibility for the investigation from the professional body and place it in a large Ombudsman's office, but to place the responsibility with the professional bodies under the watchful eye of the Commissioner/Ombudsman. We note that it has

been reported that the NSW Legal Services Commissioner recently questioned whether the proposed new Ombudsman system had been properly thought through and the 'immense' costs involved.³

38. The Discussion Paper also contemplates the national Ombudsman having a review function. The reason stated is that somehow this would maintain minimum standards and consistency in complaint handling and decision making and ensure accountability of State and Territory delegates to the national office. This all appears to be based on an (incorrect) assumption that there are presently different standards, inconsistent decision making and that the present regulators are not accountable. There is no evidence of the former two claims. However, it is inevitable (and unavoidable) that there will be some minor inconsistencies across any complaint handling system (as there are across any system where discretion is to be applied). Few are of significance, but a co-operative working arrangement between the regulatory authorities as now exists (for example the annual Conference of Regulatory Officers and the more frequent meetings of the commissioners) is resolving the differences that do exist. A national body with authority to issue 'standards' may assist in this area, but to date no case has been advanced that the proposed Board could not issue any necessary direction.
39. As to the issue of accountability, all the regulators (and the professional bodies where they have a role) provide annual reports to their Attorney-General and to the Parliament.
40. If the Ombudsman were to have a review function as is proposed (and thus require even more support staff), this would only add yet another level of review. In most jurisdictions complainants have a right to a review carried out by the independent commissioner. There is no need for the extra appeal processes proposed in the Discussion Paper.

THE PREFERRED COMPLAINTS HANDLING MODEL

41. This response is primarily directed at a regime that in general form already exists in the three largest States: Queensland, NSW and Victoria. That is where the vast majority of the legal profession practice. We appreciate that the Legal Services Commissioner regime in these States is not immediately transferable to the smaller jurisdictions. We are not suggesting that it should be. But the basic principle, that of a co-regulatory system, where the professional associations work with, and are over sighted by, the statutorily independent commissioner who has the authority to review either on his/her own initiative or on request of the complainant, is a principle that should apply across Australia. This principle could be readily applied to the present regimes in the smaller jurisdictions for the handling of complaints.

³ 'Complexity of new system questioned', *Australian Financial Review*, 20 November 2009.

42. There is no need – or justification – for a uniform system to apply in each jurisdiction in respect as to how complaints are handled. What *is* required is a system that is not unnecessarily expensive, provides an outcome as quickly as practicable, and an outcome that the reasonable complainant and affected practitioner believe has been fairly reached. There is no justification for a large, operational role being given to an Ombudsman/National Legal Services Commissioner.
43. In our view, the very successful and by any comparison cost effective NSW model, which allows the one professional body to follow a conduct complaint through all stages, should continue to apply in the larger jurisdictions where the vast majority of conduct complaints are made, but be adapted where necessary for the smaller jurisdictions. The great value of this co-regulatory system is that there is an independent, statutory oversight of the process and that any complainant dissatisfied with the decision of the professional associations can have their complaint reviewed by the Commissioner. That is, the Commissioner's resources are concentrated on the complaints where the complainant remains unhappy; there is no need for the Commissioner to spend expensive time and energy on the vast majority of conduct complaints where the complainant is satisfied with the decision of the professional body.
44. We are strongly of the opinion that the involvement of professional bodies throughout the course of the complaints process, with the oversight of an independent commissioner, provides the most efficient and cost effective means of meeting the needs of consumers (almost invariably clients) and practitioners. The addition of a further level of regulation at a national level, involving an Ombudsman with uncertain, discretionary powers in relation to disciplinary proceedings, will not simplify the process. The proposed National Legal Services Board could readily deal with matters such as national reporting standards and exchange of information and could assist if necessary to resolve any dispute about cross-border matters. The goal of common standards Australia wide would be an achievement to the benefit of both the profession and its clients. This goal can now be achieved, but to introduce a totally unnecessary new regulatory layer in the manner being proposed will not benefit the unhappy client and will ultimately prove to be an expensive disappointment.
45. Nor is there *any* justification for giving an Ombudsman (or existing regulatory bodies) power to intervene in the management of a law practice as some have proposed, other than where the practice is under a form of 'management'. No other profession is subject to such a regime. It would be a very serious intrusion into the independence of the legal profession. 'Risk management' is something that every competent practitioner routinely does, if only to ensure that the absence of such good management is not adversely reflected in their professional insurance premiums. No one can reasonably object to the professional bodies and commissioners - running (as they do now in most jurisdictions) CLE/CPD course and seminars to assist practitioners better manage their business. But

there is no justification for a regulator to carry out 'management inspections' or determine what management system is in place or how it is managed. (We do not dispute the need for, and value of, trust account inspections.)

46. If a national Ombudsman/Legal Services Commissioner is to be established, the role of such an officer should be one of broad general oversight, with the primary role of working with the State regulatory authorities and professional associations on matters such as education, common reporting statistics and the allocation of projects of relevance across Australia to a lead 'agency'. There is no need or benefit in a national office having an (inevitably costly) operational role.
47. We note the arguments contained in the Discussion Paper concerning 'consumer' as opposed to 'disciplinary' complaints, and agree that there needs to be enhanced powers given to the regulator to resolve consumer complaints and to provide appropriate redress for these complaints. We see no reason why the existing State regulatory authorities could not be given this authority.
48. A body with responsibility for setting national standards is clearly desirable. However, there is no evidence that the introduction of a new national Ombudsman will in any way be an improvement on the present State based complaint handling processes. There is no evidence that the present system is in such disrepair that it needs to be replaced with a new system that will clearly cost more and be more administratively cumbersome and slower than the present regimes. Indeed, it is our view that the establishment of an Ombudsman with more than a general oversight role and the ability to issue 'standards' (a role that could well rest with the proposed Board), will add to the cost of the regulatory regime, delay resolution of complaints and benefit neither the client nor the practitioner.

CONCLUSION

49. The present complaint handling systems across Australia, although with different methodologies and titles, is in general working well. Improvements can, and should, be effected. These improvements should be made by the profession and the independent commissioners, with a broad oversight by the proposed National Legal Service Board.
50. The encompassing argument and underlying theme of the Discussion Paper is that expending large amounts of money, time and resources introducing a system to replace one that ultimately is working is not a profitable exercise, is highly disruptive to the profession and is fraught with untested principles.
51. The idea of streamlining current legislation and complaint-handling practices to ensure consistency in its application across all jurisdictions is a good one. It is important to have a uniform way of dealing with complainants and legal

practitioners; it is important that all complaint-handling systems are accountable in the same way; it is necessary to be able to report the work of each jurisdiction in a standardised fashion and the simplifying of the legislation would be beneficial to all. However, in this process, elements of sound legal application still need to be retained – quite simply, it needs to work. Adopting certain aspects of the proposed system to *enhance* what already exists would ensure important elements are not lost. A stand alone State/Territory based complaint regulator dealing with consumer disputes and with the capacity to deal with or oversight regulation of disciplinary complaints under the guidance and supervision of a National Board is seen to be the appropriate manner by which the objectives set in the Discussion Paper can be realistically, economically, efficiently and effectively met.

52. As we have said above, it is our strong view, based on many years of practical experience, that the very successful and by any comparison cost effective NSW model, which allows the one professional body to follow a conduct complaint through all stages, should continue to apply in the larger jurisdictions where the vast majority of conduct complaints are made, but be adapted where necessary for the smaller jurisdictions.
53. There is no practical justification for the establishment of an additional layer of regulation in the form of a national Ombudsman. However, if such an office is to be established, then it should be a very small office with a general oversight role; its primary function should be working with the commissioners and profession to remove the various relatively minor terminological, statistical differences and the like and the development of a national education program. The Ombudsman should also address any cross-jurisdictional problems that remain. The Ombudsman role should be to harness the expertise of the profession and commissioners for the benefit of all. The Ombudsman should not have an operational role in the handling of individual complaints or conduct investigations.
54. We ask that the proposed establishment of, and extensive functions of, the proposed Ombudsman be reconsidered.

13 January 2010