

# **SAMOA**

## **LAW REFORM COMMISSION**

LAW PRACTITIONERS ACT 1976  
**Issues Paper IP 04/09**

**December 2009**

## **Preface**

The review of the Samoa Law Practitioners Act 1976 (“LPA”) has been long overdue. The LPA fails to address some of the current changes, issues and practices in the legal profession. The Samoa Law Reform Commission (“Commission”) has been mandated to undertake the review of the LPA.

The Commission has employed for this Issues Paper, the form of questions and a closing date for responses. This paper therefore discusses the issues and poses questions for consideration. The intention is to enable detailed and practical consideration of the issues.

We emphasize that we are not committed to the views indicated and any provisional conclusions should not be taken as precluding further consideration of the issues.

We are grateful for the assistance of John Marshall, (QC President of NZLC) who provided comments on earlier drafts of this paper.

We emphasize however that the views expressed in this paper are those of the Commission and not necessarily those of the people who have helped us.

Submissions or comments on this paper should be sent by the 19<sup>th</sup> of March 2010, to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to [lawreform@ag.gov.ws](mailto:lawreform@ag.gov.ws).

## **Introduction**

This paper discusses issues and the current law and practice in relation to the LPA in Samoa and determines options for reform by exploring similar legislation in New Zealand and Queensland, Australia.

*The content of the issues paper will be as follows:*

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### **1) LAW PRACTITIONERS ACT 1976 (Samoa)**

The Law Practitioners Act 1976 (“LPA”) of Samoa was enacted to provide guidelines for the legal profession in the conduct of their legal duties. The LPA covers various areas within the legal profession which includes:

- i) the admission of practitioners;*
- ii) the Roll of Practitioners;*
- iii) the establishment of the Samoa Law Society;*
- iv) the issuing of practising certificates;*
- v) rules in relation to trust accounts; and also*
- vi) the disciplining of the legal profession.*

The Samoa Law Society is empowered under the LPA to make rules for the regulation of the legal profession. This is stipulated under section 14(3)<sup>1</sup> of the LPA. These rules are established and contained in the Rules of Professional Conduct for Barristers and Solicitors of Samoa. (“Rules”) 14(4)<sup>2</sup> of the LPA, provides that the rules shall bind all members of the Law Society.

The Rules cover the following:

- i) *the relationship between a practitioner and a client;*
- ii) *the relationship between practitioners;*
- iii) *confidentiality and privilege issues;*
- iv) *the establishment of a private office or law firm;*
- v) *the conduct of practice;*
- vi) *rules in litigation; and*
- vii) *the independence of practitioners and conflicts of interest.*

Although the Rules are for the purpose of regulating the conduct of the legal profession, the rules are not an exhaustive code. The breach of these rules will only amount to proceedings if the breach is serious. There are no guidelines that define what comprises a ‘serious breach’. The rules provide an instructive and educational dimension for the profession rather than a disciplinary threshold.

### *1.1) The Practice of Law*

#### *1.1.1) Barrister and Solicitor*

- **Samoa**

The LPA Samoa makes reference to the terms Barrister and Solicitor with no actual distinction of the two. A person can practice as a barrister under the Act if the person is a

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<sup>1</sup> The Law Practitioners Act 1976 s.14 (3) The Law Society may from time to time make rules, not inconsistent with this Act, for any matter in this Act that is to be prescribed, determined, or regulated by rules and for any other purposes regulating the officers of the Society and the conduct of its members and any other person to whom under this Act such rules may be applied.

<sup>2</sup> The LPA s.14 (4) Rules shall bind all members of the Law Society and all other persons to whom under this Act such rules may be applied.

barrister of the Supreme Court and holds a practising certificate<sup>3</sup>. A person qualifies to practice as a solicitor if he or she is a solicitor of the Supreme Court and holds a practising certificate<sup>4</sup>. There is no clear definition on the work done by a barrister and the work done by a solicitor although the Act treats a barrister differently from a solicitor, e.g. Barristers Roll and Solicitors Roll. The Rolls are also divided between permanent and temporary.

The Rules do make reference to a barrister sole or a person who has been admitted as a barrister only or has been admitted as both a barrister and solicitor but has been instructed to act as a barrister only. A person holding a practising certificate as both barrister and solicitor shall not hold himself or herself as a barrister sole. The role of a barrister sole is set out in the Rules.

- **New Zealand**

In the New Zealand Lawyers and Conveyancers Act 2006 (“NZLCA”), any person admitted in the High Court of New Zealand under the NZLCA must be admitted as a barrister and a solicitor. In New Zealand, no person may be admitted as a barrister only or as a solicitor only<sup>5</sup>. The NZLCA defines a lawyer as a person who is a barrister and a solicitor<sup>6</sup>.

- **Queensland**

In the Queensland Legal Profession Act 2007 (“QLPA”), the terms ‘barrister’ or ‘solicitor’ are no longer used. They have adopted the terms ‘lawyer’ and ‘legal practitioner’. There is a distinction between a lawyer and a legal practitioner. A lawyer is regarded as a person admitted to the legal profession<sup>7</sup>. In contrast, a legal practitioner is

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<sup>3</sup> Law Practitioners Act 1976 s.4 (a) & s.4 (b).

<sup>4</sup> Law Practitioners Act 1976 s.5 (a) & s.5 (b).

<sup>5</sup> **Lawyers and Conveyancers Act 2006 (NZ)** s.48 (1) **Admission as barrister and solicitor**- Every person admitted by the High Court under this Act must be admitted as a barrister and solicitor; and no person may be admitted as a barrister or solicitor only.

<sup>6</sup> **Lawyers and Conveyancers Act 2006 (NZ)** s. 6- Lawyer means a person who holds a current certificate as a barrister or as a barrister and solicitor.

<sup>7</sup> **Queensland Legal Profession Act 2007** s.5 **Terms relating to lawyers**-(1) An Australian Lawyer is a person who is admitted to the legal profession under this Act or a corresponding law.

an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate<sup>8</sup>. The difference between the two terms is that a lawyer is a person who is admitted to the legal profession but does not hold a practising certificate, whereas a legal practitioner is a lawyer who is admitted to the legal profession and holds a current practising certificate.

### **Analysis**

In contrast to legislation in Queensland and New Zealand, Samoa’s legislation distinguishes a barrister from a solicitor. However, there is no clear distinction between the two. In New Zealand a barrister cannot be admitted as a barrister only but must be admitted as a barrister and solicitor. In Queensland, barrister and solicitor are mentioned but the Act does not clearly define a barrister and a solicitor. The profession is differentiated into lawyers (one that is admitted to the legal profession without a practising certificate) and legal practitioners admitted to the legal profession and hold a current practising certificate.

Samoa is different from New Zealand and Queensland due to the fact that in New Zealand, a person must be admitted as a barrister and solicitor. However, a lawyer may choose to take out a practising certificate as a barrister, or as a barrister and solicitor. In Queensland, reference to the terms barrister and solicitor are now replaced by “lawyer” and “legal practitioner”.

<b>Questions:</b>	<ol style="list-style-type: none"> <li>1. <i>Should Samoa still maintain the distinction between a barrister and a solicitor?</i></li> <li>2. <i>Should the LPA of Samoa clearly define the difference between a</i></li> </ol>
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(2) A local lawyer is a person who is admitted to the legal profession under this Act, whether or not the person is also admitted under a corresponding law.

(3) An interstate lawyer is a person who is admitted to the legal profession under a corresponding law, but not under this Act.

<sup>8</sup> Ibid. s.6 **Terms relating to legal practitioners-** (1) An Australian legal practitioner is an Australian lawyer who holds a current practising certificate or a current interstate certificate.

(2) A local legal practitioner is an Australian lawyer who holds a current local practising certificate.

(3) An interstate legal practitioner is an Australian lawyer who holds a current interstate practising certificate, but not a local practising certificate.

	<p><i>barrister and a solicitor?</i></p> <p>3. <i>Should Samoa abolish the usage of the terms barrister and solicitor and use the terms Lawyer or Legal Practitioner?</i></p>
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1.1.2) Commencement of Private Practice

- **Samoa**

In Samoa, a solicitor cannot commence practice on his or her own account or in partnership unless, he or she during the period of five (5) years immediately preceding the date on which he or she commences private practice, has had three (3) years of experience as a barrister or solicitor or a legal officer in government either in Samoa or in any other country<sup>9</sup>. This means that a person can only go into private practice as a solicitor if he or she has complied with the relevant years of experience stated in LPA. The Supreme Court on the application by a barrister or a solicitor in Samoa may grant leave for him or her to commence practice on his or her own account.

The Rules provide that the name of a law firm must not be misleading, not bring the profession into disrepute and not be unfair to other practitioners and the public.<sup>10</sup> The rules provide a guideline for practitioners in private practice and ensure that practitioners are fair to fellow practitioners and the public. It also provides that a practitioner is to maintain the integrity of the profession.<sup>11</sup>

- **New Zealand**

In New Zealand, the practice by a lawyer on his or her own account is dependent on whether he or she meets the requirements with regards to both practical legal experience and suitability that are imposed by the rules made under the NZLCA. The requirements to commence private practice are stipulated under the Lawyers and Conveyancers Act (Lawyers Practice Rules) Regulations 2008. The requirements provide that a lawyer is eligible to practice on his or her account if during eight (8) years before the

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<sup>9</sup> The Law Practitioners Act 1976 s.6(1)(a).

<sup>10</sup> Rules of Professional Conduct for Barristers and Solicitors of Samoa s.2.01.

<sup>11</sup> Rules of Professional Conduct for Barristers and Solicitors of Samoa r.2.03.

commencement of private practice, he or she has had not less than three (3) years of legal experience in New Zealand.

Another requirement for approval of a barrister and solicitor to practice on his or her own account is that during three (3) years before the date of commencement of practice on his or her own account, the lawyer has received adequate instructions and examination on the duties of a lawyer that relate to the receipt and handling of client money and the operation of a lawyers' trust account.

The final requirement is in relation to the suitability of the lawyer. The Regulations provide that a lawyer must satisfy the Council of the Law Society that he or she is a suitable person to practice on his or her own account as a barrister and solicitor. The Council takes into account the lawyers' legal experience, the intention of the lawyer on how to practice whether as a sole practitioner or a partner in a firm or otherwise, the fields of law in which the applicant intends to practice and other matters that are relevant to the Council.

There is also a provision within the NZLCA that empowers the High Court of New Zealand to grant leave to a lawyer to practice on his or her own account<sup>12</sup> on the basis that the lawyer has met some of the requirements as mentioned above. Lawyers, including barristers and solicitors, and barristers, approved to practice on their own account can be a director of an incorporated law firm.

Where an application is made to the High Court for the commencement of private practice, the High Court must serve the application to the NZLS. Upon the granting of leave to the lawyer to practice on his or her own account, the High Court may impose conditions as it thinks fit.

The requirements set out above currently apply to lawyers who wish to practice as barristers and solicitors on their own account. After 1 January 2010, subject to

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<sup>12</sup> Lawyers and Conveyancers Act 2006 (NZ) s.30 Practice by lawyer on his or her own account.

regulations being made, lawyers who wish to practice as barristers sole (as barristers on their own account) will also need to have had three (3) years legal experience.

- **Queensland**

In the QLPA, there is no provisional requirement for lawyers to commence private practice in providing legal services. However, there is a provision in relation to incorporated legal practices and multi-disciplinary partnerships. The requirement for the establishment of such practices is that notice must be given to the Queensland Law Society of the intention to provide legal services.<sup>13</sup>

### **Analysis**

The LPA of Samoa requires that unless a lawyer has had three years experience as a barrister, solicitor or as a legal officer in the government of Samoa or any other country, he or she cannot commence private practice. Furthermore, the Supreme Court has the power to grant leave to the applicant to practice on his or her account provided that he or she has complied with the requirements stated above.

In New Zealand, a barrister and solicitor may be approved to practice on his or her account if they meet the requirements with regards to both practical legal experience and suitability that are imposed by the rules made under the NZLCA regulations. The similarity with Samoa is that they are granted leave to practice on their own account after serving a number of years in the legal profession and within the respected jurisdiction. The difference is in the number of years to be served to be able to commence private practice. In Samoa it is three years in the immediate preceding 5 years of service whereas private practice in New Zealand is granted if the applicant has provided three years of service in the immediate preceding 8 years and meets the requirements as set out in the NZLCA.

In Queensland, there is a requirement to commence practice in an incorporated firm or a multi-disciplinary partnership and notice must be given to the Law Society of Queensland

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<sup>13</sup> Queensland Legal Profession Act 2007 s.114- Notice of intention to start legal services.

in the approved form for the intention to provide legal services. There is no specific provision in the QLPA on the commencement of private practice by a lawyer or a legal practitioner.

<b>Question:</b>	<p>4. <i>Should the requirements for private practice in Samoa be changed?</i></p> <p>5. <i>Should the time of relevant experience be increased?</i></p> <p>6. <i>Should relevant experience be defined as supervised traineeship at a private firm or in the Attorney General’s Office?</i></p> <p>7. <i>Should being a legal officer in a government department still qualify as relevant experience?</i></p> <p>8. <i>Should a “resident” requirement be an added necessary requirement of private practice?</i></p> <p>9. <i>Should Samoa include its Rules of Professional Conduct in the LPA? If so, how should it incorporate its Rules?</i></p>
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1.2) The Rolls of Practitioners

- **Samoa**

The LPA grants the power to the Registrar of the Supreme Court of Samoa to maintain rolls of practitioners. The LPA allows the Registrar to establish and maintain a permanent roll of barristers of the Supreme Court containing the names of all persons who are admitted as barristers of the Supreme Court. The Registrar also maintains temporary roll of barristers of the Supreme Court who are admitted temporarily as barristers of the Supreme Court of Samoa. The Registrar also maintains a permanent Roll and a temporary Roll of all the solicitors who are admitted as solicitors of the Supreme Court of Samoa.

When an order is made by the Supreme Court to admit a person as a barrister or as a solicitor or as both barrister and solicitor, the names of the person admitted is entered on the roll.

In cases where names of practitioners in Samoa are removed from the roll, a certificate must be signed by the Secretary of the Council of the Law Society indicating that the Council of the Law Society of Samoa has made an order that the practitioner's name be struck off from the roll. The main reason for which a practitioner's name is struck off the roll is due to findings by the Council of the Law Society that the practitioner is guilty of professional misconduct and conduct unbecoming of a barrister and solicitor. The Registrar upon receiving the certificate shall at once strike the name of the practitioner off the appropriate roll. The Supreme Court can make an order for the restoration of the name of a practitioner on the application by a practitioner to have his or her name restored on the appropriate roll or upon receipt of a certificate signed by the Secretary of the Law Society to have a practitioner's name restored on the appropriate roll.

- **New Zealand**

In New Zealand, the NZLCA provides that every Registrar of the High Court must keep in their office a roll of barristers and solicitors. Upon making an order admitting any person as a barrister and solicitor and on payment of the prescribed admission fee, the Registrar must place that person's name on the roll. On the other hand, the Lawyers and Conveyancers Disciplinary Tribunal ("Tribunal") may make an order that a name of a barrister and solicitor be struck off the roll and the Registrar must forthwith strike that name off the roll.<sup>14</sup> A practitioner's name is struck off the roll mainly because he or she has been found guilty of professional misconduct or unsatisfactory conduct. The order to strike off names from the roll can also be done on appeal from the Tribunal to the High Court.

The Registrar upon publication of a notice of an order made by the Tribunal and the payment of prescribed restoration fees must restore the names of struck off practitioners on the roll. A person can voluntarily remove their names from the roll with the prior consent of the Council of the New Zealand Law Society. This is done upon request to the

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<sup>14</sup> Lawyers and Conveyancers Act 2006 s. 58 Striking off and restoration of names by order of Disciplinary Tribunal or High Court.

Registrar to remove his or her name from the roll.<sup>15</sup> A person who has voluntarily removed his or her name from the roll may with the prior consent of the Council of the New Zealand Law Society request to the registrar to restore his or her name on the roll. Any costs incurred in publishing the notice must be borne by the person whose name is removed or restored.

- **Queensland**

In Queensland, the Supreme Court is to keep a roll of persons admitted under the legal profession. The local roll includes the roll of solicitors, the roll of barristers as in existence before the commencement of the QLPA and the roll of legal practitioners immediately after the commencement of the QLPA. The Registrar upon an order of the Supreme Court admitting a person must under the admission rules, enter the person's name on the local roll and the person must sign the local roll. A person's admission to the legal profession takes effect when the person signs the local roll. A person ceases to be an officer of the Supreme Court if the person's name is removed from the local roll due to findings that he or she is guilty of professional misconduct or that a practitioner has been convicted of a criminal offence.

### **Analysis**

Samoa maintains rolls of both permanent and temporary barristers or solicitors and barristers and solicitors. Samoa is similar to New Zealand in the sense that both jurisdictions require that the Registrar of the High Court keeps the roll of barristers and solicitors. The Council of the Samoa Law Society may make an order to strike off a practitioner from a roll. In New Zealand, it is the Tribunal (or the High Court on appeal from the Tribunal) which can strike off the name of a practitioner from a roll. All three jurisdictions have the same reasoning as to why a person's name is to be struck off the roll. This is dependent upon findings by the Council or Disciplinary Tribunal that the practitioner is guilty of misconduct and/or unprofessional conduct. The QLPA provision relating to the roll of practitioners is similar to Samoa in the sense that the Registrar of the Supreme Court keeps the roll of persons admitted. The difference is that the

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<sup>15</sup> Lawyers and Conveyancers Act 2006 s. 60 Voluntary removal of name from roll, and restoration.

admission of a practitioner in Queensland takes effect when the practitioner signs the local roll. In Samoa, a practitioner's name is entered in the roll upon admission to the Supreme Court.

<b>Questions:</b>	<p>10. <i>Should there be a clearer procedure for striking a name of a practitioner off the roll or the suspension of a practitioner?</i></p> <p>11. <i>Should instances of unsatisfactory conduct or conduct unbecoming of a barrister and a solicitor be specified?</i></p> <p>12. <i>Should these be specified and defined in the LPA?</i></p>
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### 1.3) Admission of Practitioners

- **Samoa**

In Samoa, a person is qualified to be admitted as a barrister, or as a solicitor, or as a barrister and solicitor of the Supreme Court if he or she is:

- i) *a citizen of Samoa;*
- ii) *has attained the age of 21 years;*
- iii) *is of good character; and*
- iv) *holds the prescribed qualifications.*

The prescribed qualification includes a qualification in law, a professional qualification in law, and an academic and professional qualification in law in any country or in any jurisdiction which in the opinion of the Council has a legal system similar to that of Samoa.<sup>16</sup>

An application to be admitted as a barrister or solicitor or barrister and solicitor shall be made to the Supreme Court in the manner prescribed by rules of Court. If there are no such rules, then in such manner as the Supreme Court may direct.<sup>17</sup> A certificate issued by the Council of the Law Society of Samoa and signed by the Secretary showing that the applicant is of good character and holds the prescribed qualifications, shall be sufficient

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<sup>16</sup> Samoa LPA s.19(3)(c).

<sup>17</sup> Samoa LPA s. 20 Applications for Admission.

evidence that the applicant has the qualifications. The Council may also require the applicant to attend before the Council to be interviewed and answer such questions and provide such information as the Council thinks proper to enable it to decide whether to issue a certificate.

On an application being made to the Supreme Court, the Supreme Court where it is satisfied that the applicant is qualified for admission shall make an order admitting the applicant as a barrister, or solicitor, or as a barrister and solicitor of the Supreme Court. Where an order is made admitting the applicant, the applicant shall take an oath known as the Oath of Admission. The LPA does not allow for an affirmation. The LPA also provides for the temporary admission<sup>18</sup> of an applicant where the applicant is not a citizen of Samoa but has the qualifications as mentioned above. The Supreme Court may make an order admitting the applicant as a barrister, or solicitor, or as a barrister and a solicitor temporarily for such a period not exceeding three (3) years as the Court shall specify in the order. The LPA also provides that no person shall be temporarily admitted for any periods exceeding the aggregate six (6) years.

- **New Zealand**

In New Zealand, the NZLCA provides that a person admitted by the High Court must be admitted as a barrister and solicitor. There are two categories in which a person may be admitted as a barrister and solicitor. Firstly, a person is qualified to be admitted if he or she:

- i) *has all the qualifications for admission prescribed or required by the New Zealand Council of Legal Education;*
- ii) *is a fit and proper person to be admitted as a barrister and solicitor of the High Court; and*
- iii) *has met the criteria prescribed by rules made under s54 NZLCA.*

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<sup>18</sup> Law Practitioners Act 1976 s.22.

Secondly, a person can be admitted if the person:

- i) *has been admitted as a barrister, solicitor or as both barrister and solicitor advocate or an attorney by the superior court of any other country;*
- ii) *has all the qualifications prescribed or required by the New Zealand Council of Legal Education in consultation with the Council of the New Zealand Law Society;*
- iii) *is a fit and proper person to be admitted and that he or she does not have any criminal record; and*
- iv) *meets the criteria prescribed by rules made under s54 NZLCA.*

The Executive Director of the NZLS or a person authorized by the Council issues a certificate purporting that the applicant is both a fit and proper person to be admitted as a barrister and solicitor of the High Court. A certificate of completion is required from the Council of Legal Education (s50 (2) NZLCA).

The High Court must make an order admitting the candidate as a barrister and solicitor of the High Court if satisfied that the candidate is qualified for admission and if the candidate has taken an oath of admission. In New Zealand, there is no provision as to temporary admission. However, there is a provision in relation to reciprocal admission. It provides that the Governor General may order the admission of a practitioner from another country if he has documents proving that the applicant has been admitted in a superior court of that country which recognizes that the applicant possesses proper qualifications. The admission of the practitioner is also dependent on whether the law of that country will admit barristers and solicitors of the High Court of New Zealand. This provision allows for the admission of candidates as barristers and solicitors of the High Court of New Zealand without examination if the candidate had been in practice before the court of a country other than New Zealand for not less than 3 years and is of good character.

The Trans Tasman Mutual Recognition Act 1997 provides that lawyers registered in Australia may register in New Zealand for the equivalent occupation without being required to sit further examinations.

- **Queensland**

In Queensland, a person is eligible for admission as a local lawyer only if the person has:

- i) *attained 18 years of age or more;*
- ii) *attained approved academic qualifications or corresponding academic qualifications; and*
- iii) *satisfactorily completed approved practical legal training requirements or corresponding practical legal training requirements. The QLPA requires that a person suitable for admission must be a fit and proper person.*

A person may apply to the Supreme Court of Queensland to be admitted in the legal profession. The Supreme Court may make an order admitting the applicant to the legal profession as a lawyer if the court is satisfied that the applicant for admission is eligible to be admitted under the Legal Profession Act 2007 of Queensland and that the person is a fit and proper person.

The Supreme Court during admission is assisted by the Legal Practitioners Admissions Board, which issues recommendations of eligibility and suitability of applicants in the form of a certificate of compliance.

### **Analysis**

Samoa's procedure for admission is similar to the procedure of admission in New Zealand. An applicant is qualified for admission upon the completion of legal education and is of good character. In contrast, Samoa specifies the age that a person must attain for admission, whereas New Zealand does not specify a particular age in its legislation. Samoa and Australia are similar as their legislation specifies an age for admission eligibility.

In Samoa and New Zealand, the determining body for the test ‘fit and proper person’ lies with the Law Society. In Queensland, the Legal Practitioners Admission Board assists the Supreme Court with the admission of applicants. New Zealand and Samoa require that an oath must be taken by the applicants before an order for admission can be made. In Queensland, the legislation is silent on whether an oath shall be sworn by the applicant. Queensland differs from Samoa and New Zealand in the case of taking oaths and also as to the requirement of a fit and proper person.

<b>Questions:</b>	<p>13. <i>Should Samoa have a reciprocity system where a foreigner can be admitted in Samoa as long as a Samoan Lawyer can be admitted in the jurisdiction of the applicant?</i></p> <p>14. <i>Should the age of admission be lowered to 18?</i></p> <p>15. <i>Should the oath be either an oath of admission or affirmation?</i></p> <p>16. <i>Should Rolls remain Temporary Rolls and Permanent Rolls?</i></p> <p>17. <i>Should Rolls be categorized into a Local Roll and a Foreign Roll where the local roll consists of practitioners who are citizens of Samoa and resident in Samoa and the Foreign roll consist of practitioners who are either not citizens of Samoa and or resident in Samoa?</i></p> <p>18. <i>Should those on a Foreign Roll be prohibited from particular types of work in Samoa?</i></p> <p>19. <i>Should the time limit of 6 years for temporary admission be increased, decreased or removed?</i></p>
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#### 1.4) The Law Society

- **Samoa**

The Law Society is established under the LPA. The Law Society consists of every person who is for the time being a barrister or a solicitor of the Supreme Court. It is a body corporate with perpetual succession and a common seal, capable of holding real and

personal property and of suing and being sued and all other things that bodies corporate may lawfully do.<sup>19</sup> The functions of the Law Society include:

- i) to promote and encourage proper conduct amongst members of the legal profession;*
- ii) to suppress illegal, dishonorable, unprofessional, and improper conduct by practitioners;*
- iii) to preserve and maintain the integrity and status of the legal profession;*
- iv) to provide, promote and encourage opportunities for the acquisition, development and diffusion of legal knowledge;*
- v) to consider and suggest amendments of the law;*
- vi) to provide for, promote and encourage the amicable settlement of professional differences; and*
- vii) to protect the interests of the legal profession and the interest of the public in relation to legal matters.*

The Law Society also has additional powers under the LPA which are as follows:

- i) to investigate charges of professional misconduct against any practitioner, institute prosecutions against practitioners or other persons for the breach of any enactment relating to the practice of law; and*
- ii) appoint any barrister to appear in any Court of law on behalf of the Society in respect of matters mentioned above.*

The Law Society may also impose or levy and collect fees or other charges on its members and on candidates for admission as barristers or solicitors and exercise any power conferred to it by the LPA. The LPA also sets out how the meetings of the society should be conducted. The quorum for a general meeting is 40% of the members of the law society personally present. The LPA also establishes the Council of the Law Society

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<sup>19</sup> Samoa LPA s12 (3) Establishment of the Law Society.

and stipulates their functions, powers and duties.<sup>20</sup> All admitted barristers and solicitors are required to be members of the Law Society.

- **New Zealand**

In the NZLCA, the New Zealand Law Society (“NZLS”) is established under Part 4. The NZLCA stipulates the membership of the NZLS and its functions and powers. The membership of the NZLS is voluntary and any liability or debt incurred by the NZLS is not imposed on its members. The regulatory functions of the New Zealand Law Society are:

- i) *to control and regulate the practice in New Zealand by barristers and by barristers and solicitors of the profession of the law;*
- ii) *to uphold the fundamental obligations imposed on lawyers who provide regulated services in New Zealand;*
- iii) *to monitor and enforce the provisions of the Lawyers and Conveyancers Act 2006, and of any regulations and rules made under it, that relate to the regulation of lawyers;*
- iv) *to monitor and enforce, throughout the period specified in any order made under section 390<sup>21</sup>, the provision of the Lawyers and Conveyancers Act 2006 and of any regulations and rules made under it that relate to the regulation of Conveyancers;*
- v) *to assist and promote for the purpose of upholding the rule of law and facilitating the administration of justice in New Zealand the reform of the law.*

The NZLS also has a representative function to represent its members and to serve their interests.

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<sup>20</sup> The Law Practitioners Act 1976 s.16 Council of Law Society, s.18 Function, powers and duties of Council.

The NZLS also has the following additional powers:

- i) to issue practising certificates to all barristers and barristers and solicitors who seek to provide legal services;*
- ii) to keep and maintain a register of persons who hold practising certificates as a barrister or as a barrister and solicitor; and*
- iii) other powers conferred on the NZLS under the Lawyers and Conveyancers Act 2006.*

The NZLS operates under a Constitution, as set out in the LCA (Lawyers) Constitution 2008. Part B of that Constitution came into effect on 1 February 2009, setting in place a new organization model. The Society now has 13 branches around New Zealand, including Auckland. The Constitution provides for the NZLS to be governed by a Council and a Board, and the appointment of an Executive Director. It also sets out how the President and other officers are elected, how voting is conducted, and the mechanism for amending the Constitution itself. The Council for NZLS comprises up to 25 members including the President, four Vice-Presidents, a representative from each branch, and representatives from each of the NZLS sections, the NZ Bar Association and a group representing the large law firms. The quorum to hold a meeting is not mentioned in the Constitution of the NZLS. A meeting of the members of the NZLS is to be held only on the passing of a resolution by the Council, and the resolution must state the time and the place, the business to be transacted and the procedure to be adopted.<sup>22</sup>

- **Queensland**

The Queensland Law Society (“QLS”) is established by the QLPA under Part 7.6. Part 7.6 provides that the QLS is a body corporate, has perpetual succession, has a common seal, and may sue and be sued in its corporate name. The Legal Profession Act 2007 stipulates the functions of the law society in which it allows the law society:

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<sup>21</sup> The exercise of Regulatory functions of the New Zealand Society of Conveyancers.

<sup>22</sup> Constitution of the New Zealand Law Society s.12 **Meetings of members and notice to members-** A meeting of members of the Law Society is to be held only on the passing of a resolution of the Council,

- i) *to define and carry out the objects of the Law Society;*
- ii) *manage its own affairs, income and property for the purpose and benefit of the QLS;*
- iii) *to perform other functions given to the Law Society under another Act;*
- vi) *to make society rules for the regulation and good government of the law society and its members;*
- vii) *to make society rules that regulate council meetings and the conduct of business at the meetings;*
- viii) *to make society rules in relation to the custody and use of the law society's common seal; and*
- ix) *to make society rules on the admission, re-admission, resignation and expulsion of members of the law society.*

The QLS has the power to enter into contracts, acquire, hold, dispose of and deal with property. It also has powers to appoint agents and attorneys, engage consultants, fix charges and other terms for services and other facilities it supplies and do anything else necessary or convenient to be done for its functions.

The QLS may exercise its powers inside or outside Queensland and Australia. The powers of the QLS are subject to limitation under the QLPA and any other Act.

The QLS members consists of individuals entitled to engage in legal practice in Queensland or is an Australian registered foreign lawyer, an individual who is a member of a class stated under the society rules as persons who are appropriate to be members of the Law Society, and an individual whom the Council considers is a fit and proper person to be a member having regard to that person's involvement with the legal profession.<sup>23</sup> This allows for non lawyers and legal practitioners to be members of the QLS.

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and that resolution must state the time and place of the meeting, the business to be transacted, and the procedure to be adopted.

<sup>23</sup> QLPA s.684 Membership of law society.

The QLPA also establishes a Council of the QLS, which consists of not less than seven (7) and not more than twelve (12) Council members. The QLPA requires that meetings of Council must be held at least six times a year. The President is to preside at Council meetings if the President is present. In the event that the President is absent, the Deputy President is to preside. If both the President and Deputy President are not present, the Vice President is to preside. The quorum for the Council meeting consists of a majority of Council members for the time being holding office. A Council meeting at which a quorum is present may perform the functions and exercise the powers of the Law Society. A question at a Council meeting is decided by a majority of the votes of the Council members present.

### **Analysis**

The Samoa Law Society, NZLS and the QLS have similar status where each is a body corporate with perpetual succession and a Common Seal capable of holding real and personal property and of suing and being sued and other things a body corporate may lawfully do. All three jurisdictions have their Law Society established under Acts that govern the practice of law. Samoa has most of the functions and powers of the law society stipulated under the LPA whereas in New Zealand, the Law Society is established under the NZLCA and the functions and powers are mainly set out in the NZLCA. The law societies of Samoa and Queensland do not have a constitution.

Queensland is similar to Samoa, where all the functions and powers of the members of the Law Society are stipulated in the Act. The quorum of a meeting of the Law Society is not specified in New Zealand and Queensland as it is in Samoa. The Constitution for New Zealand refers to meetings of the Board and Council and members. All three jurisdictions have similar functions of their law society where the main functions involve the regulation and rules of the legal profession, the continuation of legal education for lawyers and also the conduct of lawyers in the legal arena. (See also s3, NZLCA, "Purposes of the Act").

Samoa is different from New Zealand and Queensland in relation to the membership within the Law Society. Samoa does not allow for voluntary membership into the SLS as in New Zealand and Queensland.

Samoa only allows lawyers who have been admitted as a barrister or solicitor of the Supreme Court of Samoa to be members of the SLS.<sup>24</sup> In New Zealand, a person holding a practising certificate can decide whether to be a member. In Queensland, a person can become a member of the Law Society if the Council of the Law Society considers that person as a fit and proper person to be a member taking into account the person's involvement with the legal profession. This provision by Queensland makes room for non lawyers to be members of the Law Society. In New Zealand, a person without a practising certificate could be an associate member of the NZLS.

<b>Questions:</b>	<p>20. <i>Should the Samoa Law Society adopt a Constitution that is separate from the LPA?</i></p> <p>21. <i>Should the quorum of a meeting of the Law Society of 40% be decreased or increased?</i></p> <p>22. <i>Should membership of the Samoa Law Society be voluntary?</i></p> <p>23. <i>Should non lawyers be allowed to be members of the Samoa Law Society?</i></p>
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### 1.5) Disciplining the Legal Profession

- **Samoa**

The Council of the Law Society of Samoa is the body responsible for the disciplining of the Legal Profession. The Council has disciplinary powers under section 35 of the LPA to inquire into and determine in accordance with part eight of the LPA any charge of professional misconduct, of conduct unbecoming a barrister or a solicitor, relating to any practitioner. Section 36 of the LPA stipulates the procedure on inquiry which the Council can make. It provides that where the Council after making preliminary inquiries and there

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<sup>24</sup> LPA s. 12 (2) The Law Society shall consist of every person who is for the time being a barrister or a solicitor of the Supreme Court.

is reasonable cause to support that the practitioner is guilty of professional misconduct and conduct unbecoming of a barrister or a solicitor, the Secretary shall serve a notice in writing of the charge on the practitioner and specify the charge in sufficient detail to enable him or her to prepare any defence. The notice shall also state the time and place not being sooner than twenty one (21) days after the notice is served on the practitioner at which the Council will proceed to hear and determine the charge. If the practitioner is somehow unable to be found, the Secretary may publish the notice in the Gazette or in any Samoan newspaper on two separate occasions and the notice is deemed to be served.

Section 37 stipulates the powers of the Council where the charge is proved. The Council upon proving that the practitioner is guilty of misconduct or any offence may order the name of the practitioner to be struck off the roll of barristers or solicitors or off both rolls and may order the suspension of the practitioner from practice as a barrister or solicitor for a term not exceeding three (3) years. The Council also has the power to order the practitioner to pay a fine to the Law Society not exceeding ten (10) penalty units (ST\$100). The Council may also order the practitioner to pay to the Council any costs and expenses incurred by the Council during the investigation.

The interim suspension of a practitioner is mentioned under section 38 of the LPA. This section gives the Council, if a charge is pending, the power to make an order to suspend a practitioner without notifying him or her. The Council in the same manner may also revoke such an order.

The Council, for the purpose of investigation, hearing and determination of any charge against a practitioner, shall have the same powers and privileges as a Commission of Inquiry under the Commissions of Inquiry Act 1964, and witnesses in the proceedings shall have the same protection as they have under the Commissions of Inquiry Act.<sup>25</sup> A practitioner suspended from practice by the Council due to findings of conduct

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<sup>25</sup> LPA s.39 **Council to have powers of Commission of Inquiry in disciplinary matters-** For the purpose of the investigation, hearing and determination of any charge against a practitioner under this Part, the Council shall have the same powers and privileges as a Commission of Inquiry under the Commissions

unbecoming or professional misconduct can appeal to the Supreme Court against the order or decision of the Council.<sup>26</sup> The Law Society is a party to the proceedings and shall be entitled to be represented by counsel and to be heard. In the case of proceedings in the Supreme Court there shall be the right of appeal to the Court of Appeal.

The Rules give a more detailed outline of the rules of professional conduct. These Rules include confidentiality, sharing privileged documents and information and other rules that include the fees charged. The handbook however, states that these rules are not an exhaustive code and that it is an instructive and educational dimension for the profession in Samoa rather than a disciplinary threshold. The Rules also stipulate that disciplinary proceedings will only commence for the breach of any rule only if the breach is considered sufficiently serious.

- **New Zealand**

In New Zealand, the Law Society is under an obligation to establish a complaints service to receive complaints made by any person about the conduct of lawyers and former lawyers, incorporated firms and former incorporated firms and employees and former employees of lawyers and incorporated law firms. The Code of Conduct and Client Care is referred to in the NZLCA.<sup>27</sup>

A Standards Committee is established as part of the complaints service. The Standards Committee consists of at least 3 members, one of which must be a lay person. They have the power to look into complaints made by a person, to promote the resolution of complaints by negotiation, conciliation or mediation, to investigate of its own motion a matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner. They also have the power to make a final determination in relation to complaints and to lay and prosecute charges before the Disciplinary Tribunal. The Standards Committee, on deciding that a complaint or matter

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of Inquiry Act 1964; and witnessed in the proceedings shall have the same protection as they have under that Act.

<sup>26</sup> LPA s.40 **Rights of appeal to Supreme Court.**

<sup>27</sup> NZLCA s. 95 Code of professional conduct and client care.

is to be determined by the Disciplinary Tribunal, must frame an appropriate charge and lay it before the Disciplinary Tribunal.

The Disciplinary Tribunal has the power to hear and determine applications and also to hear and determine any charge that is made by a Standards Committee or the Legal Complaints Review Officer. The Tribunal also has the power to make rules that are consistent with the NZLCA in respect of the making, hearing and determination of applications, inquiries, appeals, and other proceedings before the Tribunal<sup>28</sup>.

The rules of natural justice must be observed in the performance and exercise of the functions and powers of the Standards Committees and the Tribunal. The Tribunal may make an order for the name of the practitioner where the charge is proven to be struck off the roll or suspended within a period that the Tribunal thinks fit, up to a maximum of three years.<sup>29</sup> The Tribunal may not make an order striking off the practitioner unless it is of the opinion that the practitioner is by his or her conduct not a fit and proper person to be a practitioner.

- **Queensland**

In Queensland, the entity responsible for complaints regarding a legal practitioner is the Legal Services Commissioner (“Commissioner”). A person may make a complaint to the Commissioner regarding the conduct of a legal practitioner or a law practice employee. The QLPA defines unsatisfactory conduct as conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonable competent legal Practitioner.<sup>30</sup>

The QLPA also defines Professional misconduct as “*unsatisfactory professional conduct of an Australian legal practitioner if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence*”<sup>31</sup>. This

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<sup>28</sup> NZLCA s. 227 Functions of Disciplinary Tribunal.

<sup>29</sup> Ibid. s.242 Orders that may be made where charge proved.

<sup>30</sup> QLPA s.418 Meaning of unsatisfactory professional conduct.

<sup>31</sup> QLPA s 419 Meaning of professional misconduct.

conduct can happen in connection with the practice of law or happening otherwise that connects with the practice of law that if established, would justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

The QLPA empowers the Commissioner to dismiss the complaints and also to delay dealing with the complaints. The QLPA also allows the Commissioner to refer the complaint to the law society or the bar association if the Commissioner is of the opinion that this is the relevant authority to deal with the matter. The Commissioner also has the authority to inquire into complaints made three (3) years after the date of the conduct in question.

The Commissioner on his findings on the conduct of a practitioner must notify the Legal Practice Tribunal for an order against a practitioner in relation to a complaint against him or her. The Tribunal will then direct the matter to the Disciplinary body to hear and decide each allegation stated in the discipline application. If the Disciplinary body finds the practitioner guilty of misconduct, the Tribunal may make an order, to either:

- i) remove the name of the practitioner from the local roll;*
- ii) cancel their practising certificate;*
- iv) impose conditions on the practitioner's practising certificate; and*
- v) other orders as stated in the QLPA.*

## **Analysis**

The disciplining of the legal profession is different in all three jurisdictions. In Samoa, the body responsible for the disciplining of the legal profession is the Council of the Law Society. New Zealand has various bodies that deal with complaints about practitioners. There is the Lawyers' Complaints Service whose function is to receive complaints and refer them to Standards Committees established as part of the Complaints Service. Queensland also has a different procedure in dealing with disciplinary action. They have different bodies which handle complaints to the entity that hears the complaints and finally the Tribunal which makes the order if the practitioner is found guilty. The code of conduct for the legal profession in NZ is contained in the Rules of Conduct and Client

Care. These Rules are approved by the Government as Regulations. Queensland is detailed in its definition of professional misconduct and unsatisfactory conduct. Samoa has a provision loosely including the code of professional conduct in the LPA and the Rules, and neither defines professional misconduct and unsatisfactory conduct.

<b>Questions:</b>	<p>24. <i>Are the disciplinary provisions under the LPA sufficient?</i></p> <p>25. <i>Should the LPA spell out a detailed process for complaints and the handling of complaints and the time in which complaints should be dealt with?</i></p> <p>26. <i>Should Samoa have various bodies which deal with complaints before they are taken to the Council for inquires?</i></p> <p>27. <i>Should the Council be given more or less power in relation to investigating conduct unbecoming and professional misconduct?</i></p> <p>28. <i>Should the fines of a practitioner found guilty of an offence or misconduct be increased?</i></p> <p>29. <i>Should the LPA define “professional misconduct” and “unsatisfactory conduct”?</i></p> <p>30. <i>Should the power of the Council to suspend a practitioner be fettered?</i></p>
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## **2) SUMMARY**

The issues paper has covered the main issues concerning the Law Practitioners Act of Samoa 1976. The issues discussed include the Rolls of Practitioners, the Admission of Practitioners, The Law Society and the Disciplining of the legal profession.

Given that many questions have been posed, the Commission will base its recommendations for reform once it has received all submissions from stakeholders. The recommendations of the Commission will form the basis of its final report to Cabinet. The recommendations of the Commission will be independent of all stakeholders.

### 3) SUMMARY OF QUESTIONS

1. *Should Samoa still maintain the distinction between a barrister and a solicitor?*
2. *Should the LPA of Samoa clearly define the difference between a barrister and a solicitor?*
3. *Should Samoa abolish the usage of the terms barrister and solicitor and use the terms Lawyer or Legal Practitioner?*
4. *Should the requirements for private practice in Samoa be changed?*
5. *Should the time of relevant experience be increased?*
6. *Should relevant experience be defined as supervised traineeship at a private firm or in the Attorney General's Office?*
7. *Should being a legal officer in a government department still qualify as relevant experience?*
8. *Should a "resident" requirement be an added necessary requirement of private practice?*
9. *Should Samoa include its Rules of Professional Conduct in the LPA? If so, how should it incorporate its Rules?*
10. *Should there be a clearer procedure for striking a name of a practitioner off the roll or the suspension of a practitioner?*
11. *Should instances of unsatisfactory conduct or conduct unbecoming of a barrister and a solicitor be specified?*
12. *Should these be specified and defined in the LPA?*
13. *Should Samoa have a reciprocity system where a foreigner can be admitted in Samoa as long as a Samoan Lawyer can be admitted in the jurisdiction of the applicant?*
14. *Should the age of admission be lowered to 18?*
15. *Should the oath be either an oath of admission or affirmation?*
16. *Should Rolls remain Temporary Rolls and Permanent Rolls?*
17. *Should Rolls be categorized into a Local Roll and a Foreign Roll where the local roll consists of practitioners who are citizens of Samoa and resident in*

*Samoa and the Foreign roll consist of practitioners who are either not citizens of Samoa and or resident in Samoa?*

18. *Should those on a Foreign Roll be prohibited from particular types of work in Samoa?*
19. *Should the time limit of 6 years for temporary admission be increased, decreased or removed?*
20. *Should the Samoa Law Society adopt a Constitution that is separate from the LPA?*
21. *Should the quorum of a meeting of the Law Society of 40% be decreased or increased?*
22. *Should membership of the Samoa Law Society be voluntary?*
23. *Should non lawyers be allowed to be members of the Samoa Law Society?*
24. *Are the disciplinary provisions under the LPA sufficient?*
25. *Should the LPA spell out a detailed process for complaints and the handling of complaints and the time in which complaints should be dealt with?*
26. *Should Samoa have various bodies which deal with complaints before they are taken to the Council for inquires?*
27. *Should the Council be given more or less power in relation to investigating conduct unbecoming and professional misconduct?*
28. *Should the fines of a practitioner found guilty of an offence or misconduct be increased?*
29. *Should the LPA define “professional misconduct” and “unsatisfactory conduct”?*
30. *Should the power of the Council to suspend a practitioner be fettered?*

#### **4) CALL FOR RESPONSES**

There are a total of thirty (30) questions for consideration and response. It is not necessary however to respond to all questions. It is preferred that responses be in writing.

Responses on this paper should be sent by the 19<sup>th</sup> of March 2010, to the Executive Director, Samoa Law Reform Commission, Private Bag 974 or by email to [lawreform@ag.gov.ws](mailto:lawreform@ag.gov.ws).