National Legal Profession Reform

Joint Consumer Submission

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Consumer Action Law Centre

CHOICE

Australian Financial Counselling and Consumer Reform Association

Consumer Credit Legal Centre

Footscray Community Legal Centre

West Heidelberg Community Legal Service

National Legal Profession Reform (NLPR)

Joint Consumer Submission

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1 Executive Summary

This submission considers the proposed regulation from the viewpoint of individual, small business and community organisations as clients.

This is a once in a generation opportunity for significant reform and it is essential that the reforms carry the support and confidence of consumers and those who represent them. Given that the reforms are designed to enhance consumer protection it is essential that it delivers a:

1) Stand alone ombudsman - with a national office, higher monetary limits for determinations, more effective dispute resolution and powers to resolve systemic issues

2. A National Legal Services Board that is independent of the profession, a highly respected Chair for all stakeholders and fair Board representation

3. A national fidelity fund – where claims are decided independently of profession, the claims cap abolished and the investment exemption reviewed

As the proposals stand we are concerned there is only limited potential to improve consumer protection. We support:

- that the proposals allow for the legal services Board to be independent of the profession;
- the differentiation of 'consumer matters' and 'disciplinary matters' which will allow consumer matters to be resolved quickly and with less formality than disciplinary matters;
- the power of the Ombudsman to make determinations in consumer matters ;
- the obligation on practitioners to charge costs that are 'fair and reasonable' and to obtain informed consumer consent to those costs; and
- the increased powers to respond to systemic issues within law firms.

However there are six key areas of significant concern and without improvements we cannot have confidence that these reforms will deliver a significant net consumer benefit.

In particular we are concerned that:

1. the governance arrangements may not be independent of the profession
2. the delegation processes are unnecessarily complex and will work against efficient and consistent outcomes
3. the consumer dispute resolution and regulatory functions are blurred;
4. the Ombudsman's dispute resolution powers are too limited.
5. there is insufficient capacity to deal with systemic issues

6. the reforms have not sought to address pressing problems with the operation and adequacy of fidelity funds

The National Legal Services Board – whatever its role - must be

- independent of the profession;
- have the spread of skills and expertise necessary to carry out its role; and
- have a Chair that has the support of both the key stakeholder groups – the community and the legal profession.

The new national agencies must not be compelled to delegate to state agencies and must have strong powers to direct state bodies to operate in accordance with national policies, procedures and practices.

The institutional design perpetuates the confusion of the concepts of consumer dispute resolution and conduct or regulatory matters. The outcomes and role of the consumer in each are very different. In consumer matters consumers want their problems fixed quickly, efficiently and fairly. Conduct matters are entirely different – they are regulatory and the consumer provides the source material in a process that goes way beyond their individual problem.

The Bill confuses remedies for consumer and conduct matters. Cautions and education directions are sanctions and are appropriate for conduct matters. Consumer matters require remedies that fix problems and/or provide compensation.

The dispute resolution system needs to be designed around the needs of consumers and the long established principles of dispute resolution should apply to consumer matters ie accessible, independent, fair, efficient, effective, and accountable.

In respect of the Ombudsman's powers the monetary limit for awards is way too low and should be raised to $100,000, including for cost disputes which are an element in the vast majority of consumer disputes.

We are also concerned that Ombudsman decisions are not binding on practitioners. While it is entirely consistent with accepted practice that professionals can appeal conduct decisions it is out of step with a vast array of Ombudsman schemes in Australia and internationally which require service providers or industry participants to be bound by determinations.

It is particularly unfair in the legal area given the considerable power imbalance between clients and lawyers compounded by the fact that litigation is a core skill of lawyers.

The Legal Ombudsman both in the consumer division and the conduct division needs greater power to address systemic issues, although we believe that the power to audit management systems of law firms will assist. Systemic issues can arise from both consumer matters and conduct matters and wide powers to address systemic issues (that may not necessarily be disciplinary breaches) are critical.

More needs to be done at this stage to address inconsistencies and unfairness in the operation of fidelity funds. In particular the necessity to establish claims caps should be abolished, claims decisions should be determined by an independent agency, funds should make greater use of their subrogation powers and the exemption of loss resulting from fraud in relation to investment funds held on trust needs to be reviewed.

Appendix One sets out our preferred institutional structure: the centre piece is a sole purpose Legal Ombudsman in the true sense of the word i.e. a body that exists to resolve disputes between consumers and the legal profession without any regulatory functions.

2 Introduction

2.1 Our credentials and experience

This submission is endorsed by the Consumer Action Law Centre, CHOICE, Australian Financial Counselling and Credit Reform Association, Consumer Credit Legal Centre, Footscray Community Legal Centre and West Heidelberg Community Legal Service. Between our organisations, we have significant experience with consumers who have service related disputes, including complaints about their legal practitioners. We also have extensive policy expertise in consumer protection issues, and provide consumers with general and legal advice, and we provide consumers with legal representation.

Many of us are in a position to compare the dispute resolution options for consumers who have disputes with lawyers with those who have disputes with other service providers. We deal with dispute resolution services on a daily basis. These include a range of both government and industry operated services, so we are familiar with which elements work most effectively and which are problematic.

We also have broad experience in dealing with regulators, including sitting on the governing bodies of regulators, lodging complaints with regulators, and having input to regulators’ work - for example through consultation and committees. We are familiar with the range of ways that individual complaints interact with regulatory responses and the role of industry Ombudsman schemes in resolving and reporting systemic issues (where a pattern of conduct impacts on a number of consumers).

While we represent the concerns of 'consumers' who are typically individuals, we note that many small business operators are at a similar disadvantage to individuals in terms of their practical and financial ability to resolve disputes.

While national uniformity of legal professional regulation will generate economic benefits to the legal profession directly and possibly to consumers indirectly, the Taskforce has identified 'enhanced consumer protection' as an important goal in its own right. It is to this goal that we make this submission, given our significant exposure to consumer issues.

2.2 A consumer perspective on problematic aspects of current legal professional regulation

Below we set out the problems with the current system. These are the issues we think the reforms should be addressing and we have assessed the proposals against their capacity to correct these problems.

- **Lack of independence:** arising from the significant role played by professional associations in regulating the profession (consumer concern about significant conflicts);
- **Confusion** (amongst the public but also in the profession) about the roles of the various parts of the regulatory framework i.e. the Boards, Commissioners and the multitude of professional associations;
- No capacity to resolve consumer disputes consistent with the well established principle of "**fair and reasonable** in the circumstances" ;
- Lack of ability for Legal Services Commissioners to make **determinations** or otherwise resolve complaints (apart from encouraging mediation/settlement);
- Power imbalance and difficulty for consumers in getting advice makes it difficult for many consumers to **dispute costs**, or the quality of advice or legal work done - consumers often wary about paying another solicitor to help;
- Lack of any powers in relation to **systemic issues** (e.g. generally 3 complaints about the same solicitor doing the same thing, or similar complaints arising about different solicitors within the same firm, are dealt with as separate disciplinary matters);
- Disciplinary action focuses on the individual practitioner, and generally ignores systemic issues such as processes, management style, or tasks given to inexperienced legal staff by a firm which may be the source of the problems;
- **Inadequate fidelity funds** in some states, exclusion of any funds provided to solicitors for investment purposes, significant discretion (for example in relation to maximum amounts paid or whether a claimant must take legal action to recover monies first).

2.3 What we expect from consumer protection regulation

We acknowledge that there are some differences between different types of businesses that have dealings with consumers, in particular members of a profession have significant obligations that other service providers don't have, such as duties to the Court. However, from the consumer perspective, there are significant gaps in the protections available to consumers in their dealing with the legal profession compared to other service providers. Regardless of the type of service involved, regulation that includes in its purpose the protection of consumers should provide for:

1. an independent regulator with appropriate powers and

2. access to effective dispute resolution.

2.3.1 What we expect from a regulator

A regulator should:

- Be independent from the industry or profession;
- Have a range of regulatory tools available which can be used to enforce non-compliance (for example prosecutions and enforceable undertakings), prevent problems arising and to monitor and promote industry best practice;
- Require businesses/licensees/practitioners to act fairly, honestly and efficiently;
- Be able to investigate concerns arising from consumer complaints – either complaints received directly from consumers or issues arising from complaints made to another body (but the regulator should not necessarily be involved in dispute resolution itself);
- monitor the industry (using a range of methods and sources) for emerging problems, conduct that could potentially lead to breaches of the law or other obligations;
- Be able to investigate and act on systemic issues;
- Be able to obtain compensation for all effected consumers (to the extent which these cannot be adequately addressed through the dispute resolution body) – for example, under the National Consumer Law, regulators may seek particular remedies such as refunds or contract variations to remedy a breach of the law in certain circumstances without first establishing the identity of each individual consumer[1].

2.3.2 What we expect from a dispute resolution process

The vast majority of consumers who suffer detriment due to industry conduct do not complain at all[2]. We have no reason to believe that this is any different for consumers of legal services. Accessible and effective dispute resolution can lead to an increase in complaints, which has positive benefits as it helps maintain relationships and confidence in the sector as well as providing more data for regulators and improved access to justice for consumers.

While there are a number of models used for consumer dispute resolution, the preferred model involves bodies that provide similar benefits to industry ombudsman schemes, such as the Financial Ombudsman Service, the Telecommunications Industry Ombudsman or the Energy Ombudsman schemes in a number of states. The Superannuation Complaints Tribunal is similar in nature to those schemes, but unlike the others it is a statutory scheme.

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[1] Commonwealth of Australia, Australian Consumer Law – An Introduction, April 2010

[2] Consumer Affairs Victoria, 'Consumer detriment in Victoria: a survey of its nature, costs and Implications', Research Paper No. 10 October 2006.

These schemes provide a fast, efficient and free (to consumers) alternative forum to the courts to resolve the majority of consumer disputes in those industries.

A body which resolves consumer disputes should meet similar benchmarks[3] that apply to statutory and industry based ombudsmen including: accessibility, independence, fairness, accountability, efficiency and effectiveness. In particular, the body should:

- Be provided at no cost to the consumer;
- Be independent of the industry/profession;
- Provide appropriate remedies sufficient to deal with the vast majority of consumer complaints/disputes in the relevant industry;
- Make decisions that are binding on the industry participants and non-reviewable;
- Have obligations to provide information to the relevant regulator/s about general industry issues and particularly systemic issues arising from dispute handling (but not be directly involved in a regulatory or disciplinary role).

2.3.3 The proposed reforms

We welcome the aim to improve consumer protection, and support the following positive initiatives:

- the requirement of the Ombudsman to differentiate early on between types of matters – i.e. between a 'consumer matter' and a 'disciplinary matter'. This is positive because it is important that consumer matters can be resolved quickly and with less formality than disciplinary matters;
- the power of the Ombudsman to make determinations in consumer matters (although monetary limits are too low and the right for practitioners to appeal is inappropriate);
- the obligation on practitioners to charge costs that are 'fair and reasonable' and an obligation to 'take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action ... and the proposed costs after being given that information';
- increased powers for the regulator to respond to, and prevent, systemic problems by undertaking audits of management practices.

However these do not go far enough to address existing problems and a number of other areas must be addressed before we can have confidence that these reforms will deliver a significant net consumer benefit.

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[3] ' Hon. Chris Ellison, Minister for Customs & Consumer Affairs,' Benchmarks for Industry-Based Customer Resolution Schemes', 1997, 11-12, see http://www.anzoa.com.au/National%20Benchmarks.pdf.

We acknowledged that the proposed model has not been put forward as a 'best practice' model but rather is based on compromises to enable the new system to build on the current system. However, we believe that the model as it stands has serious deficiencies and will challenge its capacity to meet its goals. In particular we are concerned that:

1. It is unclear at this stage whether the system will be sufficiently independent of the profession
2. the system is not adequately designed to drive the acknowledged and necessary ongoing reforms
3. the powers and remedies available to the Ombudsman are not adequate
4. the system design is particularly inadequate in relation to cost disputes which are a major issues for consumers
5. there is insufficient capacity to deal with systemic issues
6. the reforms have not sought to address pressing problems with the operation and adequacy of the fidelity funds

2.4 Institutional design

Most of our key concerns with the proposed regulation are interrelated, and are associated with structural deficiencies in the institutional design.

There are four significant problems that relate to the institutional design:

1. The governance arrangements are flawed
2. The unnecessary complexity of the delegation process.
3. Blurring dispute resolution and regulation function;
4. The Ombudsmen's dispute resolution powers are too limited;

Below we have detailed our concerns. We outline our preferred model, and an alternative model, at the end of this submission in Section 4.

2.4.1 Ensuring the Board's integrity with independent governance

The National Legal Services Board:

- must be independent of the profession;
- it must have the spread of skills and expertise necessary to carry out its role; and
- the Chair of the Board must have the support of both the community and the legal profession.

The model for appointing the Board in the draft bill had the potential to be consistent with the above principles. Moreover it was consistent with the 30 year old trend in Australia towards more balanced regulation of the legal profession and merely replicated the model utilized with considerable success for the last five years in Victoria.

Independence of the legal profession does not mean freedom from adherence to community norms and expectations in its relationships with clients. The increased role of independent bodies (such as Legal Services Commissioners) over the last 30 years has been driven by community dissatisfaction with self regulation and calls for increased consumer protection is a critical driving force behind these reforms.

We note that the term "co-regulation" appears to have a different meaning in the context of the legal profession, compared to its use in relation to regulation of other industries. We understand that in the context of the legal profession, co-regulation is understood to mean that a number of bodies may have the same regulatory powers and roles. In other contexts this term usually means that different bodies have different roles that contribute to the overall regulatory framework.

A regulatory system that includes a role for industry requires that stakeholder interests are balanced and this works best when any governing body is chaired by a non-aligned party. This is not to say that a majority of the Board must not have legal qualifications, rather that the majority of the Board must not represent or be seen to represent the interests of the profession.

We have provided detailed comments to the discussion paper on Composition and appointment of the National Legal Services Board in a separate submission.

Recommendation

The National Legal Services Board:

- must be independent of the profession; and
- must have the spread of skills and expertise necessary to carry out its role; and
- the Chair of the Board must have the support of both the community and the legal profession.

2.4.2 Complexity and Delegations

The current system is complex and practitioners as well as the public are confused about the distinct roles of the various regulatory bodies, for example the Board (in Victoria), the Commissioners and the professional associations in all states.

The reforms do not address this issue and arguably expand the complexity as they add a new institutional layer, though we accept this may be a necessary evolutionary step.

However, the new system is excessively complex with layers of delegations in both the consumer disputes and regulatory functions. The processes will be inefficient, probably ineffective, and highly confusing to both consumers and practitioners. For example, consumer complaints will be made to a national body, but the complaint will be dealt with by a state body and in some cases will be delegated again to a professional association.

We believe this will result in double handling, increase the capacity for mishandling and will not improve consistency of decisions across the country.

We question whether "delegation" is the appropriate term. It would generally be expected that a body that delegated its responsibilities had the power to require the delegate to undertake the work in line with particular guidelines or to revoke the delegation. However in this case the delegators have very limited powers. We question how consistency between state delegates of the ombudsmen will be achieved as there is no detail about what processes will support this. On a practical level, individuals in state based offices will be making decisions independently of one another, without any obligation to consult with their interstate colleagues. The same applies to state-national communications. To achieve meaningful national interactions, a detailed and extensive management information system will need to be developed in conjunction with on-going training. However, this is unlikely to significantly improve quality or uniformity unless the national bodies have more appropriate powers. Under the current proposal the national body has no power to require state bodies to operate in a consistent manner or to meet quality standards.

Recommendation

National agencies must not be compelled to delegate their "special powers" to state agencies; and the delegation power must include the capacity to direct state bodies to operate in accordance with national policy, practices and procedures.

2.4.3 Blurring dispute resolution and regulation

We are concerned that the current institutional design perpetuates the confusion of the concepts of consumer dispute resolution and conduct matters. What consumers want from dispute resolution is a fast and efficient resolution of their problem. The outcomes and role of the consumer in conduct matters is very different. In consumer matters consumers want their problems fixed quickly, efficiently and fairly and they want their problem remedied. Conduct matters are entirely different – they are regulatory and the consumer provides the source material in a process that goes way beyond their individual problem.

While consumer complaints are a key source of information for regulators, we don't believe that the regulatory and complaints handling role need to be within the one body to ensure that the regulator has access to this important data. We think the system needs to be designed around the needs of consumers and the long established principles of dispute resolution should apply to consumer matters ie accessible, independent, fair, efficient, effective, and accountable.

While the reforms attempt to separate consumer matters from disciplinary matters at an early stage, we are concerned that the Bill does not clearly identify how these should be treated differently in practice. In fact, the Bill seems to confuse consumer and disciplinary matters by providing remedies for consumer disputes that are, in effect, sanctions for conduct breaches or breaches of professional rules, such as cautions, education and counselling.

It is important that consumer matters have remedies that are appropriate for consumer disputes – such as compensation or orders to redo work. Consumers do not perceive that their issues are resolved when a lawyer is simply cautioned. Blurring the lines is likely to confuse the consumer, as well as the practitioner, who may respond more defensively to the dispute. It is our experience that practitioners often take a very legalistic response to consumer complaints, and need to be encouraged to resolve consumer matters quickly. Limiting remedies in consumer matters to those that resolve the dispute would greatly assist this objective.

Recommendation

Sharpen the system design in relation to the differences between consumer matters and conduct matters especially by aligning remedies to consumer matters and sanctions to conduct matters.

2.4.4 Ombudsman powers too limited in relation to dispute resolution

2.4.4.1 Monetary Compensation limits should increase from $10,000 to $100,000

The $10,000 monetary compensation limit is too low. We support the principle that a dispute resolution body should have sufficient power to deal with the vast majority of types of consumer complaints or disputes in the relevant industry and to award compensation up to an amount that is consistent with the nature, extent and value of consumer transactions in the relevant industry[4].

To identify the appropriate compensation limit would require consideration of the value of all consumer complaints against lawyers – including those made to the ombudsman, to professional liability insurers and through the courts and tribunals. Although there is no such comprehensive data available about the value of disputes in this industry, based on consumer advocate experience and experience with consumer disputes generally, we believe that a limit of $100,000 would mean that the majority of disputes would be covered. We note that the current figure for financial services providers (including insurers and financial advisors) is $280,000.

The $10,000 limit on awards for costs disputes undermines the $25,000 limit for consumer dispute awards as most consumer disputes have a costs component. The principle is that the Ombudsman's jurisdiction should provide a real alternative to the courts for the vast majority of consumer complaints.

Recommendation

The Ombudsman monetary limit for award in consumer matters and cost disputes should be $100,000.

[4] RG 139 ASIC Approval and oversight of external dispute resolution schemes July 2010

2.4.4.2 The right to appeal is appropriate for conduct matters but not consumer disputes.

The draft bill allows decisions in both conduct and consumer matters to be appealed to a court. While an appeal in conduct matters is entirely appropriate and a well established legal principle the opposite is the case for consumer matters. It is accepted practice in Ombudsman schemes in Australia and globally that determinations are binding on service providers but not on consumers.

This has arisen because experience has shown that the fairness of outcomes is often compromised when settlement is reached between two unequal parties in circumstances where the consumer's only alternative is to take the dispute to a tribunal or court. Our experience of a range of consumer dispute resolution agencies suggests that consumers will settle for less than they may be legally entitled to in order to avoid the costs (both dollar and emotional) of a formal hearing – and the other party can, and often does, take advantage of this.

While the vast majority of matters will be resolved without need for a binding determination our experience of other Ombudsman schemes demonstrates that the power to make a determination has an impact on the industry member's willingness to make reasonable offers of settlement. It also empowers consumers to reject inadequate offers of settlement, which they may otherwise feel they have no option but to accept.

Under the proposed legislation, an unhappy lawyer (or law firm) can appeal the Ombudsman's determination. In addition to the above this undermines the Ombudsman's role in providing a cheaper, shorter and generally easier dispute resolution process. Legal practitioners are obviously familiar with the process of appeals and are likely to use this court avenue, particularly as being lawyers, they have a lower practical cost to appealing than consumers.

The right to appeal a determination is likely to discourage the Ombudsman from making a determination – even when this would be appropriate. For example, we note that the Federal Privacy Commissioner has the right to make a determination, but despite criticism from consumer and privacy advocates, has not done so for at least six years. The fact that a determination can be appealed is one reason given for not making determinations. [5]

Recommendation

In order to adequately protect consumers the Ombudsman needs to be able to make decisions that are binding on practitioners i.e. non appealable

[5] "The difficulty with the Commissioner's determination, it's not binding, a party can ignore the finding of the Commissioner and if anyone wants to pursue it further then you've got to the Federal Court.", Mark Hummerston, Assistant Federal Privacy Commissioner, transcript, ABC National Law Report, 'Protecting Privacy', March 2010.

2.4.5 Systemic issues

The Legal Services Commissioners currently lack powers to address systemic issues.

Disciplinary action focuses on the individual practitioner, and generally ignores deficient or incompetent processes, management styles or administrative mismanagement. Disciplinary matters, by their nature, usually concern an individual practitioner. However, complaints often arise due to processes or systems – for example poor management practices, or problematic standard form documents such as letters or costs agreements. Experience in other areas indicates that one or two complaints about a particular practice can identify a problem that has caused detriment to many consumers.

For example, the Financial Ombudsman Service (FOS) identified problems in management processes in one financial business while examining why that business had not implemented a FOS determination in a timely way. A few complaints also led FOS to identify over 3,000 deficient default notices and incorrect credit report listings. While systemic problems within legal practices may not have such a broad impact, there are not effective processes to identify systemic issues, and many problems would be prevented if the dispute resolving body had the power to identify, require information and require a response in relation to systemic issues.

Problems arising from poor practices may be prevented by giving a regulatory body the power to audit the management practices of a firm (as proposed in the Bill), however the dispute resolution body should have the powers to seek redress for all effected clients (even if they hadn't lodged a complaint).

Recommendation The Ombudsman needs power to address systemic issues as part of its complaints handling function.

2.5 Costs

We welcome the requirements that costs are 'fair and reasonable' and that practitioners obtain informed consent in relation to proposed work and costs. However, unless the Ombudsman is able to consider the majority of consumer costs disputes, and issue guidance in relation to how the law will be applied in relation to disputes, we seriously question whether these changes will make any practical difference for consumers due to the difficulties involved in challenging bills and negotiating the various cost assessment processes around the country.

Clear guidance and very close oversight will be required in order to ensure informed consent provisions are applied in a practical and meaningful way. It is important that this is not simply addressed with crude risk management tools – for example by use of burdensome printed disclosure and signed acknowledgments - as we have seen in other industries – most egregiously the financial

services product disclosure statements. Generally, we think this may be best achieved by the development of guidelines by the Ombudsman, rather than by providing more prescriptive requirements in the legislation.

The primary objective of informed consent must be communication. The purpose of the provisions is to ensure consumers actually understand what they are agreeing to pay for legal assistance, how they might escalate, and how they may control those costs and at what point in the process. There will be cases where a face to face meeting to explain the costs is required not only at the outset but at critical junctures if the matter runs in court or takes a long time. All communications including written communications must be measured against their effectiveness as a communication tool.

Finally we are particularly concerned that the only consequence, in a consumer matter, for failure to comply with the cost disclosure rules is submitting a bill for cost assessment. While disciplinary action may be taken in extreme cases, this does not compensate the consumer. Cost disclosure is a fundamental consumer right and failure to comply with this provision must have some more direct effect on the bill than to simply submit it for assessment. We submit that where disclosure has not been provided, nor informed consent obtained then the Ombudsman and cost assessors should have the power to waive or significantly discount allowable costs.

Recommendations

- Consumers should be able to bring all costs disputes to the Ombudsman but the maximum amount that can be awarded should be $100.000.
- The Ombudsman should have the power to publish guidelines in relation to “fair and reasonable” costs, informed consent and other matters. The Ombudsman and cost assessors should have the power to discount costs or waive bills in their entirety where a practitioner has failed to disclose costs and or has failed to obtain informed consent.

2.5.1 Costs Disputes

Many costs disputes arise due to lawyers failing to clearly explain the costs or the risks being taken by the consumer and failing to obtain informed consent. The onus will be on the consumer to show that informed consent wasn’t obtained, because a costs agreement will be prima facie evidence that costs are fair and reasonable.

It is unclear whether consumers would, in practice, have the chance to have the circumstances surrounding the costs agreement considered – particularly given that costs assessments must be obtained if disputes over $10,000 can’t be mediated by the Ombudsman. Under the reforms costs assessments continue to play a significant - and we think far too important - part in resolution of cost disputes but it is difficult to see how the costs assessment process can take into account relevant factors beyond the written agreement and content of the legal file.

If consumers are to benefit from requirements that costs are 'fair and reasonable' and that lawyers obtain informed consent, the process for dealing with costs disputes must be significantly altered.

Costs assessments are problematic. They are expensive. They are not structured to take into account circumstances surrounding the costs. Further, there is a perception that assessors are paid primarily by the profession and have loyalties to the practitioner. If retained in their current form, costs assessments should be limited to those disputes where the only issue in dispute relates to the actual value of the work done. Other costs disputes require a different approach.

We propose that the Ombudsman deal with all consumer cost disputes but the maximum amount that can be awarded is $100,000. That is, we propose that the Ombudsman should have the power to deal with costs disputes above this amount but that awards are capped at the $100,000 limit. If the dispute exceeded that amount the consumer could have the right to waive the right to claim any amount above the $100,000. This is the approach taken by the Financial Ombudsman which can hear claims up to $500,000 but only make awards for $280,000. (However, consumers should be entitled to take costs disputes to other forums if they wish without any obligation to first go through the Ombudsman).

The Ombudsman is better placed to take into account factors surrounding the costs dispute, including the circumstances of the individual client and whether the client understood what he or she was agreeing to. It is also important that these disputes can be determined on the grounds of what is 'fair and reasonable in the circumstances' (which is the basis for Ombudsman determinations in consumer matters[6]).

As the bill stands compensation orders made by the Ombudsman for more than $10,000 may be appealed. As we have stated this low threshold in a costs dispute is a significant problem because we understand that many cost disputes are above this sum.

We propose that the Ombudsman is able to make a binding determination up to $100,000 in relation to all consumer disputes, including costs disputes.

We understand that the regulatory system will also deal with overcharging as a disciplinary matter. We don't preclude this option but our comments relate to individual disputes.

Recommendations

- The Ombudsman should be a real alternative to cost assessment for consumer cost disputes.
- All consumer cost disputes should be able to be dealt with by the Ombudsman.
- Binding awards should be limited to $100,000.
- Consumers who accept a decision of the Ombudsman could waive their right to claim any amount they may be entitled to above $100,000.

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[6] S.5.3.5(1)

2.5.2 Legal proceedings for legal costs

Lawyers are able to issue legal proceedings for an unpaid bill 30 days after issuing a bill. By any measure this is an extraordinarily short time for commencing recovery proceedings and is inconsistent with commercial practice generally.[7] This is compounded by the fact that lawyers are better prepared than other service providers/professionals to issue legal proceedings quickly. In addition we note that a number of community legal service lawyers say that consumers have difficulty in obtaining advice and assistance in relation to costs disputes.

It should not be possible for practitioners to commence recovery proceedings until 90 days after the bill has gone unpaid and consumers have been informed of their rights to have the legal Ombudsman consider the matter.

Recommendation

Practitioners should not be able to commence recovery proceedings for unpaid costs until 90 days after the bill has been provided in accordance with community norms.

2.6 Fidelity Funds

2.6.1 Adequacy of Fidelity Funds

Fidelity fund arrangements vary across jurisdictions. Monetary payout limits vary[8] from $50,000 in the ACT to $1,000,000 in NSW. Queensland, Northern Territory and ACT have a maximum of $200,000 per individual claim, and South Australia and Victoria do not have caps. The Western Australian Act allows for a cap but regulations do not appear to have set one.

Clearly consumers are better protected where there are no caps and where funds hold adequate reserves. The monetary limits of $200,000 in the above jurisdictions would not compensate many consumers where a house is lost due to dishonest default or other compensable solicitor failure. For most consumers such a loss would be devastating.

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[7] For example, S 88 *National Credit Code* requires a credit provider to first issue a default notice 30 days after the debtor is in default . S88(3) sets out default notice requirements which inform consumers of their rights to negotiate with the credit provider under s94 and make an application to the credit provider under s72 under hardship provisions. In practice the banks and other lenders send multiple notices requesting payment, and rarely commence proceedings until 90 days after the default.

[8] http://www.ag.gov.au/www/ministers/rwpattach.nsf/VAP/(689F2CCBD6DC263C912FB74B15BE8285)~National+Legal+Profession+Reform+-+Consultative+Group+paper+-+Fidelity+Cover.pdf/$file/National+Legal+Profession+Reform+-+Consultative+Group+paper+-+Fidelity+Cover.pdf . This Consultative Group Paper, 'Fidelity Cover', 11 December 2009, has a summary table of the arrangements for each State and Territory.

A national fund should remove the necessity for caps on claims. While funds remain in each state and territory, the national regulation should ensure that those funds are adequate to cover potential claims – or that processes are put in place for the funds to grow to an adequate level.

Recommendation

- The law should remove the necessity for caps on fidelity fund claims
- Funds should be adequate to cover potential claims

2.6.2 Claimant's Obligation to Pursue Other Avenues of Compensation

Current legislation (at least in some states) gives a broad discretion to the decision making body, to decide whether a claimant is required to pursue other avenues of redress before the claim is accepted.[9] Claimants can face significant problems if required to pursue other avenues of redress and these potentially limit the extent to which their losses are covered by the fidelity fund. Some, or all, of the fidelity funds do not compensate for legal costs incurred in pursuing other avenues of recovery. Therefore the claimant would be taking a risk – not only of losing the case but of winning the case but being unable to recover from the other party. This could mean that:

Some claimants could be deterred from pursuing their claim at all;

Claimants could be financially disadvantaged by the time taken to pursue payment;

Claimants could suffer financial loss even if their claim is paid by the fund.

It may be reasonable to expect some claimants, for example large businesses, to pursue legal action prior to a claim being accepted. However, in relation to individual claimants, the fidelity fund is likely to be in a better position to pursue the practitioner (or another party) for recovery, under its right of subrogation, than the claimant is.

While the decision making body needs to have the power to protect the fund where appropriate, the legislation should provide clear guidelines about when it is appropriate to require a claimant to take their own action before a claim is paid.

If the decision making body retains the discretion to require the claimant to pursue their claim against other parties, the fund should be able to pay any reasonable costs incurred in pursuing the claim against the practitioner or other party in the event of the claim being returned to the fidelity fund.

We also note that there is some inconsistency in the proposed law in relation to a claimant's obligation to mitigate his or her loss S.4.5.29(3)(a). On appeal to the Supreme Court, the appellant must establish that the amount claimed is not 'reasonably available' from other sources unless the

[9] We understand that in South Australia there is no discretion, as claimants are required to pursue all other options first.

nominated body waives that requirement. However, the claimant does not have such a strong obligation when making a claim – although the nominated authority must be satisfied that the claimant didn't unreasonably fail to mitigate the loss. S.4.5.23(4)(b)

Recommendation

Where a consumer has a legitimate claim the fidelity fund should take over that claim under its right of subrogation and not require the consumer to undertake exhaustive litigation before paying a claim.

2.6.3 Legal action by consumers to recover loss not compensable

Significantly, the Fidelity Fund does not appear to cover the costs of legal action taken by the claimant to recover his or her loss, apart from the costs of making the actual claim. This means that while a Fund could refuse to pay a claim unless an individual pursues other legal avenues, the claimant risks being further 'out of pocket' if the other legal practitioner or firm cannot or does not pay the judgment order, or if the claimant loses the case on a technicality or other basis.

Recommendation

If the law continues to allow the Fidelity Fund to require the claimant to take other legal action prior to making a claim, the Fidelity Fund should be able to pay the costs of that action if it is not successful.

2.6.4 Arms-length determination of claims

We support the approach that claims are determined by the Fidelity Fund at arm's-length from the profession as this avoids an actual or perceived conflict of interest. To increase national consistency and meet the independence test this role could be undertaken by the national Legal Ombudsman's office.

Decision making by the relevant body can require more than application of the law. For example, depending on the jurisdiction, decisions can involve exercising wide discretion in relation to whether a claimant is required to pursue other avenues to recover the money, whether to waive the time limit for lodging a claim, whether to waive a monetary cap, whether to impose a levy on practitioners and/or whether to make only partial payments.

Recommendation

Fidelity fund claims should be handled at arm's-length from the legal profession.

2.6.5 Broadening the range of potential claimants

The fidelity funds should extend coverage to those who are found to have suffered loss caused by legal practitioners regardless of whether that person is a client. Examples include beneficiaries under a will or another party in a legal matter. For example, a purchaser of property, who may not be a client of legal services, may pay a deposit into the vendor's solicitor's trust account. If the sale doesn't proceed, and the deposit is due to be returned, the potential purchaser should be protected if a defalcation occurs in the same way that a client of the solicitor is. We assume that it is Government's intention to protect such individuals and this should be clarified in the legislation.

Coverage should also be extended to consumers who have been defrauded by a practitioner who doesn't hold a current practising certificate, but where it was reasonable for the consumer to believe that the practitioner did. This is the case with other last resort compensation schemes such as the National Guarantee Fund (the Stock Exchange scheme), the Motor Car Traders Guarantee Fund in Victoria, and the Travel Compensation Scheme.

Recommendations

- Fidelity funds should cover legitimate claims whether or not the person was a client such as beneficiaries under a will or party to a property purchase that may not be the practitioner's client.
- Coverage should also extend to fraud by a practitioner in some cases where the practitioner did not hold a current practising certificate.

2.6.6 Revisit the investment exclusion

We understand that all jurisdictions currently exclude claims relating to trust monies held for investment purposes, and that this exclusion was introduced due to a high level of claims relating to investment funds. Claim payouts have reduced significantly since the introduction of this exclusion. This is, in part, due to additional restrictions placed on lawyers taking money for investment purposes, and other regulations such as licensing requirements for managed investment schemes.

Nevertheless there remains a smaller group of legal consumers who are still caught out without protection, for no logical reason, and the same rationale for protecting other legal consumers with fidelity fund compensation applies to this group. The trust that develops in a long-term solicitor-client relationship is typically the basis for the consumer following the lawyer's investment advice. Arguments that the investment transaction is outside the lawyer-client relationship misses this point, particularly when it is the solicitor that brings up the investment 'opportunity' and urges the client to invest.

We understand that the vast majority of people who lose money in this way 'invest' through a lawyer who is not a licensed financial services provider and has no intention of investing the money. This would seem to be a clear example of fraud.

While we agree there would be financial implications for the fidelity funds, we believe that it is time for the extent of this exemption to be reviewed.

Recommendation
Review the exclusion of all claims made in relation to trust monies held for investment purposes.

2.7 Practising Certificates, Pro-Bono and Community Legal Centres

The Draft Legislation takes a positive step towards expanding community legal centres (CLCs) and, potentially, general pro bono legal practice, by providing that all Australian lawyers engaged in legal practice must hold a practicing certificate (excluding those engaged only in legal policy work).[10] This requirement clarifies and brings into conformity the current disparate State and Territory regimes. It provides an appropriate platform for regulation of the profession, including of CLS and general pro bono legal practice.

The reform builds on this, by providing in the Draft National Law that an Australian practicing certificate authorises the holder to provide legal services as a volunteer at a CLC as of right.[11] Further, the Draft National Law establishes a stand-alone CLC volunteer practicing certificate.[12]

This will allow all holders of certificates to volunteer at a CLC, whether they are in private, corporate or government practice. Further, policy, career break, retired and other non-practicing lawyers will be able to apply for a CLC certificate, (presumably at free or low cost as per the COAG National Legal Profession Reform Taskforce Consultation Report April 2010).

Whilst the Reform does much in support of volunteerism, it fails to establish a regulatory framework that would allow corporate or government practitioners to engage in pro bono legal services, other than at a CLC. Similarly, employee lawyers in private practice are unable to practice pro bono on their own account, and career break lawyers are unable to obtain a pro bono practicing certificate.

Corporate and government practitioners, in particular, have significant capacity and interest to engage in pro bono. Their potential contribution could do much to address disadvantage and social exclusion resulting from a lack of access to legal services experienced by many marginalised Australians.

[10] See Draft National Law 1.2.1 (1).

[11] Subject to discretionary conditions that specifically prohibit, restrict or regulate volunteer CLS practice, see Draft Law 3.3.6(3)

[12] Draft Law 3.3.6(b)(iv)).

Recommendation

We recommend amendment to the Draft Legislation to allow all holders of an Australian practicing certificate to engage in defined pro bono legal practice (provided the practitioner has complying professional indemnity insurance cover and appropriate experience or supervision).

We also recommend amendment to the Draft Legislation so that the stand-alone CLC practicing certificates include an authority to engage in defined pro bono legal practice (provided the practitioner has complying indemnity insurance appropriate experience or supervision).

The Rule at 3.8.2(2) that 'a community legal service contravenes this section if it or its governing body does not have any supervising legal practitioners for a period exceeding 7 days' could be onerous. We would advocate allowing 14 days at the minimum. The Board might satisfy itself by requiring notification in the event there is no supervising solicitor.

3 Proposed legal practice rules

We raise a number of issues related to the Rules that have arisen from concerns raised by our clients or the experience of community legal services lawyers themselves.

3.1.1 Extension of the conflict of interest rules

The conflict of interest rules need to be extended to cover lawyers who obtain regular work referrals from a 3rd party. We regularly observe situations where a practitioner appears to be considering the interest of the person referring the client over the client's interests. This sometimes causes detriment to the client, although it may be subtle. Typical instances of this behaviour involve real estate agents, lenders or mortgage brokers.

Proving that a practitioner’s actions are influenced by such a conflict can be difficult, and not worth complaining about, unless our client suffers considerable detriment. This area needs to be addressed.

We also note that the Rules do not prohibit a practitioner from receiving a commission from referring a client to a third party as long as the solicitor provides disclosure and obtains informed consent[13]. There have been significant problems identified with conflicts arising from the receiving of commissions, even if those commissions are disclosed – particularly in relation to financial advice. It is not appropriate for solicitors to receive such payments and this should be prohibited by the Rules.

Case Study: Mr and Mrs C

Mr and Mrs C responded to the marketing of 'no deposit' house and land packages by a major home builder. They signed an agreement that included the provision of finance by a subsidiary of the

[13] Rule 12.4.3

builder, and the building firm provided the names of some lawyers that could assist with the conveyancing work.

Mr and Mrs C had serious concerns shortly after signing that they could not afford the mortgage payments, which were over half of their very moderate income. They raised these with one of the solicitors on the list. They were advised that they had already signed the contract and could not cancel, and that they should consider proceeding with the sale and putting the home on the market. This was likely to lead to significant financial loss, because the original price is usually inflated in 'no deposit' deals.

Mrs and Mrs C went to a local community agency for assistance. The financial counsellor at the agency acted on their behalf and convinced the builder and lender to cancel the contracts.

This case study illustrates concerns of some consumer advocates that some practitioners may be unwilling to act on their client's behalf if this could be to the detriment of a regular referral source.

3.1.2 Where lawyers are involved in mortgage lending

We note that the Bill prohibits lawyers who act for lenders from negotiating mortgages (with some exceptions)[14], however we do not believe that this prohibition is wide enough to prevent most of the problems seen by consumer credit services, and believe that the Rules should broaden the prohibition.

Some lawyers play a key role in the provision and negotiation of mortgages but do so, for example, through informal referral arrangements with lenders and brokers.

It is not uncommon for community legal centres to see lawyers playing a role in transactions involving predatory loans to consumers. These loans involve mortgage lending- usually short term – to consumers who are unlikely to be able to repay and where loss of the family home is reasonably foreseeable. Examples of these types of loans are outlined in an ASIC report [15] (although this report doesn't raise the issue of the role of lawyers).

The roles played by solicitors vary. The solicitor may act for the borrower in settling the loan. Problems of real or ostensible conflict arise where the lender refers the borrower to the solicitor. The arrangement may be a regular one between the lender and the solicitor. We believe that some solicitors in this position 'turn a blind eye' to something that is contrary to their client's best interest so they retain regular referrals.

In some cases solicitors act negligently, or fraudulently. Both Consumer Action and Consumer Credit Legal Centre are aware of practitioners who routinely arrange the signing of false business purposes declarations. The benefit to the lender and broker is that a business loan contract doesn't need to comply with consumer credit laws which provide redress for consumers with unfair loans. If the

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[14] S.4.6.3

[15] Protecting wealth in the family home: An examination of refinancing in response to mortgage stress, 2008

declaration was obtained by the lender or broker, the consumer can challenge the validity of the declaration if the lender or broker should have been aware that the loan was not for business purposes. However, the declaration is forwarded to the lender by the solicitor on behalf of the borrower - in what we believe is a clear attempt to avoid consumer protection laws.

In some cases the solicitor acts for the lender, and draws loan documents which are to the detriment of the consumer. The consumer may be confused about the solicitor's role. The borrowers we see rarely understand what the role of the solicitor is. Consumer Action recently saw a client who told us that a "solicitor arranged a loan" for him. In examining the documents it was clear that the solicitor had drafted the loan agreement for the lender (which contained an agreement that the loan was for business purposes – which it wasn't) and the borrower signed the agreement in the solicitor's presence. The loan was a high cost, short-term (6 month) loan to pay mortgage arrears which, unsurprisingly, the borrower was unable to repay at the end of the term

These consumers rarely lodge a complaint about the solicitor. Firstly, they are often engaged in a dispute with the lender and broker to save the family home – or to seek some compensation. Unless our clients believe that the solicitor would be required to pay compensation, they are not likely to want to spend the time making a complaint. Such a complaint made on behalf of a client by one community legal centre took considerable time and resources, but resulted in a finding of negligence rather than misconduct. Unfortunately the Legal Services Commissioners do not currently have the power to deal with potential systemic issues and the regulators don't have the power to audit a solicitor's practice to identify practitioners – or firms - that routinely assist brokers and lenders to avoid the law in this way.

Some of these problems may be addressed by recognition, in the Rules, of the conflict of interest that can arise from regular referrals to a practitioner. However, we believe that the problems arising in relation to mortgage lending indicate the need to develop some additional provisions that apply to the role of practitioners in this area.

3.1.3 Debt collection agencies in close relationships with law firms

The current Victorian Rules have a prohibition on a practitioner allowing the law firm's letterhead to be used by another party in a misleading way. Some debt collection firms and legal firms have very close relationships, to the extent that there sometimes appears to be little supervision of clerical staff (of the debt collection agency or legal firm) who are printing letters of demand on the legal firm's letterhead or making phone calls as "law clerks". While the Victorian Rules are imperfect, we are concerned that the new rules retain provisions to ensure that consumers aren't misled or confused about the related roles of the debt collector and law firm.

The issue of how best to regulate businesses where the legal firm and debt collection agency are related must still be thoroughly considered at some point.

3.1.4 The prohibition about contacting the client of another solicitor directly

While we understand that the primary purpose behind this prohibition in the Rules is to protect clients, this Rule can cause difficulties for some community/pro-bono lawyers and their clients. In some cases the Rule is used to benefit practitioners rather than their clients. The following comments about this Rule have been made based on input from a number of community/pro-bono/legal aid lawyers who work for a range of services that assist clients in relation to civil matters.

A large proportion of civil matters where legal proceedings are issued or threatened, involve a large company on one side (such as a bank, finance company or insurance company) and an individual consumer on the other. Liability is rarely contested in these cases and more often than not discussions are based on financial hardship and capacity to pay.

Typical cases where our services might be required to assist consumers include threats to bankrupt low-income consumers over small debts (often putting the family home at risk), refusal to consider reasonable payment arrangements (which in some cases is a legal requirement), and sometimes the threat of legal proceedings against the wrong person. The role of a debt collecting solicitor in these matters is often to obtain judgment or litigate if liability is disputed. Negotiations about hardship or payment arrangements are more likely to be handled internally by a hardship team or internal dispute resolution (IDR) despite the appointment of solicitors.

Developments in regulation over the past 10 years have led to many businesses establishing specific departments to handle IDR and/or financial hardship. For example under the General Insurance Code of Practice the debtor may request consideration of hardship and, if refused by the solicitor acting for the insurer, may have the matter referred to IDR at the insurer. However, direct contact with IDR, or a referral to IDR, might be regarded as direct contact with the client. While such a request could be made to the businesses' solicitor, our experience is that this rarely leads to the best outcome for our clients. At best, the solicitors know very little about their client's obligations or processes relating to IDR and hardship. Generally we do not believe that the majority of these solicitors seek full instructions in these cases – and if they do, they often communicate with debt recovery departments only, and not the IDR or hardship staff, which can have a major impact on the outcome for our client. Even if we suspect that the solicitors do not seek instructions from their client at all, we are not in a position to prove our suspicions.

We don't believe that the business clients we refer to are at any disadvantage – or vulnerability – in being contacted by a community lawyer. In many cases we believe that the businesses are pleased to be alerted to the consumer's situation. In some cases the contact prevents publicity that is detrimental to the business – for example about harsh enforcement against a vulnerable family or legal action against a family where a badly injured pedestrian is held liable for damage to a vehicle. In some cases discussion direct with the client business leads to that business addressing broad systemic problems in their processes that impact on a number of consumers.

In most of these cases, we can only achieve a satisfactory outcome for our disadvantaged clients by direct contact with the company. This can result in saving a client's home, or significant financial claims being waived.

Many large financial institutions have provided CLC specialist lawyers with direct contact points within IDR or corporate affairs at the company with a specific request for referral of difficult matters/hardship cases regardless of whether there is a lawyer involved. This arguably avoids any breach of the rule for these lawyers but does nothing to assist other, less experienced generalist lawyers in community legal centres.

We accept that community lawyers can refer these clients to community workers such as financial counsellors. However, this is extremely inefficient and can reduce time and resources available to assist other clients. A matter that could be dealt with quickly can take significant time, for example providing details and advice to the community worker who, in some cases, has referred the client to the lawyer in the first place.

While we do not propose that this Rule is simply removed, we believe that this is one example where the Rules are inappropriate for the type of services community/pro-bono services often need to provide for their clients. In these cases the Rule often perpetuates the significant power imbalance between a disadvantaged consumer and, what is usually, a large corporation. The Rule needs to be modified to ensure that community lawyers are not forced to choose between the interests of the most vulnerable clients and compliance with the Rules.

Recommendation

Revise the prohibition against contacting the client of another solicitor directly, with a view to expanding the circumstances in which the Rule doesn't apply.

3.1.5 Term limits

We note the legislation limits the Ombudsman and members of the Board to two terms of office but provides no restriction on the length of service of the CEO of the Board. Term limits of this nature can be used to ensure that individuals do not become 'entrenched' in positions but it would be appropriate to place a similar limitation on the CEO. We do note, however, that if maximum terms are too short they can deny an organisation access to the best available skills and can also work against the capacity of officeholders from driving long term change.

Recommendation

A maximum term should apply to the CEO of the Board as well as to the members of the Board and the Ombudsman. We suggest a maximum period of three terms of three years.

4 Our Proposed Structure

4.1 Our preferred structure with a single purpose Ombudsman role

We prefer a stand-alone consumer dispute resolution body that meets established Ombudsman benchmarks like the UK Legal Ombudsman which will open its doors on Oct 6 this year.

The Ombudsman should be able to make determinations up to an amount that covers the majority of consumer disputes including costs disputes, and deal with systemic issues within firms and the industry, to the extent that they impact on individual, or groups of, consumers. The monetary limit on disputes should be based on a figure that would include all but a few extreme examples, of disputes involving consumer and small business. Without the data to ascertain this figure, we propose $100,000.

The Ombudsman should be accountable to an independent Board, either skills-based or a balanced stakeholder Board overseen by an independent Chair. The Ombudsman must have total independence in relation to deciding disputes. The Board's role in relation to disputes would be confined to ensuring processes are in place to ensure disputes are dealt with appropriately.

If the proposed National Board was truly independent of the profession, it could be appropriate for the dispute resolution body to be accountable to this Board.

If dispute resolution was to be separated in this way it would be appropriate to call it the 'Legal Ombudsman' as it would be a true Ombudsman. This also has the advantage that its functions would be immediately recognisable to consumers and consistent with consumer expectations and would increase consumer accessibility.

The Ombudsman must be able to make decisions that are binding on practitioner and are non-appellable.

It should not be required to delegate matters to state bodies and should only be able to delegate to state bodies that are independent of the profession.

4.2 Our alternative structure within a dual role national body and a Legal Services Commissioner

If Government chooses to proceed with its proposed hybrid national body that undertakes both dispute resolution and regulatory roles, we would propose the following:

- Introduce greater integrity into the dispute resolution role by way of providing real remedies that enable a consumer's dispute to be resolved, for example compensation, re-do work or waive fees . We also propose removing remedies that are in effect sanctions for breaches of conduct standards e.g. cautions, counselling, CPD directions etc. Critically

external review rights for consumer disputes should be removed (review rights are appropriate for disciplinary matters), and practitioners must be bound by Ombudsman decisions consistent with established practices in Australia and internationally;

- Rename the body the 'Legal Services Commissioner', because an Ombudsman would not be expected to have a disciplinary or regulatory role (although we note that the term Ombudsman is more easily recognised by consumers which can help awareness and therefore accessibility);

- The body must be independent of the profession, particularly in relation to the dispute resolution function. The professional associations should not play a role – including as delegates or contractors – in resolving consumer matters or disputes between practitioners and consumers.

Any short term measures need to have an articulated plan to move to an independent dispute resolution body. In our structure the national body has sole legislative responsibility for consumer matters but is permitted to have state branches of its own office, but the state roles should be confined to the offices of the Legal Services Commissioners and not involve the professional associations. However, should it be considered necessary to delegate these responsibilities initially to the professional associations, this should be structured as an interim measure only with a view to moving speedily towards one body to deal with consumer disputes.

- Clear separation of the consumer disputes role from disciplinary and/or regulatory roles. This would involve separate teams dealing with consumer disputes and the other with disciplinary or regulatory matters. The types of determinations that can be made in relation to 'consumer matters' should only include those that resolve the dispute (such as compensation);

- In consumer matters, determinations should be able to be made up to $100,000 – and there should be no appeals for these;

- A Regulatory Board that is independent from the legal profession to undertake functions as proposed;

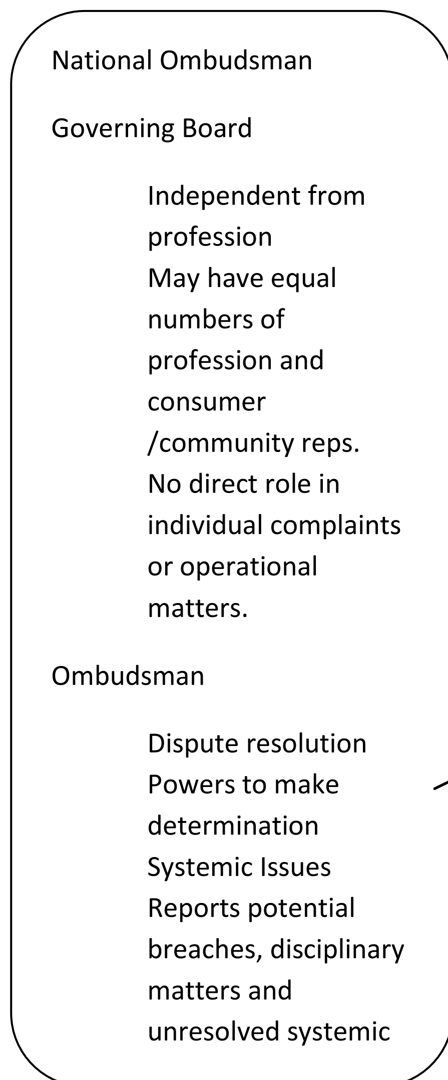
- The Legal Services Commissioner would be accountable to the Board, but only if the Board is clearly independent from the profession. If the Board is not independent from the profession, the Legal Services Commissioner should have no accountability to the Board – including no obligation to report to the Board. Instead the Commissioner should be accountable to SCAG or to a separate Board that is independent from the profession.

5 Appendix 1: Our Preferred Structure

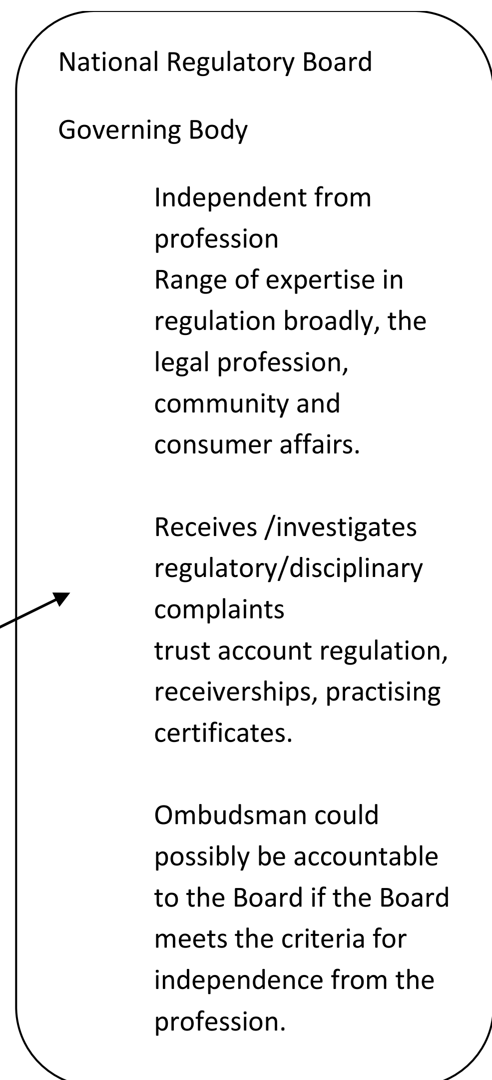
We propose a similar model to the regulation of financial services where dispute resolution and regulatory roles are undertaken separately.

DISPUTE RESOLUTION ROLE

REGULATORY & DISCIPLINARY ROLES



Ombudsman reports potential breaches, disciplinary matters and systemic issues to the Board.



6 Appendix 2: Our Alternative Structure

This structure is similar to that proposed in the Consultation Paper, but removes some levels of delegations and separates some roles internally.