

# **NATIONAL LEGAL PROFESSION REFORM PROJECT - CONSUMER CONSULTATION**

## **CONSUMER REPORT**

**Report to the National Legal Profession Reform  
Taskforce**

20 August 2010

## **Acknowledgments**

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**We would also like to thank the many consumers and consumer advocates who generously gave their time to participate in the consumer consultation process. We thank them for their time and insights and trust that their views are adequately represented in this report. The full list of those consulted is provided in Appendix 1.**

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## Executive Summary

Overall, consumers and consumer advocates welcomed the reforms proposed in the draft Legal Profession National Law (National Law), and commended the Commonwealth Attorney-General's response to the Council of Australian Government's introduction of a reform process aiming to enhance protection for consumers of legal services. Consumers were hopeful that the introduction of a National Legal Services Ombudsman would improve complaints handling processes for consumers and ensure that complaints by consumers across Australia were dealt with fairly and consistently. While consumers generally felt there should have been a broader consumer consultation process commenced much earlier in this reform project, they welcomed the opportunity to put forward their views on reform of the legal profession. Proposals that were viewed particularly positively by consumers were consumer representation on the National Legal Services Board (NLSB), the introduction of a National Legal Services Ombudsman and the proposal that claims against a fidelity fund must be determined at arm's length from the legal profession.

Consumers and advocates were strongly of the view that the correct balance of members on the National Legal Services Board was critical to achieving the proposed reforms. Consumers strongly believed that the Board should not be controlled by the legal profession and should be made up of half legal profession members and half lay or consumer members. This would ensure independence of the NLSB from the profession and was considered to be essential for enhancing consumer protection under the national law. While those consulted mostly favoured a lay Chair for the Board, independence from the profession and the characteristics of the person were considered to be more important than their background.

Apart from membership of the NLSB, the strongest consumer view expressed in the consultations was that the professional associations—Law Societies and Bar Associations—should not act in the role of local representative of the National Ombudsman, nor be involved in determining claims against the fidelity funds. The main reasons given were perceived poor performance in handling consumer complaints about legal services in the past, and real or perceived conflicts of interest in determining fidelity fund claims.

Consumers strongly believed that the National Law should provide for a truly National Legal Services Ombudsman consistent with approaches in other industries in Australia and in legal profession regulation in the United Kingdom, even if some delegation to local representatives in the States and Territories needed to occur in the short term for practical reasons. Those consulted were also keen to ensure that the National Ombudsman and local representatives had sufficient power to deal with the majority of consumer complaints and to make determinations that were not appellable, particularly by lawyers. Consumers also wanted the Ombudsman to have the capacity to obtain information on how the complaints handling system was working across the country so that this could be provided to the NLSB where systemic problems could be addressed.

While consumers welcomed the proposed principles of 'fair and reasonable' costs and informed consent, there were consistent concerns expressed about the ability of consumers to understand legal actions and costs and give informed consent. Overall, consumers were very concerned about the high cost of legal services and believed charging and billing practices needed to be improved.

Consumers and advocates wanted the National Law to be designed so that it prevented problems between lawyers and their clients, enabled the identification of problems at an early stage and provided for consumer-friendly processes to address problems when they occur. Consumers were of the view that the way in

which the National Law regulating the legal profession is implemented will determine whether consumer protection is enhanced. They believed that it was extremely important for consumers to be consulted during all subsequent periods of development and implementation of the National Law and National Rules to ensure that the goals of a more consumer focussed legal profession and enhanced consumer protection were achieved.

Using a number of data collection methods in this consumer consultation allowed triangulation of data sources. Across the data sources the views of consumers were corroborated with each other and the consistency of consumer views on the major proposals indicate that these are likely to be commonly held views among the general public.

# 1 Introduction and background

This chapter outlines the background to the National Legal Profession Reform Project and provides an overview of the Consumer Consultation process.

## 1.1 The National Legal Profession Reform Project

The Council of Australian Governments (COAG) has initiated reform of the regulation of the legal profession across Australia. Although improvements have been made in recent years, regulation of the legal profession remains overly complex and inconsistent, with each State and Territory applying different sets of rules.

At the request of COAG, the Commonwealth Attorney-General established a National Legal Profession Reform Taskforce, on 30 April 2009, to prepare draft uniform legislation to regulate the legal profession and to make recommendations outlining a proposed national regulatory framework. The National Legal Profession Reform Taskforce (Taskforce) has presented a draft Legal Profession National Law (National Law) and Legal Profession National Rules (National Rules) to COAG. The key themes underpinning the Taskforce's reform proposals are:

- the creation of a national regulatory framework
- the establishment of an Australian legal profession
- a reduction in the regulatory burden for Australian legal practitioners and law practices
- enhanced consumer protection
- maintenance of the independence of the legal profession.

With the approval of COAG, the Taskforce prepared a Consultation Package (including the Consultation Regulation Impact Statement, Consultation Report and the draft National Law and Rules), and sought public comment on the proposed reforms within a three month consultation period—from 14 May 2010 to 13 August 2010.

## 1.2 Consumer consultation

Through public consultation, the Taskforce sought to gain the views of the Australian public on the proposed reforms and ensure that consumer interests were represented in consultation submissions received by the Taskforce.

As part of the public consultation, ARTD Consultants was commissioned to conduct a consumer consultation process and produce a consumer report capturing the views of stakeholders on the draft National Law. The consultation designed by the Taskforce (in collaboration with consumer representatives, including representatives sitting on the National Legal Profession Reform Consultative Group) comprised panel discussions with consumers and consumer representatives, an online survey, telephone interviews and a follow up consumer panel meeting (see section 2 Consultation methods). The Taskforce's Consultation Report highlighted questions for consideration by consumers and consumer advocates but contributions on all aspects of the draft National Law and Rules were welcomed.

Additionally, the Taskforce welcomed submissions by the general public on areas of the proposed reforms through a dedicated website during the consultation period. This process was managed separately by the National Legal Profession Reform Working Group and is not covered by this consumer report.

## 2 Consultation methods

The consumer consultation used mixed methods, drawing on a range of data sources to gain the views of consumers, consumer representatives and advocates, and frontline legal complaints handling staff on the proposed reforms. Data collection methods consisted of panel discussions, consumer advocate discussion, telephone interviews, and an online survey (figure 2.1).

Figure 2.1: Timeline for the Consultation project

	<b>Week beginning</b>												
	24 May	31 May	7 Jun	14 Jun	21 Jun	26 Jun	5 Jul	12 Jul	19 Jul	26 Jul	2 Aug	9 Aug	16 Aug
Briefing and planning	█												
Panel discussion I: Consumers			█										
Panel discussion: Community Legal Centres			█										
Focus group: Complaints handlers			█										
Survey design		█	█	█	█	█							
Survey distribution (on-line and hard copies)							█	█	█	█	█	█	█
Telephone interviews							█	█	█				
Analysis and draft consumer report								█	█	█			
Panel discussion II: Consumers											█		
Tele-conference: Consumer advocates											█		
Final analysis and delivery of report											█	█	█

### 2.1 Design of the methods

The consumer consultation process was undertaken between 10th June and 13<sup>th</sup> August 2010. Consultation questions were designed based on the questions outlined in the Consultation Report, input from the Taskforce's Working Group and suggestions from key consumer advocates. The questions covered the following main areas, which were highlighted in the Consultation Report as likely to be of most interest to consumers.

1. The National Legal Services Board and Advisory Committees and enhanced consumer representation
2. Complaints, disputes and the role of the National Ombudsman
3. Legal costs and disclosure
4. Fidelity funds.

Feedback from the first discussion sessions with consumers, Community Legal Centre staff and Legal Services Commission staff was considered in designing the online survey and interview questions.

Throughout the consultation process, however, consumers were encouraged to express their views on other areas of the proposed reforms of interest to consumers.

## **2.2 Details of the methods**

### **2.2.1 Panel discussions and focus group**

Two consumer panel discussions were included as part of the consultation process. The purpose of the first panel discussion on the 10<sup>th</sup> June 2010 in Sydney was to obtain consumer opinions on the extent to which the Taskforce's reform proposals enhance consumer protection. Consumers and other contributors were asked to identify why the proposals enhanced consumer protection, and if they do not, describe why not and what is needed to enhance consumer protection. The second consumer panel session was held on the 2<sup>nd</sup> August 2010. The purpose of the second panel discussion was to consider the draft Consumer Report and to work through the issues that had been raised by consumers during consultation in order to ensure that a clear and comprehensive consumer perspective was presented to the Taskforce in the Consumer Report.

The first panel discussion held on the 10<sup>th</sup> June commenced with a presentation from Mr Laurie Glanfield AM, Director-General, NSW Department of Justice and Attorney-General, and was then divided into three sessions—two separate morning sessions comprised of consumers and consumer representatives, and a focus group discussion in the afternoon comprised of Legal Services Commission staff. The National Legal Profession Reform Working Group compiled the attendee list, with invitations and background information on the proposed National Legal Profession Reforms sent to attendees prior to the panel discussion. The attendee list was constructed in consultation with relevant external key stakeholders. In particular, attendees were drawn from submissions made to the Taskforce, and contact with Legal Services Commissioners, Working Group members and consumer representatives (CHOICE and the Consumer Action Law Centre).

Key areas of discussion in the consumer panel discussion were:

- interest in attending panel
- hopes for what reforms might achieve
- concerns about what reforms may not achieve
- complaints and dispute resolution
- membership of the National Legal Services Board, including consumer representation
- legal costs and disclosure
- fidelity funds
- trust accounts.

The first consumer discussion drew on consumers' experiences with lawyers, whilst the discussion with the Community Legal Centre representatives was centred on what impact the reforms would have on disadvantaged consumers. Views of Legal Services Commission staff were based on their views of where the draft National Law enhanced consumer protection and where it did not. The three discussions were each conducted over half a day.

The second consumer discussion was conducted over one full day, and in the afternoon two members of the Taskforce—Mr Laurie Glanfield, AM, Director-General, NSW Department of Justice and Attorney-General, and Mr Stephen Goggs, Deputy Chief Executive, ACT Department of Justice and Community Safety—attended the session to give a brief presentation and engage in discussion with the participating consumers.



Five consumers attended the first panel discussion, four Community Legal Centre staff and eight Legal Services Commission and other complaint handling staff representing NSW, VIC, SA, NT, and Qld, accepted invitations to attend the other discussions on 10<sup>th</sup> June 2010. Eight consumers attended the second panel discussion on 2<sup>nd</sup> August 2010. Each group was facilitated by a consultant from ARTD Consultants and included a note taker and a representative from the National Legal Profession Reform Working Group acting as a technical expert to provide input only if requested by the facilitator or the group. All group panel sessions were voice recorded with permission from attendees and summary notes were typed up following the sessions.

### **2.2.2 Online survey**

An online survey was designed in close consultation with the National Legal Profession Reform Working Group. Several drafts were developed in order to ensure the questions gave consumers plenty of opportunity to provide comment on the proposed reforms. The survey was tested with staff of the Commonwealth Attorney-General's Department and ARTD Consultants who were not involved in the consumer consultation process.

The survey was put up on the Commonwealth Attorney-General's Department website (<http://www.ag.gov.au/legalprofession>) and remained active until the 13<sup>th</sup> August 2010. A printable version of the survey was also provided to the National Legal Profession Reform Working Group for those participants who requested a hardcopy version and to Community Legal Centres. A reply paid envelope with ARTD's address was provided for this purpose.

The purpose of the online survey was to provide consumers with an opportunity to contribute their views on the Legal Profession National Law. A consumer was defined as an individual who has used the services of a lawyer.

The survey consisted of six sections which investigated the respondent's interest in the proposed national legal reforms, and their views on the National Legal Services Board and Advisory Committees and enhanced consumer representation; legal costs and disclosure; fidelity funds; complaints and disputes; and the role of the National Ombudsman; and other areas of the Legal Profession National Law.

The survey contained a mix of closed and open response questions, providing a mix of qualitative and quantitative data. The large number of open-ended response questions ensured that consumers were able to provide their views on aspects of the reforms. Closed questions generating quantitative data were included where possible, but since the survey was seeking views on the draft National Law, the opportunities for including closed questions was limited.

The results in this report cover all survey responses submitted up until the closing of the consultation period on 13<sup>th</sup> August 2010. The survey questions are presented in Appendix 2.

The survey was designed to provide more opportunities for consumers to contribute their views on the National Legal Profession Reform Project, but was not designed to capture the views of a representative sample of the population. Therefore, the results are not reported as percentages as this would have no meaning. Rather, consumers' answers to both the closed and open questions have been incorporated with other views collected as part of this consumer consultation process, and fed into this report.

### **Survey promotion**

A campaign was conducted by the Working Group to raise awareness of the survey, including national dissemination of a media release on the survey (8<sup>th</sup> July) to major metropolitan as well as rural, regional, ethnic and Indigenous media outlets (that is, over 1,200 media outlets). CHOICE and the Consumer Action Law Centre advertised the survey through their extensive networks of consumers and consumer advocates. Information packs (including a poster) were provided to all Community Legal Centres and Aboriginal Legal Services and to a considerable number of public libraries and legal aid offices (selected to ensure geographic and demographic coverage). The Legal Services Commissions in Queensland, New South Wales and Victoria and the State/ Territory consumer affairs and fair trading departments were engaged to assist in raising public awareness.

The survey was promoted on over forty websites, including:

The Australian Government's Access to Justice website  
Law Access NSW  
Legal Services Commission NSW  
Consumer Affairs Victoria (website and twitter)  
Legal Services Commission Victoria  
Legal Services Board Victoria  
Consumer Affairs and Fair Trading Tasmania  
Communitynet  
Caxton Community Legal Centre  
PS News (a news service for Australian Public Servants)  
Fair Trading NSW  
Social Security Rights Victoria  
CHOICE (website, facebook and twitter)  
Consumer Affairs Northern Territory  
Legal Aid Victoria  
Legal Services Commission Qld  
Peninsula Community Legal Centre  
North and North West NSW Community Legal Service

### **Response to the online survey**

One hundred and forty eight (148) surveys were submitted during the consultation period, and all but two of these were completed online. Of these, 77 were submitted by consumers (who did not have legal qualifications or work in a law practice). Of the remainder, 62 were currently working as a lawyer, or had previously worked as a lawyer, and 9 were working or had previously worked in a law practice. The responses of consumers have been incorporated into the body of this report. As the intention of the consumer consultation was to capture the views of consumers rather than lawyers (even though lawyers may be consumers of legal services or consumer advocates), the responses of lawyers and law practice employees have been reported in an appendix (see Appendix 2).

All but a few consumers had sought advice from a lawyer in the previous five years, with most having sought advice on one or two matters and a considerable proportion having sought advice on three or more matters.

### 2.2.3 Interviews

Those who attended the panel discussion were invited for an interview. The National Legal Profession Reform Working Group provided details of other consumers who had made submissions, and consumer advocates and lay members of regulatory bodies and committees (identified similarly to the process mentioned in section 2.2.1) who could provide a consumer perspective on the draft National Law. ARTD conducted telephone interviews with these individuals in mid July. The interviews were undertaken with ten (10) consumers, eight (8) consumer representatives (both lawyers and non-lawyers) and two (2) lay regulatory board members. Interviews lasted for an average of one hour and were voice recorded and transcribed shortly after. In most interviews with consumers, a member of the National Legal Profession Reform Working Group was present in the teleconference to provide technical input on particular aspects of the proposed reforms if requested by the interviewee.

The interviews explored the views of consumers and consumer advocates on the draft National Law, focusing on the areas which specifically aim to enhance consumer protection:

- National Legal Services Board and enhanced consumer representation
- legal costs and disclosure
- complaints and disputes and the role of the National Ombudsman
- fidelity funds and
- trust accounts.

Information pertaining to these areas was provided to the interviewees in advance, and participants were given the opportunity to discuss any other elements of the proposed reforms that they thought may positively or negatively affect consumers, as well as any other areas of legal profession regulation which were important to them and any other issues in which they were interested. The full interview guide is presented in Appendix 2.

## **3 Consumers' and advocates' response to the draft National Law**

### **3.1 Why did people contribute their views?**

Consumers who were identified through their submissions on the National Legal Profession Reform Project mostly reported an experience with the legal profession that was associated with financial loss and stress over a period of time, mostly for themselves and their family but also for others. The majority of consumers completing the survey were dissatisfied with the legal services they had received, but about a quarter were satisfied with services received. Many consumers were concerned with what they viewed as the excessive costs of legal services, and the inefficiency and poor practice they had experienced with the profession. Many consumers reported that there were good lawyers and bad lawyers and they had had experience with both, while some felt as a result of their experiences that lawyers could not be trusted at all.

Overall, consumers contributed to the consultation process because they hoped to be able to improve the provision of legal services to the general public. A number were also concerned about self-regulation of the profession and the problems this had caused for consumers.

Consumer advocates contributed mainly due to concerns that the draft National Law did not sufficiently enhance consumer protection, despite the intention that regulation of the legal profession should lead to increased protection for consumers. Community Legal Centre staff were mainly concerned about the impact of the draft National Law on disadvantaged consumers and how their particular issues might be addressed under a national law.

#### **3.1.1 Comments on the reform process**

Several consumers and consumer advocates expressed the view that the legal profession needed to be more consumer focussed and aware that their role, as for other professions, was to provide services for consumers. They also felt that it was a laudable goal to try to create a more consumer oriented legal profession through the reforms and commended the role of the Commonwealth Attorney-General in bringing about the reform process.

Consumers and advocates felt that the draft National Law was a step in the right direction, but that there were shortcomings in the draft National Law that would jeopardise the goal of enhancing consumer protection. There were concerns that an additional layer of bureaucracy had been added without improving the situation for consumers. Among both consumers and consumer advocates, there were concerns expressed that the legal profession in the different States and Territories was trying to protect its existing powers and that this would be at the expense of developing a national law that provided truly enhanced protection for consumers.

Many consumers were disappointed that they had not been consulted earlier in the consultation process as they felt this would have been appropriate and produced a more consumer focussed draft Legal Profession National Law.

## **3.2 The role of consumers in regulation of the legal profession**

### **3.2.1 The National Legal Services Board (NLSB)**

Consumers and advocates were strongly of the view that the correct balance of members on the National Legal Services Board was critical to achieving the proposed reforms, as everything flowed from that. Consumers believed that consumer representation on the NLSB would encourage a more consumer-focussed legal profession and enhance protection for consumers of legal services. Most consumers and advocates agreed with the proposal for mixed representation of members on the NLSB, more specifically they proposed half from the legal profession and half consumers or consumer representatives, with an independent chair. Consumers and advocates were strongly opposed to a National Legal Services Board controlled by the legal profession, believing that self-regulation was inappropriate and inconsistent with modern community standards of professional regulation as exemplified by other Australian regulatory bodies. Consumer advocates also noted that the United Kingdom Legal Services Board has a majority of lay members. To gain community trust and confidence, it was believed that the Board should be independent of the legal profession.

#### **Representation of lay persons on the NLSB**

All contributors felt that the NLSB should have representation from lay persons who preferably had experience as consumers of legal services. This would ensure that consumers' views were reflected in the regulation of the legal profession and enhance protection of consumers' rights. Contributors also felt that representation from independent persons would lead to a more balanced and impartial Board, and allow perspectives gained from outside the culture of legal services.

*'The premise is that legal services are there for consumers, therefore governance needs to reflect that.'* Consumer advocate

Contributors believed that consumer representation on the NLSB would benefit the profession and provided examples of how consumer representation in the regulation of the electrical, banking, building, financial industry and medical sector had made the profession more aware of consumers and the wider community's needs and perceptions.

While there was some variance in contributors' views, there was strong overall support by consumers and consumer advocates for the membership of the Board to comprise half consumers (or lay consumer representatives). Consumers felt that having only one consumer on the Board would be tokenistic and unacceptable as it would result in a Board that was not independent of the profession.

Suggestions for suitable lay members of the Board included experienced consumers, consumer advocates, other professionals such as doctors, accountants and psychologists, academics, mediators, business representatives and economists. Only a minority suggested that there should be a representative of the Government on the Board. Consumers believed that the consumer representatives on the Board should represent a broad cross-section of society and be eminent citizens. They needed to have experience and understanding of issues facing consumers of legal services, relevant life experience and good interpersonal skills. Consumers and advocates understood that lay members would need to be people capable of operating at the highest level and believed that there were any number of worthy candidates available.

### **Legal profession representation on the NLSB**

Consumers and advocates were of the view that the legal profession should be represented on the NLSB, but not in the majority. It was suggested that legal professionals would be able to bring knowledge of the law and the profession but would need to be independent thinkers and not closely tied to the professional organisations. Contributors agreed that legal profession representatives should be highly-respected and experienced professionals, have an interest or background in consumer protection, and bring skills required for the position above and beyond knowledge and experience of the law and legal profession. Contributors offered mixed views on who legal profession representatives should be, including judges, solicitors, barristers and those in charge of writing legislation. Some contributors felt that those currently working as a legal professional should not be represented on the Board as this would be a conflict of interest.

### **The Chair of the NLSB**

There was a strongly and widely held view that the Chair of the NLSB should be independent, with most preferring a lay chair—examples were provided of this working well in regulation of the legal profession in the UK and in the regulation of other industries in Australia. When provided with a small number of options in the online survey, the vast majority of consumers favoured a regulator or non-lawyer for Chair of the NLSB. A minority of consumers felt that someone with legal qualifications could be considered suitable as Chair if they were not currently practising and were independent of the profession.

Contributors believed that the most important requirement was that the chairperson should have the skills and personal characteristics required to effectively act in the position. The chairperson should be highly respected, professional, empathetic and experienced in managing groups and in ensuring all views are heard. They should also understand the interconnections between the legal profession, consumers and the community at large.

### **Process of appointments to the NLSB**

Contributors believed that appointments of members to the Board should be based on skills and experience, with particular suggestions that all members have an understanding of principles of governance, regulation and consumer issues.

The most common suggestion for appointing lay members of the Board was for a merit-based nomination and selection process overseen by the Government (possibly SCAG) but advised and supported by consumer organisations or organisations in contact with, and highly regarded by the Australian public. These organisations would help identify suitable candidates and, to increase transparency, an independent panel could select Board members from those nominated. Both consumers and advocates pointed to existing precedence and experience in appointing consumer representatives to national bodies and well-accepted principles currently used by Government.<sup>1</sup> It was believed that a consultative and transparent process for making appointments to the Board would identify highly suitable candidates. Consumers believed that since the Government appoints the judges, the Government could also oversee the appointment of members of the NLSB. Consumers believed that the 'separation of powers' was an argument being used by the legal profession to try to control the NLSB and was inappropriate.

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<sup>1</sup> Commonwealth Consumer Affairs Advisory Council. June 2005. Principles for the Appointment of Consumer Representatives: A Process for Government and Industry. <http://www.treasury.gov.au/contentitem.asp?pageId=&ContentID=994>.

Consumers had mixed views on whether it was appropriate for legal profession representatives on the Board to be nominated by the Council of Chief Justices, the Law Council of Australia, and the Australian Bar Association. Whilst most consumers thought this would be inappropriate, some felt that such groups may be best positioned to identify appropriate people for the Board.

Contributors felt that the chair should be appointed by the Attorneys-General, by the Board itself, or through expressions of interest.

### **Operation, roles and communication of the Board**

Many contributors highlighted the importance of ongoing communication between the NLSB and the National Ombudsman. The Ombudsman and possibly other agencies should deliver data on organisational trends, issues, challenges and risks that need to be addressed by legal regulation, such as trends in complaints, challenges in dispute handling and inconsistencies across States and Territories.

The role of the NLSB was also unclear to some contributors, in terms of the balance of their responsibilities in developing rules and laws, managing admissions, and in general regulation and enforcement. The balance of these activities was felt to be important—consumer input could be more beneficial when considering rules and regulations, and less useful for managing admissions or in law enforcement. It was agreed that all members of the Board, including consumer representatives, should be appropriately remunerated.

#### **3.2.2 Consumer Advisory Committee to the Board**

Most contributors liked the idea of a consumer advisory committee, and felt that this could be a useful tool for the Board in many instances. However, contributors were strongly of the view that the advisory committee should not replace consumer representation on the Board.

Many consumers saw the advisory committee as a group that should explore consumer issues at the community level. Most felt this group could consist of consumers and consumer advocates, with some consumers believing lawyers or retired judges could also be represented on this group to provide legal advice, as long as they were not the majority. There was consensus that the group should be well-resourced and properly funded, and empowered to explore issues brought to them by consumers. There should be formal processes for this information being presented to the Board, and for communication between the advisory committee and the NLSB. Consumers and advocates suggested that one member of the advisory committee, possibly the Chair, should be a member of the NLSB.

Consumers believed the consumer advisory committee should be fully accessible to members of the public, including disadvantaged and marginalised groups, and should engage in regular consultation with the general public, especially consumers of legal services. The consumer advisory committee should include representation across socio-economic groups, culturally and linguistically diverse backgrounds, States and Territories, ages and genders. Views should also be sought from those with mental health issues and who identify as Indigenous. All of these groups were felt to have different views to offer on legal services and should be consulted. There were a few suggestions about processes for appointment of members to the advisory committee—self-nomination, appointment by Government or by consumer organisations.

### 3.2.3 Summary

- Consumers believed that substantial consumer representation on the NLSB would help ensure a consumer focussed profession and consumer protection.
- Consumers were strongly of the view that the legal profession should not represent the majority of members on the Board.
- All contributors felt that the NLSB should have representation from those independent of the profession, including consumers or consumer representatives.
- Consumers favoured a National Legal Services Board comprised of half legal profession members and half lay members, with an independent Chair.
- Independence from the profession and the characteristics of the person were considered to be the most important factors in appointing a chairperson, but many preferred a lay Chair who did not have legal qualifications.
- A Chair appointed by the Government (possibly the Attorneys-General), or by the Board itself was preferred.
- It was generally felt that legal profession bodies could nominate legal profession Board representatives, but consumer groups or organisations in contact with, and highly regarded by the Australian public could help identify suitable lay candidates, or people could self-nominate.
- It was generally agreed that the Government should oversee the appointment of both legal profession and lay members. The selection process should be merit-based and transparent.
- Contributors liked the idea of a consumer advisory committee, but were strongly of the view that a consumer advisory committee was not an adequate substitute for substantial consumer representation on the NLSB. The consumer advisory committee should be in addition to consumer representation on the NLSB.
- The skills, experience and characteristics of Board and committee members was felt to be extremely important—ALL Board members should bring experience in governance and regulation, knowledge of consumer issues, and good interpersonal skills. They should represent a broad cross-section of society and be eminent citizens. It was felt that there would be any number of appropriate people available.



### **3.3 Complaints, dispute resolution and professional discipline and the role of the National Legal Services Ombudsman**

Across all consumers and advocates there was very strong support for a National Legal Services Ombudsman. The approach was believed to be in line with other national ombudsman schemes designed to provide regulation and protection for consumers. But consumers strongly believed that the National Ombudsman needed to be independent of the legal profession.

#### **3.3.1 Role of the National Legal Services Ombudsman**

Consumers and advocates were strongly of the view that the National Ombudsman should be completely independent of the legal profession. It was seen as important that complaints against lawyers were handled outside of the profession due to conflict of interest. In particular, consumers strongly believed that the professional associations such as Law Societies and Bar Associations should not be involved in handling consumer complaints. A number of advocates, as well as some consumers, referred to other national ombudsman schemes that were independent and working well for consumers, such as the Financial Services Ombudsman and the Telecommunications Industry Ombudsman, as well as the independent Legal Ombudsman which is currently being set up in the UK.

Consumers and advocates expressed strong views that the National Law should create a truly National Ombudsman that could resolve consumer disputes. Advocates supported this view with evidence of an independent National Legal Ombudsman in the UK and national ombudsman schemes in other service industries in Australia. Most contributors were concerned that the proposed performance of the Ombudsman functions by local representatives in the States and Territories meant there would be no real change for consumers. While many recognised the difficulties of working within the current State-based systems, they were convinced a National Ombudsman was required as soon as possible. It was proposed that the principle 'must delegate' in the reforms be changed to 'may delegate' to allow for a truly National Ombudsman role and because the National Ombudsman should be able to take back the delegation if necessary in the future.

In order to enhance the role of the National Ombudsman it was suggested that the National Ombudsman should directly handle some complaints and disputes, perhaps from States without Legal Services Commissions or small States where the complainant might be known, and that consumers should have the right to ask for their complaint to be heard by the National Ombudsman if they were dissatisfied with how their complaint was handled by their local representative of the Ombudsman. For practical purposes it was suggested that there could be local branches of the National Ombudsman.

Consumers and advocates expressed the view that the National Ombudsman should have the powers to ensure that complaints handling is consistent across the country, including powers to:

- hear complaints and resolve them
- clear up inconsistencies in complaints handling between States
- receive information from the local representatives to monitor complaints handling at the local level
- take back the delegation from a State if the complaints handling process is not working for consumers
- investigate law firms and lawyers where major complaints have been made

- report to the Board on systemic issues identified through complaints so that these can be addressed.

It was suggested by consumers and advocates that lawyers should be required to inform consumers that they had a right to complain if not satisfied and should provide information about the Ombudsman and complaints handling processes, perhaps making it compulsory for lawyers to provide their clients with a brochure explaining the process.

### **Should the Ombudsman be called an Ombudsman?**

There was broad agreement that the proposed National Ombudsman be called an Ombudsman as consumers understood the term and would understand that it involved handling complaints and disputes. Consumer advocates were very concerned that the proposed role of the National Ombudsman included both consumer matters and disciplinary matters as this was inconsistent with agreed principles for an ombudsman role. They strongly suggested that the governance and management arrangements and funding streams for consumer matters and disciplinary matters should be separate, although some suggested this could occur within the one organisation.

### **3.3.2 Delegation to local representatives**

Consumers and advocates were very concerned about the proposal to have many of the powers of the National Ombudsman exercised by local representatives—mainly because, if the local representatives were the bodies currently handling consumer complaints, there would be no improvements in complaints handling for consumers, and complaints handling would not be at arm's length from the legal profession.

Contributors were in agreement that the local representative of the National Ombudsman should not be a Law Society or Bar Association. It was considered very important that local representatives of the National Ombudsman were independent of the legal profession.

There were mixed views on whether the role of the National Ombudsman should be performed by the Legal Services Commission that exists in some States. Some believed it should act in the role, and others were opposed to the suggestion, reporting that consumers' interests were not currently being protected in complaints handling by that entity, mainly because of its close links with the professional bodies. Some consumers believed that Legal Services Commissions could act as the local representative but they would need to be redesigned and restaffed in order to change the current culture that was inhibiting good outcomes for consumers. Some consumers and advocates put forward the view that under the National Law, the local representatives of the Ombudsman should not be able to delegate further to the professional associations as they should not be involved and it created a third layer of delegation.

Some consumers expressed the view that there should be consumer and consumer advocate representation on the entity fulfilling the role of local representative of the National Ombudsman. The vast majority of consumers preferred a new independent agency or commission to act in the role of local representative, but some suggested Consumer Affairs or Fair Trading Department offices.

### **3.3.3 Powers of the Ombudsman to hear and deal with complaints**

Contributors believed that the Ombudsman should have broad and effective powers. The vast majority of consumers completely agreed with the proposed orders that can be made by the Ombudsman under the draft National Law. However, an area of concern for consumer advocates in particular, was that the

Ombudsman had both complaints-handling and disciplinary roles. It was proposed that this could reduce transparency about the role of the Ombudsman for both consumers and lawyers. Consumers suggested a couple of additional orders that could be made, including that there should be allowance for a full refund to the consumer of fees paid, and that the lawyer pays another firm to complete the work where the consumers could not be expected to continue with the current lawyer.

Consumers agreed that the Ombudsman should finalise consumer disputes before any disciplinary process was commenced and it was suggested that the law should include that a lawyer cannot take legal action against a consumer (for example to recover unpaid fees) while the complaint is with the Ombudsman. Consumers supported the power of the Ombudsman to award compensation to consumers, and there were mixed views about whether the \$25,000 limit was the correct one. Some suggested that there be no limit, while many suggested it should be \$100,000 and others suggested a range of amounts from \$10,000 to many millions. Some consumers and advocates believed that the Ombudsman should compensate consumers for pain and suffering.

### **Monetary thresholds for the Ombudsman**

Consumers wanted the Ombudsman to have the power to resolve disputes and bring about remedies for consumers, and there was strong agreement across all those consulted that the Ombudsman should have the power to hear the majority of consumer complaints. Therefore, consumers and advocates believed that the limit for cost disputes that could be heard by the National Ombudsman and local representatives should be set to ensure that the vast majority of consumer complaints about legal practitioners were covered, but contributors did not have sufficient information to know what this value was. Some consumers were strongly of the view that it should be much higher than the proposed limit of \$100,000, and several suggested it should be the same limit as set for the National Financial Ombudsman of \$250,000. There were a number of suggestions for the amount of the limit, ranging from \$50,000 to \$1 billion or unlimited, but most contributors suggested between \$100,000 and \$500,000.

Most of those consulted believed that the \$10,000 limit for making determinations was much too low and suggestions for what the limit should be ranged from \$10,000 to unlimited, with the majority being between \$50,000 and \$100,000. There were arguments for and against a higher limit, but advocates pointed out that the Ombudsman's power to make reasonable determinations was critical and had resulted in good settlements in other schemes.

### **Other powers**

Several people commented that they would like to see complaints under the proposed law handled much more expeditiously than happens at present. The majority agreed that the Ombudsman should have the power to undertake audits of law practices, and it was suggested that the Ombudsman should have the power to investigate lawyers and law practices that were regularly the subject of consumer complaints. It was generally agreed that it was very important for the National Ombudsman to have access to information on how the complaints handling process was working, and take this information to the National Legal Services Board so that identified systemic problems could be addressed.

#### **3.3.4 Access for consumers to the complaints handling process**

A national telephone number was seen as useful by most people—a good access point for many consumers and consistent with a national approach. But some thought it was not important since everyone was then directed back to their local complaints handling body.

Some consumers were concerned about inadequate access to the Ombudsman for people living in rural or remote areas or for those who were disadvantaged in some way. There was strong representation from advocates for additional funding to enable disadvantaged consumers to access the complaints handling process, including provision of advocates and translators. They also suggested Continuing Legal Education for lawyers about working with disadvantaged clients. Several contributors suggested a website or online complaints submission. Some consumers and advocates were concerned that the 60 day limit for bringing cost disputes to the Ombudsman was too short, particularly as consumers and lawyers were being encouraged to negotiate first, which could frequently take longer than 60 days. Consumer advocates suggested that a consumer advocacy body that could support consumers in preparing a complaint to the National Ombudsman was needed.

### **3.3.5 Summary**

- Consumers were very supportive of the proposal for a National Legal Services Ombudsman but wanted it to be a truly National Ombudsman, even if delegation to local bodies occurred in the short term. Contributors believed that the Ombudsman should have broad and effective powers.
- Consumers were strongly of the view that the National Ombudsman and local representatives, if required, should be completely independent of the legal profession and noted there were precedents for this in the UK and for other national ombudsman roles.
- Those consulted were also keen to ensure that the National Ombudsman and local representatives had sufficient power to deal with the majority of consumer complaints and to make determinations that were not appellable, particularly by lawyers.
- The majority of consumers and advocates believed that the \$100,000 limit for disputes that the National Ombudsman could hear was too low, as was the \$10,000 limit for which binding determinations could be made and the \$25,000 limit for compensation orders.
- There was strong representation from advocates for additional support to ensure adequate access to the complaints handling process for disadvantaged clients and those in rural or remote locations.
- Consumers wanted the National Ombudsman to have the capacity to obtain information on how the complaints handling system was working so that this could be provided to the NLSB where systemic problems could be addressed.

## **3.4 Legal costs and disclosure**

### **3.4.1 Legal costs**

Consumers and consumer advocates who contributed their views on legal costs agreed in principle with the proposed reforms that law practices must charge no more than 'fair and reasonable' costs. Consumers felt the proposal was a good thing, but expressed serious concerns about whether legal costs that they considered to be unfair and unreasonable would be influenced by the reforms.

#### **Agreed in principle but concerned with the implementation**

There was strong agreement from consumers that the law should state that legal costs must be 'fair and reasonable', but most consumers had concerns about how 'fair and reasonable' costs would be defined and what this would actually mean for consumers in practice.

Consumers were concerned that consumers and lawyers have vastly different views of what constituted 'fair and reasonable' costs, and that in practice there would be great difficulty in interpreting the terms 'fair and reasonable' as they are subjective. Some consumers wanted definitions or guidelines of 'fair and reasonable' in order to enhance consumer protection. Consumer advocates, however, felt it would be better for consumers if the principle of 'fair and reasonable' was included in the law without detailed definitions or guidelines, as these could be used by lawyers as a risk management tool, limiting an Ombudsman's ability to make judgements about what was fair and reasonable.

#### **Factors to be considered in determining 'fair and reasonable' costs**

Consumers generally agreed with the proposed factors for determining 'fair and reasonable', but believed that other factors should also be considered. Issues that consumers felt were most important in determining 'fair and reasonable' costs were whether the costs incurred were 'necessary', whether the charges were appropriate based on whether a lawyer or administrative staff completed the tasks, and whether the benefits were worth the costs. In particular, matters where the costs were far greater than the sum that was attempting to be recovered should be considered unfair and unreasonable. The test of 'necessary' should apply for example to the use of 'teams' of lawyers, use of barristers, and the numbers of email, letters, etcetera sent.

Many consumers believed that how efficiently the services were provided should be used to determine 'fair and reasonable', and that there were currently few incentives for lawyers to conduct matters efficiently.

Consumers and consumer advocates agreed that national benchmarks or standards for costs of certain standard legal services could be developed and made available to the public and would provide increased guidance and ultimately protection for consumers. It was noted that standard costs, for example for conveyancing services, are available in some States.

Many consumers did not mind paying more if they felt they received a better service and achieved a better outcome. Therefore, value for money should be considered when deciding whether legal costs were fair and reasonable.

Many consumers believed that non-legal services should be charged for, based on true and actual costs, and community standards of 'reasonable' could be applied to many costs for non-legal work, such as for photocopying, emails and letters.

#### **Consumers had serious concerns about charging and billing practices**

Consumers raised many concerns about legal costs, the most common being the practice of charging by time which was felt to be frequently abused leading to delayed or dragged out legal matters and associated increased legal costs. Several consumers favoured outcomes based on charging or fixed-rate quotes, where a certain fee was charged for achieving a particular outcome, as this would enable the consumer to shop around. While acknowledging the difficulty that outcome based charging would have in larger or more complex cases where unforeseen circumstances could arise, it was suggested that this would be particularly useful in smaller cases such as uncomplicated divorce settlements.

The charging practices that were of most concern to consumers were—set minutes for billing units, so that a thirty second phone call was charged as five minutes, and administration tasks being charged at lawyer’s rates or at unacceptably high rates. It was generally agreed that current charging structures and practices need to be changed in order to prevent unnecessary, unfair and unreasonable legal costs.

Consumers and advocates were particularly concerned that requests for an itemised bill could result in a much higher bill and requested that the reforms prevent this. Consumers requested improved requirements for timing of billing, including more regular bills (perhaps monthly), bills prepared before the outcome of a matter was known to prevent overcharging where the other party incurs costs, and ensuring that the time limit on providing bills to clients falls within the time limits in the national law in which a complaint must be made. Complaints handling staff were concerned that there is no reference in the proposed reforms to what needs to be in an itemised account, and both consumers and advocates strongly proposed that a cost for each action taken should be provided as standard practice. Consumers made reference to the requirements for other professions to provide consumers with a detailed breakdown of costing, and felt the same processes should be applied to the legal profession.

### **3.4.2 Summary**

- Consumers and consumer representatives agreed that in principle the proposed reforms on costs being ‘fair and reasonable’ could enhance consumer protection, however were apprehensive over how effective it would be in practice.
- Consumers suggested there be greater definition of what ‘fair and reasonable’ costs were, with clear guidelines as to what this would look like in practice, but advocates believed definitions would lead to poorer outcomes for consumers due to risk management by lawyers.
- In addition to currently proposed factors for determining ‘fair and reasonable’ legal costs, consumers wanted to include whether there was value for money, whether the benefits were worth the costs, whether the costs incurred were ‘necessary’ and whether community standards for costs of administrative tasks were met.
- Consumers and advocates suggested that national benchmarks or standard costs for certain legal services could be developed and advertised.
- Consumers were particularly concerned about current billing practices, and believed these did not contribute to ‘fair and reasonable’ costs. In particular, they believed that charging by time and set minutes billing units led to unfair and unreasonable legal costs. Regular itemised bills should be provided to clients as standard practice.

- Many consumers favoured outcome based billing where costs are agreed upfront between the lawyer and the consumer, and that consumers are charged on the basis of reaching a certain outcome.

### **3.4.3 Disclosure**

Consumers and consumer advocates who contributed their views on disclosure all agreed on the importance of legal practices ensuring that consumers have understood and consented to the proposed costs and course of action, having been given all relevant information. It was commonly reported that good communication between a lawyer and their client is important and that disclosure of information on actions and costs is part of this communication.

#### **Concerns over informed consent**

Many consumers and advocates were concerned about consumers' ability to fully understand the detailed, legal information provided and make an informed decision. Many respondents felt consumers are disempowered as they are often stressed and come to the lawyer seeking help, placing their trust in the lawyer due to lack of knowledge about the law or what legal action should be taken and what constitutes reasonable costs. Consumers and consumer advocates argued that it is because of this disempowered position that consumers will always be agreeing to something they don't fully comprehend.

All consumers and consumer advocates reported concerns over the difficulty in current disclosure requirements for the consumer to understand complicated legal terminology, particularly if they are from a non-English speaking background. Some consumers highlighted the importance that the information disclosed be provided in plain English to limit misunderstanding, and suggested that consumers be referred to an independent person/ body that assists the consumer to better understand the costs involved. For those from non-English speaking backgrounds, Community Legal Centre representatives recommended the provision of skilled interpreters at a discounted rate or a grant to firms for providing interpreters to clients to avoid the transfer of this cost to consumers. They also suggested that the reforms have specific examples of ways legal practitioners can better ensure informed consent from disadvantaged consumers. Consumer advocates warned of the dangers of large cost agreements as they are not helpful to consumers.

#### **Implementation of disclosure and informed consent**

It was generally agreed that there need to be explicit guidelines in the proposed reforms as to how lawyers must disclose legal costs, and proposed legal actions to increase transparency of legal costs and ensure consumers have a greater understanding of the costs involved and why they are being asked to pay a certain amount. Most consumers and consumer advocates were strongly of the view that lawyers should conduct initial face-to-face meetings with the client (where geographically possible), and provide unambiguous detail of the proposed actions and the costs associated with them. Consumers stated this should include a quote detailing the hourly rate, the estimated cost to undertake each action, including communicating with the client and charges for administrative tasks, an estimate of the total cost of the legal service as well as an indication of the chance of success and the costs involved if the case was unsuccessful. It was felt that this information should also be provided in written form so that the consumer has all the information to make an informed decision as to whether to pursue the matter legally, and has provided informed consent.

Many consumers and consumer advocates were of the opinion that if there were national standard fees, or fixed-rate quotes it would enable consumers to take an itemised bill or costed quote, determine whether they felt the estimated fees were 'fair and reasonable' and provide informed consent.

Most consumer concerns were about blow-outs of the original proposed costs and their lack of power to do anything about this. Generally, consumers and consumer advocates felt there needed to be a willingness from the profession to be upfront about the cost of legal services from the outset, and for greater transparency in changes to costs and actions through the course of engagement. Most consumers and consumer advocates agreed there should be greater definition in the reforms as to how ensuring informed consent would work in practice.

All consumers voiced their concern for the need for greater communication between lawyers and the consumer, with many supporting itemised billing and providing upfront detailed quotes to help consumers understand the costs of legal actions. Some raised concerns that the reforms assume the lawyers are giving advice that is in the best interest of the consumer and not the law firm. Some consumers stated that the reforms should make it mandatory for lawyers to provide consumers with the best advice for their interests and that disclosure needed to be accompanied by ethical guidelines that lawyers would have to abide by.

#### **3.4.4 Summary**

- Consumers agreed that informed consent and disclosure should be included in the National Law.
- Consumers felt that the proposed reforms do not clearly describe how disclosure and informed consent should be achieved in practice, and this is important as consumers are frequently in a disempowered position when dealing with lawyers.
- Consumers agreed that guidelines and examples be provided to lawyers about how to ensure consumers understand the proposed legal actions and costs involved both at the beginning and during the case to ensure ongoing informed consent.
- Disadvantaged consumers require additional support to provide informed consent, including the use of skilled interpreters.



### 3.5 Fidelity funds and trust accounts

Several consumers who contributed their views on fidelity funds had direct experience of the loss of large amounts of their money from lawyers' trust accounts and subsequent difficulty in, or inability to, regain that money from the State fidelity fund, which in theory was meant to recompense consumers for that type of loss. There was very strong support from consumers and advocates for the proposed reforms that determinations of fidelity fund claims should be made at arm's length from the legal profession. Consumers and advocates were strongly of the view that a National Fidelity Fund or Assurance Fund should be set up.

While staff of State-based complaints handling bodies believed that fidelity fund claims were a very small proportion of complaints, consumers who had been affected recounted the enormous financial, emotional and personal cost of having their money misappropriated and then having to fight for many years to try and get it back. They strongly believed that the National Law should ensure that other consumers of legal services should not have the same experience in the future.

#### 3.5.1 Fidelity funds

##### Consumers views of arm's length

It was unanimously agreed by consumers and advocates that if the professional associations were to determine fidelity fund claims, this would not constitute arm's length determination. Consumers and advocates strongly expressed the view that professional associations (Law Societies and Bar Associations) should not determine fidelity fund claims due to a real or perceived conflict of interest. The predominant view was that there is a real conflict of interest if professional associations determine fidelity fund claims, since the professional association is acting for its members and therefore cannot protect the interests of consumers when they are in conflict with the interests of its members. Consumers believed that arm's length operation of fidelity funds would increase the trust and confidence of consumers in the process.

*'Having the law society do it would not be seen as 'arm's length''*  
(Consumer advocate - interviewee)

*'The whole fidelity fund should be 'arm's length''*  
(Consumer - interviewee)

##### Suggested mechanisms for fidelity fund management and determinations

Consumers and advocates clearly expressed the view that the legal profession should not have the majority of members, and not be in a controlling position on an authority that determines fidelity fund claims. The most commonly suggested composition of an authority or board was a minority of members being lawyers, with a majority of lay members/ consumers and a lay chair. It was generally believed by consumers and advocates that the legal profession should have some members on the body determining fidelity fund claims because they had expertise in the relevant laws, although some consumers did not want any members with legal qualifications, including retired judges or non-practicing lawyers. Consumers felt that it was very important that the legal profession not be in a position that enabled them to change the rules governing fidelity funds in order to dismiss legitimate claims.

Some consumers and advocates suggested that the National Ombudsman or their local representatives could manage fidelity fund claims provided that these representatives were not the Law Society or Bar Association. Alternatively, some

contributors suggested that the National Legal Services Board could either oversee fidelity fund claims, or the body making determinations could be responsible to the Board, as long as the Board was independent. The nominated authority would need to have investigative powers in order to make a decision.

There was broad support for a national fidelity fund or assurance fund as it was believed this would be the most effective way for consumers to be protected. It was proposed that this fund would cover claims by individuals, family and small businesses, charities and non-profit organisations. This national fund would have national rules, be under the responsibility of a National Ombudsman independent of the profession, and would make determinations on fidelity fund claims. Some consumers proposed that the principle should be adopted in the national law that clients who have lost their money should not suffer further harm or loss in pursuing their lost funds, including having to take legal action to recover their money.

Consumers and advocates were strongly of the view that a fidelity fund scheme should have sufficient money to meet claims against it. The fund should be predominantly industry funded and receive actuarial advice to ensure that sufficient funds were always available, even to cover rare events, so that there would be no need for caps on claims. Examples were provided of national industry fidelity funds that have achieved this. Consumers believed that any funds accepted by a lawyer for any purpose should be covered, and any actions taken by a lawyer should also be covered by the fidelity fund. Fidelity funds should not be a fund of last resort, as is the current situation in one State. Consumers felt that pressures on a fidelity fund might have the effect of increasing attention within the profession on lawyers not acting properly.

Some consumers proposed that money for the fidelity fund should not be generated by interest on clients' money held in trust accounts, or through adding a percentage to clients' bills. Others proposed that fidelity funds should not be used for any purpose other than protecting consumers', and in particular should not be used to fund legal aid or continuing education of lawyers, or fight consumer actions against Law Societies.

### **3.5.2 Trust accounts**

A few consumers had experienced substantial irrecoverable loss as a result of the mishandling of lawyers' trust accounts. Consumers had mixed experience with trust accounts, although many believed that they could be better managed and controlled.

#### **Managing trust accounts**

Most consumers felt that trust accounts should be managed by an independent body, or be lodged in an interest-bearing deposit in a bank and not managed by lawyers. It was felt that the independent management of trust accounts would support consumers' perceptions that the trust account was 'above board', as well as preventing lawyers from mishandling trust accounts. Other views expressed by consumers were that managing a complex trust account may be too difficult for smaller law firms, that 'mixed' trust accounts consisting of funds from more than one client were unacceptable, and that it was inappropriate that lawyers should earn interest on monies held for the client. Some consumers felt it was reasonable to expect monthly statements of their monies held in trust accounts and expect lawyers to ask clients' permission before touching trust accounts.

#### **Investigating fraudulent behaviour**

Consumers agreed that the auditing of trust accounts should be undertaken by an independent body. A number of suggestions were put forward as to who should take on this responsibility, including an approved class of external auditors,

independent accountants or a division under the National Ombudsman. Consumers felt that such independence was necessary to ensure objective audits are undertaken, which are not influenced by any relationships or associations between the auditor and the audited party. Several consumers suggested that the body managing fidelity fund claims should also investigate fraudulent behaviour, and this would be particularly appropriate where a national fidelity fund was under the National Ombudsman as detection and prevention of thefts could be managed by an audit division.

Many consumers believed that current auditing processes were ineffective, and many described situations where the fraudulent management of trust accounts had not been detected, sometimes for many years. It was suggested that in some States these inefficiencies were due to the current focus of auditors on regulation and education, as opposed to theft detection and prevention. Consumers felt that audit procedures being prescribed by local law societies were inappropriate as they did not have the skills, experience or motivation to develop an effective process for the detection of theft. Accountants, external auditors or the National Ombudsman may be better placed to develop and oversee the audit process.

The reforms emphasise targeted and annual trust account auditing. Although this was not discussed with all contributors, some felt that random and targeted audits should co-exist, with random audits being an important tool for the detection of irregularities or suspected irregularities and the prevention of bad practice. The new reforms should ensure that random audits are not inhibited—for example, part 7.3 of the draft National Law (pertaining to the entry and search of premises) states that auditors may enter the premises with the consent of the occupier, which was felt to be against the notion of random auditing.

#### **Dealing with fraudulent behaviour**

Many consumers agreed that penalties for defrauding trust accounts should be on par with the penalties associated with any type of fraud, and acted upon criminally. This would both ensure equal justice for lawyers and the general public, and act as a strong deterrent for lawyers in engaging in fraudulent behaviours. The timeframe within which justice is carried out for lawyers should also be equivalent to that for anyone who has committed fraud.

Consumers and consumer advocates also wanted better protection of consumers following a trust account defalcation. All clients of a legal firm where trust account theft has been detected should be personally notified. Consumers emphasised that fidelity funds should compensate consumers who have been victims of trust account theft, and where a lawyer had been criminally convicted of theft, consumers should have their money returned by the fidelity fund without question. Some consumers were concerned that a lawyer could easily commit a theft, declare bankruptcy, and then practise under a new name.

#### **Communicating trust account processes to consumers**

One consumer representative felt that there was a need to provide consumers with more information about trust accounts. They felt that trust accounts were a complex concept which was not always understood by consumers, which could lead to ill-informed decisions. It was felt that this could be discussed during a face-to-face meeting with the lawyer when starting the work.

### **3.5.3 Summary**

- It was unanimously agreed by consumers and advocates that if the professional associations were to make determinations on fidelity fund claims, this would not constitute arm's length determination, due to real or perceived conflicts of interest.

- Most consumers believed that lawyers should be a minority and lay people or consumers should form the majority of members of an entity determining claims against fidelity funds or controlling fidelity funds.
- There was a strong view that a national fidelity fund or national assurance fund should be set up to protect consumers of legal services. This national fund would have national rules, be under the responsibility of an independent National Ombudsman and would make determinations on fidelity fund claims.
- The majority of contributors felt that trust accounts should be audited independently of the legal profession, possibly by an audit division of a national fidelity fund under the responsibility of an independent National Ombudsman.
- Auditing processes could be improved through an increased focus on theft prevention and detection, increased and more in-depth audits, and maintaining the use of both random and targeted audits. Penalties for defrauding trust accounts should be severe enough to prevent thefts.

### 3.6 Other issues raised about the proposed Legal Profession National Law

Several other issues were raised by consumers in relation to other parts of the draft National Law, or issues that needed to be addressed by the Taskforce in enhancing protection for consumers, including that:

- The National Law should provide for jurisdictions to deal with people unlawfully providing legal services.
- Lawyers need to be educated about how to be more consumer focussed and reduce the likelihood of consumer complaints.
- Ethical rules for the profession need to be revisited.
- The draft National Law needs to be seen as the first step in a process of change that will occur over the next ten years and the law should provide for this.
- An autonomous Board should issue practising certificates, as in other areas such as practising certificates for trades people—it should not be Law Societies.
- There is currently no provision for public interest dismissals in the reforms, except for following the preliminary assessment of a complaint.
- Changes to the National Law should only be permitted through the Board and overseen by the Standing Committee of Attorneys General (SCAG).
- It would be difficult for lawyers to itemise a file spanning several years in 21 days as stipulated in the reforms.
- Lawyers who have had orders made against them by the National Ombudsman should be identified on a national register available to consumers.
- Consumers need to be assured that their legal work is being carried out by properly qualified, accredited, insured lawyers, not clerks, secretaries or paralegals.
- The Federal ‘genuine steps’ approach to mediate disputes before going to court should be adopted, including making relevant disclosure so that both sides can understand the issues.
- Going back five years (section 5.2.8) may be difficult for those solving disputes.
- It should not necessarily be required that the Ombudsman prepare a written record of the settlement agreement as this could lengthen the dispute process.
- Education, minimum up-to-date training standards and continuous improvement will improve the quality of legal services.

## 4 Conclusions

Consumers were predominantly supportive of the proposals in the draft Legal Profession National Law, welcoming the reforms and hoping that they would result in enhanced protection for consumers of legal services. Proposals which were viewed particularly positively by consumers were consumer representation on the National Legal Services Board, and the proposal that determination of fidelity fund claims be made at arm's length from the legal profession.

While there were a range of views expressed during the consultations, there were many consistent themes that emerged in contributors' views. Consumers were strongly of the view that the composition of the National Legal Services Board was critical to the successful introduction of the reforms and should not be controlled by the legal profession as this would constitute self-regulation of the profession, which was inappropriate. Consumers were very excited by the proposal for consumer representation on the National Legal Services Board and believed that the Board should be made up of half legal profession members and half lay or consumer members. While those consulted mostly favoured a lay Chair for the Board, independence from the profession and the characteristics of the person were considered to be more important than their background.

The second strongest consumer and advocate view expressed in the consultations was that the professional associations—Law Societies and Bar Associations—should not act in the role of local representative of the National Ombudsman, nor be involved in determining claims against the fidelity funds. These views were based on the perception that an association looking after members' interests could not objectively review complaints by consumers about those members due to a conflict of interest, and also the experiences of consumers of complaints handling and fidelity fund determinations by these bodies that severely disadvantaged consumers.

Consumers and advocates believed that the National Law should provide for a truly National Legal Services Ombudsman, if not in the short term, at least in the longer term and that the legislation designed now should allow for this. Consumers and advocates were generally opposed to the performance of the Ombudsman's functions by local representatives as this would not change the situation for consumers, particularly where the local representatives were existing complaints handling bodies. Contributors believed that the National Ombudsman and/or local representatives should have sufficient power to deal with the majority of consumer complaints and to make determinations that were not appealable, particularly by lawyers. The limits on complaints that could be dealt with, and the limits on determinations should reflect this—consumers generally felt that the monetary limits proposed were too low. Consumers also wanted the Ombudsman to have the capacity to obtain information on how the system was working and the ability to provide this information to the NLSB so that systemic problems could be addressed.

Consumers and advocates were strongly of the view that a national fidelity fund or assurance fund should be set up—this fund would have national rules that ensured sufficient funds were available to meet all valid claims. Overall, consumers were very concerned about the high cost of legal services and believed charging and billing practices needed to be improved.

Consumers provided considerable information about what was required to enhance consumer protection under the draft National Law. Reform of the legal profession is a complex issue for consumers to understand and consumers who have contributed to this consultation have invested time in understanding the proposals so that they can provide informed views—revisions of all parts of the draft National Law should continue to consider the perspective of consumers. Consumers felt it was extremely

important for consumer consultation to be undertaken during all subsequent periods of development and implementation of the National Law and National Rules to ensure that the goals of a more consumer focussed legal profession and enhanced consumer protection were achieved.

Using a number of data collection methods in this consumer consultation allowed triangulation of data sources. Across the data collection methods the views of consumers were corroborated with each other and the consistency of consumer views on the major proposals indicate that these are likely to be commonly held views among the general public.

# Appendix 1: Contributors to the consumer consultation

## Panel discussions: consumers

John Crane, VIC (1&2)  
Peter Mair, NSW (1&2)  
Phil Herd, NSW (1&2)  
Stuart Driver, NSW (1&2)  
Claude Cassegrain, NSW (1&2)  
John Duncan, VIC (2)  
Wendy Sifton, VIC (2)  
Gerald Vaughan, VIC (2)

## Panel discussion: Community Legal Centres

Elizabeth Morley, Redfern Legal Centre, NSW  
Graham Wells, Springvale Monash Legal Service, VIC  
Dianne Anagnos, Kingsford Legal Centre, NSW  
Chris Charles, Aboriginal Legal Rights Movement, SA

## Focus Group: Complaints handling staff

Jim Milne, Legal Services Commission, NSW  
Elizabeth Manos, Legal Practitioners Conduct Board, SA  
Alison Smart, Law Society NT, Regulatory Services & Professional Standards, NT  
Scott McLean, Legal Services Commission, QLD  
Craig Smiley, QLD Law Society, Complaints Investigation Section, QLD  
Russell Daily, Legal Services Commission, VIC  
Frank Ederle, Legal Profession Board, TAS  
Elizabeth Barnes, NSW Law Society, NSW

## Interviewees

### Consumers

John Crane, VIC  
Gerald Vaughan, VIC  
Stuart Driver, NSW  
Peter Mair, NSW  
Nick Tringas, NSW  
John Duncan, VIC  
Roland Chatterton, SA  
Wendy Sifton, VIC  
Arnold Sierink, TAS  
Brian Saunders, SA

### Consumer advocates

Carolyn Bond, Consumer Action Law Centre, VIC  
Karen Cox, Consumer Credit Legal Centre, NSW  
Denis Nelthorpe, West Heidelberg Community Legal Centre, VIC  
Kate Judd, Women's Centre for Health Matters, ACT  
Peter Dane, Legal Profession Board, TAS  
Jenni Mack, CHOICE, NSW  
Fiona Guthrie, Australian Financial Counselling and Credit Reform Association  
Nicole Rich, Consumer Action Law Centre, VIC  
Ann Storr, Professional Conduct Committee, NSW Law Society, NSW  
Nick Stace, CEO, CHOICE, NSW



## Appendix 2: Responses of lawyers to the online survey

Sixty-two (62) people currently working or having previously worked as a lawyer completed the online consumer survey. An additional nine (9) people who were not lawyers but were working or had worked in a law practice also completed the survey. For simplicity they are all referred to as 'lawyers' in the remainder of this section.

Lawyer respondents were fairly equally divided between those who wanted to contribute because they had concerns about current status of the legal profession, were assisting consumers (for example through Community Legal Centres) or were students, and those who were concerned they would be affected by the proposed reforms or were incensed by them. Their responses to most of the questions also reflected this dichotomy.

While the distribution of responses were a little different, the lawyer respondents tended have similar responses to consumers on a few issues:

- Agreeing that the 'Law should state that legal costs should be fair and reasonable'
- Equal proportions saying 'yes' to the proposal that an existing state legal services commission should act in the role of local representative of the National Ombudsman
- Agreeing that the Ombudsman should be required to finalise consumer disputes before any disciplinary process is commenced.
- Agreeing with most of the proposed orders that can be made by the Ombudsman except that the lawyer or law practice redo the work at no or reduced cost.

The vast majority of lawyers who completed the survey claimed to be satisfied with the legal services they had received. The responses from lawyers were diametrically split in that slightly more than half supported the reforms enhancing consumer representation and consumer protection while slightly less than half were against any change in the regulation of the legal profession under the National Law.

The following is a summary of other survey responses from lawyers:

- The majority of lawyers wanted the majority of members of the NLSB to be lawyers. Similarly well over half thought the chair of the NLSB should be a lawyer or judge. Nearly half were not in favour of a consumer Advisory Committee and some felt that consumers had no legitimate role on the NLSB. Many raised concerns about government involvement in appointing members to the Board and favoured appointments by the legal profession. Some, however, preferred that the NLSB be an independent body and include consumer representatives.
- Lawyers were equally likely to agree or disagree that determinations on fidelity fund claims be made at arm's length from the legal profession. Many reported that the fidelity fund system was working well, should be controlled by lawyers and did not need to be changed. Some believed that the legal profession should not be involved in determining fidelity fund claims. Few favoured an authority making determinations on fidelity fund claims comprised of a minority of lawyer members.

- About half were in favour of Law Society and Bar Associations acting in the role of local representative of the National Ombudsman and about half were against this. There was a lot of support for the National Ombudsman being a national body and some for an independent Ombudsman. Some were concerned about new bodies being set up and preferred the existing arrangements.
- Several lawyers felt the disciplinary process should be separate from the complaints handling process and felt that the Ombudsman, if they did both, was not really an Ombudsman. Lawyers were concerned that the Ombudsman have sufficient power to make determinations but were more likely than consumers to suggest lower limits for hearing of disputes, determinations and compensation awards.
- While many agreed that the law should state that legal costs be 'fair and reasonable', many felt that this would be difficult to determine and that clients frequently expected services for less than reasonable costs. Some noted that the current system encourages drawing out matters so that costs increase. Some felt that it was not a new requirement at all.
- Comments on factors to be considered in determining whether legal cost were fair and reasonable were many and varied. A few agreed with the proposals, some mentioned value and usefulness, complexity of the matter and the sophistication of the consumer as factors. Many mentioned that the costs were disclosed at the outset.
- Around half were in agreement with the proposal re 'informed consent' but the remainder thought it was no change, was too difficult to achieve, was something that was done already or was unnecessary.

# Appendix 3: Data collection instruments

## Interview guide

### Information to be sent to interviewees prior to the interview

- A general introduction to the interview, which outlines the consultation process overall
- A summary of the proposed reforms
- A link to the draft reforms: <http://www.ag.gov.au/legalprofession>.
- Attach the consultation report.
- A copy of the interview questions.

### Interview introduction

Thank you for agreeing to take part in this one-to-one interview with us today.

We hope that you received the information we sent you regarding this interview, including the summary of the reforms proposed by the Taskforce. Is there anything in this information that was unclear to you?

As we have already discussed, we are undertaking interviews with consumers to gain their opinions on the proposed reforms under the National Legal Profession Reform Project, which intends to improve the uniformity, simplicity and effectiveness of legal regulation across the country. We are particularly interested on the effect you believe these reforms will have on consumer protection.

During the interview, we intend to focus on the four areas of reforms which specifically aim to enhance consumer protection. These are outlined in the information that has been provided to you and are:

- National Legal Services Board and enhanced consumer representation
- Legal costs and disclosure
- Complaints and disputes and the role of the National Ombudsman
- Fidelity funds.

You will also have an opportunity to discuss any other elements of the proposed reforms that you think may positively or negatively affect consumer protection as well as any other areas of legal profession regulation which are important to you.

Everything that you tell me during the interview will be confidential, and will not be presented in a way that could be directly linked to you e.g. through named quotations used in feedback or in our final consumer report. However, the National Legal Profession Reform Taskforce is aware that we are interviewing consumers as part of this consultation, and we would like to name you as a contributor in the consumer report. Do you agree to being named as a contributor in the final consumer report?

The interview will take one hour, and will be guided by you in terms of which of the reforms you would like to discuss. I will be taking written notes during the interview, and recording the interview. Do you have any questions before we start? Are you happy to continue?

## **Section one: About you (5 minutes)**

We would like to start the interview by exploring your interest in the National Legal Reform Project and its proposed reforms.

1.1 Why are you interested in the National Legal Reform Project?

1.2. Based on the information provided to you, are there any proposed reforms in which you have a particular interest?

1.3. Considering that we have one hour to undertake this interview, are there any reforms you would prefer not to comment on today?

## **Section two: National Legal Services Board and enhanced consumer representation**

2.1 What are your views on the composition of the National Legal Services Board? Who do you think the seven members of the Board should be? Who should chair the Board?

*Prompts: How many lawyers should be on the Board? How many consumers or consumer advocates should be on the Board? Should a judge or lawyer chair the Board or should it be a lay person? What sort of non-lawyers would you like to see on the Board? What skills do you think they should have?*

2.2 What are your views on the proposed process for appointments to the Board? How do you think the members should be appointed to the Board?

*Prompts: Appointed on the recommendation of the Standing Committee of Attorneys-General, appointed by Council of Chief Justices, appointed by professional associations?*

2.3 Do you think there should be a specialist consumer Advisory Committee to advise the Board? How else might consumers be represented on the proposed Advisory Committee or Committees?

*Prompts: Through consumer representatives, through individual consumer representation, through professional (non legal representation)?*

2.4 Do you have any other comments on the role of consumers and consumer advocates in the national regulatory framework?

*Prompts: What support would consumers need to contribute effectively to the NLSB or its advisory committees?*

## **Section three: Legal costs and disclosure**

3.1 The Legal Profession National Law requires that law practices must charge no more than fair and reasonable costs. What are your views on this proposal? What impact will it have for consumers?

3.2 What are your views on the factors that may be considered in determining whether legal costs are 'fair and reasonable'?

*Prompts: Are there any factors that should be added? Are there any factors that should be removed? How will this impact on consumers?*

3.3 Do you have any other comments to make on the proposed reforms to legal costs?

3.4 Under the proposed reforms, law practices must be satisfied that their clients have understood and consented to the proposed action and costs after being given all relevant information. How do you think this will impact on consumers?

*Prompts: Do you think this will be better for consumers than the existing law? Why or why not? Do you see any particular difficulties or benefits with this in practice?*

3.5 What information should lawyers provide to their clients to ensure they understand the proposed actions and costs and can provide informed consent?

*Prompt: Would gaining informed consent require a face-to-face discussion with their lawyer/ legal representative, written information from their lawyer, a State/Territory-based estimate of a 'fair and reasonable' cost for a legal service, something else?*

3.6 Are there any other comments you would like to make about the proposed reforms to costs disclosure?

## **Section four: Complaints, disputes and the role of the National Ombudsman**

Under the draft National Law complaints made by consumers to the National Legal Services Ombudsman will be handled by its local representative in each State and Territory. The National Ombudsman will be responsible for promoting consistent application of the law in all States and Territories.

4.1 Which body or organisation do you think should act in the role of the local representative of the National Ombudsman in each State and Territory? Do you think this should be a Legal Services Commission or Legal Practice Board? Do you think the local representative should be a Law Society or Bar Association or a different type of organisation?

*Prompts: What type of organisation – a non-legal independent agency, other government agency, something else?*

4.2 Do you think that the Ombudsman will deliver more consistent outcomes to consumer complaints no matter where consumers live in Australia?

*Prompts: why/ why not? How could the legislation support greater consistency in outcomes across the country? What practical and operation measure would need to be taken? Would internal review be necessary to ensure fairness in the complaints-handling process?*

4.3 Do you think 'Ombudsman' is the correct term for this body?

*Prompts: why/ why not? What name would be an appropriate alternative, and why?*

4.4 A single point of contact (a national telephone number, for example) for consumers with a complaint against a lawyer, may automatically divert them to the Ombudsman's local representative in their area. What impact do you think this number could have on the accessibility of support for consumers?

*Prompts: what actions should be taken to ensure this point of contact is effective?*

4.5 The Taskforce is proposing to give the local representative of the Ombudsman the power to make determinations in relation to consumer disputes (ie, those not raising disciplinary concerns) where the parties have failed to reach agreement. Do you support this proposal, and why?

*Prompts: Are the proposed remedies of the Ombudsman appropriate? Should consumers or lawyers be able to appeal the decisions of the Ombudsman? Why? Why not?*

4.6 Are the proposed powers of the Ombudsman appropriate to address the needs of aggrieved consumers? For example, should the Ombudsman have the power to deal with costs disputes over \$100,000?

*Prompts: Should parties with a costs dispute of less than \$100,000 be required to seek the assistance of the Ombudsman, or should direct access to costs assessment be permitted?*

4.7 What should be the maximum monetary value of a costs dispute for which the Ombudsman can make a binding determination?

*Prompts: \$10,000 or more? Up to \$10,000? The Ombudsman has discretion to make a binding determination for matters under \$10,000. Should it be mandatory for the Ombudsman to make such a determination? Should costs determinations by the Ombudsman be appealable to a costs assessor?*

4.8 What should be the maximum monetary value of compensation that the Ombudsman can award to consumers in relation to other consumer disputes (ie not cost disputes)?

*Prompts: Should it be up to \$25,000 as proposed or a different amount? What amount do you suggest?*

4.9 Should the local representative of the Ombudsman have the power to conduct an audit of a law practice's compliance with the National Law, National Rules and the applicable professional obligations, where it considers it necessary to do so?

4.10 Are there any other comments you would like to make about the proposed reforms to the handling of complaints and disputes?

## **Section five: Fidelity funds**

Under the proposed law, in addition to nominating a fund that will serve as a 'fidelity fund' in its jurisdiction, each jurisdiction will nominate an authority to administer the fidelity fund. The proposed law requires that decisions on fidelity fund claims be made at 'arm's length' from the profession.

5.1 How do you think this could be achieved in practice? What impact do you think this reform will have for consumers?

*Prompts: Will it improve the transparency of decisions against fidelity funds? Will it improve the impartiality of decisions against fidelity funds?*

5.2 What would a body at arm's length from the legal profession look like to you?

*Prompts: A majority of members being lawyers; half lawyers; a minority of lawyers; no members being lawyers, something else?*

5.3 Are there any other comments you would like to make about the proposed reforms to the handling of fidelity funds?

## **Section six: Trust accounts**

In relation to trust money and trust accounts, the National Law aims to protect the interests of those for whom or on whose behalf trust money is held.

6.1 Do you have any comments on whether the new law provides protection for consumers in the handling of trust accounts by law practices?

*Prompts: How do you think clients should be notified when a law practice has been found to have mishandled trust money? Does the law adequately provide for dealing with lawyers who mishandle trust money? Does the law adequately provide for auditing lawyers trust accounts?*

## **Section seven: Any other issues**

7.1 Are there any other areas of the reforms you would like to comment on?

## **Section eight: summary of views**

8.1 Overall, do you believe that the draft National Law will provide more protection for consumers than exists at present?

8.2 In summary, what are the three most important things you would like to see changed in the proposed law to better protect consumers?

8.3 Are there any other points you would like to raise before we close the interview?

### **Close-down**

Thanks again for taking the time to talk with us today. Your views will be used to develop a consumer consultation report to the National Legal Reform Project Taskforce.

# National Legal Profession Reform Project

## Consumer Consultation - Consumer survey

### **Background to the consultation**

On 5 February 2009, the Council of Australian Governments (COAG) agreed that, despite recent valuable reform, further work needed to be done to create simpler, more efficient and effective regulation for the legal profession across Australia. Although improvements have been made in recent years, regulation of the legal profession remains overly complex and inconsistent, with each State and Territory applying different sets of rules.

The new Legal Profession National Law (National Law) aims to improve the uniformity, simplicity and effectiveness of legal regulation. The legislation is also designed to ensure that regulation processes are transparent to consumers and that consumer protection is enhanced. The legislation was drafted by the National Legal Profession Reform Taskforce, who are keen to gain consumer's views on the proposed legislation. A copy of the legislation can be found [here](#). The Taskforce Consultation Report can be accessed [here](#).

### **The purpose of this survey**

The purpose of this survey is to provide consumers with an opportunity to contribute their views on the proposed National Law. For the purposes of this survey a consumer is an individual who has used the services of a lawyer.

### **The survey**

This survey is being managed by independent consultants. Along with consumer feedback from other consultation processes currently underway, the information gathered in this survey will be fed into a consumer consultation report to be considered by the Taskforce. Survey responses will be kept confidential.

#### *Saving your work*

At the bottom of each page, there will be an option to save your work. By clicking on this option, you can leave the survey, and return to it at any time. If you choose this option, you will be given a username and password to return to the survey. It is important that you keep this information safe for when you need it.

### **Anonymity**

Your answers are completely confidential. You do not need to provide your name or any other personal information when completing this survey.

### **Survey closing date**

This survey will close on **13 August 2010**. You will not be able to access or complete the survey after this date.



**NEXT PAGE**  
**CHOOSE YOUR AREA/S OF INTEREST**

Please tick the survey sections you would like to respond to. You will be automatically directed to these sections when completing the survey. You may tick as many or as few as you wish, but we would encourage you to respond to as many sections as possible.

1. Your interest (all respondents need to complete this section)
2. The National Legal Services Board and Advisory Committees and enhanced consumer representation
3. Legal costs and disclosure
4. Fidelity funds
5. Complaints, disputes and role of the National Ombudsman
6. Other areas of the Legal Profession National Law

1. **Your interest** - this section asks why you are interested in completing the survey.
2. **The National Legal Services Board and Advisory Committees and enhanced consumer representation** – this section asks your views on these proposed bodies, especially about the role of consumers on the National Legal Services Board and advisory committees.
3. **Legal costs and disclosure** - this section seeks your views on reforms designed to reduce cost disputes between lawyers and consumers and on proposed reforms aimed to improve the cost information provided to consumers by lawyers.
4. **Fidelity funds** - this section seeks your views on reforms aimed to improve fidelity fund claim processes.
5. **Complaints, disputes and role of the National Ombudsman** - this section seeks your views on the role of the proposed National Legal Services Ombudsman.
6. **Other areas** - this section provides opportunity to comment on any other sections of the proposed National Law.

**Information boxes**

Throughout the survey, you will see grey information boxes which contain a short introduction. More information on the proposed reforms can be found in the drop down boxes in each section. It is recommended that you read this information, as it will help you respond to the survey questions.

**INSTRUCTIONS**

Please answer each question by ticking the box that best represents your view. There are also free text boxes for you to write a more detailed response.

**Note:** The free text boxes are limited to 500 words. If you wish to provide more detailed information please make a submission at [www.ag.gov.au/legalprofession](http://www.ag.gov.au/legalprofession)

## Your interest

1. Please tell us why you are interested in contributing to this survey.

*(maximum limit 500 words)*

2. Are you of Aboriginal or Torres Strait Islander origin?

Yes  No

3. Do you speak a language other than English at home?

Yes  No

If yes, which language? \_\_\_\_\_

4. Have you ever worked as a lawyer?

- Yes, I am currently working as a lawyer
- Yes, I have worked as a lawyer in the past
- No, I have never worked as a lawyer

5. Have you ever worked in a law practice?

- Yes, I am currently working in a law practice
- Yes, I have worked in a law practice in the past
- No, I have never worked in a law practice

6. On how many separate matters have you sought advice from a lawyer in the last five years? *(tick one box)*

0  1-2  3-5  6-9  10+

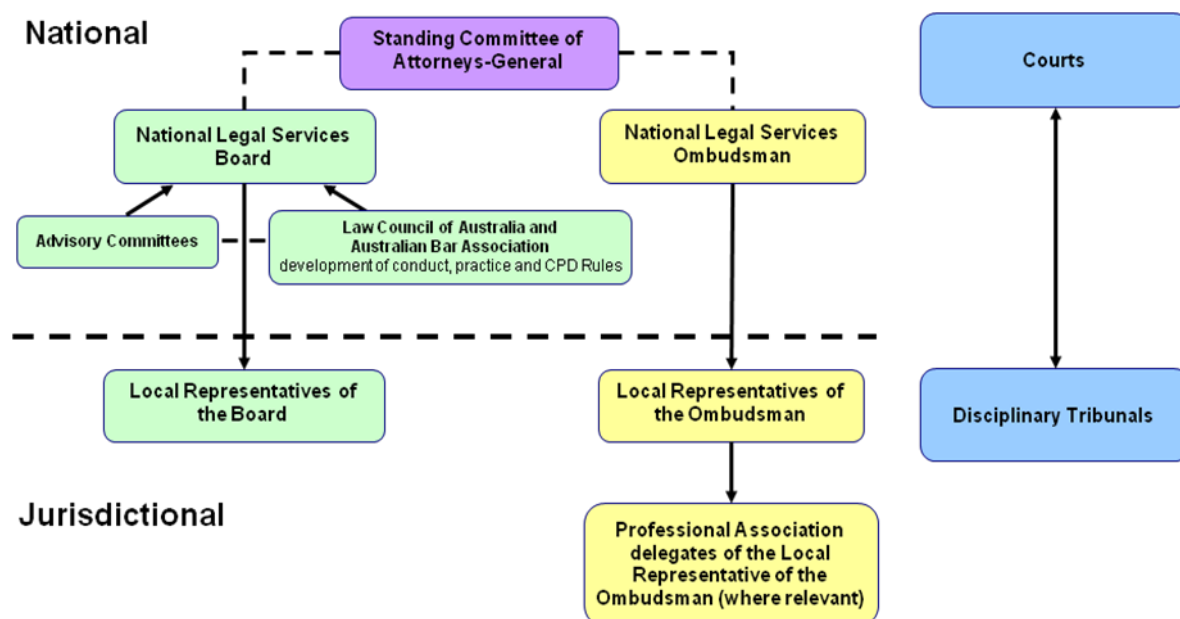
7. Overall, how satisfied have you been with the legal services you have received? *(tick one box)*

- Extremely dissatisfied
- Very dissatisfied
- Dissatisfied
- Satisfied
- Very satisfied
- Extremely satisfied

# The National Legal Services Board and Advisory Committees and enhanced consumer representation

Information on the regulatory framework under the Legal Profession National Law

Figure 1 Regulatory Framework under the Legal Profession National Law (DROP DOWN BOX)



Under the proposed reforms, there will be two new national regulatory bodies established to oversee regulation of the legal profession across Australia – the National Legal Services Board and the National Legal Services Ombudsman. Figure 1 above illustrates the relationship between these National Bodies and their local representatives in the States and Territories.

## Information on the functions of the National Legal Services Board (DROP DOWN BOX)

One of the main functions of the National Legal Services Board will be to make National Rules under the National Law. Other functions of the Board and its local representatives include:

- administering admissions to the legal profession;
- granting and renewing Australian practising certificates;
- granting and renewing Australian registration certificates for foreign lawyers;
- approving, where necessary, professional indemnity insurance policies;
- receiving various notices relating to legal practice; and
- receiving and maintaining information about lawyers through the Australian Legal Profession Register.

**Information on the composition of the Board and appointment of members (DROP DOWN BOX)**

The National Law provides that members of the Board (no more than seven members) would be appointed by the Attorney-General of the host jurisdiction on the recommendation of the Standing Committee of Attorneys-General.

The composition of the Board involves a co-operative approach with the Courts, regulators, representatives of consumer interests and the legal profession working together to set national rules for the legal profession (this is known as 'co-regulation').

Accordingly, the Law Council of Australia and the Council of the Chief Justices would each nominate a panel of three nominees, and one Board member would be appointed from each panel. The remaining Board members would be appointed on the basis of their expertise in the practice of law, the protection of consumers and/or the regulation of the legal profession. The Board members will collectively represent experience and expertise in a variety of relevant areas and have experience in both large and small jurisdictions. Board members would not represent particular areas of expertise or jurisdictions.

Under the National Law, the Board must establish one or more advisory committees to provide advice, recommendations or assistance to the Board doing its work.

**Consumer representation under the Legal Profession National Law**

Consumers provide a unique and necessary perspective on the regulation of the legal profession. It is proposed that consumers and/or consumer advocates will participate in the regulatory framework through representation on the National Legal Services Board. In addition, consumers will have a role on relevant advisory committees to the Board and in commenting on and engaging with proposed amendments to National Rules and the National Law.

What are your views on the composition of the National Legal Services Board? Please indicate who you think the seven members of this Board should be? *(Please tick yes or no and put the number from 1 to 7 next to the representatives you would like to see on the Board – must total 7 members only.)*

- |  |                              |                             |                                 |
|--|------------------------------|-----------------------------|---------------------------------|
| Members of the legal profession                    | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Number |
| Consumers  | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Number |
| Consumer advocates                                 | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input type="checkbox"/> Number |
| Others with relevant skills (please specify) _____ |                              |                             | <input type="checkbox"/> Number |
| Others with relevant skills (please specify) _____ |                              |                             | <input type="checkbox"/> Number |
| Others with relevant skills (please specify) _____ |                              |                             | <input type="checkbox"/> Number |

8. Who do you think should chair the National Legal Services Board? *(tick one box)*

- A judge
- A lawyer
- A regulator (may have legal qualifications)
- A non-lawyer
- No preference
- Other (please specify) \_\_\_\_\_

15. What are your views on the proposed process for appointments to the National Legal Services Board? Would you suggest a different process?

Please indicate whether you agree or disagree with the following statement *(tick one box)*

	Completely agree	Tend to agree	Tend to disagree	Completely disagree	Don't know
16. There should be a specialist consumer Advisory Committee to advise the Board	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>

17. Do you have any other suggestions on the role consumers and consumer advocates should play in the regulation of the legal profession?

*(Maximum word limit 500 words)*

## Legal costs and disclosure

The Taskforce has proposed a new requirement that law practices must charge no more than fair and reasonable costs. Effective communication is a critical factor in reducing confusion and misunderstandings about legal costs. The underlying principle of the proposed reforms is one of 'informed consent'. Law practices must be satisfied that their clients have understood and consented to the proposed action and costs after being given all relevant information.

### Information on 'fair and reasonable' costs and informed consent (DROP DOWN BOX)

Under the law, legal costs are fair and reasonable if they:

- are reasonably incurred and are reasonable in amount;
- are proportionate in amount to the importance and complexity of the issues involved in a matter, the amount or value involved in a matter, and whether the matter involved a matter of public interest;
- reasonably reflect the level of skill, experience, specialisation and seniority of the lawyers concerned; and
- conform to any applicable requirements of the National Law, National Rules and fixed costs legislative provisions (such as those contained in State or Territory legislation).

In addition, in considering whether legal costs are fair and reasonable, a costs assessor in deciding on a disputed costs matter may consider:

- whether the law practice and any lawyer involved in the work complied with this Law and the National Rules;
- any disclosures made, including whether it would have been reasonably practicable for there to be disclosure of the total costs of the work at the outset (rather than simply disclosing charging rates);
- any relevant advertisement as to the law practice's costs or the skills of the law practice or any lawyer involved in the work;
- the skill, labour and responsibility displayed on the part of the lawyers responsible for the matter;
- the retainer and whether the work done was within the scope of the retainer;
- the complexity, novelty or difficulty of the matter;
- the work actually done and the quality of the work done;
- the circumstances in which the work was done;
- the time within which the work was done; and
- any other relevant matter.

A client will have the right to require a negotiated costs agreement with the law practice. If the agreement complies with the disclosure provisions of the law, it will be evidence that costs disclosed in the agreement are fair and reasonable.

The Taskforce is also proposing that each bill sent out by a law practice must nominate a principal of that practice as responsible for the bill.

Please indicate whether you agree or disagree with the following statement (*tick one box*)

	Completely agree	Tend to agree	Tend to disagree	Completely disagree	Don't know
18. The law should state that legal costs must be fair and reasonable	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>

19. What are your views on the new requirement that law practices must charge no more than fair and reasonable costs?

*(Maximum limit 500 words)*

20. What are your views on the factors that may be considered in determining whether legal costs are 'fair and reasonable'?

*(Maximum limit 500 words)*

21. What are your views on the proposal that law practices must be satisfied that their clients have understood and consented to the proposed action and costs after being given all relevant information?

*(Maximum limit 500 words)*

## Fidelity funds

Fidelity cover is a source of compensation for consumers of legal services who suffer loss because of dishonest or fraudulent behaviour by their law practice.

In some States and Territories, decisions on fidelity fund claims are made by a Law Society. The proposed reforms seek to address a perceived conflict of interest in a Law Society making decisions on fidelity fund claims against their members by requiring these decisions on fidelity fund claims to be made at 'arm's length' from the profession.

In addition to nominating a fund that will serve as a 'fidelity fund' in its jurisdiction, the National Law provides that each jurisdiction will nominate an authority to administer the fidelity fund.

Please indicate whether you agree or disagree with the following statement (*tick one box*)

	Completely agree	Tend to agree	Tend to disagree	Completely disagree	Don't know
22. The law should require that decisions about fidelity fund claims are made at 'arm's length' from the legal profession	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>

What should an authority that makes decisions on fidelity fund claims at arm's length from the legal profession look like? (*please indicate which option you think would be most suitable – tick one box*).

23. A majority of members being lawyers
24. Half lawyers, half non-lawyers
25. A minority of members being lawyers
26. No members being lawyers
27. Other (please specify)
-



28. What are your views on the proposal that fidelity fund determinations be made at arm's length from the legal profession?

*(Maximum word limit 500 words)*

## Complaints, disputes and role of the National Ombudsman

Under the proposed reforms, the rights and remedies available to consumers will be nationally consistent, applying equally to consumers no matter where they live in Australia. A National Legal Services Ombudsman will be responsible for promoting consistent application of the law in all States and Territories and for overseeing the performance of each of the Ombudsman's local representatives. This national consistency will be emphasised by the creation of a single point of contact (for example, one national phone number) for consumers.

Complaints made to the National Ombudsman will be handled by its local representative in each State and Territory– these may be a Legal Services Commissioner or Legal Practice Board, or a Law Society or Bar Association depending on the decision of each State and Territory. The National Ombudsman and local representatives will have new powers to resolve disputes between lawyers and clients that are primarily disputes about the quality of services provided by lawyers. Such matters will be managed quickly, with minimal formality and with an emphasis on dispute resolution.

### Proposed powers of the National Ombudsman (DROP DOWN BOX)

Under the proposed reforms, the National Ombudsman and local representatives will have the power to make a number of orders if the mediation process is unsuccessful.

Where costs dispute resolution is unsuccessful the National Ombudsman and local representatives will have the power to make a binding determination in relation to disputed costs less than \$10,000. If the disputed costs are \$10,000 or more, individuals will still be able to seek a costs assessment under schemes run by the State and Territory courts. The National Ombudsman may make a compensation order to compensate consumers for loss they have suffered – compensation orders will not exceed \$25,000.

Which body or organisation should act in the role of the local representative of the National Ombudsman in each State and Territory (does not need to be an existing body)? (tick yes or no or don't know to each)

29. Local Law Society/Bar Association  Yes  No  Don't know

30. Existing State Legal Services Commission  Yes  No  Don't know

31. Government agency (please specify)  Yes  No  Don't know

---

32. Independent non-legal agency (please specify)  Yes  No  Don't know

---

33. Other body/organisation (please specify)  Yes  No  Don't know

---

34. Do you have any other comments on which body or organisation, in each State and Territory, should act in the role of local representative of the National Ombudsman (does not need to be an existing body)?

(Maximum limit 500 words)

Please indicate whether you agree or disagree with the following statement (tick one box)

	Completely agree	Tend to agree	Tend to disagree	Completely disagree	Don't know
35. The proposed National Ombudsman should be called an 'Ombudsman'	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>

36. What is your view on the monetary value of costs disputes that the Ombudsman should be able to attempt to resolve? *(tick one box)*

- over \$100,000 (please specify) \$ \_\_\_\_\_
- \$100,000
- below \$100,000 (please specify) \$ \_\_\_\_\_

37. What should be the maximum monetary value of a costs dispute for which the Ombudsman can make a binding determination? *(tick one box)*

- \$10,000 or over (please specify) \$ \_\_\_\_\_
- up to \$10,000

38. What should be the maximum monetary value of compensation that the Ombudsman can award to consumers in relation to other consumer disputes (i.e. not cost disputes)? *(tick one box)*

- over \$25,000 (please specify) \$ \_\_\_\_\_
- up to \$25,000

39. Who, if anyone, should be able to appeal against compensation orders made by the Ombudsman? *(tick one box)*

- Lawyers                       Consumers                       Lawyers and Consumers
- Neither lawyers nor consumers

In resolving less serious complaints made by clients against their lawyers, the Ombudsman and local representative may make a number of orders (the Ombudsman will still be able to commence disciplinary proceedings against lawyers in more serious cases). To what extent do you agree or disagree with the proposed orders that can be made by the Ombudsman? *(tick one box for each statement)*

	Completely agree	Tend to agree	Tend to disagree	Completely disagree	Don't know
40. A caution to the lawyer or law practice	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>
41. A requirement for an apology from the lawyer or law practice	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>
42. A requirement that the lawyer or law practice redo the work at no or reduced cost	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>
43. A requirement that the lawyer or law practice waive or reduce fees for work performed	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>
44. A requirement that the lawyer compensate the client for loss suffered up to \$25,000	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>
45. A requirement that the lawyer undertake training, education, be supervised in their work or undertake counseling	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>

Please indicate whether you agree or disagree with the following statement *(tick one box)*

	Completely agree	Tend to agree	Tend to disagree	Completely disagree	Don't know
46. The Ombudsman should be required to finalise consumer disputes before any disciplinary process is commenced	(1) <input type="checkbox"/>	(2) <input type="checkbox"/>	(3) <input type="checkbox"/>	(4) <input type="checkbox"/>	(5) <input type="checkbox"/>

47. Do you have any other comments on the provisions in the proposed National Law on the role of the National Ombudsman and local representatives and the handling of consumer complaints and disputes?

*(Maximum word limit 500 words)*

## Other areas of the proposed Legal Profession National Law

If you would like to provide comments on any other areas of the proposed Legal Profession National Law please make them in the boxes below which correspond to the Chapters of the Law. A copy of the legislation can be found [here](#). If you would like to provide more information than is possible in this survey, please make a submission by going to: [www.ag.gov.au/legalprofession](http://www.ag.gov.au/legalprofession)

48. **Preliminary** (includes special functions that are to be exercised by local representatives) – Chapter 1.

*(maximum word limit 500 words)*

49. **Threshold requirements regarding legal practice** (ensuring legal work is only carried out by those entitled and properly qualified to do so) – Chapter 2.

*(maximum word limit 500 words)*

50. **Legal practice** (ensuring consumer protection regardless of a law practice's business structure) – Chapter 3.

*(maximum word limit 500 words)*

51. **Business practice and professional conduct** (ensures safeguards to maintain integrity of legal services - includes trust accounts) – Chapter 4.

*(maximum word limit 500 words)*

52. **Dispute resolution and professional discipline** (includes complaints) – Chapter 5.

*(maximum word limit 500 words)*

53. **External intervention** (provides options for intervention into law practices to protect the interests of, amongst others, clients and the general public) – Chapter 6.

*(maximum word limit 500 words)*

54. **Investigatory powers** (includes powers exercisable in relation to complaint investigations) – Chapter 7.

*(maximum word limit 500 words)*

55. **National regulatory authorities** (provides the objectives and functions of the National Legal Services Board and Ombudsman) – Chapter 8.

*(maximum word limit 500 words)*

56. **Miscellaneous** (includes national rules, the Australian legal profession register and civil and criminal penalties) – Chapter 9.

*(maximum word limit 500 words)*

**Your survey has been submitted. Thank you for taking the time to complete this survey. Your responses will be incorporated into a Consumer Report that will be prepared by independent consultants and then provided to the Taskforce.**