

1. National Legal Profession Reform

Subject:

2. Commentary on Draft bill and Rule Provisions

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
Definitions - Part 1.2		
s.1.2.1	Definition of <i>admission</i>	Recommend deletion of the words, "under s.2.2.2" as they unnecessarily narrow the scope of operation of the definition.
	Definition of <i>business day</i>	Delete, as it is defined in the <i>Acts Interpretation Act</i>
	Definition of <i>government authority</i>	<p>It is considered that the words, "<u>public authority</u> of the Commonwealth, a State or Territory" may lead to confusion. This part of the definition may prove problematic because (1) it is a non-exhaustive definition; and (2) the scope of the particular words underlined.</p> <p>There is no definition of what is a "public authority" in either the National Law or in the <i>Acts Interpretation Act</i>.</p> <p>Whilst it would be easy for government lawyers to determine whether they are working for a Minister or in a government department, it may not be that clear if they are working for a "public authority". The case law suggests that the necessary attributes of a "public authority" include the performance of statutory duties and the exercise of public functions and possession, as a result of statute, of powers or duties to be exercised for public objects.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
	Definition of <i>mortgage financing</i>	<p>To be consistent with the definition in the Solicitors Rule, it is recommended this definition should be amended by deleting, "but does not include providing legal advice or preparing an instrument for the loan", and inserting:</p> <p>"but does not include:</p> <ul style="list-style-type: none"> (d) providing legal advice, or preparing an instrument, for the loan; or (e) merely referring a person to a prospective lender or borrower, without contacting the prospective lender or borrower on that person's behalf; or (f) facilitating a loan between family members; or (g) facilitating a loan secured by a mortgage: <ul style="list-style-type: none"> (i) of which an Australian legal practitioner is the beneficial owner; or (ii) held by an Australian legal practitioner or a corporation in his, her or its capacity as the trustee of any will or settlement, or which will be so held once executed or transferred."
	Definition of <i>partnership</i>	Need to define what a "limited partnership" is.
	Definition of <i>quashing</i>	<p>Recommend paragraph (b) be amended to read as follows:</p> <p>"(b) the <u>quashing</u> of the acceptance of a guilty plea in relation to the offence;"</p>
	Proposed new definition.	<p>Recommend inserting a definition of "solicitor" as follows:</p> <p>"<i>solicitor</i> means an Australian legal practitioner whose Australian practising certificate is subject to a condition that the holder is authorised to engage in legal practice as or in the manner of a solicitor only, whether or not his or her home jurisdiction is a fused jurisdiction or a non-fused jurisdiction."</p>
	Definition of <i>supervised legal practice</i>	<p>In paragraphs (a)(i) and (b)(i), recommend inserting, "unrestricted" before the words, "Australian practising certificate" so as to make it clear that only an Australian legal practitioner (ALP) who has completed their supervised legal practice can supervise another ALP.</p> <p>Adoption of this suggestion would require a consequential amendment, namely, inserting a definition of "unrestricted Australian practising certificate"</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>Also recommended that paragraph (c) be amended to read: “(c) as an employee of, or other person working under supervision in, a body corporate or government authority, where: (i) at least one other employee is an Australian legal practitioner who holds an unrestricted Australian practising certificate; and (ii) the person engages in legal practice under the supervision of an Australian legal practitioner referred to in subparagraph (i).”</p>
	<p>Insertion of new definition of “unrestricted Australian practising certificate”</p>	<p>Recommend inserting the following definition: “unrestricted Australian practising certificate means an Australian practising certificate that is not subject to a statutory condition under section 3.3.8.”</p>
<p>Part 2.1 - Unqualified legal practice</p>		
<p>s.2.1.3(2) and r.2.3.1(a) and (b)</p>		<p>In order to remove any doubt that a “conveyancer” or “land agent” is only entitled to engage in their lawful activities in their State or Territory, it is recommended that r. 2.3.1(a) and (b) be amended to read: “(a) a person carrying out conveyancing work in accordance with a licence in force under relevant State or Territory legislation <u>provided that work is carried out, and relates to, land in that State or Territory;</u> (b) a land agent performing work in respect of instruments he or she is entitled to draw, fill up or prepare and to charge for, under relevant State or Territory legislation <u>provided that work is carried out, and relates to, land in that State or Territory;</u>”</p>
<p>Part 2.2 - Admission to the Australian legal profession</p>		
<p>s.2.2.2(3)</p>		<p>Recommend that the following words be inserted at the end of the subsection, “or to admit a person on specified conditions.”</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.2.2.3(1)(c) and rules 3.4.1 & 3.4.2(a)(i)		<p>Recommended that rule 3.4.1 be amended to read, “For the purposes of section 2.2.3 of the Legal Profession National Law, <u>without limiting the matters to which the Board may have regard</u>, the matters to which the Board must have regard, before determining whether a person is a fit and proper person to be admitted are as follows: ...”</p> <p>The current drafting suggests that the matters specified in r.3.4.1 are the only matters that Board can have regard to. The recommended amendment removes this fetter.</p> <p>It is also recommended that rule 3.4.2(a)(i) be amended by inserting, after “Australia”, the following words, “and the applicant’s traffic history”.</p> <p>It is understood that most Police Services maintain criminal history records and traffic history records separately, and the only “traffic” matters recorded in a person’s criminal history is a conviction for either drink driving or disqualified driving.</p>
s.2.2.5(2)		<p>Recommend inserting the following words at the end of the subsection, “or imposed by the Court”.</p> <p>Arguably, the Supreme Court retains its inherent jurisdiction to impose any condition on admission that it considers appropriate, but this amendment removes any doubt.</p>
s.2.2.11(1)		<p>Query: why is it necessary to deem the decision of the Supreme Court on an appeal as a “decision of the Board”? The Board would be bound by the Supreme Court decision. The current drafting raises the potential for an applicant to then bring another appeal (to the Supreme Court) against the appellate decision of the Supreme Court.</p>
s.2.2.12(2)		<p>If the Supreme Court refuses the admission, undoubtedly, there will be a transcript of those proceedings. As a result, it is recommended that sub-section (2) be amended to read as follows:</p> <p>“(2) The Supreme Court must ensure that the name and other relevant particulars of a person</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		for whom the Court has refused admission <u>together with a transcript of the proceedings</u> , are provided to the Board as soon as practicable."
Part 2.3 - Prohibition regarding associates		
s.2.3.1(2)		<p>Sub-section (2) does not articulate the matters the designated Tribunal must be satisfied about in order to issue an "order". Logically, the designated Tribunal would have to be satisfied that the person, in accordance with s.2.3.1(1)(a), has been convicted of a serious offence, or has been a party to an act or omission that, if the person had been an Australian legal practitioner, may have resulted in the initiation of proceedings under Part 5.4.</p> <p>The difficulty with adopting the content of s.2.3.1(1)(b) is that this incorporates the exercise of a discretion set out in s.5.4.7. In particular, s.5.4.7(a) provides that the Ombudsman may initiate proceedings if the Ombudsman is "of the opinion that: (a) the alleged conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the designated Tribunal;".</p> <p>Given the extensive powers of the Ombudsman to determine such "disciplinary matters" it is suggested that the incorporation of this criteria is problematic.</p> <p>To remove this problematic issue, it is recommended that sub-section (2) be amended as follows:</p> <p>"(2) The designated Tribunal may order that they person is a disqualified person for the purposes of this Law, for a specified period or indefinitely, if satisfied the person;</p> <p>(a) has been convicted of a serious offence; or (b) has been a party to an act or omission that, if the person had been an Australian legal practitioner, <u>would amount to professional misconduct.</u>"</p> <p>The reason for setting the benchmark at "professional misconduct" is because of the severe nature of the Order sought (which is equivalent to the cancellation, suspension of a PC or the striking off of</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		a practitioner).
s.2.3.1.(3)		<p>Currently, this sub-section makes little sense. If the designated Tribunal orders that a person is a disqualified person ‘indefinitely’, then any appeal against that decision should be dealt with in accordance with the designated Tribunal’s governing law/process. It is odd that the aggrieved person would simply apply to the same Tribunal that issued the “order”.</p> <p>It is also recommended that the words “or varied” be inserted after the word “revoked”. By way of example, if a designated Tribunal ordered that a person is a “disqualified person” for a period of 5 years, any appeal should not be limited to seeking the revocation of the order but should also include seeking to have the order varied.</p>
s.2.3.1(4)		For the reasons advanced above, it is recommended that the words “or vary” be inserted after the word “revoke”.
Part 3.3 - Australian legal practitioners		
s.3.3.8		<p>It is noted that there is no methodology set out in the Rules as to how one calculates the periods of supervised legal practice.</p> <p>In the current Qld legislation, the equivalent section provides that the period or periods will be “worked out under a Regulation”. The Regulations then set out the methodology used to calculate the requisite period or periods.</p> <p>To ensure national consistency it is recommended that the methodology for calculating the relevant period/s be set out in the National Rules.</p>
s.3.3.11 and r.4.2.3(1)(f)		Imposing a discretionary condition on a PC that the holder must provide evidence of any outstanding tax obligations and provisions made to satisfy such obligations evidences a revenue collection objective under the guise of a professional regulatory regime. There is no philosophical

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>or legal basis to distinguish between compliance with the tax laws as opposed to compliance with any other legal obligation (e.g. Workers Compensation, Superannuation Contributions, Anti-discrimination, Sexual Harassment, etc). QLS proposes the removal of Rule 4.2.3(1)(f).</p>
s.3.3.11 and r.4.2.3(1)		<p>The prescriptive list outlined in r.4.2.3 will not cater for the vast range of differing factual circumstances that arise in practice. QLS recommends that a further sub-paragraph be inserted in sub-rule 4.2.3(1) to provide the power to impose “any reasonable and relevant condition on the practising certificate” (see, for example, s.53 of the <i>Legal Profession Act 2007 (Qld)</i>).</p>
r.4.3.2		<p>The wording of this provision needs to be amended in clauses (d) and (e) because if the Notice was a Notice of intended cancellation, or suspension, there would not have been anything specified in the Notice regarding how the certificate may be varied.</p> <p>It is recommended that clauses (c), (d) and (e) be deleted and replaced with the following:</p> <p>“(c) may take the proposed action specified in the notice, or action that is less onerous than that specified in the notice.”</p>
r.4.3.3		<p>It is recommended this Rule be amended to read as follows:</p> <p>“If the Board varies an Australian practising certificate in accordance with Part 3.5 of the Legal Profession National Law, the Board may give the holder an amended Australian practising certificate or <u>notice of the amendment</u>.”</p> <p>This Rule assumes that the Board, or its local representative, will forward hard copies of practising certificates to all Australian legal practitioners. This does not reflect reality and the entire scheme for PCs needs to cater for electronic PCs or notification to Australian legal practitioners of the terms of their PC. This Bill needs to be brought in to the 21st Century.</p>
<p>Part 3.4 - Foreign Lawyers</p>		

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.3.4.5		The LPNL needs to cater for the electronic issue of Australian Registration Certificates.
s.3.4.9(1)(a)		It would appear that the word "convicted" has been omitted from sub-paragraph (a).
r.5.3.2(c) – (e)		It is recommended that the proposed amendment to Rule 4.3.2 also be adopted with respect to sub-Rule 5.3.2(c)-(e).
r.5.3.3		It is recommended that the words "or notice of the amendment" be inserted at the end of Rule 5.3.3 so as to facilitate the electronic provision of Australian Registration Certificates.
Part 3.5 – Variation, suspension and cancellation of certificates		
s.3.5.3(2)		As indicated previously, the legislative scheme needs to cater for the electronic issue of PCs or notifications to certificate holders of the content of their certificate.
s.3.5.8(b)		Recommended that any reference to "tax offence" be removed as there is no discernable philosophical or legal reason why "tax offences" should be singled out for preferential treatment in relation to show cause events.
		Alternatively, if deletion is not adopted, it is recommended that the words "conviction for" be inserted before the words, "a tax offence". Conviction of a serious offence would be a sufficient basis for a show cause event.

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.3.5.11(a) and (b)		<p>It is suggested the Board should be able to act if a person fails to give notice of the show cause event and, in relation to the second proposed amendment, it seems irrelevant whether the Board is satisfied that the <i>applicant</i> "considers himself or herself to be a fit and proper person". The issue that needs to be addressed is whether the <i>Board</i> is satisfied that the applicant is a fit and proper person.</p> <p>It is recommended s.3.5.11(a) and (b) be amended to read as follows:</p> <p>"The Board may refuse to grant or renew, or may vary, suspend or cancel, a certificate if the applicant or holder:</p> <ul style="list-style-type: none"> (a) fails to provide a <u>notice or</u> statement as required by this Subdivision; or (b) has provided a statement in accordance with this Subdivision but the Board considers that the applicant or holder has now shown in the statement that, despite the show cause event, he or she considers himself or herself to be <u>is</u> a fit and proper person to hold a certificate; or"
s.3.5.14		<p>The provision as it is currently drafted requires the Board to carry out an investigation. However, this may not be necessary given the information in the possession of the Board prior to it issuing a show cause notice and, in addition, taking into account the material disclosed in any statement provided by the certificate holder.</p> <p>It is recommended that sub-section (1) be amended to read as follows:</p> <p>"If the holder provides a statement required this Subdivision, the Board must investigate, <u>if necessary,</u> and determine whether the person concerned is a fit and proper person to hold a certificate."</p> <p>It is also recommended that ss.(2)(b) be amended to read as follows:</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>“(b) has provided a statement in accordance with this Subdivision but the Board considers that the holder has not shown in the statement that, despite the show cause event, he or she considers himself or herself to be <u>is</u> a fit and proper person to hold a certificate; or”</p> <p>The amendment is considered necessary for the reasons previously advanced concerning the proposed amendment to s.3.5.11.</p>
<p>Part 3.7 – Incorporated and unincorporated legal practices</p>		
s.3.7.4		<p>Query: If a practitioner satisfies the elements of subsection 3.7.4(1), is he/she automatically a “supervising legal practitioner” or does he/she have a choice about whether to nominate as a “supervising legal practitioner” (provided, of course, there is at least one other practitioner who is a “supervising legal practitioner”).</p>
s.3.7.5		<p>Recommend the removal of the civil penalty in subsections (1) – (3).</p> <p>Recommend subsection (5) be amended to read as follows:</p> <p>“(5) The Board may, if it thinks it appropriate, appoint an Australian legal practitioner who is an employee of the law practice or another <u>suitably qualified</u> person nominated by the Board, in the absence of a principal, to exercise the functions conferred or imposed on a principal under this Part.”</p>
s.3.7.6		<p>For the reasons advanced in the LCA’s Submission, it is recommended subsection (2) be amended along the following lines:</p> <p>“(2) <u>The each</u> partner, director, officer or employee of the law practice who is an Australian legal practitioner <u>and who has the initial carriage of the matter</u> must ensure that a disclosure is made informing the person: ...”</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.3.7.8		Subsection (3) provides that the Supreme Court may revoke an order under this section on application by the Ombudsman or by the person against whom the order was made. If the application to revoke the Order is, in reality, an appeal against the Supreme Court's original determination, that appeal/application should be dealt with in accordance with the appellate process of the Court.
s.3.7.9		There is a typographical error at the end of the section as word "directors" appears as "di9rectors".
Part 3.8 – Community Legal Services		
s.3.8.2(2)		To enable appropriate management, the period of 7 days should be extended to 14 days.
Part 4.2 - Trust Money and Trust Accounts		
Civil & Criminal penalties		<p>It is recommended that the civil and criminal penalties be removed from the following sections: 4.2.6, 4.2.7, 4.2.8, 4.2.10, 4.2.11, 4.2.12, 4.2.13, 4.2.14, 4.2.15, 4.2.16, 4.2.17, 4.2.18, 4.2.20, 4.2.21, 4.2.22, 4.2.23, 4.2.25, 4.2.26, 4.2.29(2), 4.2.30.</p> <p>It is considered appropriate for the civil and criminal penalties to remain in the following sections: 4.2.24, 4.2.29(1), 4.2.34 and 4.2.40. The rationale for these penalties remaining is because the individuals mentioned in those sections are not subject to the disciplinary regime set out under the NLPL.</p>
s.4.2.14 – Controlled Money		<p>QLS recommends s.4.2.14 be deleted and all reference to "controlled money" be removed from the NLPL as there is no longer any need or purpose for such reference.</p> <p>The "controlled money" concept was only developed to overcome the double payment of a deposits tax (when that tax was introduced many years ago) when trust money was to be invested – the tax was paid when the money was deposited to a general trust account and when the money was deposited to an Investment Money Account. There is no longer a deposits tax in any jurisdiction in Australia. There is better overall control when general trust accounts operate as a funnel for the receipt and disbursement of trust money that is invested for a beneficiary.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.4.2.29 Reporting irregularities and suspected irregularities		<p>The Society opposes the existence of subsection (3). It recommends that subsection be deleted – it is considered totally inappropriate to undermine the fundamental rights arising from the solicitor/client relationship or the fundamental right against self-incrimination.</p> <p>If it remains, use of such information, including derivative use, should be limited to disciplinary proceedings only.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
Part 4.3 – Legal Costs		
Part 4.3 – Legal Costs		<p>The proposed National Legal Profession Reform is part of the government’s ongoing micro-economic reform agenda to strengthen the Australian economy in the face of the GFC. The joint statement issued by the Attorney-General and Minister for Finance of 3 February 2009 contemplated this reform process was required as the current regulation remains overly complex and inconsistent in each jurisdiction which maintains its own regulatory structure.</p> <p>The purpose of the reform is to reduce compliance costs which, allegedly, would be significantly reduced for the profession and consumers of legal services, especially those operating across borders and Australia’s international competitiveness would be strengthened.</p> <p>The proposed NLPL has not achieved the outcome anticipated by the joint statement. This is particularly pertinent where the proposal was to allow “competitiveness” to be strengthened. The legislation specifically doesn’t allow for this to take place as it does not promote the client agreement as the primary and paramount consideration in determining legal costs and “straight jackets” all solicitor and client negotiations into one form by not recognising retainers created in circumstances where there is a flexible market e.g. retainers by tender and lump sum costs agreements. In so doing, the NLPL fails to give effect to market forces as it does not give recognition to the paramountcy of these negotiations.</p> <p>The NLPL has created a structure:</p> <ul style="list-style-type: none"> (a) where greater uncertainty is created; (b) increased steps for compliance together with the regulatory and administrative burden for law practices; and (c) intrudes into areas of practice where regulation is not warranted. <p>Whilst no issues exist with supporting informed decisions by clients and protecting vulnerable consumers, the NLPL increases the regulatory burden without delivering benefits to meet the</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		<p>stated purposes. This is especially the case in relation to the application of the costs regime to commercial and government clients (where it does not currently apply) and the prohibition on those clients contracting out of certain provisions.</p> <p>The creation of disciplinary consequences for failure to meet a positive obligation of fair and reasonable costs, is problematic in that it lacks objective measures and fails to have regard to the other safeguards imposed (such as disclosure, reporting, billing, costs assessment to determine fair and reasonable costs) and that the charging of excessive costs is already subject to disciplinary sanction.</p> <p>These general observations are compounded by disjointed drafting in the costs provisions in that:</p> <ul style="list-style-type: none"> (a) the requirements of a costs agreement and what is to be contained in them are set out in the NLPL at section 4.3.10; (b) the requirements of a conditional costs agreement are contained in the NLPR at rule 8.2.1 to 8.2.3; (c) billing is provided for in the NLPL at section 4.3.16; and (d) the requirements for delivery of the bills contained in the NLPR rules at 8.3.1 to 8.3.2. <p>The legislation does not specifically deal with lump sum costs agreements and the effect of the fair and reasonable concepts will call the viability of such arrangements into question. This does not support effective business management in a range of legal matters. Consider, for example, simple conveyancing matters. Commercial reality suggests that the costs of compliance with the contemplated regime will create excessive paperwork for simpler matters where a client is prepared to accept a lump sum fees for a service.</p>
s.4.3.1		<p>The Draft Bill has an inherent conflict in the policy of allowing for provision of legal services in accordance with a costs agreement and the assessment process. If a costs agreement is reached between a law practice and a client in accordance with the principles set out and the agreement complied with, then the agreement ought to be the primary basis for assessing costs. Whilst</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>parties can enter into a costs agreement to regulate their relationship, if the matter goes to costs assessment, the assessor can determine that the fees are not fair and reasonable, without reference to the costs agreement.</p>
s.4.3.2		<p>Disclosure is not required to "<i>commercial or government clients</i>", but only after a formal 'contracting out' of the costs provisions. The current legislative regimes operating on the National Model Bill provisions accept a policy stance that commercial or government clients are not in need of the protection offered by the costs provisions and no material suggests a departure justified from the established current practice. Under the NLPL, commercial or government clients will be required to contract out of the disclosure requirements with the consequential additional administrative burden and cost for no perceivable consumer or market benefit.</p> <p>Without any logic being expressed, the concept of "<i>commercial and government clients</i>" curtails other groups out of the current "sophisticated clients" group including all legal practitioners and law practices, regardless of their size, including all foreign legal practitioners and foreign legal practices. It should also be extended to subsidiaries of large proprietary companies.</p> <p>Certain other exceptions in the current law should continue to apply, e.g. where the costs are below a certain threshold (which QLS proposes should be set at \$3,000); where the client has received previous disclosures and has waived its entitlement to further disclosures; by one law practice to another law practice; or where the client will not be required to pay the legal costs or they will not otherwise be recovered by the law practice.</p> <p>Generally speaking, where an exception is provided for commercial or government clients, that exception should also extend to third party payers who would be regarded as commercial or government clients if they were clients of the practice concerned. The same principles ought apply.</p> <p>The effect of not including this in the legislation is that many law practices may not take on small matters due to the problems that will arise with disclosure requirements and other administrative costs.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>Commercial clients or government clients should be expanded to include other sophisticated clients based on net worth and value rather than being restrictive. It is illogical to suggest that the law practice with fewer than 15 employees is not commercially oriented.</p>
s.4.3.3(2)		<p>Under section 4.3.3(2) the legal obligation on a third party payer can arise by or under contract or legislation or otherwise. Exceptions should be made to exempt situations where the liability to pay costs arises by virtue of an order of the Court or by operation of any rule of Court to avoid there being any suggestion that the legislation creates a non-associated third party payer in those circumstances i.e. an order of the Court of a party to pay costs does not create a non-associated third party payer pursuant to this Law.</p> <p>There is no reference to litigation which may involve class actions where the Courts may have already reviewed the costs entitlement of a law practice.</p>
s.4.3.4 (2)		<p>Section 4.3.4 of the NLPL provides that a law practice in charging must not charge more than what is fair and reasonable. Sub-section (2) sets out the requirements of what is fair and reasonable. Sub-paragraph (d) provides that costs are fair and reasonable if they “conform to any ... fixed costs legislative provision.”</p> <p>A fixed costs legislative provision is defined as including, amongst other things, a scale made under any other legislation. Sub-section 4.3.4(3) provides that an agreement is only prima facie evidence that the costs disclosed is fair and reasonable. The agreement therefore is not paramount and if it does not comply with a scale under legislation, can be deemed not fair and reasonable. An issue arises as to whether this means that law practices can only charge scale fees and this needs to be resolved to make it clear that charging fees higher than those fixed by a scale does not mean that the costs are not fair and reasonable.</p>
s.4.3.4(2)(b)		<p>The “proportionality” test which has been introduced as an element of assessing what is fair and reasonable is problematic and should be removed. Sub-section (2)(b) provides that legal costs are fair and reasonable if they are proportionate in amount to the importance and complexity of the issues involved in the matter, the amount or value involved in the matter and whether the matter</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>involved a matter of public interest.</p> <p>In short this creates uncertainty, will be difficult to apply as a principle, undermines the primacy of the costs agreement between lawyer and client and ignores the role played by client instructions and other factors in the progression of a matter, relying instead on the perfection of hindsight. The test doesn't define exactly what it means. A law practice could face the issue that costs should be reduced because the amount involved might be small yet the litigation could involve extensive issues required to be addressed by the law practice. A matter of policy clarity may be important to the client, yet have minimal financial value.</p> <p>In addition, if this is a consideration under the NLPL for the recovery of costs between the law practice and the client, it will also, by operation of the indemnity principle, be a consideration for party and party costs. This will open up an avenue of argument about party and party assessments that proportionality should be considered for the recovery of costs even when the successful litigant is faced with a recalcitrant litigant. The effect of this is that a law practice may be reluctant to accept a retainer in small claims, though meritorious, where those claims involve complexity.</p> <p>Further, there is no reference to the interaction of other legislative structures that impact on charges of a law practice, for example:</p> <ul style="list-style-type: none"> (a) Does the fact that the litigation occurs in a no cost jurisdiction cut across what may be recovered for the same litigation if it were conducted in a conventional court? (b) What is the impact on fair and reasonable concepts of legislation such as the Qld Personal Injuries Proceedings Act and WorkCover Act?
s.4.3.4(3)		<p>This overrides freedom of contract between lawyer and client rendering the costs agreement illusory. See subsections 4.3.1(a) and (b). While the legislation provides that, subject to the NLPL, a costs agreement may be enforced in the same way as any other contract, it will not be to the extent that it is only prima facie evidence that the costs charged are fair and reasonable (section 4.3.4(3)).</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.4.3.5		<p>Section 4.3.5 provides that a law practice must not act in a way that unnecessarily results in increased legal costs. No temporal limitation is applied to the requirement and this contemplates a 'hindsight' test contrary to all authorities in relation to costs. This needs to be remedied.</p> <p>Such an obligation is contrary to the fundamental principal that even on a party and party basis, a party is entitled to recover all costs which are proper or necessary, that is, proper at the time the work was done even though that work may subsequently prove to be unnecessary.</p> <p>This argument will flow on to party and party costs because of the indemnity principle.</p> <p>The further obligation contained at 4.3.5 of acting reasonably to avoid unnecessary delay increasing legal costs is unnecessary. Any protection in this area is amply covered by the obligations that are imposed at common law (e.g. the principles set out in the White Industries case and rules such as Qld UCPR R5).</p>
s.4.3.6		<p>Recommend that subsection (2) be altered to read as follows:</p> <p>“(2) Despite subsection (1), legal costs are not recoverable by a law practice if it has <u>substantially</u> not complied with the disclosure obligations of this Part, and the law practice must not commence or maintain proceedings for the recovery of any or all of those costs until the costs have been assessed.”</p> <p>It is considered that only substantial non-compliance should be a bar to the recovery of legal costs. If a reasonable benchmark is not established by the legislation, it will work inequity and only lead to increased regulatory costs arising out of minor non-compliance.</p>
s.4.3.6(c)		<p>The concept of “fair and reasonable <u>value</u>” is introduced. All prior references are to costs. This should be deleted. The reference to “value” is wholly subjective and it is unclear as to who makes the assessment.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.4.3.7(1)		<p>Subsection (1) should be amended by including, at the end of the subsection, the following words, "or a range of estimates of the total legal costs".</p> <p>The nature of the retainer may be such that it is not possible to give "an estimate of the total legal costs" as there may be a significant range of variables that will impact upon the total costs, including the client's instructions.</p>
s.4.3.7(2)		<p>There is a grammatical error in this subsection which can be remedied by putting the word, "after" after the word, "practicable" in the first line.</p>
s.4.3.7(3) – s.4.3.7(4)		<p>Section 4.3.7(3) is prescriptive as to the content of information to be provided, with 4.3.7(4) requiring the law practice to take "all reasonable steps" to satisfy itself that the client understands and consents. This will inevitably lead to further paperwork to evidence the steps taken. This adds to costs and to paperwork.</p>
s.4.3.7(5)(a)		<p>If a law practice does not comply with the disclosure obligations, the law practice cannot maintain or commence proceedings for the recovery of any of those costs unless those costs have been assessed. <u>This should only apply where the client has raised this objection to the fees charged.</u> This may flow through to party and party costs where the paying party may seek details in relation to whether the disclosure is being complied with.</p> <p>The reason for this is that section 4.3.7 (which deals with disclosure obligations) provides in subsection (5)(a) that if the law practice contravenes this section the costs agreement is void. This means the agreement is void <i>ab initio</i> and not voidable at the election of the client. This is different to the current regimen which allows the client or associated third party payer to set aside the costs agreement (see section 316 of the <i>Legal Profession Act 2007</i> (Qld)). Under the current <i>Legal Profession Act 2007</i> Qld the costs agreement is only rendered void for non-compliance of Division 5 i.e. its creation is not rendered void by non-disclosure (section 316 <i>Legal Profession Act 2007</i> (Qld)).</p> <p>The effect of this is that parties liable to pay costs on an indemnity basis in litigation will seek to</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>have the agreement set aside (see <i>Cassey-v- Quabba</i> [2006] QCA 187 and <i>ASIC -v- Atlantic III</i> [2006] QCA 540). There may well be reasons why the client may wish to enforce the agreement against the solicitor but won't be able to because the legislation will deem the agreement void. This would be an absurd result and derogates from the client's rights.</p>
s.4.3.9		<p>When the previous provision of the NLPL are read in conjunction with section 4.3.9: "<i>A client of a law practice has the right to require and to have a negotiated costs agreement with the law practice</i>", it suggests that there is a significant subjective burden cast on the legal practice to comply.</p> <p>The concept of "ensure" (s.4.3.1(a)) in conjunction with these obligations creates positive mandatory obligations and the obligations imposed could well include:</p> <ul style="list-style-type: none"> - the law practice advising the clients of competitors' rates; - any adverse aspects of the arrangements compared with other arrangements available; - the provision of information to a level that cannot be qualitatively listed, <p>all resulting in an obligation that is unworkable in practice.</p>
s.4.3.10(3)		<p>This is an unnecessary burden on legal practices and is inconsistent with principles of a competitive market.</p> <p>Contrary to the current position (section 344 <i>Legal Profession Act 2007</i> (Qld)), no-one can contract out of the costs assessment provisions (section 4.3.10(3)). The costs assessment provisions should not apply to commercial or government clients as there is no demonstrated case that they need this protection. Indeed, the costs assessment process is simply not an appropriate mechanism for dealing with cost disputes in commercial matters. If the provisions do apply by default, commercial or government clients should be able to contract out, as per the Model Law. To prohibit them from doing so undermines freedom of contract and the primacy of costs agreements entered into by commercial and government clients. Size of a commercial operation should be irrelevant to their decision-making capacity.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>The NLPL does not address the lack of uniformity in the costs assessment regime. It operates differently in different States and needs modernisations. The Regulation Impact Statement admits it was too hard (see Paragraph 4.3.3.2). However, this is an area where there should be uniformity.</p>
s.4.3.12 and Part 2 of Chapter 8 of the Rules		<p>The reading of the definition of an “uplift fee” being the additional costs payable under a costs agreement and its requirements appear to apply to both litigious and non-litigious matters. Sections 4.3.12 and Part 2 of Chapter 8 of the Rules need to be read together to establish the requirements of a conditional costs agreement and an uplift fee.</p> <p>The legislation should make it clear that an uplift fee only applies in certain circumstances, namely, where the law firm is going to charge whether the matter is successful or not but if they win, more fees would be charged in which event the uplift fee would come into play. The legislation should give an example of this to ensure there is no ambiguity as to the type of retainer the uplift fee legislation is directed towards.</p>
s.4.3.17		<p>Recommended that the time within which a law practice must comply with a request for an itemised bill be increased from “21 days” to “30 days”.</p>
s.4.3.18		<p>This section appears to serve little purpose where there is a responsible principal put in place via the client agreement process.</p>
4.3.22		<p>There needs to be a further provision associated with s.4.3.22, that provides for the giving of a written statement prepared/approved by the Board that will be taken to have satisfied the requirements of s.4.3.22. This “safe harbour” provision is necessary given the complexity of the issues specified in s.4.3.22(a) and (b). By way of illustration only, various time limits can apply to various avenues that are open to a client who wishes to dispute legal costs. If a client was alleging fraudulent misrepresentation, there appears to be no time limit to bringing such an action. Further, it would appear that any issue or dispute in relation to legal costs greater than \$100,000 falls outside the Ombudsman’s jurisdiction to deal with “costs dispute” under Part 5.2.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>A number of the requirements around bills, such as s.4.3.22, require information to be “included” in or to “accompany” a bill. This disregards other requirements under the NLPL and the commercial reality that most legal practices billing content is driven by the commercially available billing software packages. Further, the information would appear more appropriately provided at some other time. It might also be impractical to include such information in regular accounts rendered during a prolonged litigation or commercial matter.</p>
s.4.3.24(1)		<p>Whilst subsection (1) entitles a law practice to charge interest on unpaid legal costs if those costs are unpaid 30 days or more after the practice has given a bill for those costs, subsection (2) provides that the practice may charge interest in accordance with a costs agreement. It would appear that subsection (1) sets a reasonable time limit in the absence of a contrary time limit being stipulated in the costs agreement. If this is so, and in order remove any ambiguity, it is recommended that subsection (1) be amended to read as follows:</p> <p>“(1) <u>Subject to subsection (2),</u> A a law practice may charge interest on unpaid legal costs if the costs are unpaid 30 days or more after the law practice has given a bill for the costs in accordance with this Part.”</p>
s.4.3.26		<p>When assessing costs the costs agreement is no longer paramount. Under the current Queensland legislation the assessor must assess the fees by reference to the costs agreement and decide only if the work to which the costs related was reasonably carried and whether the work was carried out in a reasonable way (section 341(a) and (b) <i>Legal Profession Act 2007</i> (Qld)). Under the NLPL, the costs agreement is only prima facie evidence that the fees are fair and reasonable which means the assessor has power to vary the rates and to determine whether or not a costs agreement is valid (section 4.3.6). This does not assist business management of law practices because of its uncertainty.</p>
s.4.3.27(6)(b)		<p>If an assessment is initiated by any third party payer, associated or non-associated, the law practice cannot commence proceedings to recover their costs against the client until the assessment is completed.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		This is contrary to the principles of contract law, particularly where a non-associated third party payer's liability to the client is on a different contractual arrangement than that between the client and the law practice (see <i>Boyce -v- McIntyre</i> [2009] NSWQCA 85). This needs to be remedied.
s.4.3.28(2)(b)		Consistent with an earlier suggested amendment, it is recommended that the words, ", or a range of costs," be inserted in subsection 4.3.28(2)(b).
s.4.3.28 and 4.3.32		<p>This section specifically refers the assessor back to section 4.3.4(2) to decide whether the fees charged are fair and reasonable. The assessor does not have the appropriate judicial powers to determine whether an agreement is valid or to set it aside wholly or partially if the costs agreement is not fair or reasonable. It is intended by the NLPL that the grounds to set aside the costs agreement are now only restricted to statutory requirements as an assessor does not have judicial discretion to consider whether the agreement was unconscionable or not.</p> <p>Assessors are not a judge of a Court nor do they have Judicature Act powers. Further the assessor is not in a position to call evidence or make transcripts available for the purposes of any appeal. The assessor would need to have judicial discretion to carry out the functions contemplated by the NLPL, particularly when those findings are the subject of an appeal (see section 4.3.32). This is an unworkable scheme. Lack of transparency will no doubt be the subject of public criticism of such a system. Why shouldn't the costs agreement be set aside like any other agreement at law. i.e. by a Court? It is a commercial agreement. There is no logic in establishing a "quasi judicial" parallel for legal costs agreements. It will inevitably lead to potential further costs for disputes management.</p>
Part 4.3 - Division 6 - Costs Assessment		
Part 4.3 - Division 6 - Costs Assessment		The NLPL does not deal with preservation of confidentiality, privilege or immunity to assessors (as is currently the case - see section 350 <i>Legal Profession Act 2007</i> (Qld)). It is doubtful whether assessors will undertake an assessment process under the NLPL unless immunity is granted. Some of the findings contemplated by the NLPL will, if not supported on appeal, leave assessors exposed particularly where those findings are published.

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.4.3.30		<p>QLS opposes the imposition of an obligation on Costs assessors to refer matters to the Ombudsman for investigation if they consider costs charged are not fair and reasonable, or any matter that may amount to unsatisfactory professional conduct or professional misconduct. If there has been any gross overcharging such as to amount to professional misconduct, or any other matter that may amount to unsatisfactory professional conduct, it is always open to the client or third party payer to report the matter to the Ombudsman.</p>
New suggested provisions	Costs Reduction provisions in speculative personal injury retainers	<p>For quite a number of years, the Qld LPA has contained a number of provisions (ss.345-347) which provide a consumer protection measure in speculative personal injury cases. These provisions provide that the maximum amount of legal costs (inclusive of GST) that a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim must be worked out under the costs agreement with the client for the Claim, but in no case can those legal costs be more than half of the amount to which the client is entitled under a judgment or settlement (after specified deductions), including an amount the client is entitled to receive for costs under the judgment or settlement.</p> <p>These provisions have worked well in Queensland as a consumer protection mechanism to ensure that clients who retain law practices on a 'no win, no fee' basis actually receive (absent fraud or deceptive conduct on the client's part) at least half of the judgment or settlement sum.</p>
Part 4.4 – Professional Indemnity Insurance		
s.4.4.1		<p>The National Law should be amended to provide that professional indemnity insurance extends adequate protection against civil liability <u>incurred in connection with the provision of legal services by law practices.</u></p>
s.4.4.2		<p>The National Law and National Rules should be amended to make clear that complying insurance policies are <i>only</i> those that are approved under the relevant legislation of each jurisdiction.</p>
Part 4.5 - Fidelity Guarantee Fund		

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
r.10.2.2		QLS recommends that r.10.2.2 can be made much simpler and clearer by specifically stating that money provided for mortgage financing is not covered by the Fidelity Guarantee Fund.
Part 4.7 – Profession rules		
s.4.7.4		<p>In relation to the CPD Rules, the Board should not assume the responsibility for approving courses or providers of Continuing Professional Development. Market forces currently decide these issues, and it is a matter of detail and effort to which the Board should not be drawn at all.</p> <p>In most jurisdictions the acronym CPD refers to <i>Compulsory</i> professional development, rather than <i>continuing</i> PD. The elements detailed in 11.2.2(1)(a) relate to the compulsory elements of a general PD requirement.</p> <p>In general terms of consumer protection, the Rules may in time, extend the unit requirement for CPD.</p>
Parts 5.2 & 5.3 – Complaints and Consumer Matters		
s.5.2.5(2)(b)		QLS recommends this provision be deleted for the reasons advanced in the LCA Submission. It is anticipated this will increase the number of “cost disputes” that need to be dealt with. Given that a practitioner owes their professional obligations to the executor/trustee who is the client with whom there is a professional and contractual relationship, dealing with such “complaints” will prove problematic and only add to the regulatory costs of the scheme.
s.5.2.2 – 5.2.7		<p>The combined effect of ss.5.2.2 – s.5.2.7 is not clear. Depending on how one interprets those provisions, they can be diagrammatically represented as set out in Attachment 1. (p.34)</p> <p>The fundamental problem appears to arise because all “disciplinary matters”, except disputes or issues about costs greater than \$100,000 (on one interpretation of those provisions), are, by definition, “consumer matters”. On the alternate interpretation, all “disciplinary matters” are also “consumer matters”.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>However, s.5.2.7 gives the clear impression that a “disciplinary matter” is a category of complaint separate to a complaint that is a “consumer matter”.</p> <p>Arguably, there should be a clear distinction between a complaint that constitutes a “disciplinary matter” and a complaint that constitutes a “consumer matter”. Whilst a single complaint may raise both types of “matters”, there should be no cross-over such that the conduct in question could, by definition, constitute both a “disciplinary matter” and a “consumer matter”.</p>
s.5.2.8		<p>QLS objects to the period of 5 years within which to make a complaint. This time period ought to be reduced to 3 years.</p> <p>Further, it is recommended subsection (2) be amended to read as follows:</p> <p style="padding-left: 40px;">“(2) To the extent that a complaint involves a costs dispute <u>dispute or issue about costs (whatever the amount)</u>, it must be made within 60 days after the legal costs were payable or, if an itemised bill was requested in respect of those costs, within 30 days after the request was complied with.”</p> <p>The reason for this proposed amendment arises from the definition of “costs dispute”. A “costs dispute” is limited to a dispute about legal costs not exceeding \$100,000. The time within which to make a “complaint” should not differ depending upon the amount of costs in dispute. On the current wording, a dispute or issue about costs exceeding \$100,000 could be made up to 5 years after the event which is, for a variety of reasons, totally unacceptable and commercially impracticable.</p>
s.5.3.5		<p>The consumer dispute, even if it does not involve unsatisfactory professional conduct can lead to a sanction of a practitioner by the Ombudsman, though the most common remedy on a determination of such a matter by the Ombudsman will be akin to an enforceable undertaking (see 5.3.5(2)(c) and (d) and 5.3.5(3)). There is no right of appeal, outside of internal review of orders made by the Ombudsman, on a determination of a consumer matter save upon a compensation order over</p>

PROVISION	CONTENT	NOTES AND ISSUES								
Part/Section										
		<p>\$10,000 (see Part 5.6). QLS is of the view there should be a right to appeal or external review of any such determination.</p> <p>In relation to the power of the Ombudsman to make a Compensation Order – see the comments to Part 5.5 – Compensation Orders – below.</p>								
s.5.3.7(3)		<p>The Society opposes this provision.</p> <p>For a variety of reasons, this provision is oppressive, unrealistic and absurd. Requiring a law practice to lodge the “disputed” amount with the Ombudsman could cause irreparable damage to a law practice, interferes with the normal operations of the practice and is of no utility in the resolution of the “dispute”. Further, the complainant can exercise their rights with respect to a costs assessment or the matter can otherwise be resolved by the Ombudsman.</p> <p>The same can be said of subsection 5.3.7(1).</p>								
s.5.4.5		<p>QLS opposes vesting such a power in the Ombudsman.</p> <p>A regulator should not be empowered to investigate, prosecute, determine and sanction as there is no separation of duties, powers and functions. This is especially so given the extensive powers proposed to be given to the Ombudsman. By way of illustration, in Queensland in the last 2 years, there were 31 matters before the Tribunals/Court with the following general results:</p> <table data-bbox="996 1129 2027 1276"> <tr> <td>Struck off</td> <td>- 13</td> </tr> <tr> <td>Suspended</td> <td>- 1</td> </tr> <tr> <td>Publicly reprimanded</td> <td>- 15 (Note: 9 practitioners publicly reprimanded were also fined)</td> </tr> <tr> <td>Fined</td> <td>- 10</td> </tr> </table> <p>In relation to the penalties imposed, the breakdown is as follows:</p>	Struck off	- 13	Suspended	- 1	Publicly reprimanded	- 15 (Note: 9 practitioners publicly reprimanded were also fined)	Fined	- 10
Struck off	- 13									
Suspended	- 1									
Publicly reprimanded	- 15 (Note: 9 practitioners publicly reprimanded were also fined)									
Fined	- 10									

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
		<p>\$2,000 - 2 \$3,000 - 1 \$5,000 - 1 \$7,500 - 1 \$10,000- 3 \$15,000- 1 \$20,000- 1</p> <p>Thus, if the Ombudsman is given the power to fine up to \$25,000 and to reprimand or impose other disciplinary sanctions (as per s.5.4.5), the practical reality is that only the most serious of conduct will go before a Tribunal for determination. If the Ombudsman is to retain these powers, it is recommended that the power to fine be decreased to \$5,000.</p> <p>Further, there are a great number of matters that sit on what the Queensland Legal Services Commissioner calls "the cusp". He resolves these by in effect negotiating a settlement with the practitioner, requiring them to convince him the error will not reoccur. He then declines to prosecute in "the public interest", or rather the lack of it in doing so: see lsc.qld.gov.au/speeches/BAQ050306.pdf; s448(1)(b) LPA.</p> <p>The Ombudsman has an equivalent discretion (ss.5.1.6 & 5.1.8). But the public interest to decline to prosecute in the face of ameliorative action by the practitioner is diminished by vesting a determinative power in that very Ombudsman. The new scheme reduces the incentive to obtain this outcome by negotiation than presently exists, because it provides a more direct means of "resolving" the matter through the imposition of a sanction. The new scheme encourages conviction. The position that will likely arise will be that which obtains in the criminal courts that ameliorative action, e.g. to make restitution, will go to mitigation of penalty rather than an exercise of discretion not to prosecute.</p> <p>The extra convictions of practitioners will not come out of blatantly wrong conduct, but the areas of less objectionable conduct, for example, delay or the missed appointment.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
ss.5.4.5(1) & s.9.2.1(3) and r.13.2.1		<p>The Society is of the view that, if the Ombudsman retains the powers set out in s.5.4.5, then any “disciplinary orders” made under ss.5.4.5(1)(a)-(e) and (g) should not appear in the Australian Register. In simple terms, there is no justifiable reason for them to appear in such a Register as (a) there is no “consumer protection” purpose served in making such determinations public, and (b) publication of such determinations does not strike the appropriate balance between the privacy rights of individual practitioners when weighed against the right of the public to be informed of matters that are relevant in determining whether to engage a particular individual or law practice. Further, the Society is of the view that the power prescribed in ss.5.4.5(1)(e) should only be vested in a disciplinary Tribunal, not a Regulator.</p> <p>Further, it is absurd to suggest that an order under ss.5.4.5(1)(g) should appear in the Register as it is not the final “order” (which is a matter for the Board) and is merely part of a deliberative process. The concept of an “order” containing a “recommendation” is illogical. It appears to imply that the Board would be bound to follow the “order” and have no discretion in relation to the “recommendation”.</p> <p>In relation to the provision (s.5.4.5(1)(f)) that fines imposed by the Ombudsman are payable to the Board, the QLS considers this is inappropriate as any fine imposed by any entity should be payable to consolidated revenue.</p> <p>If the Ombudsman is invested with such powers, then:</p> <ul style="list-style-type: none"> (a) a time limit of 12 months should be set after which such entries are expunged from the publicly available Register. Otherwise, they remain on the Register indefinitely, which is less than what is offered individuals convicted of criminal offences under the various ‘Rehabilitation of Offenders’ schemes; and (b) no entries should be appear on the Register until after the time period for appealing/reviewing the Ombudsman’s determination has expired.
Part 5.5 - Compensation Orders		

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.5.5.1- 5.5.6		<p>The Society is opposed, for the reasons advanced earlier, to empowering the Ombudsman to determine disciplinary complaints and, for the reasons set out below, to the vesting in the Ombudsman the power to make a Compensation Order in response to a complaint.</p> <p>These provisions introduce a new basis of liability that is unprecedented as the power to make a Compensation Order arises where “the Ombudsman ... is satisfied that ... the aggrieved person has suffered loss <u>because of the conduct concerned</u> ... and... <u>it is in the interests of justice that the order be made.</u>” This effectively elevates the Ombudsman to the level of a Court or Tribunal and yet provides none of the associated safeguards. Unfortunately, it goes further because s.5.6.1 makes the Ombudsman’s determination final, except where the Ombudsman determines to conduct an internal review.</p> <p>Even more incongruous is that, whilst a Tribunal can only make a compensation order where it finds UPC or PM, the Ombudsman can make such an order even “if proceedings are not proposed to be initiated in the designated tribunal with respect to the complaint concerned.”</p> <p>This inconsistency apparently elevates the Regulator to prosecutor and judge, which is unacceptable and not in the interests of consumers or the profession.</p> <p>The Society also recommends the deletion of the words, “or other person” from s.5.5.4(3) as they are undefined and potentially include persons who have no contractual nexus with practitioner or firm or matter of complaint.</p>
Part 5.6 – Appeal or review		
s.5.6.2		<p>Section 5.6.2 of the NLPL allows the Ombudsman an absolute discretion to conduct an internal review of its decisions and to make a new decision. There is no limit on this. There should at least be a time limit. It does not give finality to a complaint save those that are prosecuted in a Tribunal or are appealed. Lack of finality on a complaint is unfair and inequitable.</p>
Chapter 6 - External Interventions		

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.6.3.4		<p>Section 6.3.1 effectively provides that a supervisor must be a natural person yet Section 6.3.4 provides for a penalty for a body corporate, implying that a body corporate can be appointed as a supervisor.</p> <p>This penalty provision does not exist in the current legislation and the Society questions whether it should apply if the supervisor is a member of the staff of the Ombudsman or a delegate of the Ombudsman.</p>
s.6.4.4		<p>Section 6.4.1 effectively provides that a manager must be a natural person yet Section 6.4.4 provides for a penalty for a body corporate, implying that a body corporate can be appointed as a supervisor.</p> <p>This penalty provision does not exist in the current legislation and the Society questions whether it should apply if the manager is a member of the staff of the Ombudsman or a delegate of the Ombudsman. The penalty provisions also seem to be inconsistent with section 6.6.10 of the National Law.</p>
Part 6.5 - Receivers		
s.6.5.4		<p>Interestingly, unlike the supervisor and manager provision, the receiver provisions do not provide for a penalty for a body corporate receiver, thus supporting the earlier comments in respect of the penalty provisions for supervisors and managers.</p> <p>This penalty provision does not exist in the current legislation and the Society questions whether it should apply if the receiver is a member of the staff of the Ombudsman or a local representative of the Ombudsman.</p>

PROVISION	CONTENT	NOTES AND ISSUES
Part/Section		
s.6.5.10		<p>Subsection (3) implies that a client file is regulated property but the definition, which is set out below, does not clearly provide that client files and safe custody documents are regulated property. The Society has experienced some difficulty with this issue in managing Receiverships and suggests the definition be expanded to clearly say that client files and safe custody documents are regulated property.</p> <p>“regulated property, in relation to a law practice, means the following:</p> <p>(a) trust money or trust property received, receivable or held by the law practice;</p> <p>(b) interest, dividends or other income or anything else derived from or acquired with money or property referred to in paragraph (a);</p> <p>(c) documents or records of any description relating to anything referred to in paragraph (a) or (b);</p> <p>(d) any computer hardware or software, or other device, in the custody or control of the law practice or an associate of the law practice by which any documents or records referred to in paragraph 1 may be produced or reproduced in visible form.”</p>
r.12.2.1		There is no subparagraph (f). Subparagraph (g) should be subparagraph (f).
r.12.5.1		Presently, fees, costs and expenses are paid out of the Regulatory Budget unless the appointment is made as the result of a dishonest default. That is preferable to the proposal that all such fees, costs and expenses be paid from the Fidelity Guarantee Fund as there may be no basis for any payments from the FGF. The FGF should be safeguarded to deal with proper applications to and by it.

GENERAL COMMENTARY	
SUBJECT	COMMENT
Eligibility to hold a Principal PC	It is recommended that, as a prerequisite to hold a Principal PC, the NLPL or NLPR should expressly provide that an applicant must have successfully undertaken a Practice Management Course (with an appropriate grandfathering clause). As a matter of consumer protection, a practitioner should be required to prove they possess the appropriate skills and knowledge to run the business operations of a law practice before they are held out to the public as competent to practise on their own account.
CPD	Suggest that over time, in the interests of consumer protection, a comparative look at compulsory PD models from other professional might indicate the need to increase the 10 units. This will also require a reconsideration of "what counts", similar to other professional bodies – eg CPS, GP etc.

