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The National Legal Profession Taskforce
c/o Assistant Secretary
National Legal Profession Branch
Attorney-General's Department
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By email to: legalprofession@ag.gov.au

Dear Sirs,

Draft Legal Profession National Law

Introduction

- 1 In April 2010 the Attorney-General the Hon Robert McClelland MP announced that the National Legal Profession Taskforce had presented a draft National Legal Profession National Law (the "draft National Law") to the Council of Australian Governments ("COAG"). The Attorney-General also announced that public submissions concerning the draft National Law could be made to the Taskforce.
- 2 The JCA notes that in July 2010 the Taskforce released a Discussion Paper, *Composition and appointment of the National Legal Services Board* (the "July Discussion Paper"), and invited further submissions on the proposed models of appointing the National Legal Services Board (the "Board") in the light of that discussion paper.

The Judicial Conference of Australia

- 3 The Judicial Conference of Australia (the “JCA”) was established in 1993. Its objects relate to the public interest in maintaining a strong and independent judiciary within a democratic society that adheres to the rule of law. Its membership is comprised of judges (serving and retired), masters and judicial registrars and magistrates drawn from all jurisdictions and levels of the Australian court system. The membership now stands at over 600, which is more than half of the judicial officers in Australia.
- 4 The objects of the JCA include ensuring the maintenance of a strong and independent judiciary as the third arm of government in Australia and promoting, fostering and developing within the executive and legislative arms of government, and within the general community, an understanding and appreciation that a strong and independent judiciary is indispensable to the rule of law and to the continuation of a democratic society in Australia.

Draft National Law

- 5 The draft National Law is designed to achieve national regulation of the legal profession. The JCA notes that the objects of the COAG process of creating a national legal profession were to simplify uniform legislation and regulatory standards and provide for setting national standards, policies and practices wherever possible and appropriate.¹ The objective of the draft National Law is identified as promoting “the administration of justice and to establish an efficient and effective Australian legal profession”: s 1.1.3.
- 6 The JCA favours the creation of a national legal profession which reflects the reality that Australia operates as a national economy. It is appropriate in that light, that the legal profession reflect the structure of the economic market place.² It is likewise desirable that it be efficient and effective. However the creation of a national legal profession must not be achieved at the expense of the Australian people by the creation of a structure which impinges upon the separation of powers and the rule of law which are fundamental to the Australian democratic system. The existence of a robust Australian legal profession independent of the executive branch of government is essential to both the separation of powers and the rule of law. A legal profession which lacks independence certainly cannot be effective, and probably cannot be efficient. Its independence is therefore a precondition to the realisation of the objective of the draft National Law.

¹ Paper provided by the Taskforce and Consultative Group appointed by COAG to produce draft uniform national legal profession legislation entitled “The Regulatory Framework: A National Legal Profession 16 September 2009”; as quoted in the submission by the Hon Justice Murray Tobias AM RFD on behalf of Law Admitting Consultative Committee.

² The JCA notes that the proposals in the draft National Law give effect to a national legal profession in fact, an objective which has already been substantially achieved by moves towards uniformity and reciprocity: see *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 (at [23]) per Gleeson CJ and Heydon J.

- 7 The following submissions address the model the draft National Law proposes for the Board, including its proposed relationship with the Standing Committee of Attorneys-General (“SCAG”) and the proposed method of appointment of its members. In the JCA’s view there are fundamental structural defects in the model for the Board not confined to, but including, the proposed appointment method which will impinge on the separation of powers and the rule of law and potentially undermine the independence of the legal profession.³

The separation of powers and the rule of law

- 8 The doctrine of the separation of powers is enshrined in the Commonwealth Constitution: s 1, s 61 and s 71.⁴ The separation of powers is essential to the rule of law in a liberal, representative democracy. It guards against domination of one branch of the three arms of government (the legislative, the executive and the judiciary) by another. The rule of law depends upon the preservation of the separation of powers. It ensures that all, including members of the legislative and executive arms of government, are equally accountable before the courts.
- 9 The importance of a strong judicial system with the ability to act independently to uphold and promote the rule of law was acknowledged in the recent report of the Senate Legal and Constitutional Affairs References Committee, *Australia’s Judicial System and the Role of Judges*, December 2009 (at para [4.1]).
- 10 In *APLA Limited v Legal Services Commissioner (NSW)* (at [30]), Gleeson CJ and Heydon J observed (footnotes omitted):
- “The rule of law is one of the assumptions upon which the Constitution is based. It is an assumption upon which the Constitution depends for its efficacy. Chapter III of the Constitution, which confers and denies [sic, defines] judicial power, in accordance with its express terms and its necessary implications, gives practical effect to that assumption. *The effective exercise of judicial power, and the maintenance of the rule of law, depend upon the providing of professional legal services so that citizens may know their rights and obligations, and have the capacity to invoke judicial power.*” (emphasis added)
- 11 Communications between legal practitioner and client, between legal practitioners, and between judges and practitioners, are critical to the administration of justice in Australia. They make up part of the essential elements of judicial processes required under the Constitution: *APLA Limited v Legal Services Commissioner (NSW)* (at [84]) per McHugh J. This passage from Justice McHugh’s judgment underlines the symbiotic relationship between the independent judiciary and the independent legal profession

³ The JCA notes that the submissions which appear on the Taskforce’s website have addressed other aspects of the draft National Law in great detail.

⁴ *APLA Limited v Legal Services Commissioner (NSW)* (at [76]) per McHugh J.

which, in turn, ensures the citizen is afforded equality before the law, free of undue influences from any other arm of government.

- 12 The Taskforce has stated that it “recognises the unique and important role that the legal profession plays within a healthy, democratic society” and that “[a]s legal practitioners are often required to protect the rule of law and challenge executive power, it is essential that the legal profession remain independent from executive direction or control.”⁵ Nevertheless the Consultation Report also notes that the Taskforce supports a “co-operative, co-regulatory approach to regulation, which involves the Courts, government, and the legal profession ... [and] secures the independence of the profession and draws on the profession’s essential legal expertise with government involvement ensuring transparency and accountability ... essential to consumer confidence in a regulatory system.”⁶
- 13 While, as will be apparent from the discussion below, the Taskforce appears to recognise the importance of these principles, that recognition is not reflected in the draft National Law.
- 14 In particular, the JCA challenges the Taskforce’s assumption that the independence of the legal profession can be preserved under a system whereby the executive government has the power to control the appointment of the Board which regulates the legal profession, and, in circumstances where the executive government can give policy directions to the Board. In the JCA’s view, the proposed system has the real potential to frustrate the ability of members of the legal profession to practise in a truly independent manner and, in turn, to impinge upon the independence of the legal profession and the preservation of the important principles to which I have referred.

National Legal Services Board

- 15 The Consultation Report dated April 2010, under cover of which the draft National Law and the Legal Profession National Rules (the “National Rules”) were published, observes that the National Law establishes the Board to be the principal regulatory body under the new scheme.⁷ As the Consultation Report also observes, the Board is vested with a number of critical functions which include making National Rules under the draft National Law, administering admissions to the profession, granting and renewing Australian practising certificates and granting and renewing Australian registration certificates for foreign lawyers.⁸

⁵ The Consultation Report dated April 2010 (at 19-20) under cover of which the draft National Law and the National Rules were published under the heading “Co-Regulation and Preserving the Independence of the Legal Profession”.

⁶ Consultation Report (at p 20).

⁷ Consultation Report (at p 5).

⁸ Consultation Report (at pp 5 - 7).

- 16 The objectives of the Board are set out in s 8.2.3 as follows:
- (a) to ensure the efficient, targeted⁹ and effective regulation of the legal profession and the maintenance of professional standards; and
 - (b) to address the concerns of clients of law practices through the regulatory system and provide for the protection of clients of law practices; and
 - (c) to ensure the Australian system is at the forefront of regulation of legal professionals.
- 17 The Board's functions include the oversight of the implementation and application of the draft National Law and the National Rules¹⁰ and policies and practices determined or adopted by the Board in connection with the draft National Law and the National Rules: s 8.2.4(4). As the July Discussion Paper notes (at 1), the Board "will play a fundamental role in setting National Rules governing the regulation of the legal profession."
- 18 Under the draft National Law SCAG has a general supervisory role, relevantly, in relation to the Board (and the proposed National Legal Services Ombudsman) "to ensure they are fulfilling their duties under this Law consistently with the objectives of this Law": s 8.1.2(1). SCAG may request reports from the Board and give it directions on policy matters relevant to its operations. No such requests or policy directions can be about a particular person or a particular matter. The Board must provide SCAG with any requested reports and must comply with any applicable policy directions.
- 19 It is appropriate, at this stage, to note the method by which the draft National Law proposes that members of the Board be appointed.
- 20 Provisions relating to the Board appear in Chapter 8, Part 8.2 of the draft National Law. The appointment of the Board is dealt with in Schedule 1: s 8.2.2(4). Clause 2 of Schedule 1 provides that the Board is to consist of a maximum of seven members. Of these one is to be appointed by the Attorney-General of the host jurisdiction from a panel of three nominated by

⁹ The JCA observes that the word "targeted" in s 8.2.3, which reflects s 1.1.3(e) (objectives of the draft National Law), is of uncertain content. The JCA fully understands and endorses a Board objective of ensuring the "efficient and effective regulation of the legal profession". It is unclear what purpose is served by introducing the word "targeted" in this context. Its introduction carries an unfortunate connotation in the context of a system of regulation of the legal profession, particularly given that in the present model SCAG plays a supervisory role over the Board's activities. The JCA notes that the authors of the National Legal Profession Reform Project – Consultation Regulation Impact Statement (May 2010) (at p 14, [4.1]) observed in the context of dealing with efficient and effective national legal profession regulation that: "[i]t is important that regulation is targeted, proportionate and based on risk assessment to enable it to protect consumers without imposing unnecessary burdens on providers." The objective of balancing consumers' and providers' needs is laudable. The phrase "efficient and effective regulation ..." enables the two interests referred to in paragraph 4.1 of the Consultation Regulation Impact Statement to be balanced. Use of the word "targeted" adds nothing but the potential for abuse.

¹⁰ The National Rules are dealt with in chapter 9.

the Council of Chief Justices and one from a panel of three nominated by the Law Council of Australia, the ultimate say in both cases being left to the recommendation of SCAG. Of the balance, no more than five are to be appointed by the host Attorney-General, again on SCAG's recommendation, on the basis of their expertise in one or more of the following areas: the practice of law, the protection of consumers and the regulation of the legal professions: cl 2(1), Sch 1. There is no requirement that any member of the Board have any legal qualifications, nor that, to the extent that their expertise is a qualification, that they have had any minimum period of exposure to the practice of the law.

- 21 The proposed method of appointment of the Board would ensure that whether directly or indirectly, membership of the Board would depend upon a recommendation of SCAG. Only two recommendations for membership may, albeit indirectly, be nominated by the legal profession, one only by the Council of Chief Justices and the other by the Law Council of Australia.
- 22 Thus on the current model of the draft National Law the Board will be effectively appointed by the SCAG, the body which represents the politically elected Attorneys-General of the Commonwealth – in other words the executive arm of government. It will also be susceptible to SCAG's control through that body's ability to give the Board policy directions with which the Board is required to comply. The clear intention that the Board should be subjugated to the political will is seen in the proposal that SCAG be the body which controls the appointment of the members of the Board.
- 23 The JCA endorses the view expressed by the Chief Justice of Australia, the Hon Robert French AC, in his letter to the Taskforce of 6 November 2009, that any proposed model for national legal profession reform "must maintain independence of the legal profession from the Executive Government" and that, "reflecting that independence, the majority of the members of the ... Board should be members of the legal profession appointed independently of governments and of the Standing Committee of Attorneys-General."¹¹
- 24 The JCA also agrees with the view expressed by the Hon Paul De Jersey AC, Chief Justice of Queensland, that the proposal that the Board be substantially appointed by the Executive Government "would signal a seismic shift in the dynamics of the legal profession in this nation, a shift which would ... be inimical to the maintenance of public confidence in the independent administration of justice".¹²

¹¹ The letter appears in the public submissions section of the COAG National Legal Profession Reform website.

¹² Opening Address to the Queensland Law Society Vincents' Symposium 2010, 27 March 2010. Similar comments have been made by the Hon J J Spigelman AC, Chief Justice of New South Wales, in his speech, "Towards a National Judiciary and Profession", 1 February 2010; by the Hon John Doyle AC, Chief Justice of South Australia in his Opening Address to the Law Society of South Australia's Criminal Law Conference on 26 March 2010, forwarded to Mr Roger Wilkins AO, Chair of the Taskforce by letter dated 1 April 2010 from the Law Society of South Australia; and, as reported by the media, by the Chief Justice of Western Australia, the Hon Wayne Martin and the Chief Justice of Victoria, the Hon Marilyn Warren AC.

Taskforce response – the July Discussion Paper

- 25 In the July Discussion Paper, in apparent defence of the current proposed appointment method, the Taskforce suggests that the reason SCAG should nominate the members of the Board is to ensure that its membership “reflect[s] an appropriate balance between the legal profession who will be the subject of regulation and those with experience in consumer protection and professional regulation.”¹³ The July Discussion Paper also comments, when addressing the question of the skills, experience and qualifications which should be reflected in the Board’s membership, that the Board should “account for a range of interests and have a sufficient capacity to acquit its functions effectively.”¹⁴
- 26 The JCA recognises the importance of consumer protection and professional regulation; and it has little doubt that all consumers would recognise, as the foregoing discussion makes apparent, that the fundamental objective in establishing a Board which is to be responsible for regulating the national legal profession should be to preserve the separation of powers and the rule of law as essential elements in the protection of consumers of legal services. This simply cannot happen in a model controlled by SCAG. Such a model would promote the very opposite of that which is intended.
- 27 The Taskforce attaches to the July Discussion Paper the Law Council of Australia’s proposed alternative model for appointment to the Board, the existing model and other models, one of which is based upon the Financial Services Ombudsman, but all others of which appear to be the Taskforce’s proposals.
- 28 In general all proposed models contemplate nomination by, variously, SCAG, the Law Council of Australia, the Australian Bar Association, and the Council of Chief Justices. Save for saying, as the foregoing comments would have made apparent, that SCAG should not be involved in the appointment of all members of the Board, the JCA does not wish to comment on one particular model over the other.
- 29 The JCA’s view is that the method of appointment of the Board should reflect the necessity that the separation of powers be preserved in fact, consistently with the independence of the legal profession and the ultimate goal of ensuring that the rule of law prevails in Australia. That principle can only be recognised if the majority of nominations of members of the Board are made by members of the legal profession, whether they be the Council of Chief Justices, the Law Council of Australia, the Australian Bar Association or the JCA or some combination of these. In the JCA’s view nomination variously by the latter four bodies would ensure an appropriate balance on the Board.

¹³ July Discussion Paper at p 2.

¹⁴ July Discussion Paper at p 3.

- 30 It could be left to bodies such as the Australian Consumers' Association to nominate members to reflect the objective of consumer representation, while no doubt an appropriate financial body could be identified to nominate persons with the financial expertise apparently seen as necessary. The JCA is alive to the benefits of, and supports, such representation.
- 31 The JCA strongly urges the Taskforce to consider the issues raised in this submission. They go to the heart of the continuation of the independent system of law for which Australia is renowned.

Yours sincerely

The Hon Justice R.S. McColl AO
President