

9 July 2010

National Legal Profession Taskforce  
c/o Assistant Secretary  
National Legal Profession Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

*By email: legalprofession@ag.gov.au*

Dear Assistant Secretary

### **National Legal Services Board**

On behalf of the Rule of Law Institute of Australia "**RoLIA**",<sup>1</sup> I write to make a submission on the proposed National Legal Services Board "**NLSB**". RoLIA approves of efforts to reduce regulation, though we agree with Chief Justice Robert French that the method of appointing the new board is a threat to the independence of the legal profession. It is critical that the legal profession remain independent to maintain the rule of law in Australia. That independence is a corollary of the independence of the judiciary, as Chief Justice French said in the Council of Chief Justices' submission to your taskforce on 6 Nov 2009.

### **RoLIA**

RoLIA is an independent non-profit association formed to uphold the rule of law in Australia. RoLIA was established in September 2009 with the following objectives:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

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<sup>1</sup> Formerly The Rule of Law Association of Australia, name changed 9 June 2010.

Sir Ninian Stephen identified four of the principles which are embodied in the spirit of the rule of law when he said:

“The first of the four principles is that government should be under law, that the law should apply to and be observed by government and its agencies, those given power in the community, just as it applies to the ordinary citizen; the second is that those who play their part in administering the law, judges and solicitors and barristers alike, should be independent and uninfluenced by government in their respective role so as to ensure that the rule of law is and remains a working reality and not a mere catch phrase; the third is closely associated with the second, it is that there should be ready access to the courts of law for those who seek legal remedy and relief; the fourth is that the law of the land, which rules us, should be certain, general and equal in its operation.” *(Source: 1999 Annual Lawyers Lecture St James Ethics Centre)*

The Hon Justice J J Spigelman, Chief Justice of the NSW Supreme Court, and also Patron of RoLIA, said of the rule of law:

“A State cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influences, including inducements and pressures, are inconsistent with each of these objectives.

Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and an outcome. Predictability requires a process by which the outcome is directly related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome.

Improper influence, whether political pressure or bias or corruption, distorts all of these objectives. So, of course, does incompetence and inefficiency.” *(Source: Address at International Legal Services Advisory Council Conference 20 March 2003)*

### **Issues with the draft legislation**

The proposed NLSB would set common national standards for the legal profession on issues such as admission, complaints and practising certificates. However, the proposed legislation creates a significant issue for the independence of the profession in that under the new regime there will be a NLSB whose members are appointed by the host Attorney-General and the Attorney-Generals’ Standing

Committee. This will mean that the executive arm of government will effectively be regulating the legal profession. The host Attorney-General can terminate a NLSB member's appointment, and no appeal process is specified. The Standing Committee also has the power to veto proposed rule suggestions of the NLSB.

In addition, RoLIA believes that the proposed Ombudsman's position as currently structured will effectively be an instrument of the executive arm of government, as the Ombudsman can be appointed as well as terminated, without a specified appeal process, by an act of the executive. The Ombudsman is to be accountable to the Standing Committee. If there is to be an Ombudsman then the termination powers should be in the hands of the Federal Parliament by way of a motion of both houses. Whilst the proposed legislation states that the Ombudsman is independent of the Attorneys-General, RoLIA believes that the vesting of appointment and termination powers in the Attorneys-General means that the independence is in name only.

RoLIA has no problem with the remainder of the legislation and applauds the effort to reduce regulation and red tape.

### **Importance of an independent legal profession**

The International Congress of Jurists, in 1959, stated that the independence of the judiciary and the legal profession are essential to the maintenance of Rule of Law and to the proper administration of justice.

Former High Court Justice Michael Kirby has noted in a 2005 speech that the principle of an independent legal profession is a central tenet of international human rights law and its purpose is to protect the people, not the lawyers or judges.

It cannot be ignored that to uphold the rule of law principle that all are equal before the law, it is imperative that lawyers are able to represent any client and cause without fear of retribution. Mr Kirby noted that "to ensure the supremacy of law over the arbitrary exercise of power a strong and independent legal profession is therefore essential."

The Committee of Ministers of the Council of Europe has said: "[...] it is essential to the protection of human rights, as well as to the maintenance of the rule of law, that there be an organised legal profession free to manage its own affairs."<sup>2</sup>

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<sup>2</sup> Explanatory Memorandum on Recommendation No.R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, para. 10.

## **International law requirements for an independent legal profession**

International law protects the independence of the profession through the United Nations Special Rapporteur on the Independence of Judges and Lawyers; and the United Nations Basic Principles on the Role of Lawyers ("**Basic Principles**").

Article 16 of the Basic Principles states that Governments should ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference...(c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics. RoLIA is concerned that by having the executive appoint the NLSB and the Ombudsman, this principle is not being upheld.

Article 24 of the Basic Principles states that "Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external influence." Whilst the state law and bar associations remain, the ability to protect their professional integrity is lowered by the removal of their ability to set professional conduct rules. If lawyers are members of the board, and have been independently appointed, this would remove this problem. An experience of Article 24 in practice was where the Human Rights Committee had to deal with Belarus regarding freedom of association, where the Ministry of Justice was allowed to license lawyers and cause them, in order to practise, to join a centralised Collegium controlled by the Ministry. This was found to severely compromise the independence of the judiciary and legal profession. One can draw parallels between this and the proposed situation, where practising certificates are to be issued by an executive-controlled board and lawyers are subject to the professional rules set by this board in order to practice.

RoLIA seeks that any Ombudsman be independently appointed. Article 28 states that "Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to independent judicial review." The section in the proposed legislation allowing the executive be able to appoint and remove the Ombudsman must be changed to create an 'independent statutory authority'.

## Recommendations

1. RoLIA supports the Chief Justice's position that the legal profession is to appoint the NLSB members through the Law Council and the Australian Bar Association, with no input from the Attorneys-General. The Chair could be nominated by the NLSB or the Council of Chief Justices.
2. The Ombudsman's level of proposed delegation is too high. This will contribute to the over-regulation that Australia already suffers. The position of Ombudsman should be removed from the draft legislation and the current state systems retained. If an Ombudsman is deemed necessary, they should be appointed by an NLSB that has been formed by the method suggested in our first recommendation. The Ombudsman should then only be removed by both houses of Federal Parliament.

Should you need any further information please contact RoLIA researcher, Ms Lydia Griffiths on (02) 9251 8000.

Yours sincerely



**Malcolm Stewart**  
Vice-President  
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