

**COAG LEGAL PROFESSION NATIONAL LAW
BILL AND RULES
Version 2**

**OVERVIEW OF REGULATORY FRAMEWORK FOR
NATIONAL REGULATION OF THE LEGAL
PROFESSION**

22 December 2010

Purpose

This document has been prepared by the Law Council of Australia to give an overview of the national legal profession regulatory framework as set out in the Legal Profession National Law Bill and National Rules as released on 20 December 2010.

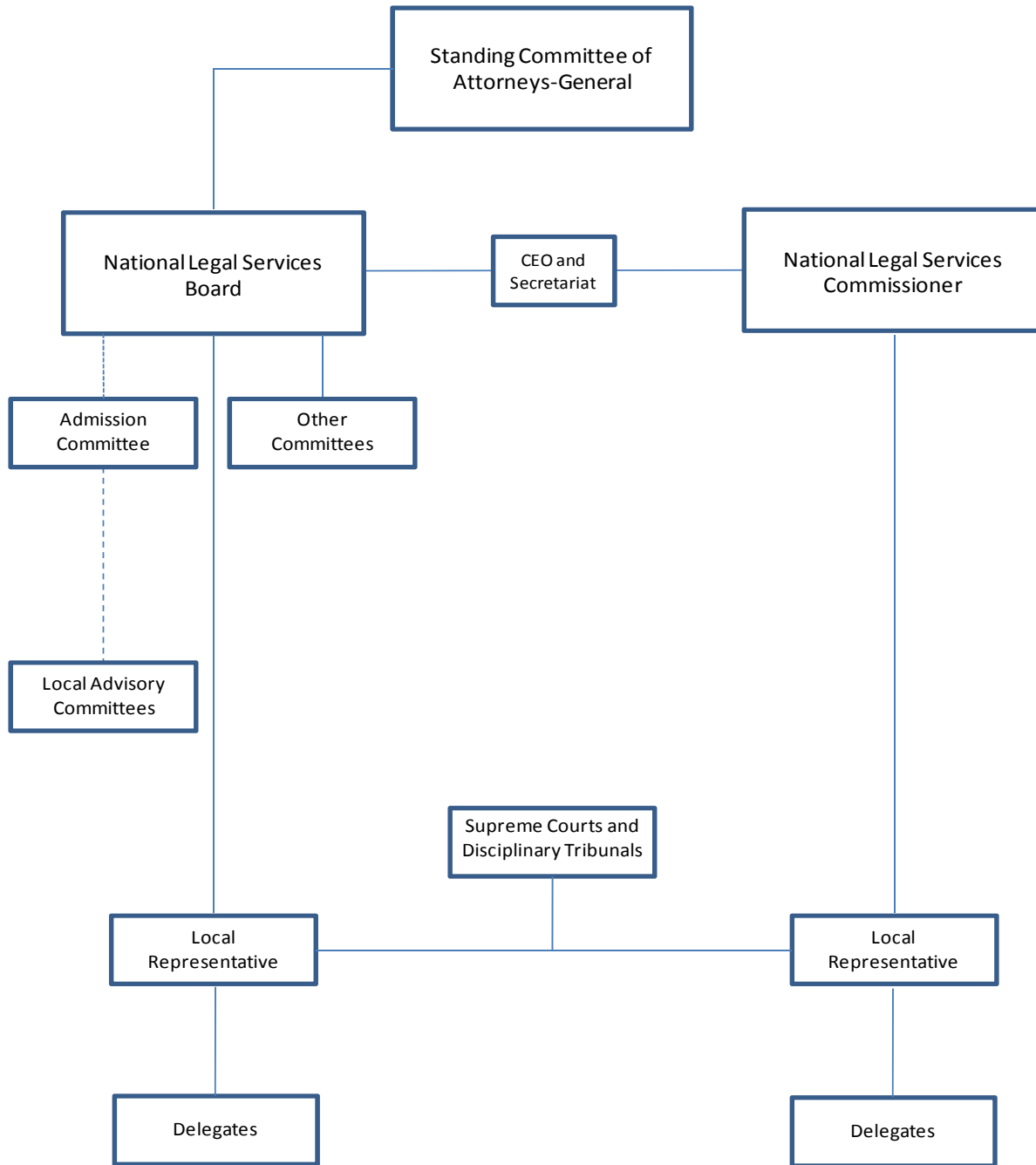
This document contains:

- A schematic representation of the regulatory framework provided for under the National Law and National Rules (pages 3 and 4)
- A summary the regulatory entity (pages 5 and 6)
- A key point summary of areas of significant interest to the legal profession (pages 7 and 8).
- A key point summary of selected parts of the National Law (pages 8 –~~XX~~)
- Attachment A – the CEO Model endorsed by the Law Council and forwarded to the Taskforce in November 2009.

On 5 November 2009 the Law Council forwarded to the COAG Taskforce a submission outlining the Law Council's then preferred approach to the National Regulatory Framework. A copy is included at Attachment A for information and reference. It should be noted that the Law Council's preferred National Framework underwent some refinements and adjustments as the COAG Taskforce progressed its thinking on the reforms.

The explanation of the regulatory framework proposed by the draft national law highlights areas of consistency with the Law Council's position on the national regulatory framework.

LEGAL PROFESSION NATIONAL LAW version 2: NATIONAL REGULATORY FRAMEWORK



LEGAL PROFESSION NATIONAL LAW version 2: NATIONAL REGULATORY FRAMEWORK

Standing Committee of Attorneys-General

Role:

- General supervisory role in relation to Board and Commissioner to ensure duties are fulfilled under law consistent with objectives of law.
- Request and receive reports.
- Approve or veto National Rules; and in respect of Legal Practice, Professional Conduct and CPD Rules, a right of veto only on restrictive, anti-competitive, public interest or funding grounds only.

National Legal Services Board

Role:

- General administration of National Law and National Rules
- Oversight implementation and application of National Law and National Rules
- Determine/adopt and oversight implementation and application of policies and practices.
- Exercise (or delegate exercise of) independent functions as set out in section 8.2.5 of National Law, including making of National Rules, and issuing guidelines and directions.
- Establish advisory and other committees.
- Maintain National Legal Profession Register.

Admissions Committee

Role:

- Exercise admission functions on behalf of Board as set out in Part 2.2 including:
 - considering applications for compliance certificates;
 - exempting applicants from certain prerequisites for a compliance certificate;
 - recommending conditions on compliance certificates in respect to foreign lawyers;
 - making declarations of early assessment of suitability;
 - referral of matters disclosed in applications to designated jurisdictional bodies for consideration and advice; and
 - issuing compliance certificates.
- Advise Board regarding Rules relating to admission and other matters as requested by Board.

National Legal Services Commissioner

Role:

- Exercise non-delegable independent functions as set out in section 8.3.4(3) of National Law including; function of Chief Executive Officer of Board; issuing guidelines and directions about exercise of special functions; monitoring, reviewing, co-ordinating and reporting on exercise of special functions by local representatives; and making recommendations to Board on compliance by local representatives with guidelines or directions of Board.
- Exercise (or delegate exercise of) delegable independent functions.

Local representative of Board

Role:

- Exercise special functions of Board relating to: unqualified legal practice; practising certificates (including variation, suspension and cancellation); external administration and receivership of ILPs; and disqualification of entities.
- Exercise such functions as are delegated by Board.

Local representative of Commissioner

Role:

- Exercise special functions of Commissioner relating to: unqualified legal practice; practising certificates (including variation, suspension and cancellation); external administration and receivership of ILPs; and disqualification of entities.

Law Council and Australian Bar Association

Role:

- Recommend to host Attorney-General of 2 (Law Council) and 1 (ABA) appointees to Board.
- Nominate candidates for appointment as Chair of Board, and concur on recommendation by SCAG for appointment as Chair.
- Develop National Rules relating to conduct, legal practice and continuing professional development.

KEY ELEMENTS OF REGULATORY FRAMEWORK

1 Regulatory entities (Chapter 8, Schedules 1 and 2)

1.1 Standing Committee

- Standing Committee comprises Attorneys-General of the States and Territories, but not federal Attorney-General.
- General supervisory role in relation to Board and Commissioner to ensure duties are being fulfilled under national law consistently with objectives of the national law.

1.2 National Legal Services Board

- Seven member Board nominated/appointed as follows:
 - 2 members appointed by host Attorney-General on recommendation of Law Council
 - 1 member appointed by host Attorney-General on recommendation of Australian Bar Association
 - 3 members appointed by host Attorney-General on recommendation of Standing Committee
 - 1 member appointed as Chair by host Attorney-General on recommendation of Standing Committee
- In recommending appointment to Chair the Standing Committee must ensure that:
 - it consults with the Presidents of the Law Council and Australian Bar Association and a member of the Council of Chief Justices;
 - the Presidents of the Law Council and Australian Bar Association and a member of the Council of Chief Justices have an opportunity to nominate candidates
 - a person is not recommended for appointment as Chair without the concurrence of the Presidents of the Law Council and Australian Bar Association and a member of the Council of Chief Justices.

1.3 National Legal Services Commissioner

- Appointed by host Attorney-General on recommendation of Standing Committee and with concurrence of the Board.
- Exercises functions of Chief Executive Officer of Board

1.4 Local representatives of Board

- Entities to be specified by each jurisdiction in Schedule 3.
- Exercise the special functions of the Board and such independent functions of the Board as are delegable and delegated.

1.5 Local representatives of Commissioner

- Entities to be specified by each jurisdiction in Schedule 4.
- Exercise the special functions of the Commissioner Board and such independent functions of the Commissioner as are delegable and delegated.
- Local representative must be a statutory body (not being a professional association), but functions can be performed by a professional association under delegation.

1.6 Role of the profession in regulatory framework

- 3 out of 6 Board positions appointed on recommendation of legal profession
- Legal profession may nominate, and must concur on recommended nominee for Chair of the Board
- Legal profession retains right to develop legal practice, professional conduct and continuing professional development rules, with limited powers of veto by Standing Committee (restricted to public interest or cost grounds)
- Legal profession administers special functions of Board – includes core functions around practising certificates
- Legal profession will be able to administer other independent functions of the Board through delegation.
- While independent and special functions of Commissioner are exercised by independent statutory officers, legal profession retains role in administration through delegation powers

2. Areas of significant interest to legal profession

2.1 Admission

- Identified as a separate function of the Board.
- Must be performed by an Admissions Committee.
- Matters can be referred to local committees for advice and recommendations.
- Remains a centralised function.

2.2 Powers of Standing Committee

- No power to give policy directions to Board.
- Approves or vetoes national rules proposed to be made by the Board.
- May only veto a Legal Practice Rule, a Professional Conduct Rule or a Continuing Professional Development Rule if:
 - the rule would impose restrictive or anti-competitive practices that are not in the public interest
 - the rule would otherwise not be in the public interest because it conflicts with the national law; or
 - the rule would impact on public funding of the regulatory scheme under the national law.

2.3 National Rules, guidelines and directions

- Each Chapter/Part of the National Law makes provision for national rules, in addition to the independent functions of the Board or Commissioner to make guidelines and directions to local representatives about the exercise of special functions or local delegates about the exercise of other regulatory functions.
- Provides flexibility necessary for dealing with matters relevant to, but not specifically addressed in national law. For example:
 - the national rules may specify a person or class of persons to be commercial or government clients (s.4.3.2(2)(h))
 - the national rules may, without limitation, be made with respect to any aspect of legal costs, including specifically costs disclosure, costs agreements, billing and costs assessments (s4.3.38)

2.4 Compliance audits and management system directions (Part 4.6)

- Compliance audits may be conducted if there are reasonable grounds to do so, based on:
 - conduct of the law practice or its associates; or
 - a complaint against a law practice or its associate.
- Reports of compliance audits must be given to law practice concerned.
- While no right of appeal provided for against audit findings, appeal rights remain if results of audit lead to prosecution or disciplinary proceedings.
- Management system direction may be given if reasonable to do so after the conduct of:
 - a trust records examination;
 - a trust records investigation;
 - a compliance audit; or
 - a complaints investigation

2.5 Professional indemnity insurance (Part 4.4)

- Primacy of State and Territory PII schemes maintained.
- National minimum standards apply unless the Board approves an insurance policy that departs from those minimum standards.
- Provision made for alternative arrangements involving other insurers or the Board if:
 - no insurers are willing to provide insurance on terms and conditions required by a State or Territory; or
 - a State or Territory decides not to make provision for a professional indemnity insurance scheme.
- Discretionary exemption from local scheme for local practitioners in a 2-jurisdiction only law practice that insurers the whole of the practice in the second jurisdiction
- Automatic exemption from local scheme for local practitioners in a 3 or more-jurisdiction law practice that insurers the whole of the practice in one of those other jurisdictions
- Permanent office and local principal tests apply to exemptions

2.6 Single national trust accounts

- Multi-jurisdictional law practices may have only 1 national general trust account.
- If no single general trust account, usual rules about general trust accounts apply.

2.7 Further development of national law and national rules

- It is anticipated there will be further opportunities to identify and deal with refinements and/or technical corrections to the draft legislation – but not core policy settings – before COAG meets to consider and decide on the package.

3. Key points summary of selected elements of the National Law

Part 2.1 Prohibitions against engaging in legal practice when not entitled

- Only “qualified entities” are entitled to engage in legal practice.
- National rules contain exemptions from general prohibition (Rule 2.1.3)
- Only qualified entities are entitled to advertise, represent or do things that state or imply an entitlement to engage in legal practice.
- Reservation to qualified entities of use of certain legal profession related titles.
- Functions under Part 2.1 are *special function* of Board that must be exercised by Board’s local representative.

Part 2.2 Admission

- Supreme Court admits, admits subject to conditions recommended by Board (foreign lawyer admissions) or refuses to admit.
- Admission requires Board to provide a compliance certificate to Supreme Court.
- Academic, practical legal training and fit and proper person prerequisites apply to issue of compliance certificate.
- Exemptions available from academic and practical legal training prerequisites.
- Declarations of early assessment of suitability for admission provided for.
- Conditional admission provisions for foreign lawyers.
- Provision for persons to object to admission.
- Appeal rights against Board decisions available.
- Functions under Part 2.2 are *admission functions* of the Board that must be performed by the Admissions Committee.
- Admissions Committee which may refer matters to local committees for advice and recommendations.

Part 3.2 Law practices – general provisions

- Legal services can be provided under any structure, subject to national law and national rules.
- Business of law practice can include other (non-prohibited) business activities
- Obligations of legal practitioners under national law, national rules and other professional obligations apply regardless of business structure.
- National law and national rules apply to extent of any inconsistency with law under which business structure is established.
- Each principal of a law practice is responsible for ensuring reasonable steps are taken to ensure that all legal practitioner associates comply with :
 - obligations under national law, national rules and other professional obligations; and
 - that legal services are provided by law practice in accordance with national law, national rules and other professional obligations
- If a law practice contravenes national law or national rules each principal deemed to contravened same provision unless:
 - contravention occurred without actual, imputed or constructive knowledge of principal;
 - or

- principal was not in a position (and it was reasonable for the principal to not be in that position) to influence conduct in relation to contravention; or
- principal used all due diligence to prevent contravention.
- Obligations of law practice can be discharged by associates of law practice.
- Professional privileges continue to apply to legal practitioners who are officers, directors, partners or employees of a law practice.
- Law relating to client legal privilege continues to apply

Part 3.3 Australian legal practitioners

- The Board grants/renews of Australian practising certificates
- Australian practising certificates issued based on practitioner's notification as to principal place of practice and subject to conditions.
- Prerequisites for practising certificate include being an Australian Lawyer; professional indemnity insurance cover and compliance with conditions of previous practising certificates, if any.
- General and statutory conditions include disposition as to trust accounts; requirement to engage only in supervised practice or undertaking reader's program and duty to notify if certificate holder is charged or convicted of certain offences.
- The Board may also impose discretionary conditions specified in rules including continuing or specific legal education, specified periods of supervision; undergoing counselling or treatment or restrictions as to type of legal practice the holder may engage in .
- Functions under Part 3.3 are *special functions* of Board that must be exercised by Board's local representative.

Part 3.4 Foreign lawyers practising foreign law in Australia

- Foreign lawyer can practise foreign law without registration for up to 90 days in any 12 month period, or during any restricted period allowed under *Migration Act*.
- Above concession does not apply to a foreign lawyer who maintains an office, or is a partner, director or other principal of an [Australian] law practice; or whose registration certificate is cancelled or suspended.
- A foreign lawyer (other than one to whom above concessions apply) cannot practise foreign law unless registered as an *Australian-registered foreign lawyer*.
- Registration function is an independent function of the Board – Board issues an *Australian registration certificate*.
- Statutory conditions (including conditions relating to trust money and notifiable events) apply to registration, as does discretionary conditions imposed by the Board.
- *Show cause event* and other related provisions in Part 3.5 apply
- *Refusal, variation, suspension and cancellation provisions* in Part 3.5 apply.
- Disclosure obligations under professional indemnity insurance provision in Part 4.4 apply.
- Complaints and discipline regime in Chapter 5 applies.
- Scope of practice limited to:
 - foreign law that lawyer is registered or authorised to undertake by a foreign registration authority; and
 - legal services and proceedings before a body (other than a court) in which the rules of evidence do not apply; and

- arbitration, conciliation, mediation and other forms of consensual dispute resolution; and
- legal services specified in national rules.
- Prohibition on practising Australian law, except to the extent of advice on Australian law necessarily incidental to practice of foreign law where advice is based on advice obtained from an Australian legal practitioner who is not an employee or foreign lawyer.
- Functions under Part 3.4 are *independent functions* of the Board that can be exercised by the Board or its delegates

Part 3.5 Refusal, variation, suspension and cancellation of registration certificates

- Registration certificate can mean an Australian practising certificate or Australian registration certificate (granted to an Australian-registered foreign lawyer)
- Board must vary, suspend or cancel if directed by a disciplinary tribunal/court
- Board may vary, suspend or cancel in response to:
 - contraventions of conditions; failure to comply with investigatory processes; recommendations of Commissioner in connection with complaints; recommendations of disciplinary tribunal/courts; or suitability to hold an Australian practising certificate; and
 - automatic or designated show cause events.
- Power to immediately vary or suspend for maximum of 56 days while Board considers whether to start, continue or complete actions if in public interest to do so.
- Functions under Part 3.5 are *special functions of the Board in relation to Australian practising certificates* that must be exercised by the local representative of the Board
- Functions under Part 3.5 are *independent functions of the Board in relation to Australian registration certificates* that can be exercised by Board or its delegates.
-

Part 3.7 Incorporated and unincorporated legal practices

- Incorporated and unincorporated law practices entitled to engage in legal practice.
- Required to have at one authorised principal (defined in section 1.2.1 to mean a principal authorised to supervise others).
- Notification to Board of intention to commence (or termination) to provide legal services is required.
- Unincorporated legal practice defined in *section 1.2.1* as meeting the following criteria:
 - a partnership, or an incorporated body or group either approved by the Board or specified in the national rules; which has
 - given a notice of intention to engage in legal practice: and
 - whose legal services are not limited only to in-house legal services or only to services not required to be provided only by an Australian legal practitioner; and
 - is not otherwise excluded by the national rules from being an unincorporated legal practice; but does not include
 - a law firm, community legal service or incorporated legal practice.
- Provisions relating to practising without a principal for more than seven days apply, including power of Board to appoint an employee to exercise responsibilities of a principal.
- Vicarious liability applies to an incorporated legal practice to the extent it would apply if the incorporated legal practice were a partnership consisting of its officers and employees.

- Functions in relation to external administration and/or receiverships of an incorporated legal practice under the Corporations Act and other legislation are *special functions* that must be exercised by the local representative of the Board

Part 3.8 Community legal services

- Declared to be a form of law practice.
- Defined in section 1.2.1 to mean an organisation that:
 - holds itself out as a community legal service, community legal centre or Aboriginal and Torres Strait Islander legal Service, 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;
 - is established or operates on a not-for-profit basis; and
 - provides legal or legal-related services to people disadvantaged in accessing the legal system or protecting their legal rights; and
 - is conducted in the public interest
- Must not be without at least one supervising legal practitioner for a period of more than seven days (similar to rules as apply to incorporated legal practices)
- Must have professional indemnity insurance and that insurance must also cover legal services provided by members, employees and volunteers.

Part 3.9 Disqualifications

- Board and/or Commissioner may apply to a designated tribunal (a court or tribunal designated by the jurisdiction) for a disqualification order against a person who is not an Australian legal practitioner.
- Tribunal must be satisfied grounds for order are made out and disqualification is justified.
- Grounds for disqualification include: conviction for a serious offence; not being a fit and proper person to be employed or receive income from a law practice; or a finding of unsatisfactory professional conduct or professional misconduct under for legal practice.
- Board and/or Commissioner may apply to a designated tribunal (a court or tribunal designated by the jurisdiction) for a disqualification order against an entity that is or was a law practice from providing legal services for a specified period or indefinitely.
- Tribunal must be satisfied grounds for order are made out and disqualification is justified.
- Grounds for disqualification include: contravention by law practice against having a disqualified lay associate; failure to comply with q management system direction; contravention by the law practice or a related entity of prohibitions on providing particular services or businesses; and finding of guilt of professional misconduct by a legal practitioner associate.
- Law practice must not contravene prohibitions against having lay associates who are disqualified or convicted of a serious offence, although Board may approve a disqualified person as a lay associate.
- Person who is disqualified or who has been convicted of a serious offence must not seek to become a lay associate without disclosing disqualification or conviction.
- Functions under Part 3.9 are *special functions* of Board that must be exercised by Board's local representative.

Part 4.2 Trust money and trust accounts

- Essentially retains core framework of the Model Bill and Legal Profession Acts.
- Trust money includes money entrusted in course of or in connection with provision of legal services; controlled money; transit money and money subject to power.
- Trust money does not include:; managed investment scheme and mortgage financing money; payments in response to a bill; money received in connection with financial services where a financial services licence is required to be held; money received for investment purposes only unless received or to be dealt with in the ordinary course of legal practice.
- Barristers must not receive trust money in ordinary course of legal practice, but may receive money on account of legal costs in advance – such money is excluded from definition of trust money but must be deposited in an account at an ADI and only paid out when a bill is given, money is refunded or is paid to an Australian legal practitioner in relation to the matter to which the advance payment of fees relates.
- Provision made for multi-jurisdictional law practices to operate a single national trust account, but no provision is made for multiple multi-jurisdictional general trust accounts
- Formula for redistribution of interest relating to single national general trust account still being refined.

Part 4.3 Legal costs

- Does not apply to commercial or government clients, apart from provisions relating to conditional costs agreements; conditional costs agreements involving uplift fees; contingency fees; and recovery or repayment of fees under certain void costs agreements
- Commercial or government clients defined, and provision is made for National Rules to include additional entities or classes of entities.
- Basic rule that legal costs must be fair and reasonable, with criteria to be applied in considering whether or not costs are fair and reasonable.
- Costs agreement is prima facie evidence that costs disclosed are fair and reasonable, provided costs disclosure is made and there has been compliance with provisions relating to making costs agreements.
- Disclosure obligations set out in National Law, including an obligation on a law practice to take all reasonable steps to satisfy itself the client has understood and given consent to the proposed course of action and proposed costs.
- What specifically has to be disclosed, and what constitutes “reasonable steps” is not defined in the national law, but general provision is made for national rules to be made about legal costs, and Board and Commissioner have powers to issue guidelines and directions to local representatives and delegates.
- Provision is made for costs agreements to be void (but not merely voidable)
- At least one principal of a law practice must take responsibility for a bill for legal costs, and if not, all principals are deemed responsible.
- Restrictions on commencing proceedings for recovery and entitlement to interest on unpaid bills retained on similar basis to Model Bill.
- Costs assessment provisions included along similar lines to those in Model Bill

- Legal costs that are or have been subject to a cost dispute complaint to the Commissioner cannot be the subject of a costs assessment unless the Commissioner is unable to resolve the dispute or himself arranges for a costs assessment to resolve the dispute.
- Costs assessors are determine whether costs are fair and reasonable, according to criteria set out in national law.
- Costs assessors *may* refer to Commissioner matters where assessor considers costs are not fair and reasonable and *must* refer to Commissioners matters that may amount to unsatisfactory professional conduct or professional misconduct.
- Contravention of requirement that law practice must not charge more than fair and reasonable legal costs is conduct capable of constituting unsatisfactory professional conduct or professional misconduct on the part of the principal or principals responsible for the bill and each legal practitioner associate or foreign lawyer associate involved in giving the bill. This applies whether or not the responsible principal had actual knowledge of the bill and its contents and whether or not he or she had actual knowledge that the costs unfair or unreasonable.

Part 4.4 Professional indemnity insurance

- Australian legal practitioner must not engage in legal practice in a jurisdiction without professional indemnity insurance under an approved insurance policy unless exempted under the national law or national rules.
- There *is a two part test* about what is an “an approved insurance policy” for a jurisdiction.
- First part of the test is that:
 - it is a policy issued or provided by an insurer or other provider under applicable jurisdictional legislation, or
 - If there is no approved or selected insurer or other provider – or if there is no applicable jurisdictional legislation – it is issued or provided by an APRA authorised insurer or an insurer or provider approved by the Board.
- Second part of the test is that the insurance policy complies with the minimum national standards or is approved by the Board.
- An incorporated legal practices must itself hold or be covered by an approved insurance policy (i.e. in addition to the insurance obligations of its legal practitioner directors, officers and employees)
- A community legal service that is incorporated must itself hold or be covered by an approved insurance policy (i.e. in addition to the insurance obligations of its principals, employees and volunteers)
- A community legal service that is not incorporated must hold or be covered by an approved insurance policy for itself and for its principals, employees and volunteers.
- Australian-registered foreign lawyers are not compelled to have professional indemnity insurance and must make written disclosures to clients about what professional indemnity insurance they do have, if any.
- Provision is made for a discretionary exemption from a local scheme for local practitioners in a 2-jurisdiction only law practice that insurers the whole of the practice in the second jurisdiction
- Provision is made for an automatic exemption from a local scheme for local practitioners in a 3 or more-jurisdiction law practice that insurers the whole of the practice in one of those other jurisdictions.

- Similar exemptions are provided for in relation to incorporated legal practices and incorporated community legal services.
- Permanent office and local principal tests apply to exemptions.
- It not compulsory for an insurance scheme to offer cover on a “per law practice” basis.
- Professional indemnity insurance cover must be obtained for legal practice engaged in on a pro bono or volunteer basis.

Part 4.5 Fidelity cover

- Essentially left to State and Territory legislation.
- Core framework is largely unchanged except for the following matters:
 - Specific exclusions from contributions and levies for barristers, government legal practitioners, corporate legal practitioners and other legal practitioners or classes of legal practitioners specified in National Rules.
 - Advertisement inviting claims must set a minimum of 3 months and maximum of 12 months in which to lodge claims.
 - Provision made for discretion to make advance payments based on likelihood of claim being allowed or to alleviate hardship.
 - Claims must be determined independently, at arm’s length from the legal profession and the fidelity fund authority must publish an annual statement about how this has been given effect.

Part 4.6 Business management and control

- Compliance audits may be conducted if there are reasonable grounds to do so, based on:
 - conduct of the law practice or its associates; or
 - a complaint against a law practice of its associate.
- Reports of compliance audits must be given to law practice concerned.
- While no right of appeal provided for against audit findings, appeal rights remain if results of audit lead to prosecution or disciplinary proceedings.
- Management system direction may be given if reasonable to do so after the conduct of:
 - a trust records examination;
 - a trust records investigation;
 - a compliance audit; or
 - a complaints investigation
- Provision is made for a general prohibition on a law practice or related entity from operating or promoting a managed investment scheme, or providing a service or conducting a business specified in the national rules (none specified as yet). This prohibition extends to a managed
 - An exception to the general prohibition applies in the context of insolvency or administration of a managed investment scheme.
- Provision is made prohibiting the provision of legal services in relation to a managed investment scheme if any associate of a law practice has an interest in the scheme or responsible entity for the scheme, except as permitted by the Board or under the national rules.
- Provision is also made for a prohibition against a law practice or related entity from involvement in mortgage financing except in certain circumstances (such as where the lender is a financial

institution) or the mortgage or class of mortgage is specified in the national rules as exempt from the prohibition.

- These statutory provisions should eliminate the need for separate prohibitions in the Australian Solicitors' Conduct Rules.

Part 5.1 Dispute resolution and professional discipline – preliminary provisions

- Objectives relate to timely and effective resolution of disputes/ issues involving clients; the discipline of legal practitioners and the promotion of professional standards competence and honesty.
- Chapter 5 applies to the conduct of , Australian lawyers ; foreign lawyers including those that gain Australian registration; former and existing Australian legal practitioners; arbitrators and cost assessors
- The Supreme Court's inherent jurisdiction to discipline its officers is said to be unaffected.

Part 5.2 Complaints

- Any person/body (including the Commissioner) can make a written complaint.
- Complaints can be either (or both) about disciplinary or consumer matters and though there is scope for extension of time, complaints must be made within three years of the objectionable conduct.
- Consumer matters can arise in respect of service issues or costs disputes; disciplinary matters relate to conduct that, if established constitute unsatisfactory professional conduct or professional misconduct
- The Commissioner must make a preliminary assessment of the complaint after which the complaint may be closed or if warranted, the Commissioner may recommend immediate suspension of the practising/ registration certificate while the matter is dealt with or investigated.
- After deciding to investigate and prior to making a determination about the complaint:
 - the Commissioner must notify or give the respondent a summary of the complaint
 - Complaint respondents may within specified period make submissions; and
 - the scope of the investigation can be extended or the matter referred to costs assessment.

Part 5.3 Consumer matters

- The Commissioner must, as soon as practicable attempt to resolve consumer disputes by informal means and may order the parties to attend mediation. If mediation 'succeeds', the parties may record of the terms of settlement and the Commissioner may close the complaint. If mediation 'fails', the Commissioner may investigate the complaint further or make a binding determination.
- Upon making a may make a binding determination that is in his/her view fair and reasonable in all the circumstances, the Commissioner may make a range of 'orders' such as requiring the legal practitioner to make an apology, redo work, undertake training, be subject to supervision,

undertake counselling , pay compensation and fines under Part 5.4). Failure to comply with such orders can constitute Unsatisfactory professional conduct or professional misconduct

- Though the Commissioner can deal with consumer matters that involve costs disputes for less than \$100,000:
 - he/she can only make binding determinations that are in his/her view fair and reasonable in respect of unresolved costs disputes of \$10,000 or less
 - where unresolved costs disputes are for more than \$10,000, the Commissioner must notify the parties of their entitlement to apply for costs assessment
- The Commissioner may require the lodgement of costs in dispute

Part 5.4 Disciplinary matters and Part 5.5 Compensation orders

- Unsatisfactory professional conduct ('UPC') and professional misconduct ('PM') are defined and can be constituted by any contravention of the National Law and Rules
- If the Commissioner proposes to determine a disciplinary matter, he/she must invite submissions. Upon making a determination that a legal practitioner has engaged in UPC or PM, the Commissioner may make a range of 'orders' such as requiring the legal practitioner to make apology, redo work or pay compensation or a fine up to \$25,000
- If the Commissioner considers it appropriate, he/she may prosecute a lawyer in the designated Tribunal
- In making a binding determination the Commissioner considers fair and reasonable he/she may order compensation up to \$25,000. The Tribunal may make compensation orders for amounts greater than \$25,000.
- Whether or not the Tribunal makes a finding of UPC or PM, it may order the lawyer to pay costs (including the Commissioners and complainants') and for procedural lapses on the Commissioner's part to be disregarded.

Part 5.6 Appeals or reviews in relation to complaints and disciplinary matters

- The Commissioner's binding determinations are final, though the Commissioner has discretion whether to conduct internal review of his/her decisions.
- A legal practitioner may subject to jurisdictional legislation appeal or seek review of the Commissioner's determinations where:
 - the Commissioner has, in respect of a consumer matter, ordered compensation for more than \$10,000; or
 - the Commissioner has, in respect of a discipline matters, made a finding that a respondent lawyer or legal practitioner associate has engaged in unsatisfactory professional conduct.

Part 5.7 General Duties of Commissioner

- The Commissioner is duty bound to act fairly efficiently and expeditiously
- Except in relation to consumer matters and to the extent they are not inconsistent with the provisions of the National Law and Rules, the rules of procedural fairness apply to the investigation, determination decisions and procedures of the Commissioner

Part 6.1 External intervention introduction

- Chapter 6 deals with external intervention and largely replicates the regime under Chapter 5 the Model Bill. The major difference is that the National Law attempts to simplify the provisions of the Model Bill by providing for supervisors managers and receivers under shared provisions that, wherever possible apply to all interveners.
- Objectives relate to intervention options for law practices so as to protect the public, clients of law practices and legal practitioners
- The Chapter has broad application in relation to former practices/ practitioners, executors administrators, receivers managers including Australian foreign lawyers etc and the appointment of an intervener in one jurisdiction is effective in respect of other jurisdictions

Part 6.2 Circumstances warranting external intervention

- Range of circumstances trigger the need for intervention, including:
 - death of legal practitioner
 - ceasing to hold a practising/ registration certificate
 - intervention where an incorporated legal practice is wound up;
 - in any case where the Commissioner forms a belief on reasonable grounds that trust money or property is not being adequately dealt with.

Chapter 7 Investigatory powers

- This Chapter largely replicates and reorders the regime under Chapter 6 of the Model Bill with the following extension in their application:
 - in respect of compliance audits, powers are extended beyond incorporated legal practices to all law practices subject to the business management and control provisions in Part 4.6 of the national law; and
 - apply to all lawyers rather than only Australian lawyers.
- Searches executed pursuant to search warrants are subject to jurisdictional requirements for their lawful execution.
- Part 7.5 provides that National Rules may provide for any aspect of trust account investigation, trust record examination , compliance audits and complaints investigations.

Part 8.1. Standing Committee

- Standing Committee comprises Attorneys-General of the States and Territories, but not the federal Attorney-General.
- General supervisory role in relation to Board and Commissioner to ensure duties are being fulfilled under national law consistently with objectives of the national law.
- Can request reports from the Board and Commissioner about aspects of their operations (but not about a particular person or matters)
- Approves or vetoes national rules, but can only veto a legal practice, legal profession conduct or continuing professional development rules, on inconsistency with the the objectives of the national law, or public interest or cost grounds
- Makes decisions by majority.

Part 8.2 National Legal Services Board

- Has general administration of national law and national rules.
- Key objectives are nationally consistent, efficient, effective and targeted regulation.
- Functions fall into 3 categories:
 - Independent functions;
 - Special functions; and
 - Admission functions
- Independent functions are either delegable or non-delegable and include:
 - approving unincorporated bodies or groups as unincorporated legal practices;
 - issuing guidelines and directions
 - fixing fees
 - making national rules.
- Special functions (relating primarily to practising certificates and disqualification matters) must be exercised by the local representative of Board
- Admission functions must be exercised by a statutory Admissions Committee.
- Board has a general monitoring and review role in relation to the exercise by the Commissioner of his or her powers and functions.

Part 8.3. National Legal Services Commissioner

- Primary roles are:
 - administer the complaints and disciplinary provisions;
 - general compliance monitoring, promotion and enforcement
 - Chief Executive Officer of the Board Ensures compliance
- Functions fall into 2 categories:
 - Independent functions
 - Special functions
- Independent functions are:
 - administer the complaints and disciplinary provisions
 - general compliance monitoring, promotion and enforcement
 - provision of annual reports
- Independent functions can be delegated, with certain exceptions, including:
 - functions as Chief Executive of Board
 - responsibility to promote consistency in in application of the law and national rules
 - monitoring, reviewing, coordinating and reporting on exercise of special functions by local representative.
 - Reporting obligations.
- Special functions are all of the functions of the Commissioner that are not independent functions (e.g. all functions relating to complaints and discipline, auditing and examination functions, external intervention functions).
- Special functions must be performed by local representatives of the Commissioner, but can be delegated to, for example, a professional association, subject to a take over power remaining with the local representative.

Part 9.1 Legal profession national rules

- Board has power to develop and make national rules, part from developing legal practice, professional conduct and continuing professional development rules
- National rules may provide for civil penalties up to 50 penalty units
- In developing national rules Board must consult with Commissioner and Board's advisory committees, and release proposed rules for public consultation.
- Proposed legal practice, professional conduct and continuing professional development rules are to be developed by the Law Council and the Australian Bar Association, who must
 - consult with Board, Commissioner and Board's advisory committees
 - release draft rules for public consultation and consider submissions received
 - make final recommendations after considering submissions..

Part 9.2 Australian legal profession register

- Register will be divided (under national rules) into public information and non-public information.

Part 9.3 Cooperative and other arrangements

- Board may negotiate and enter into cooperative arrangements with Australian or foreign regulatory authorities and courts for:
 - exchange of information, including in relation to applications for compliance certificates and
 - mutual recognition for admission purposes of academic courses and practical legal training programs
- General provision also included for exchange of information to ASIC and between persons involved in regulation of the national law and national rules.

Part 9.4 Notices and evidentiary matters

- Provision is made for service of notices/documents on legal practitioners, law practices, incorporated legal practices, the Board, Commissioner, local representatives and others

Part 9.5 Injunctions

- Largely consistent with the corresponding parts of the Legal Profession Model Bill at 8.1.3
- The Supreme Courts powers under this part are stated to be in addition to any other powers of the Court
- An application for injunction may be made to the Supreme Court without notice to the person against whom injunction is sought

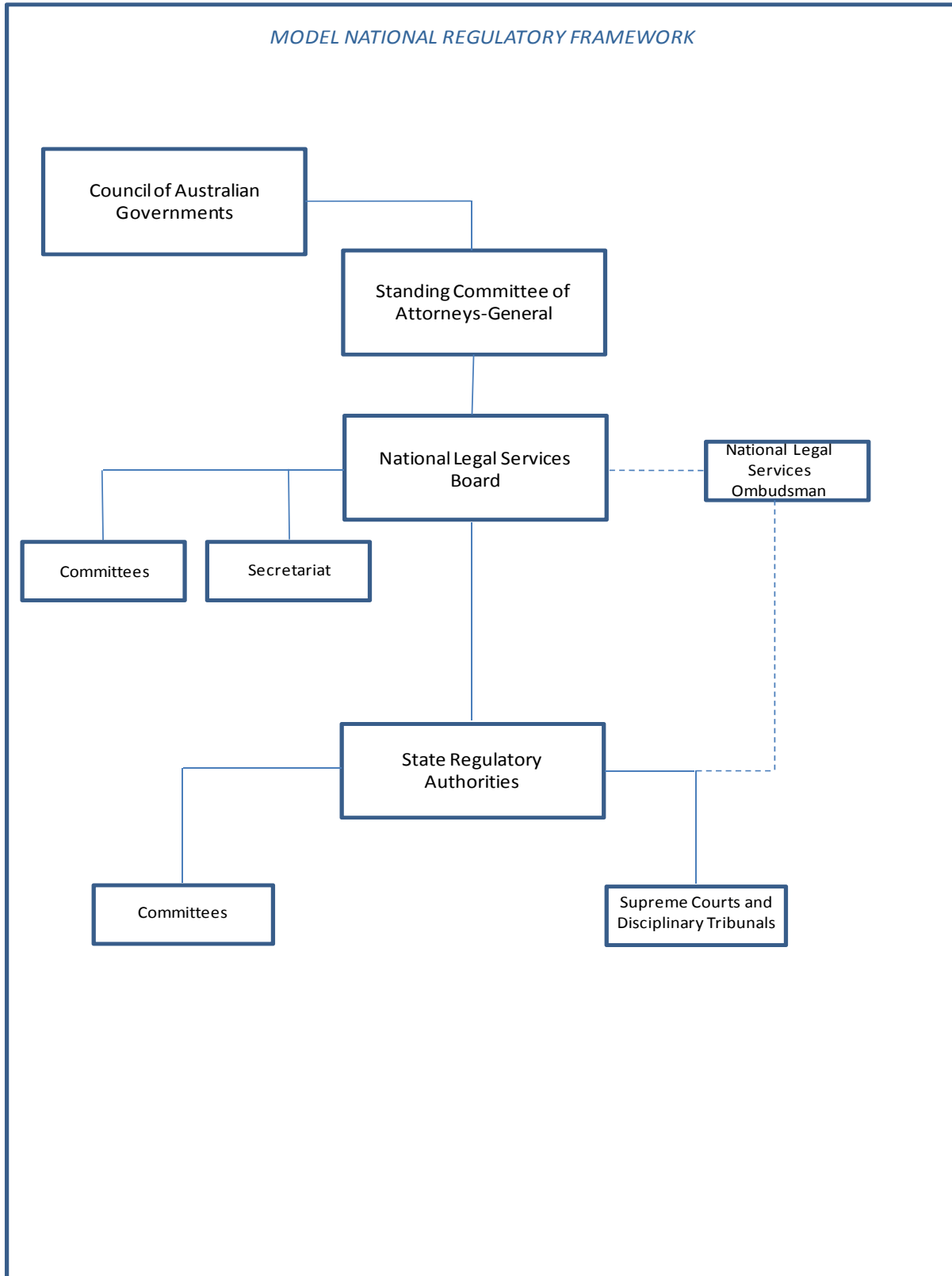
Part 9.6 Criminal and civil penalties

- Contraventions are punishable by the maximum penalty at foot of provisions under the National Law and National Rules
- The Commissioner may apply to the Tribunal within six years of a contravention for pecuniary penalty
- Contravention of a civil penalty provision is not an offence; accessory provisions are included;
- The Tribunal is prevented from making a pecuniary penalty order if a person has been criminally convicted for substantially the same conduct. However, criminal proceedings may follow against a person for contravention of civil penalty for substantially the same conduct.

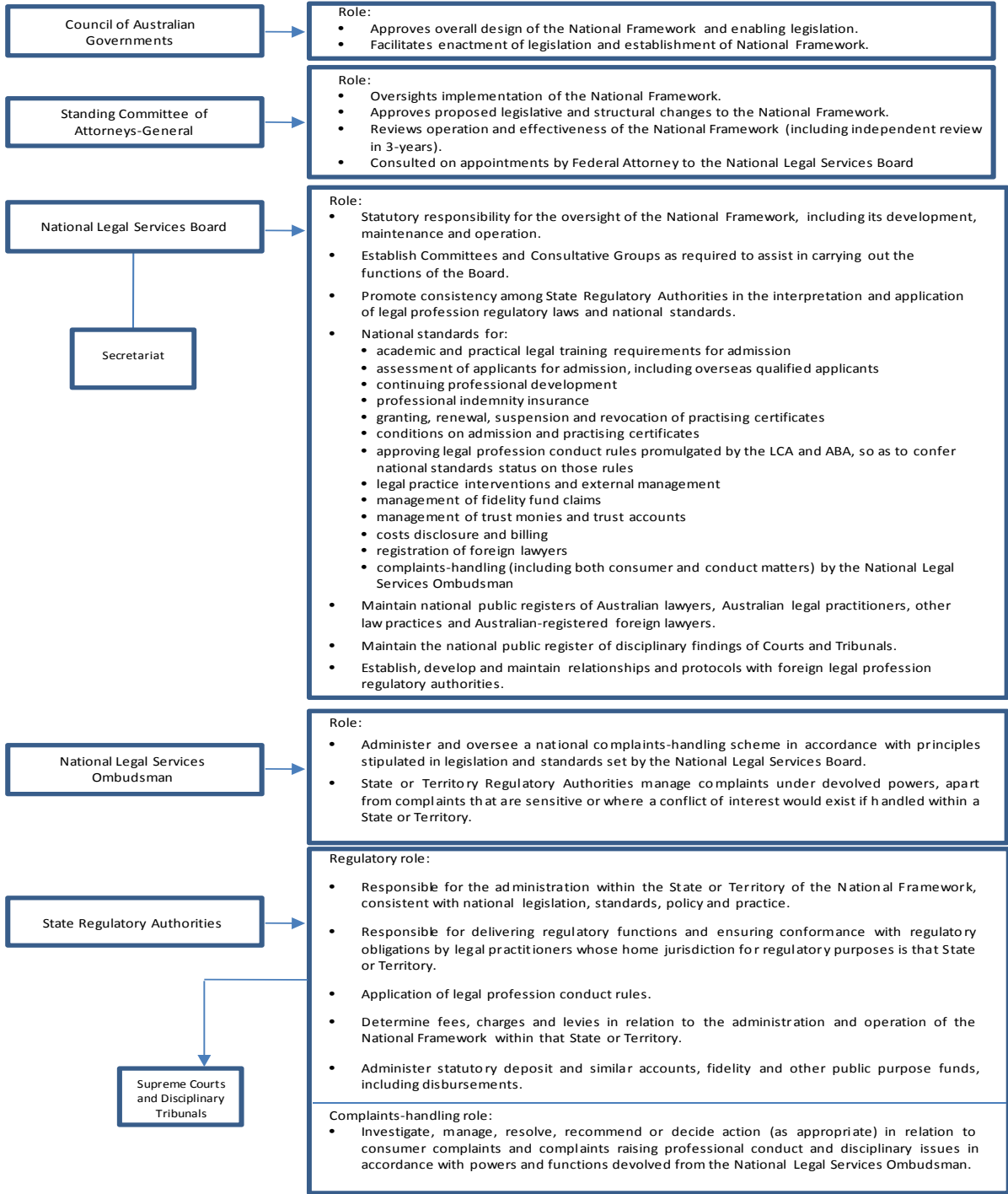
Part 9.7 General

- Provisions on prohibitions against disclosure of information are similar to those under the Legal Profession Model Legislation at 8.1.5, though the 'relevant person' definition has been expanded to include national authorities, the Attorney General of any jurisdiction, external examiners, investigators and interveners.
 - If satisfied no appeal/application for review has been made about a failure to make a timely decision ('constructive decision') or the appeal/application for review has been withdrawn or the late decision would benefit the person, a decision-maker may make late decisions.
 - Relevant persons are duty-bound to report suspected breaches of the National Law.
 - Certain requirements, such as under section 4.2.30 to give notice of a trust account irregularity (and others as specified) are unaffected by the requirement to maintain legal professional privilege or confidentiality. Complainants do not automatically waive privilege/ confidentiality allowing disclosure to be made to authorities investigating a complaint, unless they agree to do. Failure to comply with requirements can constitute UPC or PM.
-

ATTACHMENT A: CEO MODEL ENDORSED BY LAW COUNCIL NOVEMBER 2009



Model National Regulatory Framework



NOTE:

“State Regulatory Authorities” encapsulates all regulatory activities, functions and bodies that regulate legal practice and the provision of legal services within a State or Territory.

The Law Society or Bar Association of each State or Territory may have a role either as a State Regulatory Authority, or with respect to regulatory functions conferred under the organisation and allocation of regulatory functions by the relevant State or Territory.

This is in addition to the ongoing role each Law Society and Bar Association has in representing the profession, and in serving the community through relationships, products, information and services that engage, inform and educate consumers and other stakeholders about the profession, the legal system and their rights as consumers of legal services.