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National Legal Profession Reform Taskforce
c/- Ms Marjorie Todd, Assistant Secretary – National Legal Profession Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2603

By email: legalprofession@ag.gov.au

Dear Ms Todd

The Australian and New Zealand Ombudsman Association (ANZOA) is pleased to have the opportunity to contribute to the National Legal Profession Reform Taskforce's public consultation process.

ANZOA is a professional association and the peak body for Ombudsmen in Australia and New Zealand. A listing of ANZOA Members is included as Attachment 1 to this submission.

ANZOA's submission may be published on the National Legal Profession Reform website.

Inappropriate use of the term Ombudsman

We note the Taskforce's statement, on page 1 of the *National Legal Profession Reform Project, Consultation Report, 14 May 2010*, that: "In addition to the benefits of national uniformity, the Taskforce has sought to improve regulation of the legal profession by selecting good practice from around the country, and innovating in appropriate areas".

The area on which we wish to make specific comment is the proposal for a National Legal Services 'ombudsman', a matter raised on page 7 of the *Consultation Report*.

ANZOA is of the strong view that use of the term Ombudsman is inappropriate in the context of the proposed functions of this office. The primary reasons for this are:

- the proposal that the office be permitted to delegate some functions to local professional associations, which we view as fundamentally inconsistent with the required independence of an Ombudsman
- the range and type of regulatory functions to be exercised by the office, which are not consistent with the role of an Ombudsman.

Independence

The Taskforce proposes to apply the term Ombudsman to a multi-faceted, multi-role agency embedded within a regulatory regime — an agency whose proposed dispute resolution functions are able to be delegated to professional associations, the members of which will be the subject of consumer complaints. This is neither correct, nor appropriate, for an Ombudsman office.

In saying this, we note provisions such as those summarised on page 21 of the *Consultation Report*:

An important aspect of the co-regulatory system is the performance of regulatory functions by professional associations. The regulatory functions carried out by the profession rather than by government currently differ from jurisdiction to jurisdiction. As noted above, the Taskforce's proposals allow the balance between government and professional regulation to continue to be determined at a State and Territory level, by allowing professional associations to act as local representatives of the Board or Ombudsman, or as delegates of local representatives.

The Taskforce expects that professional associations will be the local representatives of the Board in most jurisdictions, and continue to carry out functions including the granting of practising certificates. The Taskforce would prefer that government bodies be nominated as local representatives of the Ombudsman, to allow complaints functions to be handled independently of the profession. This would allow other functions of the Ombudsman to be delegated to professional associations.

An Ombudsman office must be truly independent from the bodies or individuals about whom complaints are made. The Ombudsman must not be — nor be able to be perceived as — an advocate for a special interest group, agency or company.

Dispute resolution, not regulation

An Ombudsman office is established as a standalone body by way of its own Act or Constitution. Its primary responsibility must be to resolve consumer/citizen disputes, independently, fairly and without direction.

Importantly, while an Ombudsman may exercise recommendatory or determinative powers leading to regulatory change, an Ombudsman is not a Regulator. While Ombudsmen usually have strong links to any relevant Regulator, the roles of the Ombudsman and the Regulator are distinctly separate.

So, while Ombudsman reports may be drawn upon by other bodies undertaking regulatory, disciplinary and prosecutorial functions, it is not in our view generally appropriate for functions including the following to be imposed upon an Ombudsman:

- overseeing the regulation of the legal profession
- developing uniform national rules
- prosecuting matters involving unsatisfactory professional conduct or professional misconduct in the appropriate disciplinary tribunal
- administering an intervention regime, including appointment of a supervisor of trust money or a manager for a law practice.

Why a name is important

The Taskforce's proposal misuses the term Ombudsman in a way which distorts the appropriate character of an Ombudsman office.

It is important that members of the public are not confused about what to expect when they approach an Ombudsman. Public trust in, and respect for, the Ombudsman institution generally — and its independent dispute resolution function specifically — must not be undermined.

A National Legal Services Commissioner

The Consultation Report specifically seeks submissions on any other appropriate name for the new office. The role proposed by the Taskforce may be better described as one of a National Legal Services Commissioner. The name Commissioner is not inconsistent with the functions proposed and will, in fact, better describe to the community and profession the role and functions of the new office.

Essential criteria for calling a body an Ombudsman

Concerned at growing misuse of the term Ombudsman, ANZOA has recently issued a Policy Statement, which sets out six Essential Criteria for describing a body as an Ombudsman.

These criteria address independence, jurisdiction, powers, accessibility, procedural fairness and accountability. The ANZOA media release, inclusive of the Essential Criteria, is Attachment 2 to this submission.

The Policy Statement makes clear the very real issues which arise where the name Ombudsman is incorrectly used to describe an organisation that, in reality, is not an Ombudsman.

Benchmarks for Industry-Based Customer Dispute Resolution Schemes

The *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* (the *National Benchmarks*) were issued by the Minister for Customs and Consumer Affairs, within the Commonwealth Department of Industry, Science and Tourism in August 1997.

These *National Benchmarks* address the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness, all of which should be observed by any office set up to provide external dispute resolution services for consumer complaints.

We commend the *National Benchmarks* to the Taskforce as it settles the dispute resolution functions of the new national legal services body. They may be found online at <http://www.anzoa.com.au/National%20Benchmarks.pdf>

Conclusion

The members of ANZOA's Executive Committee would be pleased to discuss ANZOA's concerns about the proposed Legal Services 'ombudsman' with representatives of the Taskforce, and may be contacted through the ANZOA Secretariat at info@anzoa.com.au.

Yours sincerely



Fiona McLeod
Chair

For the Members of the Australian and New Zealand Ombudsman Association



Members of the Australian and New Zealand Ombudsman Association

Barry Adams, Energy Ombudsman Queensland

Simon Allston, Ombudsman Tasmania

Deborah Battell, Banking Ombudsman New Zealand

Richard Bingham, Ombudsman South Australia

George Brouwer, Ombudsman Victoria

Simon Cohen, Telecommunications Industry Ombudsman

Chris Field, Ombudsman Western Australia / Energy Ombudsman Western Australia

Philip Field, Ombudsman Banking and Finance, Financial Ombudsman Service

Judi Jones, Electricity and Gas Complaints Commissioner New Zealand

Wayne Lines, WorkCover Ombudsman South Australia

Alison Maynard, Ombudsman – Investments, Life Insurance & Superannuation,
Financial Ombudsman Service

Fiona McLeod, Energy and Water Ombudsman (Victoria)

Colin Neave, Chief Ombudsman, Financial Ombudsman Service,

John Price, Ombudsman General Insurance, Financial Ombudsman Service

Clare Petre, Energy & Water Ombudsman NSW

Carolyn Richards, Ombudsman for the Northern Territory

Karen Stevens, Insurance & Savings Ombudsman New Zealand

Bev Wakem, Chief Ombudsman New Zealand

Beth Wilson, Health Services Commissioner, Victoria

Until June 2010, Commonwealth Ombudsman Prof **John McMillan**, who has now taken up the new role of Australian Information Commissioner

Registered Association Number A0044196B

Media release

18 May 2010

Peak body seeks a halt to misuse of the term Ombudsman

The Australian and New Zealand Ombudsman Association (ANZOA)—the peak body for Ombudsmen in Australia and New Zealand—is calling for stronger controls on the use of the term Ombudsman.

ANZOA is supporting its call with a policy statement, setting out six essential criteria—addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability—which it says the public are entitled to expect of any office described as an Ombudsman.

In releasing ANZOA's 'Essential Criteria' policy statement, ANZOA Chair, Fiona McLeod, said, "Where problems arise in an industry or an area of government services, the call for an 'ombudsman' commonly follows. In itself, this is not a problem—indeed it is a testament to the high level of public respect for the independence, integrity and impartiality of Ombudsman offices.

"ANZOA's concern lies with the increasing inappropriate use of the term 'ombudsman' to describe bodies that do not conform to—or show an understanding of—the accepted Ombudsman model and its 200 year history.

"The term Ombudsman is understood by the public as signifying an independent office, which primarily has a complaint handling and investigation function.

"Using the term 'ombudsman' to describe an office with regulatory, disciplinary and/or prosecutorial functions confuses the role of Ombudsman with that of a regulatory body. This criticism applies to the Fair Work 'ombudsman', the recently proposed Supermarket 'ombudsman', and the proposed National Legal Services 'ombudsman', announced last week, which applies the term Ombudsman to a broad range of functions that have, until now, been performed by State legal services commissioners.

"The concept of Ombudsman is being stretched and the confidence of the Australian public in the role and independence of the Ombudsman institution is at risk of being undermined and diminished.

"An 'ombudsman' office under the direction or control of an industry or a government minister is not independent. An office set up within a company or government agency as an 'internal ombudsman' is not independent.

"In New Zealand, the term Ombudsman is protected by legislation. This is not the case in Australia.

"No Australian organisation should misuse the term. We urge anyone considering an 'ombudsman' proposal—Commonwealth, State or Local Government, Regulator, Industry, University or other Non Government body—to consult with ANZOA early in the process, to ensure the proposed office meets the necessary criteria for use of the term."

The ANZOA Policy Statement setting out Essential Criteria the public should rightly expect of any office calling itself an Ombudsman accompanies this release.

Media enquiries:

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Essential criteria for describing a body as an Ombudsman

Policy statement endorsed by the Members of the Australian and New Zealand Ombudsman Association (ANZOA)

The institution of Ombudsman has proven itself adaptable to a variety of roles and settings.

In Australia and New Zealand today, there are several types of Ombudsman offices:

- Parliamentary Ombudsmen who take complaints from citizens and constituents about government agencies
- Other statutory Ombudsmen/Commissioners who investigate complaints about particular agencies or professional services—such as health
- Industry-based Ombudsmen who take complaints from customers of companies providing particular services—such as telecommunications, banking, insurance, investments, energy, water and public transport.

The development and popularity of the Ombudsman institution has come about for one reason—the office is renowned for independent, accessible and impartial review and investigation. In increasing numbers, the public turns to Ombudsman offices for assistance and support.

It is important, therefore, that members of the public are not confused about what to expect when they approach an Ombudsman's office—public trust must not be undermined.

Many of those who approach an Ombudsman feel vulnerable, wish to do so in confidence or make serious allegations or whistleblower complaints.

Public respect for the independence, integrity and impartiality of Ombudsman offices is at risk if bodies that do not conform to the accepted model are inappropriately described as an Ombudsman office.

It is a contradiction in terms, for example, to describe a body as an 'internal ombudsman' or to apply the description to a body that is subject to the direction of a government minister or industry body.

The Australian and New Zealand Ombudsman Association (ANZOA) is concerned to ensure appropriate use of the term Ombudsman. Our view is that a body should not be described as an Ombudsman unless it complies with six essential criteria addressing independence, jurisdiction, powers, accessibility, procedural fairness and accountability.

Independence

- The office of Ombudsman must be established—either by legislation or as an incorporated or accredited body—so that it is independent of the organisations being investigated.
- The person appointed as Ombudsman must be appointed for a fixed term—removable only for misconduct or incapacity according to a clearly defined process.
- The Ombudsman must not be subject to direction.
- The Ombudsman must be able to select his or her own staff.
- The Ombudsman must not be—or be able to be perceived as—an advocate for a special interest group, agency or company.
- The Ombudsman must have an unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.
- The Ombudsman's office must operate on a not-for-profit basis.

Jurisdiction

- The jurisdiction of the Ombudsman should be clearly defined in legislation or in the document establishing the office.
- The jurisdiction should extend generally to the administrative actions or services of organisations falling within the Ombudsman's jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction—subject only to the contrary ruling of a court.

Powers

- The Ombudsman must be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably in taking or failing to take administrative action or in providing or failing to provide a service.
- In addition to investigating individual complaints, the Ombudsman must have the right to deal with systemic issues or commence an own motion investigation.
- There must be an obligation on organisations within the Ombudsman's jurisdiction to respond to an Ombudsman question or request.
- The Ombudsman must have power to obtain information or to inspect the records of an organisation relevant to a complaint.
- The Ombudsman must have the discretion to choose the procedure for dealing with a complaint, including use of conciliation and other dispute resolution processes.

Accessibility

- A person must be able to approach the Ombudsman's office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman's investigation of a complaint.
- Complaints are generally investigated in private, unless there is reasonable justification for details of the investigation to be reported publicly by the Ombudsman—for example, in an annual report or on other public interest grounds.

Procedural fairness

The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness:

- The complainant, the organisation complained about and any person directly adversely affected by an Ombudsman's decision or recommendation—or criticised by the Ombudsman in a report—must be given an opportunity to respond before the investigation is concluded.
- The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudgment.
- The Ombudsman must provide reasons for any decision, finding or recommendation to both the complainant and the organisation which is the subject of the complaint.

Accountability

- The Ombudsman must be required to publish an annual report on the work of the office.
- The Ombudsman must be responsible—if a Parliamentary Ombudsman, to the Parliament; if an Industry-based Ombudsman, to an independent board of industry and consumer representatives.