



**THE LAW SOCIETY  
OF SOUTH AUSTRALIA**

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

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29 June 2010

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JM;rp

Mr Bill Grant OAM  
Secretary-General  
The Law Council of Australia  
GPO Box 1989  
CANBERRA ACT 2601

Dear Bill

**Law Society of South Australia's Submission in relation to  
COAG's proposed National Legal Profession Reform**

Please find attached the Law Society of South Australia's submission related to the proposed Legal Profession National Law. We understand that the submission will be considered in the formulation of a national response by the Law Council to the Taskforce on behalf of the Constituent Bodies.

We would be pleased if you would note however that we reserve the right to submit a separate response to the Taskforce should our position on any substantive matter be inconsistent with that of the Law Council's.

In addition to the attached we will also be providing Mr Harold Cottee and Mr Murray Hawkins with a detailed report on technical matters, legislative drafting issues and other "micro" concerns in relation to the legislation which may have an impact on the day to day practice of legal practitioners.

Please do not hesitate to contact me if you have any questions in relation to the attached.

Yours sincerely

  
Jan Martin  
EXECUTIVE DIRECTOR



**THE LAW SOCIETY**  
**OF SOUTH AUSTRALIA**

**Submission on**

**COAG's proposals for  
National Legal Profession Reform**

29 June 2010

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## **Preamble**

The current package of legislation consists of a draft Bill and Rules. The substantive detail is in the Rules. Prior to the release of the package there was general concern expressed by constituent bodies at the balance between the Act and the Rules particularly in light of the powers of the National Board to change the Rules. The Law Society of South Australia ("the Society") remains concerned to ensure that those Rules which will impact significantly on the regulation of the profession are entrenched in the Act. Examples of this include

- Business structures
- Fidelity Cover
- External intervention

## **1 Cost and funding of the national system**

While the Society recognises that the creation of a national system for the regulation of the legal profession is a worthy objective, it should not be at any cost. This includes both the cost to individual members of the profession of the implementation of this Legal Profession National Law (LPNL) and the cost to legal practices of compliance with the regulatory and other burdens of compliance that the legislation would add.

Whilst we also recognise there may be some costs savings in terms of the cost of running a practice for firms with cross border practices, multiple trust accounts and ancillary items such as one PII provider and one Practising Certificate, these benefits are only likely to impact on a small percentage of the South Australian profession. In South Australia 83% of practitioners do not practise in large cross-border firms.

The increased regulatory burden in the LPNL, even in areas such as compliance audits and management systems structures will add an additional cost to the running of the majority of the practices in SA which may not be offset by participation in this proposed reform.

This submission is therefore predicated on there being evidence provided that the anticipated costs of the implementation of the reform will not impose an additional financial burden on the profession. Without that evidence, the Society may not be in a position to support the reforms in their current format.

## **2 National Legal Services Board**

### **2.1 Composition**

The Society's policy position is that there must remain an independent legal profession with a substantial role in its own regulation. For this reason, the composition of the Board must be substantially representative of the legal profession. We note the position of the Law Council of Australia that there be a seven member Board consisting of

- two LCA Members
- one ABA Member

- one Member nominated by the Council of Chief Justices
- three SCAG Members

with the Chair to be appointed by the Council of Chief Justices.

The South Australian position is that this is the **minimum** level of membership from the profession that we would consider acceptable on a Board of this size. Should there be another alternative proposal as to the size or composition of the Board, we reserve the right to make a further submission.

## **2.2 Role**

We support the establishment of a National Board for the purpose of making national rules to ensure the consistency and uniformity of standards applicable to a national profession.

## **2.3 Allocation of powers and functions of the Board (s1.2.7 of the LPNL)**

- 2.3.1 The National Board should have no power to take over local functions.
- 2.3.2 We oppose the National Board becoming involved in the administration at the individual level of determining individual applications for or suspension or cancellation of or imposition of conditions on Practising Certificates or otherwise dealing with individuals.
- 2.3.3 The 4 circumstances in s1.2.7(1)(a) to (d) would permit the National Board to take over a function virtually at will. The National Board would become an administrative bureaucracy, which it is not intended to be.
- 2.3.4 There has been no demonstrated need for the National Board to undertake administration in respect of individuals in any of the 4 proposed circumstances.
- 2.3.5 The first argument advanced for the "take over" power is the promotion of national uniformity (s1.3.7(1)(b)).
  - a At present and in the past, each of the 8 States and Territories has had different rules for admission, entitlement to Practising Certificates etc. Naturally, different rules have lead to different (or "inconsistent" decisions in individual cases). It does not necessarily follow that there will not be inconsistent decisions once the same uniform national rules are applied throughout Australia.
  - b The ultimate decisions on whether or not an individual should be admitted (or removed from the roll) or given (or had taken away) a Practising Certificate will be made by the courts and tribunals and not by any board (whether national or local).
- 2.3.6 The second argument advanced for the "call in" power is to handle a matter in which the local board has a potential conflict of interest (s1.3.7(1)(c)).

- a This situation is extremely rare, and no evidence has been adduced that it has not been able to be addressed by any local board in a manner which avoids any potential conflict.
  - b If it were to occur, it is best addressed by a local board in a position of potential conflict either referring the matter to the board of another jurisdiction or being directed to do so by a court or by the National Board.
  - c There is no reason at all why the National Board itself needs to deal with the matter substantively in cases of conflict.
- 2.3.7 The argument that the National Board should set precedents (s1.3.7(a)) has no weight in itself independently of the first argument addressed above.
- 2.3.8 The argument that the National Board or National Ombudsman should be able to give specific directions to local boards as to how they are to decide an individual matter and then take over the matter if the local board does not comply s.3.7(a)) is a bootstraps argument and assumes the national bodies should be so descending into detail.<sup>1</sup>

### 3 The role of SCAG

Consistent with our policy position that there must remain an independent legal profession with a substantial role in its own regulation, we strongly oppose SCAG appointing the Ombudsman or having any capacity to give policy direction to the Board (and Ombudsman). We endorse the position as stated by Chief Justice Wayne Martin in his address to the Press Club as follows

*"Those responsible for the formulation of the structures that are proposed to govern and regulate the national profession do not appear to have given adequate weight to the importance, and constitutional significance, of the independence of the profession.*

*They have consistently proposed that the profession be regulated by a board constituted with a majority of members appointed by executive government. Even more extraordinarily, the draft legislation released last week proposes that the National Board regulating the profession be subject to direction by the Standing Committee of Attorneys-General on matters of policy.*

*A regulatory structure which would empower executive government to control the legal profession is utterly inconsistent with the independence of the courts and should be rejected unequivocally and emphatically. While the creation of a national system for the regulation of the legal profession is a worthy objective, the surrender of the independence of the profession to control by executive government is too high a price to pay for the achievement of that objective."*

These sentiments have been strongly endorsed in broad measure by other Chief Justices.

<sup>1</sup> If, on the other hand, s1.3.7(1)(d) is intended to address a local representative failing to apply the National Rules, the appropriate remedy is an application to the court which will correct the local board.

The Society does not agree with SCAG's right to veto proposed amendments to the Rules.

In fact our position is that the only power SCAG should have is to appoint the SCAG members to the Board. This would ensure the complete independence from the Executive arm of Government, which we endorse.

If this position is adopted however, we recognise that the Board would have unfettered powers to make and change rules which reinforces our position that particular Rules must be entrenched in the legislation.

#### **4 National Legal Services Ombudsman**

4.1 We oppose the establishment of the role of Ombudsman. The proposed role of the "Ombudsman" is wrong in principle. Its implementation in the LPNL is therefore strongly opposed.

As a matter of principle, the Ombudsman is an instrument of executive control. The Ombudsman will be a political appointee. As contemplated by the LPNL, it has far-reaching investigatory, prosecution, judgmental and punitive roles. Those roles will be exercised administratively (see, e.g, s. 5.1.9). They are inimical to judicial or professional self-regulation.

4.2 In implementation of the Ombudsman's role, much of the proposed legislation is "consumer-driven" and not regulatory (see, e.g, s. 5.4.10). Some decisions are subject only to internal review (e.g. s.5.3.6(4), Part 5.6).

4.3 This concentration of conflicting roles has administrative precedent, but it is incompatible with transparency, independence, and public trust. Such a combination of roles can only work (and even then, doubtfully) where there is an established and substantial culture of independence, accountability and strict due process, for example in the Australian Securities and Investment Commission.

None of these conditions will exist with the "Ombudsman", who will have a small and devolved staff, inadequate resources, and a culture favouring consumer complaint.

4.4 In contrast, existing South Australian regulatory structures combine investigation and prosecution, but these are separated from adjudication and the imposition of penalties and costs. The structures combine professional self-regulation with Court supervision.

4.5 The proposed role of the "Ombudsman" is to control the legal profession at the direction of the executive arm of government, with an inbuilt punitive approach. Truly defined, the only acceptable role of an ombudsman is to provide disinterested assistance to persons engaged in disputes in other arenas, to coordinate information, and to make recommendations.

4.6 We therefore oppose the establishment of a National Ombudsman (by whatever name) to perform administration at the individual level presently performed by local bodies. The monitoring, promotion of consistency, educational and reporting role of the proposed National Ombudsman should instead be performed by the National Board.

4.7 If there is to be a National Ombudsman (by whatever name) then its role should be confined to the monitoring, oversight and reporting on performance by local bodies to ensure consistency across the board. It should have no power to "take over" or perform the functions himself unless the issue is one of national significance. It follows that if this limited role of the Ombudsman is the only role then we see no reason why it should not be "rolled into" the Board.

## 5 Uniform trust account - Interest earned on trust accounts

5.1 We support uniform regulatory requirements for trust accounts provided that a satisfactory formula for the distribution of statutory interest is developed and the formula is protected against interference without consultation with relevant stakeholders. In addition a formula must be designed to protect a distribution in accordance with the originating trust monies from which the income is earned. There should be no loss of statutory interest to this State as a result of the changes to the legislation which enable multi-national firms to hold a single trust account.

5.2 It will be essential that there be a matching of interest earned on trust accounts with the liability of the local fidelity funds. It will also be essential that there be an equitable distribution of interest between Public Purpose Funds of each jurisdiction which derive interest from trust accounts.

## 6 Fidelity Funds

South Australia does not currently have a Fidelity Fund as contemplated by the LPNL. This will be an issue for the State Government as the Fund would need to be adequately seed funded by a transfer of funds from the current Guarantee Fund. A position whereby contributions or levies would be sought from the profession (s4.5.7(a) of the draft legislation) would not be supported.

## 7 Costs and costs disclosure

*The Society has considerable concerns in relation to the provisions on costs and costs disclosure. Many of those concerns are matters of detail and will be included in a substantial submission to Mr Hawkins on this issue.*

In the meantime we provide the following comments.

### 7.1 Fair and reasonable costs

7.1.1 It is a given that practitioners must not charge more than fair and reasonable amounts for legal costs but there are no real benchmarks for fair and reasonableness in the LPNL. However, the concept of "fair and reasonable" as fixing the quantum of costs chargeable, is extraordinarily vague and subjective and will cause uncertainty for both client and the law practice (aside from a Tribunal or Court seeking to quantify costs). In addition, there appears to be differences in interpretation under 4.3.4 (general), 4.3.28 (cost assessment) and 5.3.8 (ombudsman). We support an approach akin to that of the existing legislation, that is, giving to the

client a statutory right to set aside a costs agreement which provides for costs which are manifestly excessive (or both unfair and unreasonable).

- 7.1.2 These concerns at the subjectivity of the provisions are heightened when coupled with the harsh penalty provisions of unprofessional conduct for a breach of the costs provisions including if fees are not "fair and reasonable".

## 7.2 Disclosure requirements

- 7.2.1 It is noted that there are no exceptions to the disclosure requirements, which is of grave concern as the disclosure provisions themselves are inadequate and confusing and have the potential to compromise not just the practitioner but also the consumer. The objectives set out in s4.3 of LPNL are inter alia to ensure that clients of law practices are able to make informed choices about

- their legal options; and
- costs associated with pursuing those options.

These overarching requirements are not supported by proper provisions as to either

- how legal costs are disclosed; or
- how costs associated with pursuing those options are disclosed.

- 7.2.2 In fact it is questionable in any event as to whether this is the proper function of costs disclosure. These matters go to the heart of the advice a practitioner gives once having taken instructions after entering a retainer agreement and disclosed the basis on which the charges are made. These are matters of advice and law and are part of the professional obligations as a legal adviser and representative but can not be provided until after the instructions are obtained. The provisions should separate out as initial disclosure, ongoing disclosure, disclosure in litigious matters and disclosure on settlement of litigious matters which would help clarify the position.

## 7.3 Commercial or Government clients (s4.3.2 of LPNL)

- 7.3.1 The position in the model legislation about disclosure is reversed. The Model legislation provides that disclosure is not required if the client is a commercial or government client.
- 7.3.2 This section changes the onus by providing that a commercial or government client may contract out of the disclosure requirements. The effect of this will be that every time a commercial or government client instructs a practice the practice will need to disclose to the commercial or government client that the client may contract out of the provisions. This will mean that the practice will need to provide advice about what the client is contracting out of and document that the client has so contracted out and have the advice acknowledged by the client. The provision places

a further and significant onus on a practitioner vis a vis "commercial or government clients" as to disclosure.

7.3.3 The section also fails to deal with the other matters for which disclosure was specifically not required in the model legislation. That legislation provided that disclosure was not required:

- where costs were unlikely to exceed \$1500
- where the client has received disclosure in the previous 12 months
- where a client has agreed in writing to waive disclosure
- where a principal on reasonable grounds has decided further disclosure is not warranted
- if costs or basis on which costs are to be calculated has been agreed by tender
- or if client will not be required to pay costs (eg pro bono work )

7.3.4 None of these exceptions to disclosure requirements are included in the proposed legislation. In these respects practitioners are denied legislative protection and are required in every matter to make disclosure even for small tasks such as preparing a will.

7.3.5 The Society has major concerns in relation to s4.3.7(4) in that the provision is unfair and unrealistic. A practitioner should only be required to give disclosure about a reasonably estimated range of costs the client may incur in pursuing a matter. Section 4.3.7(4) should be removed entirely. It does not address the matter of disclosure but addresses the issue of the provision of legal advice and the informed consent of a client to a proposed course of action. This goes to the heart of what the practice is being retained for. It relates to legal advice itself and that can only be provided after proper instructions are taken and for which the solicitor is entitled to charge. It goes beyond the issue of costs disclosure. The costs agreement should only specify the nature of the matter for which the practitioner is consulted. It is totally inappropriate to treat a failure to disclose legal advice as a costs issue which can then be capable of constituting unsatisfactory professional conduct or professional misconduct. The issues are quite separate. In addition, no costs agreement should stand or fall on whether the client has understood and given consent to the proposed course of action for the conduct of the matter.

## 7.4 Conditional Cost Agreements

There are fundamental access to justice issues in relation to the conditional agreement provisions in the LPNL. A limit of 25% uplift in fees may not be sufficient to encourage solicitors to take on clients who are unable to pay the fees upfront, when doing so (particularly in PI matters) means waiting for payment of fees for several years. In addition, the requirement that a successful outcome of the matter is reasonably likely will mean that clients who have cases that are on

the edge of the current law and/or of public interest are unlikely to obtain representation.

## 8 Professional Indemnity Insurance

- 8.1 The continuation of existing State/Territory indemnity Schemes will require specific legislative authority. The Intergovernmental Agreement/s should make provision for the continuing approval of State/Territory Schemes by the Attorney/s General of the relevant jurisdiction/s.
- 8.2 Rule 9.2.3 (approval of otherwise non-compliant insurers and policies – see s.4.4.3) should be removed. Instead, the Board should maintain a list of complying insurers and policies. Alternatively, criteria are needed for Board approvals, variations and revocations of policies and of insurers.
- 8.3 The question of whether compensation orders and penalties fall within 'civil liabilities' for insurance purposes should be made clear.
- 8.4 Professional indemnity insurance should be confined to the provision of legal professional services. The definition of "legal services" is too broad. Legal services are the application of legal professional skill and knowledge to provide advice. Legal services do not include all work done, or business transacted, in the ordinary course of legal practice.
- 8.5 The proposed LPNL leaves unanswered the question of whether a State/Territory Scheme can be compelled to insure. This issue needs to be addressed in the context of a likely mixed environment of State/Territory Schemes and private commercial insurers, including:
  - 8.5.1 whether some practitioners will be unable to get insurance;
  - 8.5.2 increased insurance premiums to cover increased or unknown risks;
  - 8.5.3 opportunities for 'forum shopping' and 'last on risk'.

## 9 Admissions

*Admissions is an area of the proposed law that was not circulated for comment prior to the Legal Profession National Law being drafted.*

- 9.1 It would appear from Part 1.3 of the LPNL that it is proposed that admissions will be a function of the Board and would therefore be centralised placing applicants from other jurisdictions at a disadvantage. It is our experience that applicants require a lot of support especially when having to make a disclosure and often take comfort from the fact that they can discuss the matter with someone locally. This is a service provided by administrators of admitting authorities which is never costed and therefore will not appear in any figures. No consideration has been taken by the Taskforce for the provision of this service.
- 9.2 Part 2.2.2 contemplates the central Board issuing a "compliance certificate" to the Supreme Court in the jurisdiction in which the applicant is seeking admission.

South Australia already has an equivalent process with the Board of Examiners issuing a "Report of the Board" to the Supreme Court.

- 9.3 There are already Uniform Admission Rules which are followed by the various jurisdictions. All that is required is for a uniform process. There is nothing in the LPNL or Rules that achieves this. Therefore additional regulation will still be required outside the Law and the Rules to specifically outline the process that an applicant must follow.
- 9.4 Currently in SA the admission fee is paid to the Court. Under the LPNL it is proposed that this fee be directed to the National Board to provide it with financial support. If the Court seeks to retain admission fees to cover the costs of the special sittings then applicants for admission will need to pay significantly higher admission fees if the National Board is to be financed as well. The ACIL Tasman report even suggests that admission costs may need to rise.
- 9.5 Given that most jurisdictions have Boards that consider applications for admission and that those Boards, apart from the Secretariat, comprise members of the legal profession and/or others, who provide their time gratuitously we are struggling to identify just where any real cost savings can be identified.
- 9.6 We strongly support the retention of the status quo with admissions being dealt with by the relevant jurisdiction and that the role of the National Board be confined to setting uniform procedures to be applied by the jurisdictions to ensure uniformity of procedures irrespective of the jurisdiction an applicant is seeking to be admitted in.
- 9.7 In our view there is absolutely no rationale for the admission function to be centralised.

## **10 Business Structures**

### **Compliance audits and management system directions**

*This area has a significant potential to increase the cost of running a practice for no apparent sound basis for its implementation.*

- 10.1 Under s4.6.1 of the LPNL, a compliance audit can be ordered against any law practice (ILP, ULP, law firm or CLS). Chapter 7 provides that an investigator undertaking a compliance audit be given access to documents and information relating to the affairs of the law practice (s7.2.1). Affairs of the law practice includes all accounts and records required to be maintained under the LPNL or the National Rules; other records of the practice; any transaction to which the law practice was/is a party or where the law practice acted for a party.
- 10.2 The Ombudsman may give a management system direction to a law practice to ensure that appropriate management systems are implemented and maintained.
- 10.3 Originally it was intended that such audits and directions would be limited to ILP's, but the LPNL extends these provisions to all law practices.
- 10.4 Under s4.6.1, the Ombudsman may audit a law practice at any time. This is regardless of whether a complaint has been made against the law practice or not.

- 10.5 Compliance with the Ombudsman in this regard is set out in Chapter 7 and can be costly, not to mention the potential for the audit to dislocate the day-to-day operations of the law practice while the audit subsists. In terms of reputational harm, it would be unwanted by the law practice too.
- 10.6 The 'ad-hoc' power to audit applies to all law practices, defined to include ILP's, ULP's, CLS's and sole practitioners. In our view these provisions are draconian and in the absence of actual fault by the law practice, or complaint by an aggrieved person directly affected by the alleged fault, or reasonable suspicion held by the Ombudsman of non-compliance by the law practice cannot be supported. This is not to suggest that the Ombudsman will abuse its power, but the absence of a standard before the sanction can be levied is apparent. The audit should be warranted; e.g. subject to a bona fide complaint, and only where in the reasonable view of the Ombudsman an audit is merited having regard to the nature of a bona fide complaint. In other words, it must be pursuant to a 'substantive' bona fide complaint.
- 10.7 The LPNL is to be contrasted with the *Corporations Act*. Audit obligations apply annually, but only to 'large' incorporated entities annually – meaning that small incorporated entities are not subject to audit at all; and 6 monthly – in the case of public companies. However, there is no 'ad-hoc' power reserved to ASIC or any other body to audit applicable entities at any time or to require the applicable entity to undergo an audit outside the allotted frequency. Accordingly, it seems inappropriate to treat law practices differently, particularly in the context where partnerships are not currently required to audit their practices at all, let alone for the audit sanction to apply to all law practices regardless of size.
- 10.8 The Ombudsman is empowered to issue a management system direction and, if issued to a law practice, the law practice must comply with it. Section 4.6.2 simply provides that if the Ombudsman '*considers it necessary to do so*', the Ombudsman may give a management system direction to a law practice.
- 10.9 A management system direction is, among other things, a direction to a law practice:
- which ensures that the law practice, among other things, implements the appropriate management systems to enable the law practice to provide legal services in accordance with the LPNL (s4.6.2(2)(a)); and
  - to provide periodic reports to the Ombudsman on the systems and on compliance.
- 10.10 We have major concerns in relation to the second dot point above. There is no guidance as to what type of reports and what length of periodic reporting is required. In conjunction with the 'ad hoc' audit powers, it appears that the periodic reporting is a double whammy. Should not the obligation to comply be sufficient sanction without a need for further reporting where the power to audit exists? The periodic reporting obligation should be removed.
- 10.11 The LPNL should be modified to provide a proper objective basis for an audit or direction, such as a reasonable suspicion of ongoing or persistent non-compliance with relevant provisions of the Act (not all non-compliance would

warrant an audit or directive) or a credible complaint or history of complaints. In addition, notice should be given of an intended audit and the opportunity given to a law practice to be heard prior to Ombudsman's decision becoming operative. Exceptions in the case of urgent action in the case of suspected fraud etc could be made.

## 11 Complaints and Discipline (Chapter 5 – LPNL)

The Society is not satisfied that the proposal to split complaints into consumer and disciplinary complaints is valid. In our view, all 'consumer complaints' can become a de facto disciplinary matter, given that the Ombudsman has powers to penalise (which is a disciplinary function).

The definition of a "consumer matter" at s5.2.5 of the LPNL highlights the inherent inconsistency in trying to separate the two types of complaints. Section 5.2.5(1)(a) makes specific reference to "an issue that is capable of constituting a disciplinary matter". Section 5.2.5(1)(b) refers to a "costs dispute". The Society therefore does not support the proposed split in the definition of a complaint. Under other provisions of the LPNL a "costs dispute" can lead to a disciplinary sanction.

11.1 The office of Ombudsman appears to add an unnecessary extra level of complexity to the matters covered by Chapter 5 without a corresponding benefit - given that those functions are the subject of a (mandatory) statutory delegation to local representatives, which in most cases will be existing bodies that carry out the equivalent functions under the current regime.

11.2 The LPNL provides for internal review of Ombudsman decisions; however in practice the internal review procedures will apply to decisions made by the local representatives and will be carried out by employees of the same local representatives - given that these bodies may be relatively small and un-hierarchical in their structure, the internal review procedures are unlikely to be an arms-length and independent review.

In any event the internal review processes seem flawed as they are not a form of mandatory review of decision-making processes at the request of an aggrieved party but appear a form of discretionary review based on whether the local representative considers it is appropriate.

Given that the right of internal review of the local representatives' decisions appears discretionary and that s5.6.3 only provides a right of appeal/review to an external body in limited circumstances, the LPNL provides inadequate avenues for redress for practitioners in the event of poor decision-making by the local representatives.

11.3 The focus of Chapter 5 clearly favours the interests of the complainant over and above those of the practitioner who is the subject of the complaint, for example Part 5.3 also does not contain a process to short-cut the resolution processes where the complaint is frivolous, vexatious or unreasonable.

11.4 It also appears to be weighted to bring disputes 'within the system' rather than facilitating resolution between the parties as the first option - for example the time limits imposed in s5.2.8(2) for bringing a complaint about a costs dispute does

not realistically allow much time for the 'complainant' and practitioner to communicate with each other in an attempt to resolve something that might be quite simple.

11.5 The jurisdiction of the Ombudsman in relation to resolution of costs disputes cuts out at \$100,000 - it is felt that this is too high given that there are no time limits on attempted resolution and the effect of s5.3.7 is that the practitioner may be out of pocket for the entire amount of the costs involved, not just the portion that may be subject to dispute, for the entire period that the dispute is under review - this has the capacity to cause extreme hardship to a practitioner and the practitioner should have an opportunity to argue undue hardship in relation to lodgement of disputed costs.

11.6 Part 5.5 introduces a new concept of a compensation order.

If the Ombudsman awards compensation it is neither appellable nor reviewable. The only application to review it might be the power for judicial review.

This has implications for the ability for PII to respond. And as there are no guidelines at this stage as to the circumstances in which an order may be made, this raises natural justice issues and the ability of a law practice to cover the cost of defence. A vexatious litigant could seek a compensation order, for example. The practitioners' avenues for redress are negligible.

It is also questionable whether the imposition of compensation orders in accordance with Part 5.5 is truly an administrative function or whether the Part is in fact conferring a judicial function on an administrative tribunal.

## **12 Community Legal Centres**

We note with concern that Community Legal Centres have been brought under the provisions of the LPNL without any thought being given to the specific nature of these organisations. For example, they are caught by the requirement to provide a costs agreement in circumstances where that may not be appropriate. In addition, there are issues concerning their trust account obligations. In our view more work needs to be done in identifying or more particularly exempting certain provisions of the legislation to organisations which do not carry out legal practice in the traditional sense but are brought under the umbrella of the legislation. In light of this we have encouraged such individual organisations to make submissions directly to the Taskforce.

## **13 Jurisdictional retention**

There are a number of local requirements that will have to be the subject of residual legislation, eg the incorporation of the Society, application of fidelity fund monies for local purposes, the retention of the PI Scheme and the Litigation Assistance Fund are but some examples.

We anticipate that the mechanism for this will be provided in the inter-governmental agreements that will need to co-exist as a mechanism for the introduction of the LPNL.

*The Law Society of South Australia*  
*Submission to the Law Council of Australia on the*  
**COAG National Legal Profession Reform proposal of 14 May 2010**

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**Conclusion**

In our response to some of these topics we could go into more detail however we have attempted to identify the areas of principal concern we have. It is extremely important that **any amended draft proposals be released for further comment given the significant areas of concern that are likely to be expressed on principal areas.**



Jan Martin  
**EXECUTIVE DIRECTOR**  
29 June 2010