



THE LAW SOCIETY OF SOUTH AUSTRALIA

MEMORANDUM

TO: Conference of Law Societies and Bar Associations

FROM: Richard Mellows, President

DATE: 25 November 2009

SUBJECT: COAG National Legal Profession Reform Project
National Legal Services Ombudsman Proposal

Further to the agreement reached by CEO's at the teleconference of 24 November 2009, please find below the Law Society of South Australia's comments in relation to COAG's proposal for a National Legal Services Ombudsman.

1. The LSSA recognises the need for a uniform system of regulation of the legal profession across Australia. It endorses the comments made by the Law Council in its letter of 5 November 2009 on this topic.
2. In achieving this uniformity it is recognised that a simplified system of regulation is also necessary and desirable. However, we fail to see how the proposed system under the concept of a NLSO delivers this result.
3. It is noted that the NLSO under the current proposal will have the overriding regulatory function. It is then intended to delegate the day to day management of the regulation of the profession to the existing State bodies. No costings have been provided in relation to this proposal. It is noted that it is proposed that funding will be achieved by the increased "efficiencies" delivered under the proposal. The LSSA has serious concerns as to how this can be achieved when in fact it appears that the system proposed contains an additional layer that is not currently in place at the individual levels. The LSSA asks that detailed costings based on the anticipated efficiencies be provided.
4. It is noted that complaints are intended to be divided into "consumer complaints" and complaints alleging "unsatisfactory professional conduct" or "professional misconduct". It is noted that consumer complaints are intended to be dealt within a less formal structure than complaints of a disciplinary nature. The Ombudsman is to be given broad powers to negotiate and make binding determinations. It is noted that the Ombudsman would also be given the power to award "compensation". This raises jurisdictional issues and the serious issue of whether or not a practitioner's professional indemnity insurance policy would respond to complaints of this nature. Some PI policies exclude disciplinary matters from coverage. However, consumer complaints are not under the proposed system categorised as disciplinary matters and as there is the ability to award compensation it is highly likely that a practitioner would seek to obtain cover from his PI insurer. It is highly unlikely that the current PI insurers covering practitioners in Australia had anticipated covering claims of this nature and there is the distinct possibility that a practitioner would be uninsured in respect of any award of compensation.

This could have drastic consequences for the practitioner concerned. For these consequences to be visited upon a practitioner through the informal process that the Ombudsman would be empowered to undertake in the resolution of a consumer complaint raises serious concerns.

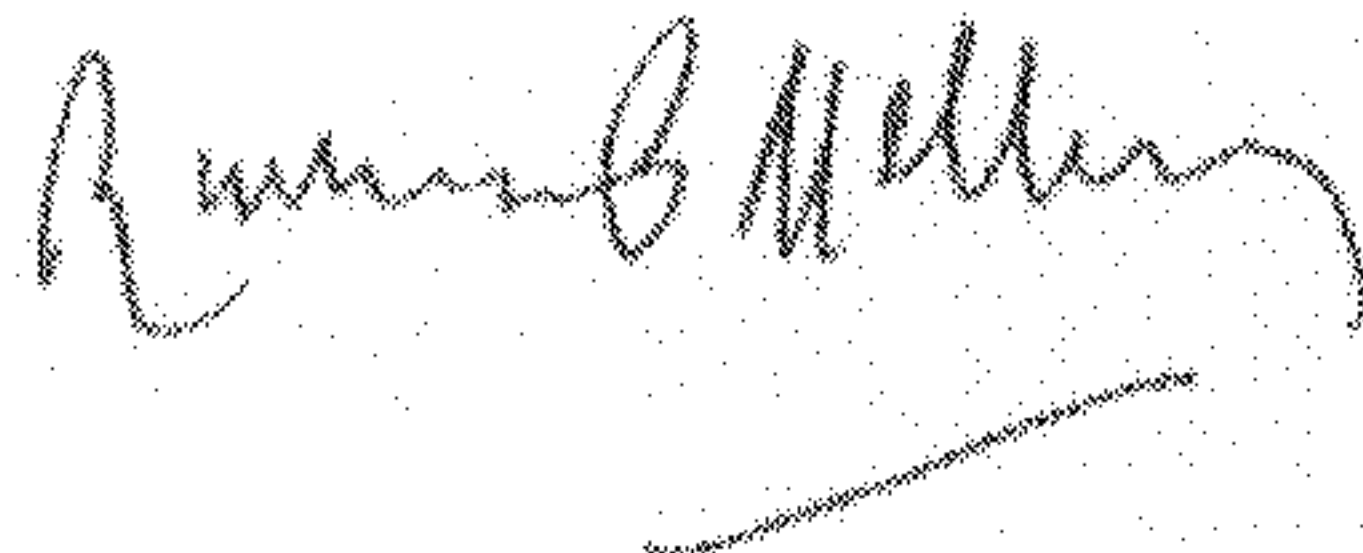
5. It is noted that in relation to determinations that the Ombudsman would be empowered to make concepts such as *"fair and reasonable in all the circumstances"* and *"reasonably satisfied"* and *"fair and reasonable"* are contemplated. All of these concepts appear particularly nebulous in their character and by themselves have the potential to amount to serious disputation between the practitioner and the Ombudsman. Further, they call for a subjective interpretation on the part of the Ombudsman which could vary depending on who is actually charged with dealing with the complaint. This would appear to be counterproductive to the intent of the reform which is to achieve some form of uniformity and consistency across Australia.

In conclusion, we note that submissions have been made by other interested parties and in particular we note and endorse the comments on this topic made by Mr Tony Abbott of Piper Alderman at paragraphs 44 to 47 of his letter of 3 November 2009. In particular, we quote the comment appearing in paragraph 47 where he states:

"On the other hand recent experience shows that the creation of an Ombudsman, or substantially shifting emphasis of the background of the Ombudsman and other complaints regulators, or the emphasis of the objectors of the scheme, to those of the consumer, does not automatically guarantee improved complaints handling system or a better system".

At this stage the LSSA does not see how the proposed National Legal Services Ombudsman achieves the aims of uniformity and simplicity and cost saving which underpin the current national reform of the legal profession in Australia.

Yours sincerely



Richard Mellows
PRESIDENT